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FILE

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

In re Applications of)
)
NORMANDY BROADCASTING CORP.)
)
For Renewal of License of)
Station WYLR(FM))
Glens Falls, New York)
)
and)
)
LAWRENCE N. BRANDT)
)
For A Construction Permit)
For a New FM Station)
Glens Falls, New York)
)

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To: Administrative Law Judge
Richard L. Sippel

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FEDERAL COMMUNICATIONS COMMISSION
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PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF LAWRENCE N. BRANDT

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SUMMARY

By Hearing Designation Order, DA 92-11, released January 21, 1992, ("HDO") the Chief, Audio Services Division, Mass Media Bureau, designated for hearing the application of Normandy Broadcasting Corp. ("Normandy") for renewal of license of Station WYLR(FM) ("WYLR"), Glens Falls, New York and the mutually exclusive application of Lawrence N. Brandt ("Brandt") for a construction permit for a new FM station to operate on the channel now utilized by WYLR. The HDO initially designated four issues to be resolved. The first issue, regarding a possible air navigation hazard relating to Brandt's tower height and location, was deleted by the Presiding Judge on February 13, 1992 (FCC 92M-200). The following three issues remain to be resolved:

(a) To determine whether the findings and conclusions about the character qualifications of Normandy in Barry Skidelsky, 6 FCC Rcd. 2221 (ALJ 1991), should disqualify Normandy in the Glens Falls renewal proceeding.

(b) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if either, of the applications should be granted.

Based on the written evidence and oral testimony presented in this proceeding, Brandt's application for a new station must prevail over Normandy's application for renewal of its license for WYLR. First, Issue (b) must be resolved against Normandy based on the findings of the ALJ in the Skidelsky case, in which Normandy was found to be disqualified on three separate misrepresentation issues. The ALJ found that Normandy:

(1) Designated a site for which it knowingly had no assurance;

- (2) So carelessly prepared its Threshold Showing, that it could not be relied upon and was in material respects exaggerated and untruthful; and
- (3) Not only did Normandy fail to report a contingent ownership interest, but its President's explanation of why he acted as he did was inconsistent with reliable, trustworthy behavior.

Second, even if Normandy is not disqualified under the Skidelsky issue, under the standard comparative factors, Brandt is the preferred applicant, based on its superior diversification proposal: Brandt has no other broadcast interests, while Normandy is the current licensee of WWSC, Glens Falls, New York, and has not made any pledge to divest itself of that interest.

Finally, the only way for Normandy to prevail over Brandt's diversification preference is for Normandy to receive a renewal expectancy. However, Normandy has not presented evidence sufficient to warrant a renewal expectancy. In fact, the record demonstrates that Normandy has almost completely disregarded its obligation to provide any public service programming. Normandy's programming consists solely of news, weather, sports, PSA's and promotions. Throughout the renewal period, Normandy aired no substantive public affairs programs over WYLR. This type of programming, at best, amounts to a "minimal" past programming record, and clearly does not warrant a renewal expectancy.

In light of the foregoing, the public interest would be best served by the denial of Normandy's application for renewal of its license for WYLR and the grant of Brandt's application for a new station.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF LAWRENCE N. BRANDT

I. Introduction

By Hearing Designation Order, DA 92-11, released January 21, 1992, ("HDO") the Chief, Audio Services Division, Mass Media Bureau, designated for hearing the application of Normandy Broadcasting Corp. ("Normandy") for renewal of license of Station WYLR(FM) ("WYLR"), Glens Falls, New York and the mutually exclusive application of Brandt for a construction permit for a new FM station to operate on the channel now utilized by WYLR. The HDO initially designated four issues to be resolved. The first issue, regarding a possible air navigation hazard relating to Brandt's tower height and location, was deleted by the Presiding Judge on February 13, 1992 (FCC 92M-200). The following three issues remain to be resolved:

(b) To determine whether the findings and conclusions about the character qualifications of Normandy in Barry Skidelsky, 6 FCC Rcd. 2221 (ALJ 1991), should disqualify Normandy in the Glens Falls renewal proceeding.^{1/}

(c) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(d) To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if either, of the applications should be granted.

The hearing sessions in this proceeding were held on August 4, 1992 and September 1, 1992. Upon the conclusion of the September 1, 1992 hearing, the record was closed. Lawrence N. Brandt, ("Brandt") by his attorneys, submits his proposed findings of fact and conclusions of law in this proceeding.

^{1/} This is the version of Issue (b) as modified by the Presiding Judge by Order 92M-381, released March 26, 1992.

II. Proposed Findings of Fact

A. Issue (b): The Skidelsky Issue. Issue (b), also referred to as "the Skidelsky issue" states the issue to be resolved as follows:

(b) To determine whether the findings and conclusions about the character qualifications of Normandy in Barry Skidelsky, 6 FCC Rcd. 2221 (ALJ 1991), should disqualify Normandy in the Glens Falls renewal proceeding.

The ALJ in Skidelsky disqualified Normandy on three issues. First, under the site misrepresentation issue, the ALJ concluded, based on the record, that "Normandy designated a site for which it had no assurance and that it knew when it designated the site that it had none." 6 FCC Rcd. at 2229. The ALJ noted that the assurance of an antenna site is one of only a few substantive questions about an applicant's proposal that is required on Form 301, and that Normandy's misrepresentation on this question raised serious questions about Normandy's qualifications:

If the Commission cannot rely on a truthful answer when so little is asked, it is unlikely that it will be able to do so when the applicant must act as a steward of the public interest over an extended period of time. Normandy has not established that it responded honestly when it told the Commission that it had reasonable assurance for the use of Mr. Abess' land. Id.

Second, the ALJ found that Normandy's Threshold Showing on its nonentertainment programming had been carelessly prepared, could not be relied upon and was in material respects untruthful. Id. The ALJ also found that Normandy's representations about the quantity of programming carried on WWSC/WYLR-FM turned out to be exaggerated or untruthful and that the stations' program logs

distorted the actual amount of time devoted to various program categories.^{2/} The ALJ concluded that:

The number and breadth of the errors in Normandy's Threshold Showing were more than exaggerations: Normandy's material claims were false or unsubstantiated. Normandy's Threshold Showing may not have been a planned deception but the showing was done with so little care, the errors were so pervasive and its response to the designated issue so inadequate that Normandy destroyed any possibility that the assertions about its broadcast record can be relied on. Id.

The ALJ also emphasized that, in the context of threshold showings, "irresponsible pleading merits serious condemnation." Amer. International Development, Inc., 86 F.C.C. 2d 808, 817 (1981). The most important criteria for licensees and applicants is truthfulness and complete candor; both of which the ALJ found Normandy to lack. 6 FCC Rcd. at 2229.

Finally, the ALJ found that not only did Normandy fail to report a contingent ownership, but that Mr. Lynch's explanation of why he acted as he did was inconsistent with reliable, trustworthy behavior. Id. at 2230. The ALJ noted that while this issue standing alone would not be disqualifying, the three misrepresentations combined made it:

evident that the Commission cannot rely on Normandy's representations in this proceeding and that there is a substantial likelihood that Normandy will not make a trustworthy licensee.

Id. at 2230-31.

^{2/} Moreover, the ALJ in Skidelsky also noted that although Normandy had the opportunity to present evidence to show that its programming was satisfactory, it had failed to do so. See Barry Skidelsky 6 FCC Rcd. 2221 at Note 3 (ALJ 1991).

On April 7, 1992, Brandt filed a "Motion for Summary Decision" in this proceeding to resolve Issue (b) against Normandy, based on the findings made in Skidelsky. In a Memorandum Opinion and Order, 92M-560, released May 15, 1992, ("Order") the Presiding Judge denied Brandt's motion based on KOED, Inc., 5 FCC Rcd. 1784 (1990). The Order held that despite the Review Board's instruction to the Presiding Judge in this case "not to relitigate the programming misrepresentation issue tried in this instant [Queensbury] proceeding," Normandy was nonetheless entitled, under KOED, to

introduce exculpatory evidence of a nature and to an extent that will mitigate the type of violative conduct found against Normandy in Barry Skidelsky. See KOED supra at 1785.

However, the Order also held that under the Commission's decision in Character Qualifications, 102 FCC 2d 1179, 1211, n.79 (1986), "meritorious programming [could] not mitigate serious deliberate misconduct such as misrepresentations to the Commission."

Therefore, the burden in this proceeding was on Normandy to present some kind of exculpatory evidence, other than evidence of meritorious programming, to mitigate the three misrepresentations found against it in Skidelsky. However, the evidence produced by Normandy in this proceeding to mitigate the Skidelsky findings consisted solely of information concerning Normandy's program service. Moreover, as discussed infra at § III(C), the programming service that Normandy proposed over WYLR not only was

not "meritorious," but can at best be characterized as "minimal" in the critical area of public service.

B. Comparative Issue

1. Normandy Broadcasting

a. Corporate Structure. Normandy is a New York corporation whose stock is 100% owned by Christopher P. Lynch ("Lynch"). Normandy Ex. 1.

b. Diversification. Normandy is the current licensee of Station WWSC, Glens Falls, New York. Brandt Ex. 2. Normandy has not made any commitment to divest itself of WWSC and, in fact, intends to continue to own and operate WWSC if its application for renewal of its license for WYLR is granted. Admission Session Tr. at 237.^{3/}

c. Integration. If WYLR's renewal is granted, Lynch will continue to devote forty hours or more per week as the station's General Manager. Normandy Ex. 2. Lynch has been a resident of Queensbury, New York (located within the service area of WYLR) for thirty-one years and has been the 100% owner and operator of WYLR since 1984. Lynch's civic activities include the Vietnam Veterans of America (board member of local chapter), American Heart Association (Chairman of the Board from 1975-1978), Planned Parenthood (Board of Directors) and Lower

^{3/} The transcripts of the proceedings in this case are cited herein as "Tr. ___" with reference to the applicable page or pages.

Adirondak Regional Arts Council (honorary lifetime membership).
Normandy Ex. 3/1-3/6.

d. **Auxiliary Power.** Normandy will continue to provide auxiliary power for WYLR. Normandy is also in the process of acquiring an emergency generator for WYLR's tower site. Normandy Ex. 5.

2. **Lawrence N. Brandt**

a. **Applicant Structure.** Brandt is an individual applicant and if his application is granted, he will own and operate the station as a sole proprietor. Brandt Ex. 1.

b. **Integration.** Brandt does not propose to be integrated into the day-to-day operations of the station. Brandt Ex. 1.

c. **Diversification.** Except for interests in multichannel multipoint distribution systems ("MMDS") in five communities, Brandt has no other mass media interests.^{4/} Brandt Ex. 1.

d. **Auxiliary Power.** Brandt will install auxiliary power generators at both the transmitter and studio sites of the station to ensure that the station will be able to remain on the air in the event of a power failure. Brandt Ex. 1.

C. **Renewal Expectancy: Non-Entertainment Programming**

1. **Relevant Time Period.** The relevant time period for purposes of determining Normandy's entitlement to a

^{4/} Brandt is the licensee of MMDS systems in Cleveland, OH, Buffalo, NY, Elmira, NY, Columbus, MS and Florence, SC.

renewal expectancy is the period from June 1, 1984 to April 30, 1991. Tr. 520-521. Hereinafter this will be referred to as the renewal period.

2. Community Ascertainment. Normandy conducts community ascertainment "periodically" by interviewing community leaders and members of the general public. Ex. 6/2. Normandy also consults with groups and agencies in the Glens Falls area. Normandy Ex. 6/2-6/4.

3. Public Affairs and Other Programming.
Normandy's claim for a renewal expectancy relies exclusively on "news, sports, weather, and PSA's."^{5/} Normandy Ex. 6/1. Normandy believes that "short announcements and live broadcasts" are the preferred public service format for the station:

because of WYLR's format and listenership, most public service and community affairs issues were covered through short announcements and live broadcasts.

Normandy Ex. 9/5. However, Normandy's Issues/Programs lists reveal that few, if any, of these PSA's and promotions were tied to any ascertained community issues. Brandt Ex. 3.

Moreover, throughout the renewal period, Normandy aired no substantive public affairs programs over WYLR. As explained by Normandy employee, Richard C. Dusenbery:

WYLR was, at the time, was a music intensive radio station, so, no, we would not --we would not format a talk public affairs program.

^{5/} Normandy also provides emergency broadcast service and makes WYLR accessible to all political candidates. Normandy Ex. 6/7, 6/8.

Tr. 705. For example, although Normandy has done live remotes at charitable events such as the Multiple Sclerosis Bike-a-thon, Normandy presented no evidence that any members of the Multiple Sclerosis Society ever appeared on WYLR to talk about the ailment. Tr. 537-538.

Normandy claims that it broadcasted approximately 110 public service announcements ("PSA's") per week, or an average of over 15 PSA's per day. Normandy Ex. 6/15. However, a review of two of WYLR's program logs^{6/} during the renewal period indicated that not a single PSA was logged as having run, despite the fact that PSA's were uniformly logged on Normandy's AM station, WWSC. Brandt Ex. 4 and 5, Tr. 591, 599. In addition, Normandy's basis for stating that the station ran 110 PSA's per week was based on Lynch's review of program logs for the week of February 11, 1992 - a week that was well outside of the relevant renewal period. Tr. 566-567.

Normandy also claims credit for the program "Tri-County Notebook," a community calendar, which Normandy claims ran 120 times per week, for approximately 30 seconds, for a total of one hour per week. Tr. 583, Ex. 6/15. This claim is exaggerated and inaccurate: a review of two of the station's actual logs reveals that Tri-County Notebook ran, on average, for 15 seconds per

^{6/} These logs were produced by Normandy in response to a "Supplemental Request for Production of Documents" filed by Brandt on May 28, 1992. The logs represent two days of a "composite week," which consists of randomly selected days over the renewal period.

spot, or a total of one-half hour per week- only half as long as Normandy claimed it ran. Brandt Ex. 4 and 5. The station logs also raise doubts as to whether Tri-County notebook actually ran as frequently as Normandy claims: according to the logs, this program was "checked off" by the disc jockey's very infrequently, while other spots, particularly commercial advertisements, were uniformly checked off, indicating that the commercial spot ran as scheduled. Tr. 573-583.

Below is a summary of Normandy's Issues/Programs lists for the entire renewal period (Brandt Ex. 3), which reveals that Normandy aired virtually no public service programming on WYLR during the majority of the renewal period^{7/}:

<u>1984</u>	No FM Programs
<u>1985</u>	No FM Programs
<u>1986</u>	News ^{8/}
<u>1987</u>	
1st Quarter:	News
2nd Quarter:	News

^{7/} The Issues/Programs lists cover both Normandy's AM and FM stations. It was established at the hearing in Skidelsky that the most commonly listed program, "Speak Up," aired only on the AM station. For some of the other programs, the station over which they aired is not listed. These are indicated with an asterisk (*).

^{8/} The Issues/Programs lists for 1986 and the first two quarters of 1987 contain no programs for the FM station. However, according to Lynch's testimony at the hearing, the newscasts listed under WWSC also ran on WYLR. Tr. 527-528.

3rd Quarter: One 2-1/2 hour program* and public service announcements (PSAs) over the July 4th holiday
4th Quarter: No FM programs

1988

1st Quarter: No FM programs
2nd Quarter: Two hour broadcast of radiothon and promotions about the event during one month
3rd Quarter: No FM programs
4th Quarter: PSAs; one live simulcast of a benefit concert

1989

1st Quarter: No list exists for this quarter
2nd Quarter: PSAs; one 3 hour remote
3rd Quarter: PSAs; one live simulcast of a rock concert, newscasts*; 2 hour broadcast of the election returns*; two 4 hour remotes
4th Quarter: PSAs; 11 hours of remotes*

1990

1st Quarter: PSAs; newscasts; live remotes totalling less than 25 hours*
2nd Quarter: No lists exist for this quarter
3rd Quarter: No lists exist for this quarter
4th Quarter: No lists exist for this quarter

1991

1st Quarter: No lists exist for this quarter
April: No lists exist for this quarter

In addition, Lynch himself conceded at several points in the Skidelsky hearing that WYLR's public service programming was inadequate. Specifically, Lynch admitted:

- That public service announcements aired by WYLR were minimal. Transcript of Proceedings in MM Docket 90-181 ("Skidelsky Tr.") at 733-34.

- That Normandy made no efforts to develop and air WYLR programs responsive to community problems. Skidelsky Tr. at 1019-1020.
- That Normandy's public file does not contain a list of issues concerning community. Skidelsky Tr. at 667-670.

Based on the original Issues/Programs lists submitted by Normandy in Skidelsky,^{9/} an issue was specified against Normandy to determine whether Normandy had an unusually poor broadcast record with respect to WYLR. In the Initial Decision in Skidelsky, the ALJ held that Normandy was not basically qualified and, thus, its application was not eligible for comparison. Therefore, the ALJ did not reach a conclusion on the issue of Normandy's poor broadcast record.^{10/} Id. at n.3. However, the ALJ did note with respect to Normandy's programming that "it is doubtful that Normandy carried any public affairs programming on WYLR" and that "the record does not reflect programming designed to discuss issues of public importance on WYLR." Id.

III. Proposed Conclusions of Law

A. Issue (b): "The Skidelsky Issue"

The fact that Normandy was found to have committed three separate misrepresentations in Skidelsky, and has failed to present any exculpatory evidence, in this proceeding, to mitigate

^{9/} In this proceeding, Brandt filed a "Supplemental Request for Production of Documents" on May 28, 1992, requesting that Normandy submit a complete copy of all WYLR Issues/Programs lists for the entire renewal period.

^{10/} On appeal, the Review Board upheld Normandy's disqualification and, thus, also did not reach the issue of whether Normandy's broadcast record at WYLR was unusually bad. Barry Skidelsky, FCC 91R-115 (released, January 2, 1992).

the Skidelsky findings, clearly disqualifies Normandy from continuing as the licensee of WYLR.

The Commission considers truthfulness and candor to be of the highest priority in evaluating its licensees. As stated in Policy Regarding Character Qualifications in Broadcasting Licensing:

misrepresentation or lack of candor to the Commission...should be considered as qualifications issues bearing on an applicant's likely future broadcast performance.... The act of willful misrepresentation not only violates the Commission's Rules; it also raises immediate concerns over the licensee's ability to be truthful in any future dealings with the Commission.

102 FCC 2d 1179 (1985). In light of the importance that the Commission places on truthfulness and candor from its licensees, Normandy's lack of these qualities, as evidenced by the ALJ's findings in Skidelsky, should disqualify Normandy from remaining the licensee of WYLR.

Moreover, Normandy has not met its burden, under the KOED standard, to produce evidence of a nature that will mitigate the type of violative conduct found against it in Skidelsky. First, the only type of evidence presented by Normandy in this proceeding relates to what it considers to be "meritorious" programming. As stated in Character Qualifications, supra, such evidence is insufficient to mitigate serious deliberate misconduct such as misrepresentations to the Commission. Second, even if evidence of meritorious programming could be considered as mitigating the misconduct found in Skidelsky, Normandy's programming, which consists solely of PSA's, live remotes at community events, and the standard news, sports and weather,

falls far short of what the Commission has determined to be "meritorious" or "substantial." In fact, as demonstrated below, the evidence demonstrates an extremely poor past record of public service programming. (See Section C, below).

Accordingly, because of the serious nature of the findings against Normandy in Skidelsky, and Normandy's subsequent failure, in this proceeding, to present evidence to mitigate these findings, Issue (b) should be resolved against Normandy, thus disqualifying it from remaining the licensee of WYLR.

B. Comparative Issue

If Normandy is not disqualified from remaining the licensee of WYLR based on the Skidelsky issue, this case must then be decided based on the standard comparative criteria set forth in the Policy Statement in Comparative Broadcast Hearings, 1 FCC 2d 393 (1965). Under the Policy Statement, the Commission considers diversification and integration of ownership and management to be of primary importance in determining which applicant is best qualified to serve the public interest. Id. Both Normandy and Brandt have presented evidence relating to diversification and integration, and thus these are the decisive factors to be considered in this case.^{11/}

With respect to integration, Normandy receives a preference over Brandt because Lynch will work full time at WYLR as the station's general manager. This 100% integration credit is also

^{11/} The only other comparative factor on which the applicants have presented evidence is auxiliary power. Because both applicants have proposed auxiliary power, neither applicant receives a preference in this regard.

enhanced by Lynch's local residence and civic activities.

Brandt, on the other hand, will not be integrated into the day-to-day management of the Station. Findings at § B(1) and (2).

However, Brandt receives a diversification preference over Normandy because, except for interests in multichannel multipoint distribution systems ("MMDS") in five communities, Brandt has no other mass media interests. Normandy, on the other hand, is the current licensee of WWSC in Glens Falls, New York, and has not made any commitment to divest itself of WWSC. In fact, it will continue to own and operate WWSC if its application for renewal of its license for WYLR is granted. Findings at § B(1)(b).

The Commission has held that it is of essential importance to the public that there are diverse and antagonistic sources of information available, with respect to both news and public affairs programs. First Report and Order on Multiple Ownership Standard, FM & Television Stations, 22 FCC 2d 306 (1971); see also Associated Press v. United States, 326 U.S. 1, 20 (1945). For this reason, when all other comparative criteria are equal, an applicant with a diversification preference prevails over an applicant with an integration preference. See 1965 Policy Statement, supra.

However, the courts and the Commission have also recognized that if a licensee can establish a renewal expectancy, it will outweigh the comparative advantages a challenger may have with respect to diversification and integration. Cowles Broadcasting, Inc., 86 FCC 2d 993, 1015 (1981), aff'd sub nom. Central Florida Enterprises, Inc. v. FCC, 683 F.2d 503 (D.C. Cir. 1982), cert.

denied, 460 U.S. 1084 (1983). Therefore, the only way Normandy can prevail over Brandt, is for Normandy to receive a renewal expectancy. As will be demonstrated below, Normandy has not presented evidence sufficient to warrant a renewal expectancy and thus Brandt's application for a new station must be granted over Normandy's application for renewal of WYLR.

C. WYLR's Renewal Expectancy

It is well established that, in a renewal proceeding, an incumbent's past performance is the best indication to the Commission of whether the public interest will be best served by granting the incumbent's renewal. Office of Communications of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Belo Broadcasting Corp., 47 FCC 2d 540 (1974). The licensee essentially "runs on its record, and when past performance is in conflict with the public interest, a very heavy burden rests on the renewal applicant to show how a renewal can be reconciled with the public interest." Simon Geller, 90 FCC 2d 250, 270 (1982) citing United Church of Christ, 359 F.2d at 1007. Although the Commission will consider all elements that bear on the public interest, the "central issue" is the licensee's responsiveness to the ascertained problems and needs of its community. Formulation of Policies Relating to the Broadcast Renewal Stemming From the Comparative Renewal Process, 66 FCC 2d 419, 429-430 (1977), aff'd sub nom. National Black Media Coalition v. FCC, 589 F.2d 578 (D.C. Cir. 1978). In order for an incumbent to qualify for a "legitimate renewal expectancy," the incumbent must prove that its past performance has been

"meritorious" or "substantial." Cowles Broadcasting, Inc. 86 FCC 2d at 1012-1014. On the other hand, if an incumbent only establishes that it has rendered "minimal" service, it is entitled to no renewal expectancy, nor any comparative preference whatsoever against competing applicants. Id. In the Report and Order on Deregulation, 84 FCC 2d 968, 989, n.53, recons. denied, 87 FCC 2d 797 (1981), the Commission explained what it considered to be "minimal performance:"

only that which would justify renewal in the absence of challenge by a competing applicant. It would consist of performance of all statutory obligations (i.e. Fairness Doctrine, access by candidates for federal elective office, etc.) and minimal although adequate, attention to the issues confronting the licensee's community primarily, and service area outside its community, secondarily.

A "substantial" performance can only be demonstrated by a showing of public service over and above what would be considered minimal. Broadcast Communications, Inc., 93 FCC 2d 1162, 1166 (1983).

In this case, Normandy, at best, has only established that its past record of WYLR amounts to a "minimal performance." The record reveals that Normandy has devoted minimal attention to the issues confronting the Glens Falls area. Even if Normandy's past record is classified as "adequate," although the record does not support such a finding, Normandy still would not be entitled to a renewal expectancy.

The evidence in the record demonstrates that Normandy has almost completely disregarded its obligation to provide any public service programming. First, the fact that an issue was added in the Skidelsky proceeding to determine whether Normandy's

broadcast record with respect to WYLR was unusually bad, combined with the ALJ's observations regarding the evidence with respect to WYLR's performance, establish a prima facie case that WYLR's programming has fallen far short of what is expected of a Commission licensee.

Second, the evidence established at the hearing in this case also reconfirmed that WYLR had no regularly scheduled public affairs programs. Findings at § C(3). WYLR's non-entertainment programming consists solely of news, sports, weather, and PSA's. Id. In addition, the summary of Normandy's Issues/Programs lists reveals that for the majority of the renewal period, Normandy aired virtually no public service programming that was tied to specifically ascertained issues of importance to the Glens Falls community. Id.

Moreover, there is no indication that Normandy's future performance at WYLR will be any more responsive to the issues of concern to Glens Falls community than it has been in the past. The testimony has revealed that Normandy has no intention of changing or expanding its public service format to provide any regularly scheduled public affairs programs. Instead, the Normandy "philosophy" is that the WYLR listenership is only interested in short announcements and remotes, rather than any more in-depth, substantive programming. Id. However, there is no indication that this format decision - to rely solely on PSA's and remotes - was arrived at based on any formal ascertainment of the community to verify that the WYLR listeners were not, in fact, interested in any public affairs programs.

In addition, with respect to the programs that Normandy does claim to have run, the record reveals that Normandy falsely describes the amount of public service programming aired on WYLR. The record shows that WYLR has "padded" the amount of time it actually devoted to programs such as Tri-County notebook and to PSA's, which thereby calls into question the accuracy of Normandy's representations in its evidentiary submission as to of the frequency and duration of other programs that it claims were aired over WYLR during the renewal period. Id. Perhaps most importantly, this evidence shows that Normandy has continued its practice of misrepresenting facts to the Commission as it did in the Queensbury proceeding, where the ALJ concluded that:

The number and breadth of the errors in Normandy's Threshold Showing were more than exaggerations: Normandy's material claims were false or unsubstantiated. Normandy's Threshold Showing may not have been a planned deception but the showing was done with so little care, the errors were so pervasive and its response to the designated issue so inadequate that Normandy destroyed any possibility that the assertions about its broadcast record can be relied on.

6 FCC Rcd. at 2229.

Normandy also tries to obtain meritorious credit for providing emergency broadcast service, and for making the station accessible to all political candidates. Id. However, these types of programs do not rise to the level of "meritorious programming;" rather, they are merely statutory obligations imposed on every licensee. According to the Deregulation Order, supra, at note 53, these types of programs are only considered "minimal" programming, and as such, do not count towards Normandy's claim for a renewal expectancy.

Based on Normandy's own evidentiary submissions, it is clear that WYLR's public service programming has consisted solely of PSA's, short announcements such as Tri-County notebook, news, weather, sports and live remotes at various local events. Over the course of the entire seven year renewal period, WYLR aired no substantive discussions of the issues facing the Glens Falls community. Moreover, the inaccuracies found in the record relating to the amount of time spent on public affairs programs raises serious doubts as to how extensively WYLR addressed any public affairs issues at all. This type of showing is clearly not "over and above" what an average broadcaster would air and thus does not qualify Normandy for a "substantial" programming rating, nor does it entitle Normandy to a renewal expectancy.

IV. Ultimate Conclusion

The evidence in this proceeding has shown that Issue (b) must be resolved against Normandy, thereby disqualifying it from receiving a renewal of its license for WYLR, because Normandy has failed to present any evidence to mitigate the misrepresentations found against it in the Skidelsky case. However, if Issue(b) is not resolved against Normandy, under the comparative factors, Brandt nonetheless prevails because Normandy has failed to prove that it is entitled to a renewal expectancy, and thus Brandt's

preference for diversification prevails over Normandy's
preference for integration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David Tillotson", written over a horizontal line.

David Tillotson
Kathleen L. Franco
Arent, Fox, Kintner, Plotkin &
Kahn
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October 9, 1992

CERTIFICATE OF SERVICE

I, Alethea R. Wilson, a secretary in the law office of Arent, Fox, Kintner, Plotkin & Kahn do hereby certify that a copy of the foregoing **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF LAWRENCE N. BRANDT** has been sent via U.S. Mail, First-Class postage prepaid this 9th day of October, 1992 to the following:

*Administrative Law Judge
Richard L. Sippel
Federal Communications Commission
2000 L Street, N.W., Room 212
Washington, D.C. 20554

*Paulette Laden, Esq.
*Gary Schonman, Esq.
Federal Communications Commission
Hearing Branch, Enforcement Division
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