

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

In re Applications of	)	
	)	
<b>Saga Communications of New England, LLC</b>	)	Facility I.D. No. 18057
	)	NAL/Acct. No. MB-200941410032
For Minor Modification and License to Cover for	)	FRN: 0009269424
FM Translator Station W240CB (formerly	)	File No. BLFT-20080915AEO
W238AA), Ithaca, New York	)	File No. BMPFT-20081030ACM

**MEMORANDUM OPINION AND ORDER  
AND  
NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: April 26, 2010**

**Released: April 27, 2010**

By the Chief, Audio Division, Media Bureau:

**I. INTRODUCTION**

1. We have before us an October 14, 2008, “Informal Objection to Application for License and Request for Cancellation of Program Test Authority” (the “License Objection”)<sup>1</sup> filed by Finger Lakes Radio Group, Inc. (“Finger Lakes”)<sup>2</sup> to the captioned covering license application (“License Application”),<sup>3</sup> an October 31, 2008, Informal Objection (the “Modification Objection”),<sup>4</sup> and a January 6, 2010, Supplement to Informal Objection (the “Supplemental Objection”)<sup>5</sup> to the captioned minor modification application (“Modification Application”). Both the License and Modification Applications were filed by Saga Communications of New England, LLC (“Saga”), licensee of FM translator station W240CB, at Ithaca, New York (the “Station”).

2. In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* (“NAL”) issued pursuant to Sections 309(e) and 503(b) of the Communications Act of 1934, as amended (the “Act”), and Section 1.80 of the Commission’s Rules (the “Rules”),<sup>6</sup> and by authority delegated under

<sup>1</sup> Finger Lakes filed an *Erratum* to this pleading on October 22, 2008.

<sup>2</sup> Finger Lakes, at the time the pleadings were filed, was the licensee of WFIZ(FM) (formerly WFLR) at Odessa, New York, in the Ithaca, New York, Arbitron radio market. Current licensee of WFIZ(FM) is ROI Broadcasting, Inc., which is controlled by the same principals who controlled Finger Lakes. See File No. BALH-2009024AAR.

<sup>3</sup> The License Application was dismissed by the staff at Saga’s request on January 5, 2009. See *Broadcast Actions*, Public Notice, Report No. 46898 (rel. Jan. 8, 2009).

<sup>4</sup> As discussed below, because the License Application has been dismissed, the October 14, 2008, License Objection to the License Application will be dismissed as moot. However, Finger Lakes requests in its October 31, 2008, Modification Objection that the arguments in the License Objection also be considered regarding the Modification Application.

<sup>5</sup> Saga filed a response on January 7, 2010.

<sup>6</sup> 47 U.S.C. §§ 309(e), 503(b); 47 C.F.R. § 1.80.

Section 0.283 of the Rules,<sup>7</sup> for the reasons stated below, we: (1) dismiss the License Objection as moot; (2) grant in part and deny in all other respects the Modification and Supplemental Objections; (3) grant the Modification Application; and (4) conclude that Saga is apparently liable for a monetary forfeiture in the amount of ten thousand dollars (\$10,000) for false certification in violation of Section 1.17(a)(2) of the Rules.<sup>8</sup>

## II. BACKGROUND

3. The Station is currently licensed to operate on Channel 238 with two directional Scala HDCA 10-element antennas located at 105 feet and 50 feet height above ground level (“AGL”), directed at six degrees and 295 degrees true, respectively.<sup>9</sup> On July 27, 2007, the staff granted Finger Lakes’ proposal to move WFIZ(FM) from Channel 240 at Dundee, New York, to Channel 238 at Odessa, New York.<sup>10</sup> Implementation of the modified WFIZ(FM) facilities would require the Station, as a secondary service not entitled to protection from existing full-service FM stations, to discontinue operations because of predicted contour overlap.<sup>11</sup> On September 10, 2008, Saga filed a minor modification application to modify the Station to specify operation on Channel 240 at a reduced power of two watts to avoid predicted contour overlap with WFIZ(FM) until an alternate site to resume operations at full power could be found.<sup>12</sup> The staff granted this application on September 11, 2008. The construction permit specified a radiation center AGL of 118 feet and also specified the use of one composite antenna consisting of two Scala HDCA-5 antennas, as proposed in the application. On September 15, 2008, Saga filed the License Application to cover this permit. Saga represented in the License Application that, *inter alia*, the Station was constructed in accordance with the underlying permit.

4. On October 14, 2008, Finger Lakes filed the License Objection to the License Application claiming that Saga had made false certifications in the License Application regarding the construction of the Station. Specifically, Finger Lakes contends that Saga installed two damaged ten-element antennas at far lower levels on the tower than specified in the permit; *i.e.*, at 38-40 and 95 feet height AGL, respectively. On October 22, 2008, when Saga’s “counsel was advised that there was a question concerning location of the lower antenna,” Saga terminated operations and requested dismissal

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<sup>7</sup> 47 C.F.R. § 0.283.

<sup>8</sup> 47 C.F.R. § 1.17(a)(2).

<sup>9</sup> See File No. BLFT-19850611TB. On June 20, 1984 the staff granted an application of Cornell University of a construction permit (File No. BPFT-19840608MS) (the “Cornell Construction Permit Application”). The Cornell Construction Permit Application specified two antennas which were to be mounted at 120 feet AGL, six degrees, and 115 feet AGL, 295 degrees true, respectively, with a radiation center of 118 feet height AGL, located on a 142-foot tower. On June 21, 1985, the staff granted the covering license application (File No. BLFT-19850611TB), (the “Cornell License Application”). The Cornell License Application disclosed that construction of the antennas had been altered to 105 and 50 feet height AGL. On September 27, 1985, Cornell University submitted a clarification letter reiterating that the antennas were not built as specified in the underlying permit, but rather, at 105 and 50 feet height AGL, as specified in the Cornell License Application. Commission records, however, erroneously listed the licensed antenna height as 118 feet AGL.

<sup>10</sup> See *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Dundee and Odessa, NY)*, Report and Order, 22 FCC Rcd 13734 (MB 2007).

<sup>11</sup> See 47 C.F.R. § 74.1203.

<sup>12</sup> See File No. BMPFT-20080910AAI. We note that this application proposed one composite antenna consisting of two Scala HDCA-5 antennas linked together to create a composite directional pattern mounted in the same plane but on separate orientations at a radiation center AGL of 118 feet. *Id.* at Exhibit 12.2 (vertical antenna plan illustration).

of the License Application.<sup>13</sup> On October 30, 2008, Saga filed the Modification Application to move the Station to a different site. Finger Lakes filed its Modification Objection on October 31, 2008, arguing that Saga's false certifications in the License Application are evidence of Saga's lack of character qualifications, and on this basis, urged the Commission to revoke the Station's license.<sup>14</sup> The staff inadvertently granted the Modification Application on November 12, 2008, and rescinded it that same day when it realized that the staff had not considered the Modification Objection.<sup>15</sup> On December 5, 2008, Saga filed, among other things, separate Oppositions (collectively, the "Opposition")<sup>16</sup> to the License and Modification Objections, and on January 6, 2009, Finger Lakes filed, among other things, a consolidated Reply (the "Reply"). On July 31, 2009, Saga filed a "Renewed Request for Expedited Action," which Finger Lakes opposed on August 7, 2009. Saga filed a "Reply to Opposition to Renewed Request for Expedited Action" on August 19, 2009. On August 19, 2009, Saga also filed a request for special temporary authority ("STA") to continue operating the Station on Channel 240 with a reduced effective radiated power of one watt in order to preserve its license.<sup>17</sup>

5. On November 24, 2009, because of the differing allegations regarding the exact nature of the Station's technical facilities, the staff requested that Saga measure the height of both antennas. On December 2, 2009, Saga responded, specifying that the lower antenna -- which it states had been removed -- would have been at 39 feet, 2 inches height AGL, while the upper antenna is at 95 feet height AGL. On January 6, 2010, Finger Lakes filed the Supplemental Objection to its Modification Objection arguing that Saga is circumventing the Commission's local radio multiple ownership rules, to which Saga responded the following day.

### III. DISCUSSION

6. Pursuant to Section 309(e) of the Act,<sup>18</sup> informal objections, like petitions to deny, must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with Section 309(a).<sup>19</sup> We find, for the reasons set forth below, that Finger Lakes has failed to raise a substantial and material question of fact calling into question Saga's character or its basic qualifications as a licensee.

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<sup>13</sup> Opposition at 15. Because we dismissed the license application on January 5, 2009, at Saga's request, we will dismiss the License Objection as moot. We note, however, that the same issues raised in the License Objection are still before us by virtue of Finger Lakes' Modification Objection.

<sup>14</sup> Modification Objection at 1.

<sup>15</sup> See *Broadcast Actions*, Public Notice, Report No. 46864 (rel. Nov. 17, 2008); see also *Broadcast Applications*, Public Notice, Report No. 26864 (rel. Nov. 17, 2008).

<sup>16</sup> We note that the separate Opposition to the License Application, apart from a cover page, fully incorporates the Opposition to the Modification Application, and therefore, both filings are textually identical.

<sup>17</sup> See File No. BSTA-20080819AFI. The staff granted the STA request on August 21, 2009. See *Letter to Gary S. Smithwick, Esq.* (MB rel. Aug. 21, 2009).

<sup>18</sup> 47 U.S.C. § 309(e).

<sup>19</sup> 47 U.S.C. § 309(a). See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objections, like petitions to deny, must contain adequate and specific factual allegations sufficient to warrant the relief requested).

7. False Certification. Finger Lakes opposes grant of the Modification Application arguing first that Saga knowingly made three false certifications in the License Application in violation of Section 73.1015 of the Rules and Section 319(c) of the Act.<sup>20</sup> Finger Lakes states that, in the License Application, Saga certified that: (1) “all terms, conditions, and obligations in the underlying permit have been fully met;” (2) “apart from changes already reported, no cause or circumstance has arisen since the grant of the underlying construction permit which would cause any statement or representation contained in the construction permit to be incorrect now;” and (3) “the facility was constructed as authorized in the underlying construction permit.”<sup>21</sup> Each of these, Finger Lakes claims, is “blatantly false.”<sup>22</sup>

8. Specifically, Finger Lakes argues that Saga Vice President Susan Johnston and Saga consulting engineer Justin W. Asher both knowingly falsely certified their respective portions of the License Application with regard to the height of the Station’s antennas.<sup>23</sup> Finger Lakes argues that a simple site inspection of the tower reveals that “the difference between five-bay antennas mounted at 118 feet [which were specified in the permit] and [Saga’s] ten-bay antennas mounted separately at 40 and 95 foot levels should be apparent to anyone, much less a highly qualified engineer and Saga’s vice president.”<sup>24</sup> Furthermore, Finger Lakes claims that in October 2008 Saga’s local engineer Justin Gorodetzer verified the actual height of Saga’s antennas to the tower manager; “[t]hus, [Finger Lakes argues] the false certifications were made knowingly.”<sup>25</sup> Finally, Finger Lakes contends that Saga’s willful false statements are subject to appropriate administrative sanctions, including revocation of the Station’s license, pursuant to Section 312(a)(i) of the Act and Section 73.3513(d) of the Rules.<sup>26</sup>

9. In Opposition, Saga acknowledges that the location of the lower antenna was listed inaccurately in the granted September 10, 2008, minor change application and the License Application.<sup>27</sup> Saga states, however, that “the error was corrected by dismissing the [License] [A]pplication and suspending operations” of the Station.<sup>28</sup> Specifically, Saga claims that the error in the License Application occurred because Saga’s consulting engineer Asher used incorrect information provided to him by “the FCC’s engineering database”<sup>29</sup> and Saga’s local engineer Jason Gorodetzer to prepare the

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<sup>20</sup> Modification Objection at 3-4; *see also* 47 U.S.C. § 319(c) and 47 C.F.R. § 73.1015.

<sup>21</sup> License Objection at 2, citing License Application, Section II, Items 2, 3 and Section III, Item 4.

<sup>22</sup> License Objection at 2.

<sup>23</sup> Modification Objection at 4.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* *See* October 14, 2008, Declaration of Finger Lakes Vice President Alan Bishop and October 10, 2008, e-mail from tower manager Dave Stevenson to Alan Bishop. License Objection at Attachments 1 and 2. *See also* Reply at 11.

<sup>26</sup> Modification Objection at 3; *see also* 47 U.S.C. § 312(a)(i) and 47 C.F.R. § 73.3513(d).

<sup>27</sup> Opposition at 15.

<sup>28</sup> *Id.* at 15. Saga alleges that it requested dismissal of the License Application before it became aware of the License Objection. *See id.* at 3.

<sup>29</sup> We note that the Commission’s electronic database (“CDBS”) lists authorization/application technical information provided to the Commission *by the applicants*. It is the applicants’ duty to provide the correct information to CDBS and to operate their facilities lawfully. *See* 47 C.F.R. § 1.17; *see also, e.g., Media Bureau Announces New Features in CDBS*, Public Notice, 21 FCC Rcd 2071 (rel. Feb. 28, 2006) (“CDBS is designed to provide applicants flexibility in managing *their* accounts.”) (emphasis added).

applications.<sup>30</sup> Saga also claims that “at some point in the past” the tower owner, in moving the tower from one side of his building to the other, lowered the lower of the two Station antennas from approximately 50 feet height AGL to 36 feet height AGL, and Saga states that it did not reflect this previously unknown height change in its permit and covering License Application.<sup>31</sup> Saga also acknowledges that the Station’s antennas are two Scala 10-element and not the two Scala 5-element Yagi antennas specified in the permit and covering License Application.<sup>32</sup> Finally, Saga acknowledges that although Gorodetzer “was provided a copy of a draft of the application [which incorrectly depicted the two antennas at the same level] before it was filed with the FCC,” Gorodetzer “did not catch the error” before the License Application was filed.<sup>33</sup>

10. As noted earlier, due to the factual discrepancy between Saga and Finger Lakes as to the exact height of the two Saga antennas, the staff, on November 24, 2009, requested that Saga measure the height of both antennas on the tower and provide the information to the Commission. In response, Saga claims that “the antenna configuration on the Tower had changed since September 2008,” when the matters underlying Finger Lakes’ objections arose.<sup>34</sup> Saga indicates that only one of the antennas formerly used by the Station is now mounted on the tower, and it also indicates that the lower antenna “had been removed for parts.” According to Saga’s measurements, the lower antenna would have stood at “39 feet, 2 inches [height AGL],” and the higher antenna is mounted at “95 feet [height AGL].” Because the antennas were licensed at 105 and 50 feet height AGL, respectively, we therefore find that the actual facilities did not match those described in either the License Application or its underlying permit.

11. The Commission and the courts have recognized that “[t]he FCC relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing.”<sup>35</sup> Misrepresentation is “a false statement of fact made with intent to deceive.”<sup>36</sup> Lack of candor is

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<sup>30</sup> *Id.* at 10, 13. Asher states in a declaration made under penalty of perjury that he never physically visited the site. *See* Opposition at Attachment 3. In addition, Johnston states in a declaration made under penalty of perjury that she relied “on our engineering consultant to properly complete the engineering portion of the applications.” *See* Opposition at Attachment 2.

<sup>31</sup> *See id.* at 13-14 and n.12. Finger Lakes states that it agrees that the 36 feet AGL height level is approximately correct for the height of the lower antenna. *See* License Objection at 4. *See also*, ¶ 10, *infra*.

<sup>32</sup> Opposition at 12-13 and at n.16. Saga adds that it has no explanation why “the original license had the correct antennas specified on it, but . . . [its] latest one [*i.e.*, File No. BMPFT-20080910AAI] was changed for some reason.” *Id.*

<sup>33</sup> Opposition at 13. We note that Gorodetzer did not provide for the record a declaration made under penalty of perjury.

<sup>34</sup> *See Letter from Gary S. Smithwick, Esq.*, filed Dec. 2, 2009; *see also* “Declaration” of Tower Technician Stephan Johnson made under penalty of perjury on November 30, 2009, at Attachment.

<sup>35</sup> *See Commercial Radio Service, Inc.*, Order to Show Cause, 21 FCC Rcd 9983, 9986 (2006) (“*CRS Order*”) citing, *e.g.*, *Contemporary Media, Inc., v. FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000) (“*Contemporary Media*”); and *Cumulus Licensing, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 13711, 13717 (MB 2007) (“[I]t is essential that licensees make full and clear disclosure of all material facts in every application. . .”).

<sup>36</sup> *CRS Order*, 21 FCC Rcd at 9986, citing *Policy Regarding Character Qualifications in Broadcast Licensing Amendment of Rules of Broadcast Practice and Procedure, Relating to Written Responses to Commission Inquiries and the Making of Misrepresentation to the Commission by Applicants, Permittees, and Licensees, and the Reporting of Information Regarding Character Qualifications*, Report, Order, and Policy Statement, 102 FCC 2d (continued . . .)



“concealment, evasion, or other failure to be fully informative, accompanied by intent to deceive.”<sup>37</sup> Intent to deceive is established if a licensee knowingly makes a false statement<sup>38</sup> and can also be inferred when the surrounding circumstances clearly show the existence of intent to deceive.<sup>39</sup> The Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency.<sup>40</sup>

12. Moreover, Section 1.17(a)(2) of the Rules provides that no person may provide, in any written statement of fact, “material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.”<sup>41</sup> In expanding the scope of Section 1.17 in 2003 to include written statements that are made without a reasonable basis for believing the statement is correct and not misleading, the Commission explained that this requirement was intended to more clearly articulate the obligations of persons dealing with the Commission, ensure that they exercise due diligence in preparing written submissions, and enhance the effectiveness of the Commission's enforcement efforts.<sup>42</sup> Thus, even absent an intent to deceive, a false statement may constitute an actionable violation of Section 1.17 of the Rules if it is provided without a reasonable basis for believing that the statement is correct and not misleading.<sup>43</sup>

13. We do not find that the evidence presented by Finger Lakes or the record as a whole is sufficient to raise a substantial and material question as to whether Saga intended to deceive the Commission by making a false certification.<sup>44</sup> Rather, the record indicates that Saga's consulting engineer Justin W. Asher incorrectly concluded that he was using the proper technical information when

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1179, 1210-11 (1986) (“1986 Character Policy Statement”).

<sup>37</sup> *Id.* at 9986 (citing *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983)). A false certification may also constitute a misrepresentation. *Id.* at 9986 n.15 (citing *San Francisco Unified School District*, Hearing Designation Order and Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 13326, 13334 nn.40-41 (2004) (“*San Francisco*”).

<sup>38</sup> *Id.* at 9986 (citing *Leflore Broadcasting, Co., Inc. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980)).

<sup>39</sup> *Id.* (citing *American International Development, Inc.*, Memorandum Opinion and Order, 86 FCC 2d 808, 816 n.39 (1981), *aff'd sub nom. KXIV, Inc. v. FCC*, 704 F.2d 1294 (D.C. Cir. 1983)).

<sup>40</sup> *Contemporary Media*, 214 F.3d at 196.

<sup>41</sup> See *White Park Broadcasting, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 3549, 3565 (MB 2009).

<sup>42</sup> See *Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, Report and Order, 18 FCC Rcd 4016, 4016-4017, 4021 (2003), *recon. denied*, Memorandum Opinion and Order, 19 FCC Rcd 5790, *further recon. denied*, Memorandum Opinion and Order, 20 FCC Rcd 1250 (2004).

<sup>43</sup> See *id.* at 4017 (stating that the revision to Section 1.17 is intended to “prohibit incorrect statements or omissions that are the result of negligence, as well as an intent to deceive”); see also *San Francisco*, 19 FCC Rcd at 13337 (2002) (“[A] false statement, even absent an intent to deceive, may constitute a violation of Section 1.17. . .”).

<sup>44</sup> See *Liberty Productions, A Limited Partnership*, 16 FCC Rcd 12061, 12079-80 (2001) (in determining the merits of a false certification issue, substantial evidence of an intent to deceive is necessary to support a finding of misrepresentation or otherwise raise a question as to an applicant's basic qualifications); *Georgia Public Telecommunications Commission*, 7 FCC Rcd 2942 (Rev. Bd. 1992), *review denied*, 7 FCC Rcd 7996 (1992) (disqualification for false certification not warranted unless the applicant intended to deceive the Commission).

preparing the License Application. Thus, we find that there is no evidence that Saga *knowingly* falsely certified in the License Application that the facility was constructed as authorized in the underlying construction permit, and there is no apparent motive from which we might infer an intent to deceive.<sup>45</sup> Thus, we find that Finger Lakes has raised no substantial and material question of fact calling for further inquiry regarding Saga's qualifications to be a Commission licensee based on its allegedly false certifications.<sup>46</sup>

14. Nevertheless, regardless of its intentions, it appears that Saga falsely certified in the License Application that it had constructed the Station's modified facilities as authorized in the underlying construction permit,<sup>47</sup> at least with respect to the correct height of its antennas. This constitutes a violation of Section 1.17(a)(2) of the Rules.<sup>48</sup> Specifically, we find that the certification was made by Saga without a reasonable basis for believing it to be correct; the record indicates that Saga did not exercise the proper "due diligence" in the preparation of its written submissions, as required by Section 1.17(a)(2). For instance, Saga acknowledges that neither its consulting engineer nor its vice president ever visited the transmission site during preparation of the License Application; Saga admits to miscommunication between its consulting engineer and its local engineer; and Saga acknowledges that its local engineer reviewed the License Application before it was filed but did not alert his superiors of the "error" before filing.<sup>49</sup> In addition, it was only by virtue of the staff's November 2009 request for further information that Saga determined the actual height of the Station's antennas and that the lower antenna had been removed.<sup>50</sup> We believe, therefore, that Saga should be sanctioned for its false certification, and that a monetary forfeiture is appropriate for its apparent willful<sup>51</sup> violation of Section 1.17(a)(2) of the Rules.

15. Local Radio Ownership Limits. Finger Lakes argues that an additional reason for the Commission to deny the Modification Application and to revoke the Station's license is Saga's alleged use of its two additional high-definition ("HD") channels in combination with its "high-power" FM translators to effectively create two new FM stations in the Ithaca radio market that blatantly circumvent

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<sup>45</sup> Had Saga provided the actual height of the one remaining antenna in the License Application to reduce the Station's power to two watts, it would not have caused the staff to dismiss that application. Therefore, there was no motive to provide incorrect data regarding the location of the Station's antenna.

<sup>46</sup> See, e.g., *Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 196 (D.C. Cir. 2000) citing *Schoenbohm v. FCC*, 204 F.3d 243, 247 (D.C. Cir. 2000) (intentional misrepresentation sufficient ground for the revocation of license).

<sup>47</sup> See n.9, *supra*.

<sup>48</sup> The failure to amend allegedly erroneous information in an application is more properly within the purview of Section 1.17 of the Rules rather than Section 73.1015 as Finger Lakes asserts. Section 73.1015 concerns complete and truthful responses to inquiries made by the Commission. Here, there was no Commission inquiry; Saga made inaccurate certifications in an application.

<sup>49</sup> See Opposition at 11-14.

<sup>50</sup> See ¶ 10, *supra*.

<sup>51</sup> The Commission has held that violations resulting from inadvertent error are willful violations. See *Five Star Parking d/b/a Five Star Taxi Dispatch*, Forfeiture Order, 23 FCC Rcd 2649, 2651 (EB 2008) (declining to reduce or cancel forfeiture for late-filed renewal based on licensee's administrative error). In the context of a forfeiture proceeding, "willful" does not require a finding that the rule violation was intentional. Rather, the term "willful" means that the violator knew that it was taking the action in question, irrespective of any intent to violate the Rules. See *Eure Family Limited Partnership*, Memorandum Opinion and Order, 17 FCC Rcd 21861, 21863-64 (2002) (licensee responsible for willful conduct of its contractor).

the local radio ownership rules.<sup>52</sup> Specifically, Finger Lakes argues that Saga, which is already at the local ownership limit for radio stations in the Ithaca radio market, is using its HD-2 and HD-3 services as quasi “studio-transmitter links” to feed programming to its FM translators creating an “over-the-local-ownership-limit situation.”<sup>53</sup> We disagree. The Commission clearly addressed this issue in its 2007 *Digital Audio Broadcasting Second Report and Order*, stating that FM stations may use their additional digital bit capacity as it wishes, as long as a licensee owning the maximum permissible number of stations in a particular market does not acquire additional broadcast streams on non-commonly-owned stations through time brokering agreements.<sup>54</sup> The Commission states that “a radio station must simulcast its analog programming service on its digital signal.”<sup>55</sup> Saga is doing so here. There is no current prohibition on FM translator stations re-broadcasting the alternate program streams aired on the parent station’s digital transmissions. Accordingly, we find Finger Lakes’ argument meritless.

16. Proposed Forfeiture. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.<sup>56</sup> Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.<sup>57</sup> The legislative history to Section 312(f)(1) of the Act clarifies that this definition of “willful” applies to both Sections 312 and 503(b) of the Act,<sup>58</sup> and the Commission has so interpreted the term in the Section 503(b) context.<sup>59</sup>

17. The Commission’s *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules and Section 503(b)(2)(A) of the Act,<sup>60</sup> establish a base forfeiture amount of \$32,500 for misrepresentation and/or lack of candor.<sup>61</sup> In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in Section 503(b)(2)(D) of the Act, including “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.”<sup>62</sup>

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<sup>52</sup> Supplemental Objection at 2.

<sup>53</sup> *Id.* at 4.

<sup>54</sup> See *Digital Audio Broadcasting Systems*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 10344, 10355-61 (2007).

<sup>55</sup> See *id.* at 10355.

<sup>56</sup> 47 U.S.C. § 503(b)(1)(B). See also 47 C.F.R. § 1.80(a)(1).

<sup>57</sup> 47 U.S.C. § 312(f)(1).

<sup>58</sup> See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

<sup>59</sup> See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

<sup>60</sup> 47 U.S.C. § 503(b)(2)(A).

<sup>61</sup> See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) (“*Forfeiture Policy Statement*”), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I. See also *Inflation Adjustment of Maximum Forfeiture Penalties*, Order, 69 FR 47788 (August 6, 2004).

<sup>62</sup> 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4).



18. Considering all of the enumerated factors and the particular circumstances of this case, we do find, however, that Saga apparently willfully violated Section 1.17(a)(2) of the Rules by providing incorrect factual information to Commission staff.<sup>63</sup> Although Saga sought dismissal of the License Application once it detected the incorrect technical information, its failure to exercise due diligence to ensure that the information it initially provided was correct consumed scarce Commission resources. Taking into consideration these facts and all of the factors required by Section 503(b)(2)(D) of the Act, the *Forfeiture Policy Statement*, and Section 1.17(a)(2) of the Rules, we propose to reduce the forfeiture from the base amount to \$10,000 for the false certification.<sup>64</sup>

#### IV. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that Saga Communications of New England, LLC, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of ten thousand dollars (\$10,000) for its apparent willful violation of Section 1.17 of the Commission's Rules and apparent willful violation of Section 301 of the Communications Act of 1934, as amended.

20. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release date of this *NAL*, Saga Communications of New England, LLC, SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

21. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank—Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code).

22. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Washington D.C. 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

23. 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

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<sup>63</sup> See, e.g., *Intelsat North America, LLC*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 9246, 9250 (EB 2006) (licensee provides incorrect material factual information to the Commission in violation of Section 1.17).

<sup>64</sup> See, e.g., *Access1 New York License Company, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 15205, 15209 (MB 2007) (imposing a \$10,000 NAL for licensee's false certification in its license renewal application regarding compliance with the Commission's public file requirements); *Cumulus Licensing LLC*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 13711, 13718 (MB 2007); *Applications of Citicasters Licenses, LP, and AM/FM Broadcasting Licenses, LLC*, Memorandum Opinion and Order, 22 FCC Rcd 19324, 19339 (MB 2007) (same).

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.

24. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director-Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.<sup>65</sup>

25. IT IS FURTHER ORDERED, that Finger Lakes' October 14, 2008, Informal Objection IS DISMISSED, as moot. IT IS FURTHER ORDERED, that Finger Lakes' October 31, 2008, Informal Objection and its supplement ARE GRANTED to the extent indicated above and ARE DENIED in all other respects.

26. IT IS FURTHER ORDERED, that Saga's application for minor modification of facilities (File No. BMPFT-20081030ACM) IS GRANTED.

27. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Saga Communications of New England, LLC, 73 Kercheval Avenue, Grosse Pointe Farms, Michigan 48236, and to its counsel Gary S. Smithwick, Esq., Smithwick & Belendiuk, PC, 5028 Wisconsin Avenue, N.W., Suite 301, Washington, DC 20016, Finger Lakes Radio Group, Inc., 3568 Lenox Road, Geneva, New York 14456, and to its counsel John F. Garziglia, Esq., Womble, Carlyle, Sandridge and Rice, PLLC, 1401 Eye Street, N.W., 7<sup>th</sup> Floor, Washington, DC 20005, and ROI Broadcasting, Inc., 3568 Lenox Road, Geneva, New York 14456.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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<sup>65</sup> See 47 C.F.R. § 1.1914.