

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	EB Docket No. 02-21
	)	
PENINSULA COMMUNICATIONS, INC.	)	File No. EB 01-IH-0609
	)	FRN: 0001-5712-15
Licensee of stations	)	
KGTL, Homer, Alaska;	)	Facility ID Nos. 52152
KXBA(FM), Nikiski, Alaska;	)	86717
KWVV-FM, Homer, Alaska; and	)	52145
KPEN-FM, Soldotna, Alaska.	)	52149
	)	
Licensee of FM translator stations	)	
K292ED, Kachemak City, Alaska	)	52150
K285DU, Homer, Alaska;	)	52157
K285EG and K272DG, Seward, Alaska	)	52158 and 52160
	)	
Former licensee of FM translator stations	)	
K285EF, Kenai, Alaska;	)	
K283AB, Kenai/Soldotna, Alaska;	)	
K257DB, Anchor Point, Alaska;	)	
K265CK, Kachemak City, Alaska;	)	
K272CN, Homer, Alaska; and	)	
K274AB and K285AA, Kodiak, Alaska	)	

**Appearances**

*Jeffrey D. Southmayd, Esquire*, on behalf of Peninsula Communications, Inc.;  
*James W. Shook, Esquire* and *Judy Lancaster, Esquire*, on behalf of the  
Enforcement Bureau

**INITIAL DECISION  
OF  
CHIEF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL**

**Issued:** June 17, 2003

**Released:** June 19, 2003

**PRELIMINARY STATEMENT**

1. On February 6, 2002, pursuant to Section 312(a) of the Communications Act of 1934, as amended (the "Act"), the Commission commenced this proceeding to determine whether all broadcast licenses held by Peninsula Communications, Inc. ("PCI") should be revoked. *In the Matter of Peninsula Communications, Inc., Order to Show Cause*, 17 F.C.C. Rcd 2838 (2002) ("OSC").

### Order to Show Cause

2. The Commission specified the following issues:
  - (a) To determine the facts and circumstances surrounding Peninsula Communications, Inc.'s operation of former FM translator stations 285EF, Kenai; K283AB Kenai/Soldotna; K257DB Anchor Point; K265CK, Kachemak City; K272CN, Homer; and K274AB and K285AA, Kodiak, all in Alaska, subsequent to August 29, 2001, contrary to the Commission's order in *Peninsula Communications, Inc.*, 16 F.C.C. Rcd 11364 (2001), and related violation of § 416(c) of the Act;
  - (b) To determine, in light of the evidence adduced pursuant to issue (a), whether Peninsula Communications, Inc. has the requisite character qualifications to be a Commission licensee and thus whether its captioned broadcast and FM translator licenses, including any former licenses reinstated, should be revoked.

*OSC*, ¶ 6. The burden of the introduction of evidence and the burden of proof were assigned to the Enforcement Bureau ("Bureau"). *OSC*, ¶ 9.

3. By *Order*, FCC 02M-42, released May 24, 2002, the Presiding Judge permitted PCI to offer proof on a state of mind defense, the burdens of proceeding and proof resting with PCI. *Order*, FCC 02M-69, released July 19, 2002 (proof on state of mind permitted).

4. A hearing was conducted in Washington, D.C. from September 24 through 26, 2002.<sup>1</sup> A supplementary admissions session was conducted on October 16, 2002, and the Presiding Judge closed the record on October 18, 2002.<sup>2</sup> The parties filed Proposed Findings on December 24, 2002, and Reply Findings on January 23, 2003.

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<sup>1</sup> Enforcement Bureau exhibits are referred to as EB Exh. \_\_\_\_; Official Notice exhibits are referred to as Off. Notice Exh. \_\_; PCI exhibits are referred to as PCI Exh. \_\_\_\_; hearing transcript pages are cited as Tr. \_\_\_\_.

<sup>2</sup> EB Exh. 23 was modified by stipulation to address confidentiality concerns. *See Order*, FCC 02M-97, released October 18, 2002 (Stipulation re Enforcement Bureau Exhibit 23 received in evidence as EB Exh. 23A). The record was reopened and closed to accept Off. Notice Exh. 21, which was received by *Order*, FCC 03M-12, released April 18, 2003 (intention to assign two Seward translators to Moody Bible Institute). The record was again reopened and closed to accept Off. Notice Exh. 22. *See Order*, FCC 03M-17, released May 16, 2003 (status of PCI licenses).

## Overview

5. On May 18, 2001, the Commission directed PCI to terminate operations of seven of the captioned FM translators.<sup>3</sup> *Memorandum Opinion and Order to Show Cause*, 16 F.C.C. Rcd 11364 (2001) (“*Termination Order*”). On June 15, 2001, PCI filed an appeal with the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) seeking to overturn the *Termination Order*. PCI continued operations but never succeeded in obtaining a stay from the Commission or from the D.C. Circuit.

6. On August 29, 2001, the Commission warned that operation of the seven FM translators would raise questions about PCI’s qualifications to be a Commission licensee and could result in proceedings leading to license revocation. Nonetheless, PCI declared that it intended to operate the FM translators until such time as the D.C. Circuit ruled on its appeal. PCI continued operating for fifteen months and only ceased operations on August 28, 2002, after a federal court injunction became final.<sup>4</sup>

7. On February 6, 2002, the Commission commenced this proceeding realizing the possibility that the D.C. Circuit could reinstate the seven FM translator licenses. Whether or not reinstated, PCI’s operation of the FM translators after a Commission order to terminate raised substantial questions as to whether PCI should be entitled to continue as a licensee. *OSC*, case caption n.2.

8. PCI contends that it continued operating its seven FM translators in reliance on legal advice and a Commission practice that generally permits broadcasting to continue while an appeal is pending. PCI pleads that it already has incurred a substantial forfeiture penalty, and that its past record is sufficiently good to permit keeping its four full-power station licenses and its remaining four translator licenses.

## FINDINGS OF FACT

### FM Translators

9. FM translators are low-power stations that receive the signals of full service FM stations and retransmit those signals on another frequency. The Commission first authorized translators in 1970 to provide FM service to those unable to receive satisfactory service due to distance or terrain obstructions. The enabling rule provides:

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<sup>3</sup> PCI’s seven FM translator stations that appear in the caption of this case include: K285EF (Kenai); K283AB (Kenai/Soldotna); K257DB (Anchor Point); K265CK (Kachemak City); K272CN (Homer); K274AB and K285AA (Kodiak).

<sup>4</sup> *United States v. Peninsula Communications, Inc.*, 287 F. 3d 832 (9<sup>th</sup> Cir. 2002) (rehearing denied July 3, 2002). (Off. Notice Exh. 19.) On August 13, 2002, the D.C. Circuit denied PCI’s final motion for stay. (Off. Notice Exh. 20.)

FM translators provide a means whereby the signals of FM broadcast stations may be retransmitted to areas in which direct reception of such FM broadcast stations is unsatisfactory due to distance or intervening terrain barriers.

47 C.F.R. § 74.1231(a).

10. FM translators are a secondary service intended to supplement, but not a substitute for, full-service stations. Translators were never intended for full service power commercial stations to rebroadcast signals beyond their primary service areas into service areas of competitors. *Monroe County Commn'rs.*, 72 F.C.C. 2<sup>nd</sup> 683, 685 (1979). This case concerns seven FM translator stations operating in "other areas" in the state of Alaska at Kenai, Soldotna, Anchor Point, Kachemak City, Homer, and Kodiak, by retransmitting the programming of two full service stations, KPEN-FM, Soldotna, and KWVV-FM, Homer.

### **Translator Waivers**

11. In 1990, the Commission adopted strict FM translator waiver rules and standards. See discussion at Paras. 20-21, *infra*. After 1990, waivers were favored only in areas which otherwise received no signal called "white" areas. The Commission continued to make special allowance for waivers in Alaska, finding that its "unique terrain, its remoteness and isolation, justify special treatment." *Wrangell Radio Group*, 75 F.C.C. 2d 404, 407 (1980). There still were "sufficient public interest reasons for waiver of the translator rules to allow small, remote Alaska communities the opportunity to receive off-the-air broadcast programming". *Id.* at 408. But the new stricter rules also applied to Alaska, and PCI was bound by those rules from 1994 forward.

### **PCI's Principals**

12. Mr. David Becker, president of PCI, has decision-making authority at PCI, and is in charge of all operations and sales. He holds a BS degree in Electrical Engineering from California State Polytechnic University. He received a Masters of Science Degree in Electrical Engineering from the University of California. He was employed for six years by Raytheon Company. (Tr. 94, 115-116.)

13. In 1976, David Becker and his wife Eileen Becker moved from California to Alaska. They immediately became active in local church matters, and so remain. Mr. Becker served on the board of directors of Alaska Village Missions which operates the Alaska Bible Institute. He personally hosted a religious radio program for 23 years. He professes to have great respect for legal authority and to have an appreciation for good moral and ethical conduct. (PCI Exh.1 at pages 3-4.)

### PCI's Business

14. PCI was formed in 1978. David and Eileen Becker are sole owners, each holding 50 percent. In September 1979, PCI started broadcasting on KGTL-FM (now KWVV-FM), which became Homer Alaska's first commercial FM venture. In 1984, PCI added a second full service FM station, KPEN-FM, licensed to the community of Soldotna. (PCI Exh. 1 at 4.) PCI has not been directly penalized with respect to its full power FM stations. But PCI was sanctioned for unauthorized operations of the seven FM translators which were ordered terminated by the Commission. (EB Exh. 30 at 304; PCI Exh. 1 at 4-11; Off. Notice Exh. 13.)

### PCI's Translator "Network"

15. By the mid 1980s, PCI had assembled a "network" of FM translators to broadcast programming of "primary" FM stations<sup>5</sup> KWVV-FM, Homer, and KPEN-FM, Soldotna, into three major communities of Alaska's Kenai Peninsula: Kenai, Soldotna and Homer. The "primary" programming was received via translators that were licensed to PCI at Kenai/Soldotna, Homer, Anchor Point and Kachemak City. (EB Exh. 3 at 17, and EB Exh. 5 through Exh. 8.) PCI also provided "primary" programming to Kodiak via translators.<sup>6</sup> (EB Exh. 4 at 60; EB Exh. 9 at 41.) The "network" of translators retransmitting programming of KPEN-FM and KWVV-FM are identified in PCI's chart:

<u>Call Sign</u>	<u>Community</u>	<u>Grant Date</u>	<u>Hearing Exhibit</u>
K285EF	Kenai	09/06/1991	EB Exh. 7
K283AB	Kenai/Soldotna	04/13/1984	PCI Exh. 6
K257DB	Anchor Point	06/26/1986	PCI Exh. 7
K265CK	Kachemak City	06/26/1986	EB Exh. 5
K272CN	Homer	06/26/1986	PCI Exh. 4
K274AB	Kodiak	09/13/1984	PCI Exh. 5
K285AA	Kodiak	07/31/1988	PCI Exh. 8

See PCI Proposed Findings and Conclusions at Para. 6.

<sup>5</sup> A "primary FM station" is the station whose signal a translator retransmits. 47 C.F.R. § 74.1201(d).

<sup>6</sup> Section 74.1232(d) did not apply to Kodiak because there was no other commercial FM station serving Kodiak when PCI began operating its two Kodiak translators. (Off. Notice Exh. 8 at 3-4.) In 1998, the staff approved Special Temporary Authority ("STA") for the operation of Kodiak translators under *Wrangell* waivers. (PCI Exh. 5 at 6-14; PCI Exh. 8 at 1-10.)

### PCI's Other Stations

16. PCI also holds licenses for full power stations KXBA-FM, Nikiki, and KGTL(AM), Homer, and licenses for FM translator stations K292ED, Kachemak City, K285DU, Homer, and FM translator stations K285EG and K272DG, Seward. These stations were not part of the "network," were not terminated under the *Termination Order*, and were not found to have operated illegally or to have aided or abetted illegal transmissions, or retransmissions.

### PCI's Business Strategy

17. PCI's "network" was able to reach potential customers in competition with full-power stations operating without translator supplementation. Therefore, there was a clear economic incentive for PCI to keep its low cost translator "network" operating for as long as possible. PCI's income was almost forty percent derived from ad sales in Anchorage which was outside PCI's primary FM coverage areas. (EB Exh. 23A, "Stipulation re Enforcement Bureau Exhibit 23.")<sup>7</sup> Any ad agency using PCI's "network" could purchase time in Homer that reached the Kenai Peninsula and Kodiak Island. Coverage was paramount and ratings were less of an incentive to advertise with PCI than was PCI's superior reach to customers. (Tr. 509, 514-15, 535-42.)

18. Convincing empirical evidence shows that PCI's translator signal into Kodiak split revenues between Kodiak's full-service competitor and PCI, a condition that corrected itself once PCI ceased translator operations in Kodiak. (PCI Exh. 6 at 13; EB Exh. 34 at 3; Tr. 205.) PCI's "network" realized savings through PCI's staff in Homer using Kenai/Soldotna facilities for sales. Concurrently, in Kenai, Soldotna, Kodiak and Seward, PCI reduced staffing costs below costs of competing full stations. (EB Exh. 31 at 4; EB Exh. 32 at 3; Tr. 556-58.) Competing full service public service broadcasting spots became economically marginalized as revenues were siphoned off by PCI's translators in Kenai/Soldotna and Kodiak. (EB Exhs. 32 at 3; 33 at 2, 34 at 3-4.)

19. Translators were essential to the "network" strategy, but PCI preferred to operate without waivers. Before June 1, 1991, PCI had not even submitted a waiver request for its "other area" translators. (Tr. 119.) And on April 24, 1992, without requesting a waiver, PCI received a permit and a license for a new Kenai FM translator. (EB Exh. 7 at 15, 18; 29; Tr. 166-67.) By

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<sup>7</sup> To provide PCI with protection, the data in proposed EB Exh. 23 was reduced to a Stipulation that was received in evidence as EB Exh. 23A.

letter dated February 18, 1992, the staff waived ownership and signal delivery rules for PCI, citing *Wrangell*.<sup>8</sup> (Off. Notice Exh. 5; Tr. 306.) As a result, PCI identifies its “network” as the “Wrangell FM translator stations.” See PCI Proposed Findings and Conclusions *supra, passim*.

### Stricter Waiver Rules

20. New waiver rules were adopted in 1990. See *Amendment of Part 74 of the FM Commission Rules Concerning Translator Stations, Report and Order*, 5 F.C.C. Rcd 7212, 7221, 7223, and 7245 n. 59 (1990) (“*Report and Order*”) recon. denied, *Memorandum, Opinion and Order*, 8 F.C.C. Rcd 5093 (1993). The rules set ownership and financial conditions for translators, and established a stricter waiver standard. See *Memorandum Opinion and Order*, 8 F.C.C. Rcd 5093, 5095 (1993) (affirming and clarifying stricter FM translator rules). These rules were stricter in order to protect existing FM stations from adverse, anticompetitive effects of translators, such as PCI’s “network.”

21. The *Report and Order* distinguished between “fill-in” translators (coverage remains within primary station’s coverage) and “other area” translators (coverage extends beyond primary station’s contour). FM translators that were operating before March 1, 1991, could continue to operate until March 1, 1994, including those owned by full service stations that had signals reaching beyond authorized contours, i.e., “other areas.” 47 C.F.R. § 74.1232(d). Only where a licensee wishing to use “other area” translators could demonstrate that adequate service is otherwise unavailable, would the Commission grant waivers. *Memorandum Opinion and Order*, 8 F.C.C. Rcd. at 5095.

### Translator Renewals – 1995

22. On November 22, 1995, PCI filed renewal applications for its translators. (EB Exh. 3 at 8; EB Exhs. 4-9, *passim*, Tr. 312-13.) In each application, PCI responded “yes” to questions about compliance with § 74.1232. (EB Exh. 6 at 11; Tr. 371-72.)<sup>9</sup> PCI believed that in approving initial construction permits and licenses for translators, the Commission had granted

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<sup>8</sup> The Seward translators were not subject to the *Termination Order*. But after the *Termination Order*, the Commission revisited Seward and found waivers were not warranted due to a change of material facts, and that continuation of waivers would result in discriminatory application of Commission rules. *Memorandum Opinion and Order* FCC 03-47, released March 10, 2003. PCI has committed to assign the Seward licenses to a non-profit operator. See *Order* FCC 03M-12, released April 18, 2003, admitting into evidence Off. Notice Exh. 21. Seward assignments were under consideration as of the issuance of this *Initial Decision*.

<sup>9</sup> The parties stipulated on-the-record that EB Exhibits 8 through 15 contained identical disclosure for each of the seven translator stations. (Tr. 311.)

waivers. (*See* Stipulation on-the-record at Tr. 311 and Tr. 313.) In 1995 – 1996, PCI believed that it was authorized through waivers to operate the translators in their present mode. (EB Exh. 3 at 15.)<sup>10</sup> PCI had not received “blanket” rule waivers as it states in Para. 6 of its Proposed Findings and Conclusions. But it does appear that in 1995, PCI had reason to believe that it was authorized to operate its translators. (Tr. 311-13.) For example, PCI did not request or receive a waiver for Kodiak and Kenai translators, and there were no rulings on waiver requests for Anchor Point, Kachemak City and Homer in connection with license renewals. (Tr. 315.) At that time, there did not appear to be any rigid application or strict observance of the waiver rules.

### Renewals Challenged

23. On March 4, 1996, after having filed its renewal requests, PCI was informed by letter that it may be in violation of the Commission’s stricter 1990 FM translator rules. (Off. Notice Exh. 7 at 1.) The letter stated that prior waivers had been granted based on an assumption that the translators would be for service to isolated communities in Alaska, and on the further assumption that no existing or potential full service stations would be adversely affected. (*Id.*) The letter also noted that PCI waivers had been granted before the 1990 rules went into effect. It was made clear that if PCI wished to continue to operate translators, it would have to show that they were providing fill-in service to “white areas,” or service to small, isolated Alaskan communities that were otherwise deprived of aural services. (Off. Notice Exh. 7 at 2.) Understandably, PCI’s competitors felt a need to take action. In early 1996, two years after the grace period for complying with new waiver rules, petitions to deny were filed against PCI’s translator renewal applications.<sup>11</sup> Each competitor complained that PCI was violating § 74.1232(d) with translators that rebroadcast KPEN-FM or KWVV-FM signals beyond their respective authorized contours. (Off. Notice Exh. 8 at 1-2; Tr. 524.) On September 11, 1996, a Division Chief notified PCI’s counsel in a letter that left no doubt of the Chief’s conclusion, that PCI had operated the seven FM translators since June 1, 1994, without benefit of valid waivers. (Off. Notice Exh. 8.) Mr. Becker admitted that he received and understood the letters. (Tr. 169-171.)

24. In an effort to be fair to PCI, it was given a “benefit of the doubt” regarding operation of translators after June 1, 1994. (Off. Notice Exh. 8 at 7.) The staff concluded that PCI could have reasonably, but mistakenly, believed that the staff had implicitly waived § 74.1232(d). (*Id.* at 6-7.) The staff acknowledged that it had granted waivers for the Seward translators on February 18, 1992. (*Id.* at 7.) However, it was made clear to PCI that prospective

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<sup>10</sup> In PCI’s renewal application filed on September 30, 1997, seeking renewal for translator license KZ72CN, Homer, PCI answered in response to Questions 5(a) and 5(b) (compliance with § 74.1232) that PCI was authorized by waiver of §§ 74.1232(d) and (e) to operate the translator. *Id.*

<sup>11</sup> The petitioners were KSRM, Inc., White Falcon Communications, Inc., King Broadcasters, Inc., and Cobb Communications, Inc., competitors in Kenai/Soldotna, Kodiak and Seward, Alaska.



waivers were not warranted for other translators, including the two in Seward, and PCI was to divest ownership interests in those translators.<sup>12</sup> (*Id.* at 9.) The staff deferred action on the renewal applications, allowing PCI sixty days to file applications to assign the nine licenses to unaffiliated parties. Should any assignment applications be granted, grants of the renewal applications would be conditioned upon consummation of the assignments. (*Id.* at 10.)

25. PCI accepted the condition and did not seek reconsideration. But competitors were not satisfied and filed an application for review. In an Opposition to Application for Review, PCI declared unequivocally that it would honor the assignment condition within sixty days. (EB Exh. 10 at 3; Tr. 173-74.) PCI also acknowledged that divestiture of non-compliant translators was required by June 1, 1994, but still contended that it was operating under waivers. (EB Exh. 10 at 5-6.) PCI argued that it could continue to operate the FM translators until a final determination was made with respect to the renewal applications. (*Id.* at 6-7; Tr. 173.)

### Assignment Applications

26. In November 1996, PCI applied to assign the challenged translators to Coastal Broadcast Communications, Inc. ("Coastal"). (EB Exh. 11; Tr. 174-75.) Coastal is owned by David Buchanan and Judy Buchanan. (Off. Notice Exh. 10 at 3.) The Buchanans reside outside of Anchorage, about 200 miles from Homer. The Beckers and the Buchanans are long-time acquaintances. (EB Exh. 11 at 5; Tr. 176.)

27. The assignment applications included an Asset Purchase Agreement ("APA"). (EB Exh. 11 at 10-43; Tr. 175-76.) It proposed the sale of PCI's nine translators at a price determined by cost averaging. (EB Exh. 11 at 15.) PCI agreed to make financing available, with PCI receiving a security interest in equipment. (EB Exh. 11 at 12, 15, 38, 40-43.) PCI agreed to air commercials produced by Coastal on its two primary stations. (Tr. 188-92.) The business plan contemplated commercials to be produced by Mr. Buchanan for broadcast over PCI's primary stations and retransmitted over the assigned FM translators. (Tr. 189-90 "-- the same ad plays on all the translators".)

28. On June 17, 1997, the staff denied the assignments because the intended financing left the assigned stations having a connection with the primary stations controlled by PCI. (Off. Notice Exh. 9; 47 C.F.R. § 74.1232(d)(e).) Section 74.1232(d) prohibits assignment to any entity having any connection with the primary station and therefore PCI financing was not allowed. On July 1, 1997, PCI and Coastal refiled applications deleting the seller-financing provisions while Coastal obtained tentative approval for a Small Business Administration loan. But nothing more was done to finalize and complete the assignments. (EB Exhs. 12, 16.)

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<sup>12</sup> Section 74.1232(h) provides for termination of any waiver upon 60 days notice where the circumstances in the area served are so altered as to have prohibited grant of the application had such circumstances existed at the time of its filing. (Off. Notice Exh. 8 at 8.)

To PCI's benefit, on November 6, 1997, the nine renewal applications were granted, conditioned on completing assignments to Coastal, and the petitions to deny the assignments were denied. (Off. Notice Exh. 10 at 4.) The renewal grants were continued to be conditioned on consummation of the assignments. (*Id.* at 3-4.) Coastal soon found that due to an antenna's destruction by the Air Force, PCI's translators were no longer able to receive KWVV-FM (clearly) or KPEN-FM (at all). In June, 1997, Coastal sought to modify PCI's Kodiak translator to receive a satellite signal, and also sought a waiver of § 74.1231(b). (EB Exhs. 4, 9.) Coastal argued unsuccessfully for Kodiak satellite waivers based on the staff having allowed satellite feeds for the Seward applications.

### Unauthorized Satellite Operation in Kodiak

29. On November 12, 1997, PCI reported that the Kodiak translators were "silent." (PCI Exh. 5 at 13; PCI Exh. 8 at 9.) But prior to leaving the air, the Kodiak translators had operated via satellite without authorizations. In explanation of Kodiak's unauthorized satellite transmission, PCI claimed that it was seeking to avoid the lapse of licenses from non-use. Still, Mr. Becker admitted that satellite delivery without a waiver was in violation of the Commission's rules. *See* 47 C.F.R. § 74.1231(b). (Tr. 205, 240-41.) More likely, the true motive for the unauthorized use of a satellite feed was profit, made apparent by the fact that when PCI's Kodiak translators were silent (or were rebroadcasting programming of the Kodiak Community Church) competing full power commercial stations licensed to Kodiak increased their advertising revenues. (EB Exh. 34 at 3; EB Exh. 23A/Stipulation.)

### Renewal Applications - 1997

30. In September 1997, due to a rule modification providing for FM translator license terms to run concurrently with FM primary stations,<sup>13</sup> PCI refiled renewal applications for FM translator licenses simultaneously with applications to renew its full service licenses. (EB Exh. 3 at 9 through EB Exh. 9 at 1-7.) As contrasted with its 1995 applications, PCI acknowledged that the FM translator operations were noncompliant with § 74.1232(d), but offered as justification its expectation that approval of pending assignment applications to Coastal would effect compliance. (EB Exh. 3 at 7.) On November 6, 1997, the Division Chief granted PCI's 1995 renewal applications and the assignment applications. (Off. Notice Exh. 10.) Chief Blair's letter also denied the petitions to deny the assignment. (*Id.*) On December 17, 1997, the competitors filed petitions to deny the 1997 renewal applications. (Off. Notice Exh. 11 at 1, 3-4, Tr. 210.)

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<sup>13</sup> *See Report and Order*, 9 F.C.C. Rcd 6504 (1994). As a result of the modification, the renewal period for PCI's FM translators was extended to February 1, 1998. To comply, PCI filed renewals for the nine translators on September 30, 1997. Under circumstances that applied in 1997, the policy was to grant otherwise grantable assignment applications prior to the time for acting on renewal applications, provided that consummation of assignments not occur until grant of renewals. (Division Chief Blair's letter of November 6, 1997; Off. Notice Exh. 10 at 4 n.7.)

### Renewal Applications Granted – 1998

31. On December 10, 1998, the Commission renewed PCI's applications for the two Seward translators, and applications for the Kenai and Kenai/Soldotna translators as to which no signal delay issues were presented, and applications for the unchallenged translators in Anchor Point, Homer and Kachemak City. *Memorandum Opinion and Order*, 13 F.C.C. Rcd 23992, 23999-24000 (1998). (Off. Notice Exh. 11.) The Commission affirmed the staff's determinations with respect to conditionally granting PCI's 1995 renewal applications, and with respect to the PCI/Coastal assignment applications. The Commission also granted PCI's 1997 renewal applications for six of nine translators, conditioning renewals on consummation of assignments, thereby eliminating any possible violations of § 74.1232(d). But the Commission concluded that the staff's findings rendered PCI ineligible to continue to hold any of its "other area" FM translator licenses which made the seven FM translators vulnerable for termination. *Id.*, *passim*.

### No Right to Waivers

32. Post-1990 waivers were limited to "white areas" in order to promote full-service broadcasting while preventing translators from unfairly competing with full-service stations. Consistent with its new policy, the Commission denied Coastal's applications to modify the Kodiak translators for satellite signals because the translators served no "white areas." However, because the situation in Seward had not changed since the initial grant, the Commission allowed the continuation of waivers for the Seward translators, allowing for a revisit if a prospective full-service FM station became operational in Seward. *Memorandum Opinion and Order*, 13 F.C.C. Rcd at 23997-98. (Off. Notice Exh. 11.)

### No Assignment

33. But the die was cast, and by March 1, 2000, the assignment was dead. (Tr. 220; 409.) Four of the nine translators had become "worthless" because Kodiak translators were being denied satellite waivers and were no longer receiving primary station programming, while Seward translators would lose commercial value when a full service station goes on-the-air. Coastal had concluded that the Kodiak translators were "useless" and that the Seward translators would soon become valueless. As a result, Coastal would purchase PCI's translators only at a substantially reduced price. (EB Exh. 19 at 4-5; Tr. 220, 409-10.) Recognizing that the assignment option was lost, as a last resort, in February – March 2000, PCI unsuccessfully sought stays from the Commission and from the D.C. Circuit. (EB Exhs. 18, 19, 26; Tr. 236, 331.)

### Untimely Rejection of Condition

34. On February 14, 2000, the Commission dismissed PCI's petition for reconsideration and motion for stay. *Memorandum Opinion and Order*, 15 F.C.C. Rcd 3293 (2000). (Off. Notice Exh. 12.) The Commission found that PCI had unduly delayed consummation of the assignments. *Id.* at 3294. The Commission ordered that if PCI did not divest within thirty days, the staff would rescind the conditional grants of renewal, cancel the FM translators' call signs, and terminate PCI's operating authority. *Id.* Since the translators did not serve any "white areas," the Commission concluded that continuing PCI's waivers would be detrimental to the full service broadcast stations operating in Seward, and the Commission ordered termination of the Seward waivers within sixty days. *Id.* at 3296.

35. Under the Commission's regulatory regimen, if PCI had timely rejected the condition, PCI would have been entitled to a renewal hearing. 47 C.F.R. § 1.110 (hearing required when conditions of grant are not accepted). The Commission determined that by accepting conditional renewals, PCI waived its right to reject the condition of assignment, and also its right to a hearing. The licenses were rescinded for failure to meet a condition that PCI had accepted more than two years earlier, and by PCI accepting that condition, there was no right to a hearing on the FM translators' renewals. *Memorandum Opinion and Order and Order to Show Cause*, 16 F.C.C. Rcd 11364, 11369 (2001).

36. Mr. Becker knew that the Commission required consummation of translator assignments and that otherwise PCI risked loss of the licenses. (Tr. 237.) On March 15, 2000, in a last ditch effort, PCI filed a pleading styled "Rejection of Conditional License Renewal and Assignment of License Grants" ("Rejection"). That pleading was PCI's first and only attempt to reject conditional renewals issued in 1997 and 1998. (EB Exh. 20; Tr. 238-39, 423.) PCI argued that as a consequence of its Rejection pleading, the Commission was required to set the translator renewal applications for hearing. PCI also tried to convince the staff in that pleading that the Commission's conditional grants were void. (EB Exh. 20 at 2; Tr. 424.) Upon learning that PCI had filed its Rejection, the D.C. Circuit dismissed PCI's appeal without prejudice to its re-filing following the Commission's resolution of PCI's recently filed Rejection.<sup>14</sup> (Off. Notice Exh. 13 at 5; Tr. 425.)

37. On May 18, 2001, the Commission dismissed PCI's Rejection as untimely, noting that PCI's filing was made years after the thirty day limitation for rejecting conditional renewals. *Termination Order* at Para. 11. (Off. Notice Exh. 13 at 5.) The Commission also rescinded the conditional renewals and assignment grants because of default. *Termination Order* at Para. 13. (Off. Notice Exh. 13 at 6.) As a consequence, the Commission deleted the call signs of the FM translator stations serving Kenai, Kenai/Soldotna, Anchor Point, Homer, Kachemak City and the

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<sup>14</sup> The Ninth Circuit noted that "proceedings before the FCC took another complex procedural turn" and "because of procedural complications, the D.C. Circuit had dismissed Peninsula's appeal." *U.S. v. Peninsula Communications, Inc.*, 287 F 3d at 382-383.

two FM translator stations in Kodiak, and ordered PCI to cease operating. *Termination Order* at Para. 21.<sup>15</sup> (Off. Notice Exh. 13 at 8.) The Commission’s refusal to accept PCI’s late-filed Rejection in the *Termination Order* has been approved by the D.C. Circuit. See *Peninsula Communications, Inc. v. F.C.C.*, No. 01-1273, *per curiam Judgment and Memorandum*, filed January 30, 2003.<sup>16</sup>

### Termination

38. The “*Termination Order*” directed PCI to cease operating the seven FM translators by May 19, 2001. *Memorandum Opinion and Order and Order to Show Cause*, 16 F.C.C. Rcd 11364, 11371 (2001). (Off. Notice Exh. 13 at 8.) PCI received the *Termination Order*, read it, understood it, and continued to operate unlawfully for fifteen months. (Tr. 221-23; EB Exhs. 1 and 3 – PCI admits receipt by May 30, 2001.) In June 2001, PCI filed an appeal with the D.C. Circuit seeking to overturn the *Termination Order*. PCI never obtained a stay of the *Termination Order* from the Commission or from the D.C. Circuit. The D.C. Circuit denied PCI’s appeal and upheld the legality of the *Termination Order*. *Peninsula Communications, Inc. v. F.C.C.*, Case No. 01-1273, *per curiam Judgment and Memorandum* filed January 30, 2003 (ordered and adjudged that the *Termination Order* be affirmed).

### Forfeiture

39. On August 29, 2001, in a clear shot across the bow, the Commission released its *Notice of Apparent Liability for Forfeiture and Order*, 16 F.C.C. Rcd 16124 (2001) (“*NAL*”), notifying PCI that further operation of the seven FM translators might raise serious questions about PCI’s qualifications to be a Commission licensee, and also might result in proceedings leading to revocation of PCI’s licenses. PCI received the *NAL*, read it, understood it, but nonetheless continued operating the seven FM translators. (Tr. 222-23.)

40. On February 6, 2002, the Commission released its *Forfeiture Order*, 17 F.C.C. Rcd 2832 (2002), finding that PCI “willfully and repeatedly” failed to comply with Section 301 of the Communications Act of 1934. PCI was assessed a base amount forfeiture of \$10,000 for each of the seven stations (\$70,000), adjusted upward because of PCI’s intentional and continued illegal

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<sup>15</sup> The Seward translators were not terminated under the *Termination Order*. Instead, the Commission commenced a proceeding under § 316 of the Act to determine whether licenses for the Seward translators should be modified by termination of the waivers. *Termination Order* at Para. 24. (Off. Notice Exh. 13 at 8.) As a result, Seward lost its rights to continued waivers. *Memorandum Opinion and Order*, FCC 03-47, released March 10, 2003.

<sup>16</sup> The unpublished *per curiam Judgment and Memorandum* of the D.C. Circuit is cited herein only as fact and for legal conclusions that are uniquely relevant to this case, and not cited for precedential legal authority.

operations. *Id.* at 2836. The *Forfeiture Order* in the amount of \$140,000 is being enforced by a United States Attorney. 47 C.F.R. § 1.80(f)(5) (judicial enforcement of forfeiture order). A *de novo* collection action is pending in the United States District Court for the District of Alaska, Case No. A02-295 (JWS). (Off. Notice Exh. 22.)

### Notice of Unlawfulness

41. After the assignments failed, PCI reversed field and argued to the Commission and to the D.C. Circuit that the Commission lacked statutory authority to issue conditional grants of renewal. In its motion for stay, PCI also argued that Commission rulings had found that its operation of “other area” translators had been in the public interest, that there had been no serious violations of the rules, and that there had been no other violations that showed a pattern of abuse. (EB Exh. 18 at 6-7.) But that argument omits the fact that beginning in September 1996, the staff and the Commission had found that the seven FM translators were operating in violation of § 74.1232(d) since June 1, 1994, and that the orders to divest were issued to cure those violations prospectively. (Off. Notice Exh. 8 at 1; Off. Notice Exh. 11 at 5; EB Exh. 3; EB Exh. 10.) The Commission did not act on PCI’s motion for stay, and on March 14, 2000, the D.C. Circuit denied PCI’s emergency motion for stay. *See Termination Order* at Para. 9. (Off. Notice Exh. 13 at 5.)

### Continuing Violation

42. On September 10, 2001, in response to the *NAL, supra*, PCI submitted an affidavit wherein Mr. Becker acknowledged its continued operation of the seven FM translators. (EB Exh. 27; Tr. 245-46.) PCI contended that despite the *Termination Order*, PCI’s renewal applications remained pending by virtue of the appeal to the D.C. Circuit. (*Id.*) PCI continued to assert that the pendency of renewal applications allowed PCI to continue operating the FM translators until the D.C. Circuit decided the appeal. (EB Exh. 27 at 2-3.) PCI was relying on two non-applicable Commission rules: § 1.62(a)(1) (operation authorized pending action on renewal applications) and § 73.3523(d)(a) (application deemed pending until order becomes not subject to further review by courts). (EB Exh. 27 at 2-3.)

43. Mr. Becker also asserted that continuation of broadcasting over the translator stations was needed to avoid automatic license termination. Section 312(g) of the Act provides:

If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period ....

But since the translators’ call signs were deleted, PCI could not have been further adversely impacted under the Act by complying with the *Termination Order* because PCI would have no designated licenses to automatically terminate. *See Termination Order* at Para. 21. (Off. Notice

Exh. 13 at 6.) PCI continued to operate the FM translators on erroneous legal advice that PCI could operate the translators so long as the *Termination Order* was on appeal, or until a court injunction became final. (Tr. 222-23, 266; EB Exh. 30 at 339-41.) If PCI were correct in its automatic stay argument, then § 312(g) of the Act would have no relevance. Under either *scenario*, there is no relevance to this case of § 312(g) of the Act.<sup>17</sup>

44. Mr. Becker knew soon after release of the *Termination Order* that the Commission had ordered PCI to discontinue using the seven FM translators. (Tr. 221-22.) Yet PCI continued to operate them. (Tr. 222-23; EB Exh. 30 at 340-41.) Mr. Becker instructed counsel to inform the Commission that PCI would not terminate its translator transmission. (Tr. 227.) The Beckers knew that PCI was disobeying a Commission order. (Tr. 223-25; EB Exh. 30 at 340-42.) On June 15, 2001, PCI filed an appeal with the D.C. Circuit and continued operating without obtaining a stay of the *Termination Order*. (Off. Notice Exh. 17 at 5; Tr. 229, 232.) Counsel had notified the Commission that PCI intended to operate translators while pursuing an appeal to the D.C. Circuit in accordance with the general Commission practice allowing operations to continue while appeals are pending. (Tr. 224, 227-232; Off. Notice 14 at 4.)

### Injunction

45. In July 2001, the United States Attorney for Alaska filed an action to enjoin PCI and to enforce the *Termination Order*. (PCI Exh. 1 at 9.) On October 17, 2001, a United States District Court issued a preliminary injunction, affirmed on April 22, 2002, by the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”). *United States of America v. Peninsula Communications, Inc.*, 287 F.3d 832 (9<sup>th</sup> Cir. 2002). The Ninth Circuit held that filing an appeal with the D.C. Circuit did not excuse compliance with a Commission order, absent a stay. 287 F.3d at 836. (Off. Notice Exh. 17 at 7.) And the Ninth Circuit rejected the argument that under § 1.62(a)(1) and § 73.3523(d)(2) its renewal applications remained pending. 287 F. 3d at 839.<sup>18</sup> (Off. Notice Exh. 17 at 12.) Even after the Ninth Circuit affirmance, PCI advised the United States Attorney through its local counsel that PCI “cannot voluntarily cease operation because that will destroy the business and livelihood of the owners and employees.” (EB Exh. 21.)

46. On July 3, 2002, the Ninth Circuit denied PCI’s petition for rehearing. (Off. Notice Exh. 19.) On August 13, 2002, the D.C. Circuit denied PCI’s last request for a stay of the *Termination Order*. (Off. Notice Exh. 20.) On August 28, 2002, PCI shut down the seven FM

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<sup>17</sup> See further discussion below on PCI’s State of Mind, Paras. 48 – 53, *infra*.

<sup>18</sup> The Ninth Circuit held: “Peninsula is wrong. The definition of “pending” in 47 C.F.R. § 73.3523(d)(2) is limited to proceedings under that section of the regulations, and thus does not apply to the renewal application procedure set forth in 47 C.F.R. § 1.62(a)(1). See 47 C.F.R. § 73.3523(d) (introducing definitions in that subsection with the limited phrase “[f]or the purpose of this section ...”). Therefore, Peninsula cannot revive its licenses by importing 47 C.F.R. § 73.3523(d)(2)’s definition of “pending” into 47 C.F.R. § 1.62(a)(1).”

translators, announcing that it had “temporarily” suspended operation of the translators until the legality of the *Termination Order* was decided by the D.C. Circuit. (EB Exh. 22; Tr. 331.) The D.C. Circuit has upheld the *Termination Order*, and it is conclusively established that PCI had been operating the seven translators illegally until August 28, 2002. (EB Exh. 27 at 2-3.) See *Peninsula Communications, Inc. v. F.C.C.*, No. 01-1273, *per curiam Judgment and Memorandum* filed January 30, 2003.

### State of Mind

47. PCI has shown its state of mind to be primarily focused on arguing reasons for not obeying the *Termination Order*. (See PCI Exhs. 1-C-I through 11.)<sup>19</sup> In telling testimony, Mr. Becker asserted: “If the injunction had never been issued, I would be continuing to operate today under authority of § 307(c)(3).”<sup>20</sup> (Tr. 266.) Section 307 of the Act has no relevance. The *Termination Order* was a final order and there was no pending petition for reconsideration under Section 405 of the Act. See *United States v. Peninsula Communications, Inc.*, 287 F. 3d at 839, holding that PCI’s renewal applications were “finally determined by the FCC” as of the date of issuance of the *Termination Order*.

48. Shortly after May 19, 2001, PCI counsel advised the Commission by telephone that it would continue to operate the seven FM translator stations while appealing to the D.C. Circuit, believing that it was conforming with Commission precedent. (Tr. 224, 227; *Forfeiture Order* at Para. 10, and Off. Notice Exh. 14 at 4.) On September 10, 2001, Mr. Becker stated PCI’s belief that it could continue to operate while its appeal was pending before the court. (EB Exh. 1 at 30-35.) PCI was relying on a Commission general practice of permitting continued broadcasting pending completion of an appeal.

Generally, we permit a disqualified broadcast licensee to continue operations during judicial appeals to ensure service to the public until the court resolves the licensee’s qualifications.

*Pinelands, Inc.*, 7 FCC Red 6058, 6061 n.12 (1992). The Commission acknowledged this policy. See *OSC* at 3 n. 10. However, in this case the Commission opted to refuse staying the *Termination Order* pending appeal. See, *OSC* at 3-4. The Commission’s authority to refuse a stay was a point on appeal to the D.C. Circuit which held:

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<sup>19</sup> Because Mr. Becker was relying on his understanding of the law concerning finality, this fact finding analysis also requires consideration of Mr. Becker’s legal arguments.

<sup>20</sup> Section 307 (c) (3) provides:

Continuation Pending Decision – Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to Section 405, the Commission shall continue such license in effect.

47 U.S.C. § 307 (c) (3).



[T]he Commission was well within its authority when it prohibited [PCI] from operating during its appeal.

*Peninsula Communications, Inc. v. F.C.C.*, No. 01-1273, *per curiam Judgment and Memorandum*, filed January 30, 2003.

49. The word “generally” used by the Commission in *Pinelands, supra*, is a qualifier that shows a selective decision for allowing interim broadcast operation pending appeals. The D.C. Circuit acknowledged the fact that the Commission “normally allows licensees whose renewal applications have been denied to continue operating pending the exhaustion of any appeal --- [but] only as a matter of discretion,” citing *Pinelands, Inc., supra*. See *Peninsula Communications, Inc. v. F.C.C.* (No. 01-1273), *supra*. When it advised the Commission in May 2001, PCI did not know how the D.C. Circuit would rule and was relying only on its own belief as to authority under *Pinelands, Inc.* to continue operations. Discretion for the Commission to decide who can and who cannot operate pending judicial appeal does not appear in the Act, the rules, or Commission policy. And Mr. Becker was being advised that there has never been a case where a licensee was denied the right to continue licensed operations pending appeal. As a result, he believed that it was wrong for the Commission to order PCI off the air with a determination that it would have been inappropriate for the Commission to give PCI continued authority to operate. See *OSC* at 3 n. 10. Substantially the same argument was reiterated in Mr. Becker’s testimony. (See Tr. 154, 231-232, 370, 412-414, 420-422.)

50. Mr. Becker claims to have “agonized” over continuing the operation of the translators because he did not “want to disobey the Commission...” (Tr. 224.) In the course of his “agonizing,” Mr. Becker saw not terminating under the *Termination Order* as being consistent with the Commission actions in connection with the Seward translators. On February 14, 2000, the Commission ordered PCI to terminate the two Seward translators by April 14, 2000. *Memorandum Opinion and Order*, 15 F.C.C. Rcd 3293, 3296 (2000). (Tr. 415.) PCI appealed to the D.C. Circuit, did not terminate the Seward translators, and the Commission took no action to either enforce its order or to penalize PCI. (Tr. 419.) Mr. Becker argues that the reason the Commission took no action was because PCI had timely filed an appeal with the D.C. Circuit, thinking that the appeal automatically postponed further compliance with the order regarding the Seward translators. (Tr. 416, 420-21.) But Mr. Becker’s reasoning is not supported by the record. The appeal to the D.C. Circuit did not result in an automatic stay, no stay was requested, and no stay was obtained. Thus, there was no reasonable basis for PCI to rely on unrelated Seward procedures as precedent for not obeying the *Termination Order*.

51. The Commission acknowledged in the *Termination Order* that PCI had challenged the earlier decision to terminate Seward and determined:

We believe that Section 316 of the Act affords the most direct and expedient means of resolving the matter.

*Termination Order* at Para. 14. (Off. Notice Exh. 13 at 8.) The Commission then granted PCI's renewals for the two Seward stations. The Commission also ordered a proceeding under § 316 of the Act requiring PCI to show cause why the waivers should not be discontinued. *Id.* As found above, the Commission ultimately discontinued the Seward waivers. *See* Para. 38 n. 16, *supra*. Mr. Becker now concludes that it was fortuitous not to have terminated the two Seward translators because, in the *Termination Order* of May 2001, the Commission excluded termination of the two Seward translators from its termination directive. *Termination Order* at Para. 14. (Tr. 416-418.) Mr. Becker believes that had PCI terminated the two Seward translators in April 2000, under § 312(g) of the Act, the licenses for the Seward translator stations would have been automatically terminated by the date of the release of the *Termination Order*. (Tr. 417-418.)

52. Mr. Becker simply calculated that PCI's appeal to the D.C. Circuit, filed in July 2001, could not be prosecuted to a conclusion within twelve months. (Tr. 224-225, 233, 360.) Mr. Becker therefore concluded that compliance with the *Termination Order* would effectively moot the appeal by operation of the automatic forfeiture provision of § 312(g) of the Act. (Tr. 360-361.) PCI now contends that advice of counsel and Mr. Becker's views on the law made it reasonable to conclude that PCI was entitled to operate the seven FM translators after May 18, 2001, pending the exhaustion of its appeal to the D.C. Circuit, and as a legitimate measure to protect the translators from automatic forfeiture. Mr. Becker justifies non-compliance because of the so called Seward "precedent." As found in Paragraph 43 *supra*, the *Termination Order* cancelled the call signs of the seven translators, and if PCI had complied timely with the *Termination Order*, there would be no application of §312(g) of the Act to the facts of this case. There is absolutely no basis for Mr. Becker to have relied on unrelated Seward procedures in deciding not to obey the *Termination Order* which concerns the termination of only "network" licenses, none of which were concerned with Seward.

### Ultimate Fact Findings

53. In launching its "network during the 1980s, PCI obtained waivers to retransmit primary signals over seven translators in "other areas" which were primary areas of full service competitors. The waiver standards tightened in 1990, and under grandfathering rights, PCI was able to operate its "other area" translators until 1994, relying primarily on *Wrangell, supra*. PCI should have been down sizing its "other areas" broadcasting, but instead was motivated to keep operating its "network" by the economics of PCI's business plan. The "network" enabled PCI to expand primary station coverage through low cost translators, thereby unfairly competing for advertising in "other areas" that were already receiving full service. Through its "network", PCI was able to provide advertising time for lucrative clients. PCI's translators also siphoned business from full service FM stations. Motivated strictly by profit, PCI unilaterally decided to continue broadcasting through unauthorized translators after being ordered on May 19, 2001, to cease operations.

54. Prior to the *Termination Order*, the Commission had concerns about PCI when challenges were filed to staff renewal grants. *Memorandum Opinion and Order*, 13 F.C.C. Rcd 23992 (1998). (Off. Notice Exh. 11.) By then, the Commission would not grant waivers for “other area” translators to entities interested in or connected with commercial FM stations, and only “white areas” were eligible for waivers. *Id.* As a result, PCI’s renewal applications fell into jeopardy and valid waivers could be obtained only for two Seward translators which at the time were filling legitimate needs. Other PCI translators that were up for renewal had been found to be operating in violation of § 74.1232(d). *Memorandum Opinion and Order*, 13 F.C.C. Rcd 23994. But *see also* Division Chief Blair’s earlier, highly instructive letter dated September 11, 1996, to PCI’s counsel with copies directed to challenger’s counsel. (Off. Notice Exh. 8).

55. To resolve the situation, in 1998, the Commission granted PCI’s renewal applications subject to a condition of assignment, and rejected competitors’ petitions to deny. *Memorandum Opinion and Order*, 13 F.C.C. Rcd 23992 (1998), *recon. denied*, *Memorandum Opinion and Order*, 15 F.C.C. Rcd 3293 (2000). PCI could not meet the assignment condition because the potential value of the translators, which was based on their ability to retransmit primary signals into “other area” Alaskan communities, had diminished significantly. The assignment condition not being met, in May 2001, the Commission issued its *Termination Order* which PCI knowingly failed to honor, on a daily basis, for more than one year.

56. PCI defended its misconduct on a mistaken belief that a timely appeal of the *Termination Order* to the D.C. Circuit gave it an absolute right to continue to broadcast until the appeal became final. (EB Exh. 27.) PCI’s intransigence required the Commission to obtain an injunction in a United States District Court that was affirmed by the Ninth Circuit. On August 28, 2002, and only after affirmance of the injunction and refusal to hear *en banc* reconsideration, did PCI finally honor the *Termination Order*. To its detriment, from May 19, 2001 to August 28, 2002, PCI was daily violating the Commission’s *Termination Order*. (Tr. 142.)<sup>21</sup>

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<sup>21</sup> August 28, 2002, was a date selected by PCI to terminate operations. (Tr. 142-43.) The final ruling of the Ninth Circuit was an order denying PCI’s petition for rehearing *en banc*, filed by the Clerk on July 3, 2002. (Off. Notice Exh. 19.) The last request for stay of the *Termination Order* was denied by the D.C. Circuit on August 13, 2002. (Off. Notice Exh. 20.) In a final act of flaunt, Mr. Becker negotiated with the United States Attorney to continue broadcasting in violation of the *Termination Order* during a local primary election that ended on August 27, 2002. (Tr. 269-70.)

## CONCLUSIONS OF LAW

### Violations of the Act

57. Section 301 of the Act provides:

It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels --- under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.

Section 312(a)(4) of the Act provides:

The Commission may revoke any station license or construction permit –

for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act, or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

Section 416(c) of the Act provides:

It shall be the duty of every person, its agents and employees, and any receiver or trustee thereof, to observe and comply with such orders so long as the same shall remain in effect.

The totality of this record shows that PCI willfully violated the Act by knowingly operating its seven FM translators for more than a year after notice of the *Termination Order*, and for nearly a year after notice through the *NAL* of a forfeiture of \$140,000. On the basis of this record, PCI is found, by a preponderance of the evidence, to have violated § 301, § 312(a)(4) and § 416(c) of the Act by knowingly failing from May 19, 2001 to August 28, 2002, to observe and comply with a Commission order terminating seven FM translator licenses in Alaska.

### Discussion

58. The *Termination Order*, released on May 18, 2001, became effective on May 19, 2001. *Memorandum Opinion and Order to Show Cause*, 16 F.C.C. Rcd 11364, 11368-70 (2001). The law is clear that notice was effected on the release date. 47 C.F.R. § 1.103(a) and § 1.4(b)(2) (date of notice is date of Commission action and public notice is document release date). *Cf. United States v. Szoka*, 260 F.3d 516, 529-30 (6<sup>th</sup> Cir. 2001) (cease and desist order effective on release and enforceable by injunction before appellate finality). The testimony also shows that PCI had actual knowledge of the *Termination Order* soon after its release. (Tr. 221-

22) There was never any stay, and the D.C. Circuit has categorically rejected PCI's challenge to its validity. *Peninsula Communications, Inc. v. F.C.C.*, No. 01-1273, *per curiam Judgment and Memorandum*, January 30, 2003. It is now the law of the case, as decided in two circuits, that the *Termination Order* was effective upon its release, that PCI received timely notice, and that the *Termination Order* was a valid Commission order. *Id.* See also *United States v. Peninsula Communications, Inc.*, 287 F.3d at 836 (*Termination Order* "regularly made" under § 401(b) of the Act).

59. Nonetheless, PCI made clear its intention not to honor the *Termination Order*. And so, in July 2001, the United States Attorney for Alaska filed an action for preliminary injunction.<sup>22</sup> In October 2001, an injunction was issued by the United States District Court for Alaska. PCI appealed the injunction to the Ninth Circuit. PCI also filed an appeal of the *Termination Order* with the D.C. Circuit.

60. In April 2002, the Ninth Circuit held:

Filing an appeal [with the D.C. Circuit] under Section 402 does not excuse a broadcaster from complying with the FCC [*Termination Order*] absent a decision by the D.C. Circuit to stay the order.

*United States v. Peninsula Communications, Inc.*, 287 F3d at 836. Therefore, any formal or informal stays of the injunction had no effect to stay the *Termination Order*. There never has been a stay of the *Termination Order* by the Commission or by any court having jurisdiction to stay the *Termination Order*. Therefore, it must be concluded that PCI was in clear violation of the *Termination Order* continuously from May 19, 2001, to August 28, 2002. To its credit, PCI ceased to violate the *Termination Order* on August 28, 2002, and has since been in compliance.

61. For an affirmative defense, PCI relies on a general practice at the Commission of allowing licensees to continue broadcasting pending appeals. The Act provides:

Continuation pending decision. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 [47 USC § 405], the Commission shall continue such license in effect.

See 47 U.S.C. § 307(c)(3). The Commission has acknowledged the practice:

Generally, we permit a disqualified broadcast licensee to continue operation during judicial appeals to ensure service to the public until the court resolves the licensee's qualifications.

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<sup>22</sup> Section 401(b) of the Act provides that if any person fails to obey a Commission Order, the United States Attorney General may apply to a federal district court for an injunction.

*Pinelands, Inc.*, 7 F.C.C. Rcd 6058, 6061 n.12 (1992). First, it is noted that since full power FM signals were already broadcasting in the “network” areas, there was no signal gap to fill by continuing PCI’s translator retransmissions. In addition, as a matter of law there is no statutory mandate requiring the Commission to permit operations pending appeals. Nor was PCI entitled to continue operations as a “pending” renewal application because “pending” does not apply to the renewal application process under § 1.62(a)(1) (applications continue in effect until Commission “final determination). Compare 47 C.F.R. § 73.3523(d)(2) (in settlement of comparative renewal, an application is deemed “pending” from filing to “final” order). It has been judicially held that PCI “cannot revive its licensing by importing § 73.3523(d)(2)’s definition of ‘pending’ into § 1.62(a)(1).” *United States v. Peninsula Communications, Inc.*, 287 F. 3d at 839. The Ninth Circuit’s analysis, stated with a clarity for all to understand, is consistent with the Commission’s rejection of the interplay of § 1.62 and § 73.3523. See *OSC* at Para. 3 (neither rule justified continued operation of PCI’s translators after May 19, 2001).

62. PCI also seeks to justify non-compliance on a statutory provision for automatic forfeiture of licenses for stations that fail to broadcast for twelve months. Section 312(g) of the Act provides:

If a broadcasting station fails to transmit broadcast signals for any consecutive 12 month period, then the station license granted for the operation of that broadcast station expires at the end of that period....

The Commission has already considered this point and rejected it. See *OSC*, at Para. 4, 17 F.C.C. Rcd at 2840-41. The Commission found that “the seven FM translator licenses are no longer in effect.” *Id.* The Commission’s rulings on the law in the *OSC* are binding on the Presiding Judge. *Fort Collins Telecasters*, 103 F.C.C. 2d 978, 983-84 (Review Bd 1986), citing *Atlantic Broadcasting Co.*, 5 F.C.C. 2d 717, 720-21 (1966). Cf. *Echrenhaft v. Malcolm Price, Inc.*, 463 A. 2d 1192 (D.C. App. 1984) (question of law already decided in same case is binding at trial level). Furthermore, since § 312(g) of the Act applies to licenses that are “in effect” and remain silent for one year, there could not be any right or obligation for PCI to continue broadcasting as licensee of seven terminated translators which were after May 19, 2001, no longer licenses that were “in effect.” *Id.* Therefore, since PCI had no duty or right to broadcast over terminated stations, there was no basis to apply § 312(g) of the Act as justification for PCI’s failure to comply with the *Termination Order*.

63. Finally, PCI offers as a defense Mr. Becker’s reliance on advice of counsel. The evidence shows that despite stern warnings from the Commission, PCI continued to violate the *Termination Order* until August 2002. During the period of daily disobedience, Mr. Becker was receiving legal advice that he could continue to operate lawfully pending all appeals. However, it is well established that “advice of counsel cannot excuse a clear breach of duty by a licensee.” *RKO General v. F.C.C.*, 670 F.2d 215, 231 (D.C. Cir. 1981). Cf. *United Broadcasting*, 94 F.C.C. 2d 938, 954 (1983); *Asheboro Broadcasting Co.*, 20 F.C.C. 2d 1, 3 (1969).

64. Advice of counsel possibly qualifies as an affirmative defense if there is a “technical issue in a complex area of the law, making reliance on specialized counsel particularly appropriate.” *Fox TV Stations, Inc.*, 10 F.C.C. Rcd 8452, 8500 (1995). In a sense, there was for a short time a technical legal issue on whether a terminated licensee on appeal may continue broadcasting. The D.C. Circuit recognizes that “the Commission normally allows licensees whose renewal applications have been denied to continue operating pending the exhaustion of any appeal.” *Peninsula Communications, Inc. v. F.C.C.*, No. 01-1273, *per curiam Judgment and Memorandum, supra*. Here, any remnant of a “technical legal issue” vanished when Mr. Becker was graphically warned by the *NAL* that PCI’s licenses were at risk if the *Termination Order* was not obeyed. The Commission then showed an increasingly grave concern for PCI’s disobedience when it sought an injunction. In view of these red flag warnings of how serious the Commission was taking its clear and concise readily understandable *Termination Order*, there was no longer a discernable “technical issue” that required “specialized” advice. Therefore, PCI cannot defend its willful defiance of the *Termination Order* by relying on a legal advice defense. If Mr. Becker relied on his attorney’s advice, the advice is that of an agent and Mr. Becker must accept the consequences if the agent’s advice turns out to be wrong. *Cf. Carol Sue Bowman*, 6 F.C.C. Rcd 4723 (1991); and *Hillebrand Broadcasting Corp.* 1 F.C.C. Rcd 419, 420 n. 6 (1986).

65. It is concluded that without any legal justification, PCI committed a “clear breach of duty” to immediately obey the unambiguous *Termination Order*. While there are extenuating circumstances that are discussed below, it must be concluded as a matter of law that PCI willfully violated both the letter and the spirit of the *Termination Order* from May 19, 2001 to August 28, 2002, in violation of § 301, § 312(a)(4) and § 416(c) of the Act.

### Appropriate Sanction

66. The Commission has broad discretion in its choice of remedies and sanctions. *RKO General, Inc. v. F.C.C.*, 670 F. 2d 215, 237 (D.C. Cir. 1981); *Leflore Broadcasting Co. Inc. v. F.C.C.*, 636 F. 2d 454, 463 (D.C. Cir. 1980); *Lorain Journal Co. v. F.C.C.*, 351 F.2d 824, 831 (D.C. Cir. 1965). The Commission relies on truthfulness and reliability of licensees. These traits are demonstrated by willingness or unwillingness to comply with the law generally and the Communications Act and the Commission’s rules in particular. *Policy Regarding Character Qualifications In Broadcast Licensing*, 102 F.C.C. 2d 1179, 1188-91 (1986) (“*Character Policy Statement*”). *See also Policy Regarding Character Qualifications In Broadcast Licensing*, 5 F.C.C. Rcd 3252 (1990), *modified, Memorandum Opinion and Order*, 7 F.C.C. Rcd 6564 (1992).

67. In assessing a sanction, willfulness of misconduct, its frequency and its currency are considered, along with the seriousness of misconduct and efforts made to remedy wrongs, noting particularly the licensee’s record of compliance with the Act and Commission rules and policies. *Character Policy Statement*, 102 F.C.C. 2d at 1227-28. For a period of several weeks in 1997, PCI operated its Kodiak translators through an unauthorized satellite delivery system. However, to PCI’s credit, the evidence shows that STAs were sought and PCI stopped commercial broadcasting in Kodiak after the Commission failed to address the STA requests. The record does not support a conclusion that PCI was a total scofflaw with respect to seeking to

comply with rules and regulations. And far more serious than an unauthorized short-term satellite signal

in Kodiak is PCI's intentionally violating the *Termination Order* over a substantial period of time. PCI's misconduct related to the *Termination Order* warrants a severe sanction of license revocation because it resulted from a knowing and intentional decision to disobey daily a lawful order from May 2001 to August 2002.

68. Contrary to Mr. Becker's claim of an "agonized" act of disobedience, PCI operated from an economic motive to avoid the *Termination Order* for as long as possible. Through a carefully crafted "network," PCI captured revenues that otherwise would have gone to competing full-service licensees operating properly within their assigned service areas. Through the seven offending translators, PCI placed its own economic interests ahead of the Commission's regulatory scheme and the public interest in having honest competition. After losing an extended joust with the staff on waiver authorizations and then failing to effect an assignment, PCI turned to the appeal process to postpone compliance with the *Termination Order*. This was a particularly cynical abuse of the fairness shown by the Commission and the Commission staff in giving PCI the benefit of several doubts.

69. In December 1998, the Commission rejected license revocation for PCI's translator licenses, the sanction that was sought by competing broadcasters who were opposing PCI/Coastal assignments. *Memorandum Opinion and Order*, 13 F.C.C. Rcd 23992 (1998). Petitioners argued the *Jefferson Radio* policy which requires assignment applications to be deferred where there are unresolved basic character qualifications. *Jefferson Radio Co. v. F.C.C.*, 340 F.2d 781, 783 (D.C. Cir. 1964). *Cf. RKO General, Inc.*, 3 F.C.C. Rcd 5057, 5060-61 (1988). PCI accepted the Commission's rulings regarding assignment, an acceptance which it later unsuccessfully tried to reject. Although loss of the seven FM translators was a possibility in December 1998, the Commission probably would not have placed PCI's full-power licenses into a revocation hearing merely for violations of translator waiver rules. PCI's exposure to revocation of its full-power licenses first arose after May 19, 2001, when PCI received and failed to obey the *Termination Order*. PCI's licensing then became continuously more vulnerable as it continued to violate the *Termination Order*.

70. In the final analysis, this record demonstrates that PCI has questionable "reliability" in obeying any future Commission order with which it disagrees. Such an unreliable licensee does not meet the standards for licensees set by the *Character Policy Statement, supra*. PCI clearly deserves to lose all licenses used in connection with its "network" operations, which include two full service primary FM stations. However, in view of a Commission policy to revoke only offending licenses, it is concluded that under the particular facts of this case, revocation of non-"network" PCI licenses would be inappropriate, and also would be inconsistent with Commission precedent.



### Revocation

71. In weighing the relevant character traits of truthfulness and reliability, truthfulness is paramount.

The act of willful misrepresentation not only violates the Commission's Rules; it also raises immediate concerns over the licensee's ability to be truthful in any future dealings with the Commission.

*Character Policy Statement, supra* at 1209. PCI and the Beckers have a clean slate insofar as actionable misrepresentation and lack of candor are concerned.<sup>23</sup> Therefore, there should be no significant concern about PCI dealing honestly with the Commission in the future with respect to its Commission licenses. In fact, PCI's conduct was so transparent, which is the antithesis of fraud and deception, as to amount to a contempt of the Commission's regulatory authority under § 301 of the Act.

72. The Commission treats any violation of the Act or rules as "possibly predictive of future conduct" and, to that extent, any violation raises concerns about future truthfulness and reliability. *Character Policy Statement* at 1209-10. However, the sanction for any misconduct not involving misrepresentation need not be universal license revocation. And particularly pertinent to this case, the Commission has rejected any presumption that misconduct at one station means a licensee is not qualified to operate other stations. *See Character Policy Statement, supra* at 1224 (no presumption that misconduct at one station means a licensee is unqualified to operate others).

### Mitigation and Deterrence

73. There are circumstances of changing waiver rules and shifting waiver policies uniquely applicable to translator stations in Alaska, that diminish the degree of concern for PCI's future compliance in operating its non-"network," full-power and translator stations. Such ameliorating circumstances do not dilute the seriousness of PCI's willful violation of the Commission's *Termination Order*. But the projected future impact of PCI's misconduct is tempered by attempts to obtain stays, appeals to the courts, and PCI's ultimate compliance once an injunction became final and the D.C. Circuit denied PCI's final stay request. PCI was exhausting all available legal remedies. And in the context of discretionary sanctions, it cannot be ignored that there was no scheme or attempt to conceal an illegal activity that was uncovered by a whistleblower or staff investigation. PCI was simply parlaying waiver rules and the *Wrangell* case for retransmitting into "other areas" through a transparent "network." Now with

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<sup>23</sup> There are no Commission decisions finding that PCI or the Beckers misrepresented or lacked candor, and the Bureau has not sought the adding of such issues or adverse findings of lack of candor in the course of this hearing.

the loss of its transparent “network” it cannot be predicted that this would ever happen again. In paying the piper, PCI has deservedly foregone a translator “network” while receiving a *Forfeiture Order* of \$140,000, which it will most likely be required to pay after costly litigation. Under these circumstances, deterrence in PCI operating full-power stations and translator stations that are not part of a predatory-like “network” can be reasonably assured by “sanctions short of [total] revocation.” *Character Policy Statement* at 1228.

### Multiple Revocations

74. The Commission found in its study of revocation sanctions:

*Suffering the loss of one station, with the costs thereby imposed, will likely serve to deter all but the most unrepentant from serious future misconduct.*

*Character Policy Statement* at 1228. (Emphasis added.) Mr. Becker seems to be somewhat “repentant.” He creditably testified: “I did not want to disobey the Commission.” He also admitted to deliberately disobeying the *Termination Order*, gratuitously adding, “and I was greatly troubled by that because I am an ethical person.” (Tr. 155, 224-225.) While Mr. Becker has not proven himself to be “most repentant,” he is not found to be “most unrepentant.” PCI has incurred serious “costs” incident to terminating the “network”. PCI currently has substantial exposure to forfeiture in the amount of \$140,000 which it is litigating as a matter of right in a federal district court. Finally, serious attention must be paid, in the context of the record in this case, to the Commission’s admonition:

*Only in the most egregious case need termination of all rights be considered.*

*Character Policy Statement* at 1228. (Emphasis added.) As discussed below, in the absence of fraud or misrepresentation, PCI’s transparent non-compliance with a Commission order pending appeals does not reach the level of “most egregious.” Thus, it is concluded that the Commission’s sanction policy does not contemplate a universal revocation of the totality of PCI’s licenses.

### Rehabilitation

75. Another important factor in assessing sanctions is rehabilitation, and the efforts of PCI to remedy the situation. *See Character Policy Statement* at 1229. While it is too early to determine with precision whether and to what extent PCI and the Beckers are truly “rehabilitated,” there is substantial evidence showing that the *Termination Order* was not blithely ignored. PCI availed itself of lawful remedies by timely appealing to an appropriate forum (D.C. Circuit). Generally, the Commission permits broadcasting to continue pending such court appeals. PCI relied on that practice and on legal advice that the practice would apply in

this case.

Those circumstances cannot be totally ignored. Of course, PCI has not proven exculpation because without a stay from the Commission or from the D.C. Circuit, PCI was flaunting the *Termination Order*. But there was recognition and appreciation shown by PCI for established legal processes, and that recognition and appreciation indicates a degree of reliability and rehabilitation.

76. Other circumstances must be weighed. Assuming that PCI was acting on a good faith mistaken belief that it could operate pending its D.C. Circuit appeal, once served with injunction papers, the Beckers had to realize that the Commission was taking very seriously its *Termination Order*. Misguided or mischievous as its strategy was, PCI litigated the injunction in the Ninth Circuit. PCI succeeded in obtaining formal and informal stays from the Ninth Circuit and an informal stay from an Assistant United States Attorney, pending appeals of the injunction. Of course, those Ninth Circuit injunction stays have nothing to do with whether or not to obey the non-stayed *Termination Order*. It is concluded that PCI's misplaced reliance on a general Commission practice of permitting operations pending appeal was insufficient to completely mitigate operating its "network" without a stay.

77. However, in PCI's favor, there was a good faith appeal pending in the D.C. Circuit in August 2002. After an injunction became final in the Ninth Circuit, and with stays being denied by the D.C. Circuit, PCI belatedly met its duty to cease operating its seven FM translators. This leads to the probability that by August 28, 2002, PCI and the Beckers had gotten the message and began to rehabilitate. PCI has evidenced a *modicum* of compliance which deserves recognition and at least a slight credit in considering a demand by the Bureau for full license revocation.

### Equal Treatment of Licensees

78. The Commission reserves "termination of all rights" to "the most egregious cases" which are usually those with an element of misrepresentation or flagrant "piracy," elements that are not present here.

79. In a Commission decision cited and relied on by the Bureau, *James A. Kay, Jr.*, 17 F.C.C. Rcd 1834 (2002), *recon.*, 17 F.C.C. Rcd 8554 (2002),<sup>24</sup> the Commission held:

The misconduct found here --- involves only stations operating on the 800 MHz band. We find that the revocation of --- licenses for stations operating on this band will serve as a significant deterrent to future misconduct. --- We therefore limit the sanction --- to revocation of the 25 licenses for his stations operating on the 800 MHz band.

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<sup>24</sup> Appeal pending *sub nom.* *James A. Kay, Jr. v. F.C.C.*, No. 02-1175 (D.C. Cir. June 5, 2002).

17 F.C.C. Rcd at 1865, and 17 F.C.C. Rcd at 8558. Before sanctioning, the Commission made independent adverse findings on credibility. *See James A. Kay, Jr.*, 17 F.C.C. Rcd at ¶¶71-99. As a result of those findings, the Commission revoked 25 licenses for SMR stations on the 800 MHz band. But the Commission did not revoke all licenses. *Id.* at Para. 108. In a companion case, also on appeal, the Commission revoked 15 licenses for SMR stations on the 800 MHz band but again did not revoke all licenses. *Cf. Marc Sobel*, 17 F.C.C. Rcd 1872, 1894 (2002). The reasons for not revoking all licenses were Commission conclusions that the misconduct, which involved misrepresentation, did not affect all licensed facilities of the licensees. *See Marc Sobel*, 17 F.C.C. Rcd at 1893.

80. In *KQED, Inc.*, 5 F.C.C. Rcd 1704 (1990), wherein the Commission denied a license renewal for station KQEC(TV) in San Francisco, the licensee had “committed serious misconduct by lacking candor about and misrepresenting the reasons for deactivation of KQEC(TV).” *Id.* The Commission held that “[s]uch conduct violates the fundamental duty of a licensee to deal honestly with the Commission.” [Citation omitted.] *Id.* at 1785. The Commission found that mitigation evidence had little weight in the face of more critical evidence of dishonesty in informing the Commission. *Id.* The *KQED* case shows that a misrepresentation is more likely to result in revocation than will technical problems in operating a station. In this case, the open and transparent violation of the *Termination Order*, foolish though it was and being much more than a mere technicality, did not equate with a disqualifying misrepresentation or conduct that would warrant revoking PCI licenses not involved with operating the offending “network.”

81. In *Contemporary Media, Inc.*, 13 F.C.C. Rcd 14437 (1998), also cited by the Bureau, the Commission affirmed the revocation of three commonly owned licenses “because of violations of law relating to repeated sexual abuse of children by the station’s sole owner and misrepresentations by the licensees.” In the case of those convictions (repeated child sexual abuse) the Commission found a form of criminal behavior amounting to such “egregious misconduct” that it was not necessary to find a specific relationship to truthfulness. *Id.* at 14442. In fact, the conduct was more than extremely serious. These were “heinous crimes” characterized by “moral turpitude” in the category of those that “shock the conscience.” *Id.* at 14444. Yet the principal of *Contemporary Media*, who was found to have committed those “heinous crimes,” was permitted to operate for almost four years pending “finality.” As brazen as PCI was in not obeying the non-stayed *Termination Order*, the transparent conduct of PCI does not approach the standard of “heinous crimes” that “shock the conscience” which did not mandate the licensee to cease operations while appeals were pending.

82. The Bureau also relies on the cases of *Star Stations of Indiana, Inc.*, 51 F.C.C. 2d 95, 97 (1975) and *Leslie D. Brewer*, 16 F.C.C. Rcd 12878, 12883 (Enf. Bureau 2001). In *Star Stations*, a case involving a renewal applicant for Amateur FM stations, the Commission concluded that the record showed “a reprehensible course of misconduct” that included “improper campaign contributions, slanted news broadcasts, and misrepresentations to the Commission.” In that case, the renewal applicant had the burden of proof, which it failed to meet thereby losing its license renewals. Here, the Bureau was assigned the burden of proof which it readily met in proving the violations. But the Bureau also must carry a burden of persuading that revocation of unrelated licenses is part of an appropriate sanction.

83. *Brewer* was a “pirate radio” case in which the “pirate” operator was also licensee of Amateur Radio and General Mobile Radio Service stations. In sharp contrast to PCI, Brewer had never even filed for a license to operate his unauthorized “pirate” facility. The Commission had warned Mr. Brewer to cease operating unlicensed broadcast facilities. Mr. Brewer refused to cease and brazenly continued operating unlicensed broadcast facilities for over four years. When called to defend his conduct, Mr. Brewer failed to file a notice of appearance, failed to appear, and was found to be in default. Mr. Brewer’s unrelated Amateur and GMRS licenses were revoked *in absentia* based on unopposed findings made of his “cavalier disregard toward his licensee obligations.” *Id* at 12883. None of those circumstances apply to PCI or to this case.

84. *Star Stations* is distinguished from this case because it involved “reprehensible conduct” of misrepresentations and cheating, adverse character findings which are not sought and are not made here. *Brewer* does not provide authority for revocation of all PCI stations because Mr. Brewer, unlike Mr. Becker, was one of those “pirates” who blatantly carried on unlicensed broadcasting activities for four years. Mr. Brewer had never even applied for a license to operate the “pirate” station. Mr. Brewer then intentionally defaulted on a Commission show cause order, and suffered the natural consequences of a buccaneering broadcaster. Conversely, PCI was acting under a changing regimen of waivers, had received a pass on revocation in 1998, and was at all times engaged in appeals to the Commission and to the courts, showing a *modicum* of appreciation for the legal process. The “pirate” operator, on the other hand, showed none of those attributes. The *Brewer* case provides analogous authority only for revoking the full power “network” stations that illegally retransmitted through the terminated seven FM translators. However, neither *Star Stations* nor *Brewer* provide convincing authority for revocation of PCI’s non-offending full-power licenses or non-offending translator licenses which were not used in connection with the offending “network”.

### Ultimate Conclusions

85. PCI has paid a heavy price in losing seven FM translators, and probably will be required after *de novo* collection litigation to pay a hefty forfeiture. PCI’s conduct was seriously misguided, bordered on contemptuous, and was deserving of those sanctions, in addition to revocation of two full service FM stations that were used in operating the “network.” But under the circumstances of this case, PCI’s misconduct was not such a “cavalier disregard” of licensee obligations so that PCI should lose unrelated full-power FM licenses or unrelated translator licenses, a sanction that would not be in keeping with Commission policy.<sup>25</sup>

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<sup>25</sup> In concluding that PCI’s non-“network” licenses may be retained, the principle of equal treatment of licensees for similar conduct also is a consideration. See e.g. *Garnett v. F.C.C.*, 513 F.2d 1056, 1060 (D.C. Circuit 1975).

86. PCI had run afoul of stricter Commission waiver rules and made efforts to rectify the violations through a Commission sanctioned assignment. The reasons for not assigning the licenses were seemingly legitimate business concerns about loss of earlier granted waiver relief, unexpected loss of an antenna, denial of authority to operate by satellite, and projected commercial loss of otherwise valuable Seward translators. Those circumstances indicate that PCI initially had reason to believe that it was attempting in good faith to comply with Commission rules and directives, until making the foolhardy miscalculation to not obey the Commission's *Termination Order* while attacking the assignment remedy that Mr. Becker had once embraced.

87. But it is concluded that PCI's transparent transgressions, which did not include acts of deception or misrepresentation, do not call for the revocation of PCI's non-offending licenses. The combination of a likely substantial money forfeiture, the costs of litigating the collection of the forfeiture, the costs of multiple appeals, the costs of this hearing, the revocation here of licenses for two income producing full-power FM stations coupled with the loss of a "network," and adverse findings against PCI in this *Initial Decision* should, in their totality, provide adequate assurance of PCI's reliability in its future dealings with the Commission.

### ORDER

IT IS ORDERED that licenses held by Peninsula Communications, Inc. for FM full-power stations KWVV-FM, Homer and KPEN-FM, Soldotna ARE REVOKED.<sup>26</sup>

IT IS FURTHER ORDERED that the remaining licenses held by Peninsula Communications, Inc. ARE NOT REVOKED, i.e., full-power stations KGTL(AM), Homer, and KXBA-FM, Nikiski; and FM translator stations K292ED, Kachemak City, K285DU, Homer, K285EG and K272DG, Seward.<sup>27</sup>

### FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel  
Chief Administrative Law Judge

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<sup>26</sup> The licenses for the seven FM translator stations were terminated by the *Termination Order* released on May 18, 2001, and the D.C. Circuit has upheld the *Termination Order*. As a result, the contingent return of the seven FM translator licenses provided for in the *OSC* is moot.

<sup>27</sup> This Initial Decision shall become effective and this proceeding shall be terminated 50 days after its release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. § 1.276(b).