

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| 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; and |) | 52157 |
| K285EG and K272DG, Seward, Alaska |) | 52158 and 52160 |
| |) | |
| Former licensee of FM translator stations | | |
| K285EF, Kenai, Alaska; | | |
| K283AB, Kenai/Sodotna, Alaska; | | |
| K257DB, Anchor Point, Alaska; | | |
| K265CK, Kachemak City, Alaska; | | |
| K272CN, Homer, Alaska; and | | |
| K274AB and K285AA, Kodiak, Alaska | | |

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 2005

Released: June 20, 2005

By the Commission:

1. By this order, we terminate this hearing proceeding. On June 19, 2003, Administrative Law Judge Richard L. Sippel issued an Initial Decision, revoking Peninsula Communications, Inc.'s (Peninsula) stations KWVV-FM, Homer, Alaska, and KPEN-FM, Soldotna, Alaska. Peninsula Communications, Inc., 18 FCC Rcd 12349 (ALJ 2003). Judge Sippel found that Peninsula refused to comply with a Commission order directing it to cease operation of seven FM translator stations serving the Kenai Peninsula in Alaska that were being

operated in violation of the Commission's rules. Peninsula filed exceptions on August 21, 2003 and the Commission's Enforcement Bureau filed a reply on September 4, 2003. These pleadings are now pending before the Commission.

2. On December 8, 2004, the President signed into law the Consolidated Appropriations Act of 2005, Pub. Law 108-447. Title IX of the Act is the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA). Section 213(2) of SHVERA adds new 47 U.S.C. § 307(f)(2), which states in part:

. . . . any holder of a broadcast license who has broadcast to an area of Alaska that did not have access to over the air broadcasts via translator, microwave, or other alternative signal delivery may continue providing such service even if another holder of a broadcast license begins broadcasting to such area, and shall not be fined or subject to any other penalty, forfeiture, or revocation related to providing such service including any fine, penalty, forfeiture, or revocation for continuing to operate notwithstanding orders to the contrary.

Section 213(3) of SHVERA inserts new language at the end of 47 U.S.C. § 312(g), including the following:

Any broadcast license revoked or terminated in Alaska in a proceeding related to broadcasting via translator, microwave, or other alternative signal delivery is reinstated.

3. On December 14, 2004, Peninsula filed a Request to Reopen the Record and for Official Notice. In this pleading, Peninsula asserts that these amendments to the Communications Act are controlling on matters before the Commission in this proceeding. Specifically, Peninsula notes language in new section 307(f)(2) and contends that: "The subject modification in the Communications Act prohibits [Peninsula] from being ' . . . fined or subject to any other penalty, forfeiture, or revocation for continuing to operate notwithstanding orders to the contrary.'" Request at 3. Peninsula thus implies that SHVERA requires reversal of the initial decision and termination of this proceeding. Peninsula does not discuss the language of amended section 312(g) in this pleading.

4. The Commission's Enforcement Bureau (EB), a party to the hearing proceeding, supports reopening the record but argues that new section 307(f) does not apply to this proceeding.¹ EB observes that section 307(f)(2) applies only to "any holder of a broadcast license who has broadcast to an area of Alaska that did not have access to over the air broadcasts. . . ." EB Comments at 3. According to EB, the record of this proceeding indicates that none of the translators that the Commission ordered Peninsula to terminate were established to broadcast to "an area of Alaska that did not have access to over the air broadcasts," inasmuch as each of the translators was granted to serve an area already receiving over the air broadcasts. EB thus contends that the Commission should not terminate this proceeding and should proceed to rule on Peninsula's pending exceptions. EB also does not cite section 312(g) in its comments.

¹ EB's comments on Peninsula's request were filed December 17, 2004.

5. We also received comments from KSRM, Inc. (KSRM), which is not a party to this hearing proceeding, but which participated in earlier, related proceedings.² Like EB, KSRM contends that section 307(f)(2) does not apply to this proceeding. Additionally, KSRM argues that section 312(g) does not apply. According to KSRM, the quoted language from section 312(g) only applies to licenses that have already been revoked or terminated and that this would be the case only if the full Commission had issued a decision revoking Peninsula's stations. KSRM Comments at 6.

6. In response to an informal request by the Office of General Counsel, Peninsula and EB filed clarifying comments on January 14, 2005. Responding to the arguments made by EB and KSRM, Peninsula argues that both sections 307(f)(2) and 312(g) require termination of this proceeding. According to Peninsula, the phrase "an area of Alaska that did not have access to over the air broadcasts . . ." refers to areas of Alaska that did not receive multiple broadcast signals, as opposed to areas that did not receive any broadcast signals. Moreover, Peninsula argues that the last sentence of new section 312(g) requires termination of this hearing proceeding because, in its view, this proceeding involves station licenses in Alaska that were revoked in connection with a translator matter. Finally, Peninsula suggests, that in amending the Communications Act through SHVERA, Congress intended to terminate this proceeding.³ Peninsula states: "The subject changes to the Communications Act clearly signal that the Congress believes enough is enough in this proceeding and [Peninsula] should be returned to the *status quo ante bellum*." Peninsula Comments at 11. Peninsula also refers to this case as a "purple cow" that would have no precedential impact beyond this proceeding *Id.* at 8 n.8.

7. In its comments, EB states that to the extent the language applies to all stations and not just stations that have failed to operate for more than a year,⁴ and to the extent the Commission views this as a proceeding related to broadcasting via translators, section 312(g) applies to the licenses revoked in this proceeding and this proceeding should be terminated. EB Further Comments at 4.

8. We find that it is unnecessary to consider Peninsula's argument that section 307(f)(2) controls or EB's and KSRM's contention that section 307(f)(2) does not apply to this proceeding, because we find that the language of section 312(g), quoted above, is dispositive.⁵ We find that this language requires us to terminate this hearing proceeding, which is "related to broadcasting via translator," and in which broadcast licenses in Alaska were ordered revoked by an administrative law judge. As EB notes, the proceeding arose due to Peninsula's operation of seven translators without authority. We also have no basis to conclude that the language of the

² KSRM is not a party to this proceeding and lacks standing to file pleadings. However, because we find that KSRM's comments assist us in our deliberations, we will grant KSRM's petition for leave to file comments, filed December 17, 2004, and accept KSRM's comments, filed the same day, as an amicus pleading.

³ As EB and KSRM note, however, there is no legislative history of the relevant amendments. EB Comments at 4 n.4; KSRM Comments at 3.

⁴ Section 312(g) mainly concerns the expiration of licenses for stations that have not operated for more than a year.

⁵ Nor do we address in this proceeding any other issues raised by section 307(f)(2) or any licenses that may have been otherwise terminated and that are not in issue in this hearing matter. In this regard, we will not consider a pleading filed by an entity called Kodiak Island Broadcasting Company, Inc. regarding the status of Peninsula's translators. Additionally, our disposition of this matter moots Peninsula's discussion of an amendment to 47 U.S.C. § 307(c)(3) made by SHVERA.

new provision applies only to stations that have failed to operate for more than a year. As noted, the new provision refers specifically to reinstatement of broadcast licenses in proceedings “related to broadcasting via translator, microwave, or other alternative delivery systems,” not proceedings involving failure to operate for more than a year. Additionally, the preexisting (now first) sentence of section 312(g) concerns the expiration of licenses, not their revocation or termination in a proceeding; this subject matter difference indicates that the applicability of the new sentence at the end is not confined to the circumstances addressed in the previous sentence.⁶

9. KSRM points out that the proceeding remains pending before the full Commission on exceptions to the ALJ’s Initial Decision. Because of that, KSRM contends that the broadcast licenses at issue in this proceeding have not yet been revoked and the statutory language of amended section 312(g) does not apply. KSRM is correct that, at the time the new law was enacted, the effective date of the ALJ’s revocation order in this proceeding had been automatically stayed pending the Commission’s review of the exceptions in this proceeding.⁷ See 47 C.F.R. § 1.276 (filing of exceptions “shall stay the effectiveness of the initial decision” until Commission review completed); 5 U.S.C. 557(b) (ALJ’s initial decision becomes decision of agency unless there is a timely appeal to the agency). The ALJ’s order of revocation thus is not a final Commission decision. We note, however, that the scope of the new statutory provision in section 312(g) is not limited to proceedings in which a final agency order of revocation has been issued; the new provision provides that “Any license revoked” in a proceeding that satisfies the other statutory conditions “is reinstated.” In our view, this statutory language suggests that the purpose of the new provision was to effectuate, by operation of law, a change in the outcome of pre-existing administrative decisions in which an order of revocation has already been issued. The record does not suggest any rationale Congress plausibly could have had for requiring the

⁶ Prior to the amendment at issue, section 312(g) provided:

If a broadcasting station fails to transmit broadcast signals for any 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary.

As amended by SHVERA, section 312(g) provides:

If a broadcasting station fails to transmit broadcast signals for any 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary, except that the Commission may extend or reinstate such station license if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness. Any broadcast license revoked or terminated in Alaska in a proceeding related to broadcasting via translator, microwave, or other alternative signal delivery is reinstated.

⁷ The initial decision states (18 FCC Rcd at 12378):

IT IS ORDERED that licenses held by Peninsula Communications, Inc. for FM full-power stations KWVV-FM, Homer and KPEN-FM, Soldotna ARE REVOKED.[FN]

[FN] 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).

reinstatement of licenses finally revoked, but not protecting licenses in the same class from the execution of existing revocation orders. We therefore do not construe section 312(g) as directing that illogical result.

10. ACCORDINGLY, IT IS ORDERED, That the Initial Decision of Chief Administrative Law Judge Richard L. Sippel, FCC 03D-01 (Jun. 19, 2003), 18 FCC Rcd 12349 (ALJ 2003) IS VACATED.

11. IT IS FURTHER ORDERED, That the Petition of KSRM, Inc. for Leave to File Comments, filed December 17, 2004, IS GRANTED, and the Comments of KSRM, Inc., filed December 17, 2004, ARE ACCEPTED as an amicus pleading.

12. IT IS FURTHER ORDERED, That Request to Reopen the Record and for Official Notice, filed December 12, 2004, by Peninsula Communications, Inc. IS GRANTED.

13. IT IS FURTHER ORDERED, That the Exceptions and Brief of Peninsula Communications, Inc. to The Initial Decision of Chief Administrative Law Judge Richard L. Sippel, filed August 21, 2003, ARE DISMISSED as moot.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary