



June 2009

Audio Division Deletes Nine Stations for Failure to Construct as Authorized

Matthew H. McCormick
mccormick@fhhlaw.com
703-812-0438

A scathing 23-page Memorandum Opinion and Order emphatically demonstrates that the FCC takes very seriously certifications included in applications. If we needed a reminder, the decision proves again that lying in any application can result in the loss of the station authorization in question *and* a referral of the matter to a U.S. attorney for potential prosecution *and* a separate FCC hearing to determine whether you're basically qualified to be a licensee of *any* station. Strong medicine indeed.

But most importantly, the decision conclusively establishes that, if you don't build the facilities specified in the CP the FCC gives you, you risk losing whatever facilities you did build, along with the underlying CP.

Following a lengthy investigation, the Audio Division concluded that two NCE licensees – Great Lakes Community Broadcasting, Inc. and Great Lakes Broadcast Academy, Inc. (we'll refer to them collectively as "Great Lakes") – under the control of one James J. McCluskey had lied to the Commission. In at least nine license applications – five for full-power NCE stations and four for translators – Great Lakes had certified, falsely, that CP-specified facilities had been constructed when they hadn't.

Various complaints and petitions from broadcasters (including some I authored for WYCE, Wyoming, Michigan) brought some of Great Lakes's shenanigans to the Commission's attention. With that start, the FCC pursued Great Lakes through a combination of Enforcement Bureau on-site inspections, an Audio Division letter of inquiry and (as described in a related article on page 7) even some cyber-sleuthing. In instance after instance the Division found that Great Lakes's claims that it had constructed the facilities specified in CPs issued to it just weren't true. In one case, no facilities had been constructed at all, notwithstanding a certification in the license application to the contrary. In other cases, facilities of some sort apparently had been built, but they were at the wrong site, the wrong height and/or the wrong power.

The Division ruled it was not good enough for Great Lakes to just throw something up in

the general vicinity of the CP sites. (The horseshoes/hand grenades axiom is fully applicable here.) CPs for four full-power stations and two translators were automatically forfeited because the facilities authorized had not been constructed before the CPs expired. Great Lakes did escape cancellation of one CP because grant of the license application had already become final, but that escape may be temporary: the Audio Division concluded the facilities specified in the CP and license application were never constructed, so that station will be the subject of a forthcoming hearing designation order. That hearing designation order will also examine the character qualification of the Great Lakes entities, McCluskey and Great Lakes's engineering consultant David C. Shaberg to hold other FCC authorizations.

Great Lakes's varied and sometimes contradictory proffered reasons for its false certifications had, in my admittedly biased view, the persuasive power of a sixth-grader's excuses for not doing his home work.

For example, Great Lakes argued that the facilities it constructed complied with its authorizations because they did not exceed the antenna heights and power levels set in the CPs and therefore would not cause interference to other stations. Without breaking a sweat, the Audio Division swatted that down: except in very specific instances covered in the FCC's rules, the Division observed, "we do not allow permittees to self-approve modifications to their construction permits." The Audio Division continued that parties like Great Lakes cause "substantial harm when they hoard spectrum by holding authorizations for full-service FM stations but operate minimal facilities" that might not have been approved had they actually been presented to the FCC.

Great Lakes also claimed that problems getting accurate readings from its GPS unit led to construction of facilities at considerable distance from the FCC-authorized sites. In that regard Great Lakes seems to have been oddly unperturbed when it kept getting different readings, as if it were to be expected that a particular site really ought to have at least a couple of different sets of geographical coordinates. In any case, the Division was unconvinced.

The vigor with which the Audio Division is going after Great Lakes may be a harbinger of a "get tough" policy with respect to spectrum warehousing and false construction certifications. If you've found yourself blocked by an operation akin to Great Lakes, that should be good news – the *Federales* may be on the way to help you out. But on the other hand, if you hold a CP for unbuilt facilities, you are well advised to "get 'er done" within the time provided. If you don't get finished in time, you are equally well advised to fess up and suffer the consequences. While it may not might nice to try to fool Mother Nature, it's downright dangerous to try to fool the FCC.