

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

In re Peninsula Communications, Inc.)
)
 Order to Show Cause Why the Licenses for)
 Translator Stations K272DG and K285EG,)
 Seward, Alaska Should not be Modified)

MEMORANDUM OPINION AND ORDER

Adopted: March 4, 2003

Released: March 10, 2003

By the Commission:

1. The Commission has before it the June 18, 2001, Protest and Opposition of Peninsula Communication, Inc. (“Peninsula”) to the Commission’s Order to Show Cause why the licenses of translator stations K272DG and K285EG, Seward, Alaska, (“Seward Translator Stations”) should not be modified, pursuant to Section 316 of the Communication Act of 1934, as amended,¹ and Section 1.87 of the Commission’s rules,² to terminate previously granted waivers of Sections 74.1231(b) and 74.1232(d)³ of the Commission’s rules.⁴ Also before us is a July 5, 2001, Opposition to Peninsula’s Protest and Opposition to the Commission’s *Order to Show Cause* filed by Phoenix Broadcasting, Inc., licensee of KSWD(AM) and KPFN(FM) Seward, Alaska (“Phoenix”). In this Order, we deny Peninsula’s Protest and Opposition and modify the Seward Translator Stations’ licenses to terminate the waivers of Sections 74.1231(b) and 74.1232(d), effective 60 days from release of this Order.

I. Background

2. The most appropriate and efficient means of providing additional FM service nationwide is by creating opportunities for the establishment and development of full service broadcast stations.⁵ FM translator stations provide supplementary service to areas that either are underserved or receive service limited by terrain.⁶ Due to the potential competitive impact that translator stations can have on FM radio broadcast stations and the development of full service radio in less populated areas, the Commission authorizes FM translators on a secondary basis only under rules that restrict their service, ownership,

¹ 47 U.S.C. § 316.

² 47 C.F.R. § 1.87.

³ *Id.* § 74.1231 (b) and 74.1232 (d).

⁴ See *Peninsula Communications, Inc.* 16 FCC Rcd 11364 (2001) (“*Order to Show Cause*”).

⁵ See *Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations, Report and Order*, 5 FCC Rcd 7212, 7215 (1990) (“*Translator R&O*”), modified, 6 FCC Rcd 2334 (1991), recon. denied and clarified, 8 FCC Rcd 5093, 5094 (1993) (“*Translator MO&O*”).

⁶ See *Translator R&O*, 5 FCC Rcd at 7212-13; *Translator MO&O*, 8 FCC Rcd at 5093.

sources of financial support, and program origination.⁷ In 1990, the Commission substantially amended these rules to ensure that FM translator stations serve their intended secondary role. At issue in this case are Sections 74.1231(b) and 74.1232(d), which provide that an other-area or non-fill-in translator station may only retransmit a commercial FM station signal that is received directly off-air⁸ and that an authorization for such a translator station will not be granted to any person interested in or connected with the translator's primary commercial FM station.⁹ A primary station is the full service station whose signal a translator retransmits. An other-area or non-fill-in translator is one whose coverage contour extends beyond the protected service contour of its primary station.

3. The Commission may grant a waiver of its rules for good cause.¹⁰ Waiver of a Commission rule is appropriate if: (1) special circumstances warrant deviation from the general rule; (2) waiver will not undermine the policy served by the rule; and (3) deviation from the rule will serve the public interest.¹¹ The Commission will favorably consider requests for waivers of Sections 74.1231(b) and 74.1232(d) for translators that provide service to a white area, *i.e.*, an area outside the coverage contour of any full-time aural broadcast service.¹² A showing of service to a white area generally is required in order for a commercial primary station to own another-area translator.¹³ The Commission has rejected the contention that waiver of the ownership restrictions set forth in Section 74.1232 of the Commission's rules also should be presumptively available for the provision of FM translator service to "underserved" areas, defined as areas receiving fewer than five full-time aural services.¹⁴

4. Peninsula is the licensee of the Seward Translator Stations and the primary full service stations that those translators rebroadcast KPEN-FM, Soldotna, Alaska, and KWVV-FM, Homer, Alaska. The Seward Translator Stations are located outside the protected service of their primary stations and require non-off-air delivery systems to rebroadcast the signals of those stations. At the time the applications for construction permits for the Seward Translator Stations were filed, KSWD (AM), Seward, Alaska, provided the only primary broadcast service to Seward. Thus, both Seward Translator Stations are non-fill-in translators that do not serve (and have never served) any white area. On February 18, 1992, the staff granted Peninsula's original construction permit applications for the Seward Translator Stations and granted waivers of the eligibility and signal delivery requirements set forth in Sections 74.1231(b) and 74.1232(d).¹⁵ The staff noted that Peninsula reported that Seward was a somewhat isolated area for radio due to the mountainous terrain and that the Seward Translator Stations would provide a much needed first

⁷ See *Translator R&O*, 5 FCC Rcd at 7212 (citing *Amendment of Part 74 of the Commission's Rules and Regulations to Permit the Operation of Low Power FM Broadcasting Translator and Booster Stations, Report and Order*, 20 Rad. Reg. 2d (P&F) 1538, 1541 (1970)).

⁸ The Commission concluded that off-air reception should be adequate for most translator operations and that any further relaxation of this policy "would be inconsistent with the role of FM translators as a secondary service not intended to supplement the services provided by radio broadcasters." *Translator R&O*, 5 FCC Rcd at 7221.

⁹ The Commission imposed this restriction to promote the establishment of full service FM broadcast stations. *Id.* at 7215.

¹⁰ See 47 C.F.R. § 1.3; see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("*WAIT Radio*").

¹¹ See *Northeast Cellular Telephone Company, L.P., et al., v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*"); see also *WAIT Radio*, 418 F.2d at 1157, 1159; *Capital Cities/ABC, Inc., ET. al.*, 11 FCC Rcd 5841, 5872-73, 5898 (1996).

¹² See *Translator R&O*, 5 FCC Rcd at 7213-16, 7220-21; *Translator MO&O*, 8 FCC Rcd at 5094-95.

¹³ See *Translator Report and Order*, 5 FCC Rcd at 7216.

¹⁴ See *id.* at 7215-16; *Translator MO&O*, 8 FCC Rcd at 5094-95.

¹⁵ *Letter to Peninsula Communications, Inc.*, Ref. No. 8930-MER (Chief, Auxiliary Services Branch, Audio Services Division, Mass Media Bureau, Feb. 18, 1992).

commercial FM service. The staff found that off-air broadcast signals were not readily available in Seward and, relying on *Wrangell Radio Group*,¹⁶ determined that waivers were justified. It noted the Commission's "special concern for the availability of broadcast services in Alaska" and the number of people who would receive programming.¹⁷ On February 1, 1993, the staff granted Peninsula's applications for licenses to cover the construction permits for the Seward Translator Stations.

5. When reviewing Peninsula's November 1995 and September 1997 renewal applications for the Seward Translator Stations, the Commission determined that continuation of the waivers of 47 C.F.R. § 74.1232(d) was not warranted and granted the renewal applications conditioned on assignment of the licenses to unrelated parties in order to bring the stations into compliance with the Commission's FM translator rules.¹⁸ Peninsula filed an appeal of the *February 2000 MO&O* with the United States Court of Appeals for the District of Columbia Circuit. Peninsula also filed a pleading with the Commission. The Court dismissed the Peninsula appeal without prejudice to refile following the Commission's resolution of the issues pending before the Commission. In the *Order to Show Cause*, the Commission dismissed Peninsula's newly filed pleading, granted the Seward Translator Stations' renewal applications,¹⁹ and, finding that Section 316 of the Act afforded the most direct and expedient means of resolving outstanding matters, ordered Peninsula to show cause why the Seward Translator Stations' licenses should not be modified, pursuant to Section 316 of the Act and 1.87 of the Commission's rules, to discontinue the previously granted waivers of 47 C.F.R. 74.1231(b) and 74.1232(d). The Commission afforded Peninsula thirty days to file a written protest to the proposed license modifications. On June 18, 2001, Peninsula filed a "Protest and Opposition Order to Show Cause for Modification of Licenses," in which it opposed the proposed license modifications and requested a hearing prior to any Commission action. On July 5, 2001, Phoenix, the licensee of the only AM and FM full service stations in Seward, filed an Opposition to Peninsula's pleading asserting that the Commission should modify the Seward Translator Stations' licenses to discontinue the waivers of 47 C.F.R. Sections 74.1231(b), 74.1232(d).

II. Discussion

6. Pursuant to our authority, under Section 316 of the Act and Sections 1.87 and 74.1232(h) of the Commission's rules, to modify any license if we determine that such action will promote the public interest, convenience, and necessity, we modify the Seward Translator Stations' licenses to terminate the waivers of Sections 74.1231(b) and 74.1232(d). Continued waivers of Sections 74.1231(b) and 74.1232(d) are not warranted because: (1) the facts upon which the staff waiver was based have changed materially; (2) Section 74.1232(h) specifically contemplates the termination of Section 74.1232(d) waivers as a result of changed circumstances; (3) these waivers undermine the policy objectives of

¹⁶ See *Wrangell Radio Group*, 75 F.C.C. 2d 404 (1980) ("Wrangell").

¹⁷ In *Wrangell*, the Commission granted rule waivers for the operation of 10-watt television translators in remote and isolated Alaskan communities where there was no off-air television programming available. The Commission noted that there are numerous small, isolated, and remote villages in Alaska, many of which are more than 500 miles apart, and that television broadcast signals are not readily available off-air in most Alaskan communities. 75 F.C.C. 2d at 405, 407.

¹⁸ See *Letter to Jeffrey D. Southmayd, Esq.*, Ref. No. 1800B4-AJS (Acting Chief, Audio Services Division, Mar. 4, 1996); *Letter to Jeffrey D. Southmayd, Esq.*, Ref. No. 1800B4-AJS (Chief, Audio Services Division, Sept. 11, 1996); *Letter to Jeffrey D. Southmayd, Esq.*, Ref. No. 1800B3-BSH (Chief, Audio Services Division, Nov. 6, 1997); *Peninsula Communications, Inc.*, 13 FCC Rcd 23992 (1998) ("*December 1998 MO&O*"); *Peninsula Communications, Inc.*, 15 FCC Rcd 3293, 3295 (2000) ("*February 2000 MO&O*"). In the *February 2000 MO&O*, the Commission also found that continued waivers of 47 C.F.R. § 74.1231(b) were not warranted.

¹⁹ The renewal application proceeding is now final. For a complete history of this proceeding, see *Order to Show Cause*, 16 FCC Rcd at 11365-70.

Sections 74.1231(b) and 74.1232(d); and (4) continuation of the rule waivers would result in discriminatory application of the Commission's rules.

7. Changed circumstances in Seward since the grant of these waivers support their termination at this time. In February 1992, the staff noted that: (1) Peninsula asserted that the Seward Translator Stations would provide a much needed first commercial FM service to the community; (2) the Commission was concerned about the availability of broadcast services in Alaska; and (3) broadcast signals were not readily available off-air in Seward. In February 2000, the Commission granted the application for a license to cover the construction permit of station KPFN (FM), Seward, Alaska (File No. BLH-990125KE). Seward is now served by full service AM and FM radio stations. Therefore, the basis for these waivers no longer exists and their continuation is unwarranted. We note that the Seward Translator Stations' Section 74.1232(d) waivers are subject to the condition set forth in Section 74.1232(h) that permits the Commission to terminate such waivers upon sixty days written notice if changed circumstances would have prohibited grant of the initial authorization.²⁰

8. Peninsula asserts that, after station KPFN (FM) commenced broadcast operations,²¹ the Commission granted the Seward Translator Stations' licenses to operate pursuant to the subject rule waivers in January 1999 and granted in May 2001 the stations' renewal applications without taking any action against the waivers. Peninsula contends that there have been no changes in the number of broadcast stations operating in Seward and no changes in the Commission's translator rules and policies since January 1999 or May 2001 that would justify modification of the Seward translators' licenses by terminating the subject rule waivers. We reject Peninsula's selective and otherwise flawed parsing of the record and conclude that it has failed to raise a substantial and material question of fact as to whether the proposed modifications of the Seward Translator Stations' licenses are in the public interest. To the extent that the Commission has revisited these 1992 and 1993 waivers, it has consistently focused on the possibility that changed circumstances may require their termination. Prior to KPFN (FM) becoming operational, we specifically noted that it might be necessary to "consider whether the circumstances under which the waivers were granted have so changed as to warrant termination of the Seward translator operations."²² It also appears that the Commission was unaware of the filing by Glacier, several days before the 1998 MO&O was adopted, which advised the Commission of the commencement of program tests by KPFN(FM). Moreover, the KPFN(FM) license application and fee were received by Mellon Bank on January 25, 1999, two months after adoption of the December 1998 MO&O. Plainly, the routine staff grants²³ on January 27 and 28, 1999, of licenses to cover minor changes in the Seward Translator Stations occurred without consideration of the impact of the receipt of the KPFN (FM) license application by the Commission several days earlier. Finally, Peninsula's reliance on the May 2001 *Order to Show Cause* is misplaced. In this action the Commission explicitly ordered Peninsula to show cause why the Seward Translators Stations' licenses should not be modified to discontinue the subject waivers.²⁴ The Commission stated that it believed that this afforded the most direct and expedient means of resolving this matter.

²⁰ See 47 C.F.R. § 74.1232(h) (any authorization for a FM translator station whose coverage contour extends beyond the protected contour of the commercial primary station that is issued to an applicant who is the licensee of the commercial primary FM radio broadcast station will be issued subject to the condition that it may be terminated at any time, upon not less than sixty days written notice, where the circumstances in the community or area served are so altered as to have prohibited grant of the application had such circumstances existed at the time of its filing).

²¹ On November 13, 1998, Glacier notified the Commission that KPFN(FM) had commenced program tests.

²² 13 FCC Rcd at 23999.

²³ See License Authorizations issued January 27 and 28, 1999 (File Nos. BLFT-19981022TC-TD).

²⁴ Peninsula had argued, citing 47 U.S.C. § 309(k) (1), that the Commission was required to grant its renewal applications unconditionally and had no authority to terminate the subject waivers or terminate operating authority in the context of that renewal proceeding.

9. Waivers of Commission rules must not undermine the policy objectives of those rules which the Commission has determined serve the public interest.²⁵ We find that the Seward Translator Stations' waivers of Sections 74.1231(b) and 74.1232(d) adversely affect the operation of local full-service FM radio broadcast stations by impermissibly expanding the service area of a non-local primary station.²⁶ Here, adherence to the rule will promote local full-service radio service.²⁷ White area waivers are consistent with these policies; waivers to areas served by two full service radio stations are not.²⁸ Additionally, continuation of these waivers would result in the Seward Translator Stations being treated differently than other similarly situated non-fill-in translators without justification.²⁹ Therefore, modification of the Seward Translator Stations' licenses to terminate these rule waivers is in the public interest.

10. Peninsula asserts that there is no evidence in the Commission's records to indicate that the operation of the Seward translators causes economic harm to any other broadcast station in the Seward radio market. We conclude that Peninsula has failed to raise a substantial and material question regarding whether the proposed modification of licenses is warranted. Phoenix states that, during a previous license renewal proceeding, the licensee and permittee of stations KSWD(AM) and KPFN(FM) asserted that competition from the Seward translators made it difficult for station KSWD(AM) to survive and prosper in the small community of Seward, that the Seward translators would threaten the financial viability of station KPFN(FM), and that the Seward translators were taking between \$4,000 and \$6,000 per month in radio revenues out of Seward, a community of fewer than 5,000 people with limited sources of advertising revenue.³⁰ Phoenix now contends that the Seward translators continue to have an adverse economic impact on Seward's full service stations because they siphon substantial advertising revenues out of Seward which would otherwise be available to support the full service stations. Peninsula has not disputed the claim that the Seward translators generate \$4,000 to \$6,000 per month from Seward advertisers. We find that permitting Peninsula to continue the Seward translators current operations pursuant to waivers of 47 C.F.R. 74.1231(b) and 74.1232(d) would be a clear detriment to full-service broadcast stations licensed to Seward, given the size of the market.

11. Peninsula also asserts that termination of the Seward Translator Stations' rule waivers would force these stations, which have a significant number of listeners, to cease operations and would result in a significant loss of broadcast service to Seward. Peninsula's arguments in this regard are unavailing and fail to raise a substantial and material question of fact regarding whether the proposed license modifications serve the public interest. The Commission contemplated such a loss of translator service to

²⁵ See *WAIT Radio*, 418 F.2d at 1157; see also *supra* note 6.

²⁶ Modification of our rules to permit the expansion of FM service through the use of translators would be inconsistent with our basic FM allotment scheme. *Translator R&O*, 5 FCC Rcd at 7215; *Translator MO&O*, 8 FCC Rcd at 5094. The rules which generally limit FM translators to re-broadcasting off-air signals are designed to eliminate disincentives for service by full-service radio broadcast stations in instances where sufficient community interest exists for additional services, but where the existence of 'other area' translators financed by primary stations would work to limit the economic viability of such stations. See *Translator MO&O*, 8 FCC Rcd at 5098.

²⁷ The public interest is best served by promoting the broad distribution of full service FM radio broadcast stations. *Translator R&O*, 5 FCC Rcd at 7215; *Translator MO&O*, 8 FCC Rcd at 5094.

²⁸ See *supra* at ¶¶ 2, 3.

²⁹ See *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) (the Commission must treat similarly situated parties alike unless it explains its reasons for differential treatment in light of the purposes of the Communications Act).

³⁰ See Phoenix Opposition at 5-7; see also *December 1998 MO&O*, 13 FCC Rcd at 23997; *February 2000 MO&O*, 15 FCC Rcd at 3295.

the public when it created a service that is permitted to operate on a secondary basis only, and adopted rules that impose strict FM translator eligibility service and waiver standards. Section 74.1232(h), which permits the termination of certain translator authorizations based on changed circumstances, codifies this policy with regard to white area waivers. Therefore, this loss of translator service is not a special circumstance but an outcome specifically contemplated by the rules.

12. Peninsula's protest to our proposed modification of the Seward translators' licenses is subject to the requirements of Section 309 of the Act for petitions to deny.³¹ Therefore, Peninsula is entitled to a hearing only if it presents a substantial and material question of fact as to whether the proposed modification serves the public interest.³² The record establishes that KPFN(FM) has operated as a licensed station in Seward since February, 2000, and that AM and FM service is now readily available in Seward. As an initial licensing matter, the Commission would not have waived its rules in these circumstances to grant an other-area FM translator station construction permit to Peninsula. Section 74.1232(h) contemplates the termination of an FM translator station authorization in precisely this situation. Moreover, our order to terminate operations complies with the sixty-day notification period codified in this subsection. We conclude that Peninsula has failed to raise a substantial and material question of fact regarding whether the proposed modification of the Seward Translator Stations' licenses is in the public interest. Accordingly, we deny Peninsula's request for a hearing.

13. Peninsula's Protest is denied. Pursuant to Section 316 of the Act and Sections 1.87 and 74.1232(h) of the Commission's rules, we modify the Seward translators' licenses to terminate the waivers of Sections 74.1231(b) and 74.1232(d), effective 60 days from release of this Order. Thereafter, Peninsula must operate the Seward Translator Stations in accordance with their modified licenses and, if it is unable to do so, it must terminate operations immediately.³³ Within 60 days from release of this order, Peninsula must file with the Secretary of the Commission, with a copy to the Chief, Media Bureau, an affidavit executed by an officer or director certifying that the Seward Translator Stations are operating in compliance with their modified licenses and stating how such compliance was achieved, or certifying that the Seward Translator Stations have ceased operations.

III. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, that Peninsula Communications, Inc.'s June 18, 2001 "Protest and Opposition Order to Show Cause for Modification of Licenses" IS DENIED.

15. IT IS FURTHER ORDERED, that pursuant to Section 316 of the Communications Act of 1934, as amended, and Section's 1.87 and 74.1232(h) of the Commission's rules, the licenses for translator stations K272DG and K285EG, Seward, Alaska ARE MODIFIED to terminate the waivers of Sections 74.1231(b) and 74.1232(d) of the Commission's rules, effective sixty days from release of this Order.

16. IT IS FURTHER ORDERED, that no later than sixty days after release of this Order, Peninsula SHALL FILE with the Secretary of the Commission, with a copy to the Chief, Media Bureau, an affidavit signed by an officer or director indicating: (1) that stations K272DG and K285EG, Seward Alaska are operating in compliance with their modified licenses and in compliance with Sections 74.1231(b) and 74.1232(d) of the Commission's rules and stating the basis on which such compliance

³¹ See 47 U.S.C. § 316(a) (3); see also 47 C.F.R. § 1.87(d).

³² See 47 U.S.C. § 309(d), (e); see also *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Crandon, Wisconsin)*, 3 FCC Rcd 6765 (1998); *Paul and Nancy Schumacher*, 3 FCC Rcd 7148 (1988), *recon. denied*, 4 FCC Rcd 3605 (1989).

³³ See *Order to Show Cause*, 16 FCC Rcd at 11370.

was achieved; or (2) that stations K272DG and K285EG, Seward Alaska are unable to operate in accordance with their modified licenses and have terminated operations.

17. IT IS FURTHER ORDERED that the Media Bureau SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this Memorandum Opinion and Order to:

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c/o Jeffrey D. Southmayd, Esquire
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Peninsula Communications, Inc.
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Phoenix Broadcasting, Inc.
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FEDERAL COMMUNICATIONS COMMISSION

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