

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

In the Matter of)	
)	
Peninsula Communications, Inc.)	File No. EB 01-IH-0403
)	NAL/Acct No. 200132080060
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)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: August 23, 2001

Released: August 29, 2001

By the Commission:

1. In this Notice of Apparent Liability for Forfeiture and Order (“NAL”), we find that Peninsula Communications, Inc. (“Peninsula”) has apparently violated Section 301 of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. § 301. The apparent violations arise from continued operation of translator stations K285EF, Kenai; K283AB, Kenai/Soldotna; K257DB, Anchor Point; K265CK, Kachemak City; K272CN, Homer; and K274AB and K285AA, Kodiak subsequent to our order to terminate such operations. *See Peninsula Communications, Inc.*, FCC 01-159, released May 18, 2001 (“*May 2001 MO&O*”).¹ We conclude that Peninsula is apparently liable for a forfeiture in the amount of one hundred forty thousand dollars (\$140,000). We also order Peninsula to submit an affidavit informing us whether Peninsula has ceased operating the above-captioned translators and whether it intends to operate those translators at any time in the future absent authorization to do so. In this regard, we note that continued unauthorized operation may lead to an order to show cause to revoke Peninsula’s other Commission licenses.

I. BACKGROUND

2. This case involves our eligibility and licensing requirements for FM translators, which appear in 47 C.F.R. § 74.1232(d). Briefly, that subsection provides that authorization for an “other-area” or “non-fill-in” translator will not be granted to persons interested in or connected with the commercial

¹ That order also dealt with translators licensed to Peninsula, which are in Seward, Alaska. The operation of those translators is not pertinent to this NAL, and no further reference will be made to them.

“primary FM station.”² These rules became effective on June 1, 1991, with pre-existing translators required to comply no later than June 1, 1994.³ As the Commission explained in establishing these rules, translators are intended to provide “supplementary service to areas in which direct reception of FM radio broadcast stations is unsatisfactory due to distance or intervening terrain barriers,” and the governing rules are meant “to ensure that the translator service does not adversely affect the operation of FM radio broadcast operations.” *Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations*, *supra* note 3, 8 FCC Rcd at 5093.

3. Peninsula was the licensee of the captioned FM translator stations K285EF, Kenai; K283AB, Kenai/Soldotna; K257DB, Anchor Point; K265CK, Kachemak City; K272CN, Homer; and K274AB and 285AA, Kodiak, Alaska. All of those translator stations were non-fill-in stations that rebroadcast primary stations licensed to Peninsula. All of the translators, except the Kodiak translators, have been operated by Peninsula in violation of 47 C.F.R. § 74.1232(d) since at least June 1, 1994.⁴

4. In September 1996, the staff, in addressing petitions to deny filed against some of the translators’ 1995 renewal applications,⁵ determined that Peninsula was operating the translator stations in violation of our translator rules’ ownership restrictions. *See* 47 C.F.R. § 74.1232(d). Nevertheless, the staff deferred action on the 1995 renewal applications for a period of 60 days to allow Peninsula to file assignment applications in order to come into compliance with 47 C.F.R. § 74.1232(d). *See Letter to Jeffrey D. Southmayd, Esq.*, Ref. No. 1800B4-AJS (Chief, Audio Services Division, Mass Media Bureau, September 11, 1996) (“*September 1996 letter*”). Ultimately, acceptable assignment applications were filed.⁶

5. On November 6, 1997, the staff granted the assignment applications, as well as Peninsula’s 1995 renewal applications, conditioned upon consummation of the authorized assignments. In addition, the staff conditioned consummation of the assignments on grant of the recently-filed 1997 renewal applications.

² An “other-area” or “non-fill-in” translator is one whose coverage contour extends beyond the protected service contour of its primary station. *See* 47 C.F.R. § 74.1201(h) and (i). A “primary” FM station is the station whose signal a translator retransmits. 47 C.F.R. § 74.1201(d).

³ *See Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations*, 5 FCC Rcd 7212 (1990), *modified*, 6 FCC Rcd 2334 (1991), *recon. denied*, 8 FCC Rcd 5093 (1993).

⁴ The Kodiak translators ceased rebroadcasting Peninsula’s KPEN-FM, Soldotna, and KWVV-FM, Homer, Alaska, on November 12, 1997, and remained silent between that date and October 29, 1998. On October 29, 1998, the Kodiak translators began rebroadcasting the signal of a noncommercial FM translator in Kodiak in accordance with our translator rules. *See Peninsula Communications, Inc.*, 13 FCC Rcd 23992, 23998 n. 13 (1998) (“*December 1998 MO&O*”). However, in January 2001, Peninsula recommenced the rebroadcast of stations KPEN-FM and KWVV-FM in violation of 47 C.F.R. § 74.1232(d). *See May 2001 MO&O* at p. 2, n. 4.

⁵ The challenged translator stations included K285EF, Kenai; K283AB, Kenai/Soldotna; and K274AB and K285AA, Kodiak.

⁶ Peninsula and Coastal Broadcast Communications, Inc. (“Coastal”) originally filed applications to assign the translator stations on November 14, 1996. Those applications were dismissed as patently not in accordance with the Commission’s rules. *See Letter to Jeffrey D. Southmayd, Esq., et. al.*, Ref. No. 1800B3-BSH (Chief, Audio Services Division, Mass Media Bureau, June 17, 1997) (“*June 1997 Staff Decision*”). The *June 1997 Staff Decision* afforded Peninsula and Coastal ten business days to file assignment applications that would fully comply with the Commission’s rules. Peninsula and Coastal did so on July 1, 1997.

See *Letter to Jeffrey D. Southmayd, Esq.*, Ref. No. 1800B3-BSH (Chief, Audio Services Division, Mass Media Bureau, November 6, 1997) (“*November 1997 staff decision*”). The *November 1997 staff decision* stated that failure to meet the divestiture condition would render grant of the 1995 renewal applications null and void. Peninsula did not seek reconsideration or review of the *November 1997 staff decision*. However, other entities (collectively referred to as “Petitioners”) filed both a petition for reconsideration and an application for review of the *November 1997 staff decision*.

6. In December 1998, the Commission dismissed and denied, respectively, Petitioners’ petition for reconsideration and their application for review. See *December 1998 MO&O*. Essentially, Petitioners had argued that the staff should have revoked Peninsula’s licenses because of the rule violations and that the staff erred in concluding instead that Peninsula could sell the subject translator stations. In our decision, we noted that, in the absence of an unresolved basic character qualification issue, “there can be no doubt as to the Commission’s authority to cure or remedy [the violation of the ownership restrictions] by granting the renewal applications conditioned on divestiture of the translators.” *December 1998 MO&O*, 13 FCC Rcd at 23996. In the *December 1998 MO&O*, we also granted Peninsula’s 1997 renewal applications,⁷ conditioned on consummation of the authorized assignments, and denied requests for waiver of 47 C.F.R. § 74.1231(b), the over-the-air delivery restrictions, filed by Coastal for the Kodiak translators.⁸

7. Peninsula and Glacier Communications, Inc. sought reconsideration of the *December 1998 MO&O*. Peninsula disputed, for the first time, the conditional grants of the 1995 and 1997 renewal applications and the determination that the seven subject translators had been operating in violation of 47 C.F.R. § 74.1232(d) since June 1, 1994. In addition, Peninsula, but not Coastal, requested reconsideration of the denial of requests for waivers of 47 C.F.R. § 74.1231(b) for the Kodiak translators.

8. On February 14, 2000, we dismissed Peninsula’s petition for reconsideration of the *December 1998 MO&O*. *Peninsula Communications, Inc.*, 15 FCC Rcd 3293 (2000) (“*February 2000 MO&O*”). We ordered Peninsula to consummate the authorized assignments within thirty days of the decision, and we directed the staff to rescind the conditional grants of the 1995 and 1997 license renewal applications, cancel the relevant call signs and terminate the translators’ operating authority if Peninsula did not comply with the divestiture requirement. *February 2000 MO&O*, 15 FCC Rcd at 3294, 3296. On February 23, 2000, Peninsula filed with the Commission a motion to stay the effect of the *December 1998 MO&O* and the *February 2000 MO&O* pending the filing and resolution of an appeal it intended to file.

9. On March 8, 2000, Peninsula filed an appeal of the Commission’s *February 2000 MO&O* with the United States Court of Appeals for the District of Columbia Circuit (“Court”). That same day, Peninsula filed an Emergency Motion for Stay of the *February 2000 MO&O* with the Court. On March 14, 2000, the Court denied Peninsula’s Emergency Motion for Stay. The next day Peninsula filed with the Commission a pleading styled “Rejection of Conditional License Renewal and Assignment of License Grants” (“Rejection of Conditional Grants”). By order dated July 11, 2000, the Court dismissed

⁷ The brevity of the time period between the filing of the 1995 and 1997 renewal applications was the result of the Commission’s decision to modify FM translator license terms to run concurrently with the terms of FM primary stations. See *In the Matter of Modifying Renewal Dates for Certain Stations Licensed under Part 74 of the Commission’s Rules and Revising FCC Form 303-S, Report and Order*, 9 FCC Rcd 6504 (1994).

⁸ 47 C.F.R. § 74.1231(b) provides that other-area or non-fill-in translators may only retransmit primary FM station signals received by the translator directly over-the-air.

Peninsula's appeal without prejudice to refile following the Commission's resolution of the "Rejection of Conditional Grants."

10. In our *May 2001 MO&O*, we dismissed as untimely Peninsula's "Rejection of Conditional Grants." In addition, we rescinded the 1995 and 1997 conditional grants of renewal; rescinded the conditional grants of assignment; dismissed the 1995 and 1997 renewal applications; dismissed the 1997 assignment applications; canceled the call signs and terminated Peninsula's operating authority for the seven captioned translator stations. In this regard, we ordered Peninsula to terminate operations for the translator stations effective at 12:00 midnight on the day after release of that order, and we warned Peninsula that further operations by it after that time may subject it to serious sanctions, including but not limited to forfeitures.⁹ Thus, in order to comply with our *May 2001 MO&O*, Peninsula was obligated to cease operations by 12:00 midnight on May 19, 2001.

11. Commission records reflect that Peninsula and its counsel were served with our *May 2001 MO&O* on May 21, 2001, and that Peninsula itself was served with the *May 2001 MO&O* no later than May 30, 2001. Nonetheless, information provided to the Commission by our field personnel in Alaska and by competitors indicates that Peninsula has not shut down any of the translators and is continuing to broadcast the signals of its primary stations. In addition, Peninsula's counsel has informed Commission staff in a telephone conversation that Peninsula has no intention of terminating its operations on the captioned translators.

II. DISCUSSION

12. Section 301 of the Act, 47 U.S.C. § 301, prohibits radio operation "except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act." As explained above, Peninsula's licenses for the seven captioned translators were canceled as of midnight May 19. Nevertheless, Peninsula has continued to operate those stations in apparent defiance of our order to terminate such operations.

13. Section 503(b)(1) of the Act, 47 U.S.C. § 503(b)(1) provides that any person who willfully or repeatedly fails to comply with the provisions of the Communications Act or a Commission order shall be liable for a forfeiture penalty.¹⁰ In this context, the term "willful" means that the violator knew it was taking the action in question, irrespective of any intent to violate the Communications Act,¹¹ while "repeatedly" means more than once.¹² The information before us clearly reflects that Peninsula has knowingly operated its translators subsequent to receipt of a direct order from us to stop. It thus appears that Peninsula's violations with respect to unauthorized operations were not only willful but also were intentional. It further appears that each of the violations described occurred on more than one day; thus, they were repeated.

⁹ See *May 2001 MO&O* at p. 7, ¶ 13.

¹⁰ See also section 1.80(a)(1) and (2) of the Commission's rules, 47 C.F.R. § 1.80(a)(1) and (2).

¹¹ See *Jerry Szoka*, 14 FCC Rcd 9857, 9865 (1999), *recon. denied*, 14 FCC Rcd 20147 (1999), *petition for review pending sub nom. Grid Radio and Jerry Szoka v. FCC*, No. 99-1463 (D.C. Cir. November 17, 1999); *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

¹² See *Hale Broadcasting Corp.*, 79 FCC 2d 169, 171 (1980).

14. In assessing a forfeiture, we take into account the statutory factors set forth in Section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), which include the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require. The Commission's forfeiture guidelines currently establish a base amount of \$10,000 for operation without an instrument of authorization for the service.¹³ It appears that Peninsula has willfully and repeatedly operated seven stations without authorization, thereby bringing the total base amount of the forfeiture to \$70,000. In considering whether adjustments are appropriate, it further appears that Peninsula has unlawfully operated the translators following receipt of our *May 2001 MO&O*, which unequivocally ordered Peninsula to cease operations by midnight May 19, 2001. It thus appears that Peninsula's unauthorized operation has been intentional, which warrants an upward adjustment of the forfeiture amount.¹⁴ Moreover, we are not currently aware of any facts that would mitigate Peninsula's apparent violations. Accordingly, we believe that a \$140,000 forfeiture is appropriate.

15. Finally, in light of Peninsula's apparent defiance of our *May 2001 MO&O*, we hereby notify Peninsula that further violation of Section 301 of the Act and our *May 2001 MO&O* may raise serious questions about Peninsula's qualifications to be a Commission licensee. It thus may be necessary to institute further proceedings pursuant to Section 312(a) of the Act, 47 U.S.C. § 312(a), with respect to its full service radio station licenses and other translator station licenses. Such proceedings could lead to issuance of an order revoking one or more of those licenses. In this regard, we emphasize that the mere pendency of an appeal of our *May 2001 MO&O* will not suffice to avoid further enforcement action.¹⁵ To assist the Commission in making a determination whether such a proceeding should be instituted, Peninsula is ordered to file with the Commission's Secretary, with a copy to the Chief, Enforcement Bureau, an affidavit by an officer or director indicating (1) whether Peninsula has ceased operating the relevant translator stations; and (2) whether it intends to operate the relevant translator stations at any time in the future absent further Commission or court action giving it authority to do so. Such affidavit shall be filed no later than 10 days from the release of this order.

III. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, Peninsula Communications, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of one hundred forty thousand dollars (\$140,000) for violating Section 301 of the Act, 47 U.S.C. § 301, by operating the seven captioned translator stations subsequent to midnight May 19, 2001.

17. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission's rules, 47

¹³ See section 1.80 of the Commission's rules, 47 C.F.R. § 1.80 (note to paragraph (b)(4)). See also *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

¹⁴ See *M.C. Allen Productions*, Notice of Apparent Liability, DA 01-1166 (Enforcement Bureau May 9, 2001); *WRHC Broadcasting Corp.*, Notice of Apparent Liability, 15 FCC Rcd 5551 (Enforcement Bureau 2000) (subsequent history omitted).

¹⁵ See, e.g., 47 U.S.C. § 416 ("It shall be the duty of every person ... to observe and comply with such orders so long as the same shall remain in effect.").

C.F.R. § 1.80, within thirty days of this NOTICE OF APPARENT LIABILITY FOR FORFEITURE, Peninsula Communications, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

18. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the NAL/Acct. No. referenced above.

19. The response, if any, must be mailed to the Federal Communications Commission, Enforcement Bureau, Investigations and Hearings Division, 445 12th Street, S.W., Washington, D.C. 20554 and MUST INCLUDE the NAL/Acct. No. referenced above.

20. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (“GAAP”); or (3) some other reliable and objective documentation that accurately reflects the respondent’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

21. Requests for payment of the full amount of this NOTICE OF APPARENT LIABILITY FOR FORFEITURE under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁶

22. IT IS FURTHER ORDERED THAT, no later than 10 days after release of this NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER, Peninsula shall file with the Secretary of the Commission, with a copy to the Chief, Enforcement Bureau, an affidavit signed by one of its officers or directors indicating (1) whether Peninsula has ceased operating each and every one of the above-captioned translator stations; and (2) whether Peninsula intends to operate any or all of the above-captioned translator stations at any time in the future absent further Commission or court action giving it authority to do so.

23. IT IS FURTHER ORDERED THAT a copy of this NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER shall be sent by Certified Mail Return Receipt Requested to Peninsula Communications, Inc., Post Office Box 109, Homer, Alaska 99603, with a copy to Jeffrey D. Southmayd, Esquire, Southmayd & Miller 1220 19th Street, N.W., Suite 400, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

¹⁶ See 47 C.F.R. § 1.1914.