

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

In the Matter of	)	
	)	
<b>Peninsula Communications, Inc.</b>	)	File No. EB 01-IH-0403
	)	NAL/Acct No. 200132080060
Former licensee of FM translator stations K285EF,	)	FRN: 0001-5712-15
Kenai, Alaska;	)	
K283AB, Kenai/Soldotna, Alaska;	)	
K257DB, Anchor Point, Alaska;	)	
K265CK, Kachemak City, Alaska;	)	
K272CN, Homer, Alaska; and	)	
K274AB and K285AA, Kodiak, Alaska	)	

**FORFEITURE ORDER**

**Adopted: February 1, 2002**

**Released: February 6, 2002**

By the Commission:

1. In this Forfeiture Order, we find that Peninsula Communications, Inc. (“Peninsula”) has willfully and repeatedly failed to comply with Section 301 of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. § 301.<sup>1</sup> The violations arise from continued operation of FM translator stations K285EF, Kenai; K283AB, Kenai/Soldotna; K257DB, Anchor Point; K265CK, Kachemak City; K272CN, Homer; and K274AB and K285AA, Kodiak, all in Alaska, subsequent to our order to terminate such operations. *See Peninsula Communications, Inc.*, 16 FCC Rcd 11364 (2001) (“*May 2001 MO&O*”).<sup>2</sup> Based on our review of the facts and circumstances of this case and after considering Peninsula’s response<sup>3</sup> to our *Notice of Apparent Liability and Order*, 16 FCC Rcd 16124 (2001), released August 29, 2001 (“*NAL*”), we conclude that Peninsula is liable for a forfeiture in the amount of one hundred forty thousand dollars (\$140,000), the amount proposed in the *NAL*. Moreover, as explained herein, our order to terminate operations on the seven translators continues to be valid, and Peninsula is obligated to comply with it.

<sup>1</sup> This day we also release an *Order to Show Cause* (FCC 02-32), which commences a hearing proceeding to determine whether Peninsula’s full service broadcast and FM translator station licenses should be revoked.

<sup>2</sup> That order also dealt with Peninsula’s FM translators that are licensed in Seward, Alaska. The operation of those translators is not pertinent to this Forfeiture Order, and no further reference will be made to them.

<sup>3</sup> Peninsula styled its September 28, 2001, response as a “Petition for Reconsideration.” No such pleading lies, inasmuch as a notice of apparent liability is not a “final Commission action,” which is the predicate for a petition for reconsideration pursuant to 47 C.F.R. § 1.106. *See Excel Communications, Inc.*, 11 FCC Rcd 19765, n. 3 (Common Carrier Bureau 1995). We will therefore treat Peninsula’s pleading as a “response” pursuant to 47 C.F.R. § 1.80(f)(3).

## I. BACKGROUND

2. The background pertinent to this forfeiture is discussed at length in the *NAL* and will be referenced only briefly here. Our FM translator rules provide that an authorization for an “other-area” or “non-fill-in” translator will not be granted to persons interested in or connected with the commercial “primary FM station” that the translator will rebroadcast.<sup>4</sup> 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.

3. In addressing petitions to deny filed against Peninsula’s 1995 renewal applications, the staff determined that Peninsula was operating the translator stations in violation of our translator rules’ ownership restrictions. Nevertheless, the staff deferred action on the 1995 renewal applications to allow Peninsula to file assignment applications in order to come into compliance. *See Letter to Jeffrey D. Southmayd, Esq.*, Ref. No. 1800B4-AJS (Chief, Audio Services Division, Mass Media Bureau, September 11, 1996) (“*September 1996 letter*”). After acceptable assignment applications were filed, the staff granted the assignment applications, as well as Peninsula’s 1995 renewal applications, conditioned upon consummation of the authorized assignments. *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*”). However, Peninsula and the proposed assignee never consummated the assignments. Moreover, at that time, Peninsula did not reject any of the conditional grants.

4. Subsequently, the Commission issued two related decisions,<sup>5</sup> and the Court of Appeals for the District of Columbia Circuit dismissed an appeal filed by Peninsula.<sup>6</sup> While its appeal was pending, Peninsula filed a pleading styled “Rejection of Conditional License Renewal and Assignment of License Grants” (“*Rejection of Conditional Grants*”), which we dismissed as untimely. *See May 2001 MO&O*. In addition, because Peninsula never fulfilled the condition imposed, we rescinded the grants of the 1995 renewal applications, dismissed those applications as well as subsequent related applications, cancelled the stations’ call signs, and ordered Peninsula to cease broadcast operations on the FM translators by midnight of the day following the release of the *May 2001 MO&O*, that is, by midnight May 19, 2001. Although Peninsula received the *May 2001 MO&O* no later than May 30, 2001 (and its counsel was notified of the order to cease operations on May 21, 2001), it did not shut down any of the seven captioned FM translators. Indeed, by its counsel, Peninsula related that it had no intention of terminating its operations on the translators. Consequently, we issued the *NAL*.

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<sup>4</sup> *See* 47 C.F.R. § 74.1232(d). An “other-area” or “non-fill-in” translator is one whose coverage contour extends beyond the protected 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).

<sup>5</sup> *See Peninsula Communications, Inc.*, 13 FCC Rcd 23992 (1998); *Peninsula Communications, Inc.*, 15 FCC Rcd 3293 (2000) (“*February 2000 MO&O*”). For a summary of these orders, *see* either *NAL*, 16 FCC Rcd at 16126 (paras. 6-8), or *May 2001 MO&O*, 16 FCC Rcd 11366-67 (paras 6-8).

<sup>6</sup> *Peninsula Communications, Inc. v. FCC*, Case No. 00-1079 (D.C. Circuit March 8, 2000) (*dismissed without prejudice*, 2000 WL 1225776, July 11, 2000). For a summary of the Court of Appeals’ actions, *see* either *NAL*, 16 FCC Rcd at 16126-27 (para. 9) or *May 2001 MO&O*, 16 FCC Fcd at 11367-68 (para. 9).

## II. DISCUSSION

5. In responding to the *NAL*, Peninsula acknowledges that it continued to operate the FM translators following its receipt of the *May 2001 MO&O*. Peninsula seeks to justify its continued operation by claiming that its renewal applications are still “pending” pursuant to sections 1.62 and 73.3523 of the Commission rules, 47 C.F.R. §§ 1.62 and 73.3523, and that those rules therefore permit Peninsula to continue operation. We disagree. As a preliminary matter, we note that even if the rules did permit Peninsula to continue operation, a licensee cannot ignore a Commission order simply because it believes such order to be unlawful. As the Act specifically provides:

All such orders shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order.<sup>7</sup>

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.<sup>8</sup>

In any event, neither rule cited by Peninsula authorized it to continue broadcasting after the date specified in the *May 2001 MO&O*. Section 1.62 of our rules provides that a renewal applicant’s license “shall continue in effect ... until such time as the Commission shall make a final determination with respect to the renewal application.”<sup>9</sup> Here, the Commission made such a final determination. The fact that an appeal is pending is irrelevant for purposes of section 1.62, as the Commission held in *Mobilcom Pittsburg, Inc.*,<sup>9</sup> FCC Rcd 509 (1994). As for 47 C.F.R. § 73.3523, the definition of a pending application on which Peninsula relies is expressly restricted by subsection (d) of that rule to the operation of that rule alone. Section 73.3523 seeks to prevent a competing applicant who filed against a renewal application from receiving “greenmail” from the renewal applicant. That rule has absolutely nothing to do with this case. Hence, neither rule provides any justification whatsoever for Peninsula’s continued

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<sup>7</sup> 47 U.S.C. § 408.

<sup>8</sup> 47 U.S.C. § 416(c).

<sup>9</sup> See also 5 U.S.C. § 558(c) (corresponding provision of the Administrative Procedure Act states that the license continues until the renewal application “has been finally determined by the agency”).

operation of the captioned translators after the date specified in the *May 2001 MO&O* (that is, after midnight May 19, 2001).<sup>10</sup>

6. 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, 2001. Nevertheless, Peninsula continued to operate those stations in defiance of our order to terminate such operations.

7. 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.<sup>11</sup> 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,<sup>12</sup> while “repeatedly” means more than once.<sup>13</sup> The information before us clearly reflects that Peninsula has knowingly operated its translators subsequent to receipt of a direct order from us to cease. The only reasonable inference to draw is that Peninsula’s violations with respect to unauthorized operations were not only willful but also were intentional. We also conclude that each of the violations described occurred on more than one day; thus, they were repeated.

8. 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

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<sup>10</sup> 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. *See Pinelands, Inc.*, 7 FCC Rcd 6058, 6061 n. 12 (1992). In those situations, when we choose to allow licensees to continue operations, we do so explicitly. *See, e.g., Contemporary Media, Inc.*, 13 FCC Rcd 14437, 14461 (1998). In our *May 2001 MO&O*, we did not give Peninsula continued authority to operate. We also note that, in light of the record, it would have been inappropriate for us to do so. As discussed in the *May 2001 MO&O* and *NAL*, Peninsula received in November 1997 conditional grants of renewal and assignment applications to remedy rule violations that had been ongoing since June 1, 1994. At the outset, Peninsula accepted and endorsed the conditional grants as fair and consistent with the facts and the law. *See May 2001 MO&O*, 16 FCC Rcd at 11368. However, by the time of the *May 2001 MO&O*, Peninsula had failed to fulfill the condition, namely, consummating the assignment of its FM translator licenses, despite having years to do so and despite our explicit warning that not doing so would result in cancellation of those licenses. *See February 2000 MO&O, supra* note 5; *May 2001 MO&O*. Moreover, the record further demonstrated beyond doubt that Peninsula would never fulfill the condition. In light of these circumstances, granting Peninsula authority to continue to operate its FM translators during the pendency of any judicial appeals of the *May 2001 MO&O* would have perpetuated long-standing rule violations and been inconsistent with the warning in our *February 2000 MO&O*. We saw no reason to do either. We had given Peninsula ample time to meet the condition imposed in 1997 and come into compliance with 47 C.F.R. § 74.1232(d).

<sup>11</sup> *See also* 47 C.F.R. § 1.80(a)(1) and (2).

<sup>12</sup> *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).

<sup>13</sup> *See Hale Broadcasting Corp.*, 79 FCC 2d 169, 171 (1980).

guidelines currently establish a base amount of \$10,000 for operation without an instrument of authorization for the service.<sup>14</sup> We find 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, we also find that Peninsula has unlawfully operated the translators following receipt of our *May 2001 MO&O*, which unequivocally cancelled the licenses and ordered Peninsula to cease operations. We therefore conclude that Peninsula's unauthorized operation has been intentional in that it continued operation of the FM translators even though it knew it no longer held licenses for them, which warrants an upward adjustment of the forfeiture amount.<sup>15</sup> Moreover, in view of the intentional nature of Peninsula's current violations, we do not find that Peninsula's past broadcast record warrants a downward adjustment. Accordingly, we find that the proposed \$140,000 forfeiture is appropriate and should be imposed.

### III. ORDERING CLAUSES

9. 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. FORFEIT to the United States the sum 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.

10. 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, within thirty (30) days of the release of this Forfeiture Order. *See* 47 C.F.R. § 1.80(h). The payment MUST INCLUDE the FCC Registration Number (FRN) referenced above, and should also note the NAL/Acct. No. referenced above. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to 47 U.S.C. § 504. A request for payment of the full amount of this Forfeiture Order under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12<sup>th</sup> Street, S.W., Washington, D.C. 20554. *See* 47 C.F.R. § 1.1914.

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<sup>14</sup> *See* 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).

<sup>15</sup> *See* *WRHC Broadcasting Corp.*, Notice of Apparent Liability, 15 FCC Rcd 5551 (Enforcement Bureau 2000) (subsequent history omitted).

11. IT IS FURTHER ORDERED THAT a copy of this FORFEITURE ORDER shall be sent by Certified Mail Return Receipt Requested to David F. Becker, President, Peninsula Communications, Inc., Post Office Box 109, Homer, Alaska 99603, with a copy to Jeffrey D. Southmayd, Esquire, Southmayd & Miller, 1220 19<sup>th</sup> Street, N.W., Suite 400, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary