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Report No. 17007

ACTION IN DOCKET CASE

May 21, 1982

GRANDBANKE CORPORATION GRANTED NEW FM STATION AT GLOUCESTER, MASS.;
SIMON GELLER DENIED RENEWAL
(DOCKET NOS. 21104-5)

The Commission has granted the application of Grandbanke Corporation for a new FM station at Gloucester, Mass., and denied the competing application of Simon Geller for renewal of station WVCA-FM, Gloucester.

The Commission said that, although Geller was basically qualified to be a Commission licensee, he deserved no renewal expectancy for his past program record and his application was inferior to Grandbanke's on comparative grounds.

The mutually exclusive applications were designated for hearing on February 25, 1977, on the standard comparative issue and on basic qualifying issues to determine Geller's efforts to ascertain community problems and the manner in which he proposed to meet them (ascertainment issue), and whether Geller's nonentertainment programming was reasonably responsive to community problems, needs and interests during the 1972-1975 licensing period (past programming issue).

Later, an issue was added to determine which of the applicants' program proposals would better serve the public interest.

In an initial decision released June 19, 1978, FCC Administrative Law Judge John H. Conlin resolved the basic qualifying issues in Geller's favor and concluded that a grant of Geller's application would better serve the public interest. Grandbanke and the FCC Broadcast Bureau appealed this judgment to the Commission and oral argument was heard by the entire Commission on January 12, 1982.

The Commission found that although Geller did not substantially comply with the FCC's ascertainment requirements, there was no evidence that he acted in bad faith or was unwilling to conform to Commission requirements had his resources permitted. On the contrary, the Commission said, "the evidence amply supports the ALJ's finding that Geller's ascertainment deficiencies were a direct result of his limited resources, lack of staff and physical handicap". Therefore, it found Geller qualified under the ascertainment issue.

In specifying the past programming issue for hearing, the Commission noted that WVCA's composite week for the 1972-1975 license term reflected less than one percent nonentertainment programming and did not list any programs presented in response to community needs. The rest of Geller's programming was devoted almost exclusively to symphonic music.

(over)

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The Commission said that while Geller's programing was lacking in news and public affairs programing, his performance satisfied, and even exceeded, the nonentertainment program proposals contained in his preceding renewal application (covering the 1972-1975 license period). The Commission said that when the Broadcast Bureau approved the application, the Bureau did not question the adequacy of Geller's proposal or its underlying rationale.

Consequently, the Commission said, it would be unfair to penalize Geller for having complied with his representations to the Commission in good faith and his inadequate past performance should not be a ground for his disqualification.

However, the Commission noted, Geller's inadequate past performance "reflects poorly on the likelihood of future service in the public interest." Further, it found that Geller had no "legitimate renewal expectancy" because his past performance was neither "meritorious" nor "substantial."

Because his past record entitled Geller to no renewal expectancy, the Commission said, this case must be decided like an ordinary comparative proceeding where all applicants are competing for a new station. The Commission noted that the criteria for evaluating applicants in such a proceeding are those set forth in the 1965 Policy Statement on Comparative Broadcast Hearings. The Commission there identified the primary objectives of the comparative process as the "maximum diffusion of control of the media of mass communications" and the "best practicable service to the public."

In analyzing the best practicable service issue, the Commission looks at a variety of factors, including integration of ownership with management, efficient use of the frequency and proposed program service.

The Commission said it was undisputed that Geller deserved a preference under the diversification criteria since, unlike Grandbanke's principals, he owns no other media interests. Three of Grandbanke's shareholders together own North Country Communications, Inc., licensee of WNCS(FM), Montpelier, Vt., and Edward Mattar, Grandbanke's 66 percent shareholder is 100 percent stockholder in Northbanke Corporation, licensee of a new class A FM station at Winchendon, Mass.

The Commission said Geller's preference was diminished by his failure to provide adequate informational programing. Therefore, his ownership of the station did not promote the underlying rationale of granting this preference -- the widest possible dissemination of information from diverse sources.

Similarly, the preference Geller received for his 100 percent integration of ownership with management is diminished since the Commission's concern is to increase the likelihood of greater sensitivity to an area's changing needs and the programing designed to serve those needs and Geller's programing makes no attempt to address the community needs.

The Commission awarded Grandbanke a substantial preference for its proposed programing, noting the differences between the two applicants' program proposals were both material and substantial. Geller proposed to continue his present format, consisting almost entirely of classical music, with less than one percent information programing, none of which is designed to respond to ascertained community needs.

Grandbanke, on the other hand, proposes a program of community service which the ALJ found to be "substantial and ambitious." It will devote 16.9 percent of its broadcast week to news, 55 percent of which will be local and regional. Another 11.8 percent of its air time will be devoted to public affairs and other nonentertainment programing. The Commission noted that the program proposal was developed in response to ascertained community needs. Moreover, it added, many of the programs will be locally produced and will directly involve local community leaders and the public. In addition, Grandbanke proposed to provide service to 360,000 people, while Geller provides service to only 43,000.

On balance, the Commission said, Grandbanke's better programing proposal and considerably longer broadcast week (136 hours v. Geller's 44 hours a week proposal), outweighed Geller's diminished preferences for diversification and integration. and, therefore, Grandbanke's application would be granted.

Action by the Commission May 20, 1982, by Decision (FCC 82-243). Commissioners Fowler (Chairman), Fogarty, Dawson and Rivera with Commissioners Quello and Washburn dissenting and issuing a separate statement. Commissioner Jones will vote later on circulation.

SUMMARY OF DISSENTING STATEMENT BY COMMISSIONERS WASHBURN AND QUELLO ON GELLER DECISION

We dissent from the majority's decision today because the denial of Simon Geller's renewal application on comparative grounds is unsupported by substantial record evidence and directly conflicts with government precedent.

As an initial matter, we reject the majority's characterization of Geller's past broadcast record as "inadequate" and therefore entitled to no renewal expectancy. In our judgment, the evidence amply supports the ALJ's determination that "WVCA has been uniquely responsive to needs and interests of the listening public and...a loss of the service it has provided for many years would be deeply felt." On the strength of his record, we believe that Geller deserves a substantial renewal expectancy.

We also believe that the majority turns the Commission's 1965 Policy Statement on its face and ignores the 1978 court decision in Central Florida Enterprises by applying a functional approach to the issues of diversification and integration, and by diminishing Geller's obvious, strong preferences under those factors.

Finally, under the proposed programming issue, we agree with the ALJ's conclusion that a choice between Geller and Grandbanke cannot reasonably be made. Assuming for the sake of argument, however, that Grandbanke does deserve a preference under this issue, we believe that its credit should be less than substantial since Grandbanke has not demonstrated a need for all types of programming it proposes.

For seventeen years, the Commission has struggled to interpret its Policy Statement in a fair and just manner. Not once has it determined that a licensee was so deficient in serving its community that denying renewal on comparative grounds was warranted. In its eagerness to reach that result today, the majority grossly distorts our comparative renewal policy and, in the process, disserves the people of Gloucester, who have enjoyed Simon Geller's service for 18 years.

MAY 20, 1982

DISSENTING STATEMENT OF COMMISSIONER ABBOTT WASHBURN AND JAMES QUELLO

RE: Applications of Simon Geller and
Grandbanke Corporation

At the core of its adjudicatory function, the Commission has a fundamental responsibility to base its decisions on substantial record evidence, to follow applicable precedent, and to supply a well-reasoned analysis for its conclusions. 1/ Today the majority abdicates that duty by denying on comparative grounds Simon Geller's renewal application for Station WCA-FM and granting the competing application of Grandbanke Corporation. 2/ Even under the most elastic interpretation of governing precedent and the hearing record, the award of Grandbanke's application cannot stand.

Renewal Expectancy

As an initial matter, we reject the majority's characterization of Geller's past broadcast record as "inadequate" and therefore entitled to no renewal expectancy. In our judgment, the evidence amply supports the ALJ'S determination that "WCA has been uniquely responsive to needs and interests of the listening public and...a loss of the service it has provided for many years would be deeply felt." 3/ On the strength of his record and other related factors, we believe that Geller deserves a substantial renewal expectancy.

It is well established, and the majority recognizes, 4/ that an

1/ See Miner v FCC, 663 F.2d 152, 155 (D.C. Cir. 1980) and cases cited therein.

2/ We concur with the majority's judgment that Geller is basically qualified to be a Commission licensee. However, we disagree with the Commission's poor assessment of Geller's past record and its suggestion that only the equities discussed in Para. 30 of the Decision justify a resolution of the qualifying issue in his favor. In our opinion, Geller's record to the citizens of Gloucester standing alone justifies his qualifications and, as discussed below, the grant of a renewal expectancy. See Patrick Henry, 59 FCC 2d 1204, recons. denied, 62 FCC 2d 293 (1976).

3/ Initial Decision Conclusion 6.

4/ Commission Decision, Para. 39.

incumbent's past performance affords the Commission the strongest and most reasonable basis for determining whether the public interest will be served by its renewal. In evaluating past service, however, the Commission and the courts have acknowledged that broadcasters have broad discretion. 5/ Thus, although the number of hours or percentage of time devoted to nonentertainment programming has always been a consideration in licensing cases, the Commission's ultimate concern has always been not with the time devoted to such programming, but rather with whether that programming can reasonably be expected to meet community needs. 6/

It is against this background which Geller's past record must be evaluated. The evidence shows that, although Geller offered little nonentertainment programming, his program judgments violated no Commission Rules 7/ and reflected a reasonable exercise of discretion. Geller has fulfilled his programming representations to the Commission diligently and there is no indication that he has ever been admonished or reprimanded by the Commission for violating its rules. 8/ Moreover, although Geller's profits have been small, he has reinvested them to improve his service to the listening public by increasing the amount of his informational programming and his hours of service. 9/ Most noteworthy, however, is

5/ As the ALJ noted (Initial Decision Conclusion 3), the only quantitative program standards the Commission has ever promulgated were "procedural rather than substantive," it being recognized that "[t]he amount and kind of programming to be broadcast...is left largely to the reasonable, good-faith judgment of the individual licensee." Amendment to Section 0.281, 59 FCC 2d 491 (1976). Under our recent Report and Order on Deregulation of Radio (Deregulation Order), 84 FCC 2d 968, 971, recons. denied, 87 FCC 797 (1981), even these guidelines have been eliminated. See also Columbus Broadcasting Coalition v. FCC, 505 F. 2d 320, 327 (D.C. Cir. 1974): "Programming is a matter left largely in the discretion of the licensee and can never be measured by a simple percentage test."

6/ This concern underlies the Designation Order in this proceeding, 65 FCC 2d 161 (1977) as well as our Deregulation Order, supra.

7/ See n. 5, supra.

8/ Initial Decision Conclusion 2.

9/ Initial Decision Finding 7, 34. In Citizens Communications Center v. FCC, 447 F. 2d 1201 (D.C. Cir. 1971), clarified, 462 F. 2d 822, 823 (1972), the Court of Appeals suggested specific criteria for use in determining whether an incumbent had performed in a "superior" manner, including (1) elimination of excessive and loud advertising; (2) delivery of quality programs; (3) the extent to which the incumbent

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Geller's reputation in the community. Because of the unique position WVCA listeners are in to judge the station's day-to-day performance, their uniform praise for the station's accomplishments is persuasive evidence of its meritorious service to the community. 10/

In light of these considerations, we submit that Geller has demonstrated a strong, unique and continuing commitment to the community which is far above a level of service which would minimally warrant renewal. Accordingly, we believe that the majority errs by failing to accord Geller a substantial renewal expectancy and preference for his past broadcast record. In our opinion, moreover, the Commission compounds this error by ignoring its own recent rationale for granting a renewal expectancy in Cowles Broadcasting, Inc. 11/ There we stated that:

The justification for a renewal expectancy is threefold. (1) There is no guarantee that a challenger's paper proposals will, in fact, match the incumbent's proven performance. Thus, not only might replacing an incumbent be entirely gratuitous, but it might even deprive the community of an acceptable service and replace it with an inferior one.

(2) Licensees should be encouraged through the likelihood of renewal to make investments to ensure quality service. Comparative renewal proceedings cannot function as a "competitive spur" to licensees if their dedication to the community is not rewarded. (3) Comparing incumbents and challengers as if they were both new applicants could lead to a haphazard restructuring of the broadcast industry

had reinvested the profit from his license to the service of the viewing and listening public; (4) diversification of ownership of mass media; and (5) independence from governmental influence in promoting First Amendment objectives. Under all of these criteria, we would submit, Geller's broadcast record has been superior.

10/ Initial Decision Finding 11, Conclusion 5, n. 15. WVCA listeners who testified in Geller's behalf stated that other local sources fully satisfied their need for news and public affairs information. Tr. 51, 57, 60-61, 65, 67, 68, 70, 74, 78, 79-80, 85-86, 92, 107, 110, 114, 117, 122, 127, 133, 144, 145, 160, 167, 181, 188, 194, 204, 385, 401. These witnesses also testified that WVCA's programming adequately served their needs and interests. Tr. 53, 68, 70, 74, 78, 82, 99, 105, 108, 112, 117, 122, 130, 168. In the opinion of one listener, "almost no one in Gloucester...gives more to the community and the quality of life here for less return than does Simon Geller." Tr. 146.

11/ 86 FCC 2d 993, 1013 (1981)

especially considering the large number of group owners.
[Citation omitted.] We cannot readily conclude that such a restructuring could serve the public interest.

In our judgment, the above justifications are pertinent to this proceeding and further buttress the renewal expectancy Geller rightly deserves.

Other Comparative Factors

Even if the majority's conclusion that Geller deserves no renewal expectancy is correct, we believe that Geller's overall superiority with respect to Grandbanke under the standard comparative factors 12/ is so substantial that it warrants a grant in his favor. In our judgment, Geller should receive substantial preferences under both the diversification and integration criteria. Under the proposed programming issue, neither applicant deserves a preference, although if a preference must go to Grandbanke, it should be no more than moderate. 13/ In sum, we believe that Geller's preferences outweigh those of Grandbanke, making him the preferred applicant.

As the majority properly notes, under our 1965 Policy Statement we announced that the two primary objectives toward which comparisons would be directed were (1) maximum diffusion of control of the media of mass communications (diversification), and (2) the best practicable service to the public. Of these, we identified diversification as "a factor of primary significance since...it constitutes a primary objective in the licensing scheme." 14/ Of the factors to be considered under the criterion of best practicable service, we identified integration as "of substantial importance." 15/

12/ Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965).

13/ We concur with the majority's determination that Grandbanke's preference for its more efficient use of the frequency should be only slight.

14/ 1 FCC 2d at 394.

15/ Id. at 395.

Diversification of Ownership of Media Mass Communication

In the instant proceeding, Grandbanke principals own two other media interests in New England, while Geller owns none. 16/ Although the majority concedes (and Grandbanke admits) that Geller is superior under diversification, it then proceeds to discount that superiority on the basis of his alleged failure to provide a diverse and antagonistic voice in the community. In our opinion, this functional analysis is fallacious.

Under the 1965 Policy Statement, the Commission's approach to diversification was plainly structural, looking only to the extent of the applicants' ownership and control of other media, and not to the manner in which those media were operated. The functional approach enunciated by the majority today is clearly at odds with this long-standing policy and strikingly similar to the analysis rejected by the Court of Appeals in Central Florida Enterprises, Inc. v. FCC. 17/ In Central Florida, the court expressed, inter alia, a concern that a functional approach to diversification might raise serious First Amendment questions by requiring the Commission to inquire into program content. Although it denies doing so, the majority today justifies that concern by making a subjective judgment regarding the value of Geller's entertainment format, on the one hand, and informational programming on the other. Under its functional analysis, moreover, the majority curiously ignores the testimony of WCA listeners that Geller was indeed promoting the goals of diversification by providing a unique service to the community. 18/

16/ Since the Initial Decision, Northbanke Corporation's application for a new FM station in Winchendon, Massachusetts has been granted, making the disparity between Grandbanke and Geller under diversification even greater.

17/ 598 F. 2d 37 (D.C. Cir. 1978), cert. dismissed, 441 U.S. 957 (1979).

18/ Initial Decision Finding 11. As the majority itself recognizes, the Commission's goal of promoting programming diversity encompasses entertainment as well as informational programming. See, e.g., WNCN Listeners Guild, 450 U.S. 582 (1981). In our opinion, the majority also errs by giving "double weight" to Geller's broadcast practices, considering them not only under the pertinent programming

Consistent with the court's decision in Central Florida and the Commission's own recent ruling in Cowles, 19/ we believe that the only acceptable approach to apply to the diversification criterion is a structural one. Under governing precedent, applicants such as Geller owning no other media of mass communications have received substantial preference for diversification over applicants holding other interests, even where there is no overlap of service areas. 20/ Applying this rule, Geller should receive a substantial and undiminished preference for diversification.

Integration of Ownership with Management

The majority's functional approach to integration is similarly misguided. Under the 1965 Policy Statement, our approach to integration was again structural. We stated that we were primarily interested in full-time participation and would look to the positions participating owners would occupy. In weighing integration proposals, we stated that we would also consider the attributes of participating owners, such as their experience and local residence. Thus we held that, "[w]hile...integration of ownership and management is important per se, its value is increased if the participating owners are local residents and if they have experience in the field." 21/

Under these standards, Geller's 100% integration proposal, enhanced by his 40 years broadcast experience and local residence, deserves a clear, substantial preference over Grandbanke's proposal of only 66% integration. 22/ The majority's

issues, but under the diversification and integration issues as well. See Grand Broadcasting Co., 36 FCC 925, 929 (1964).

19/ 86 FCC 2d at 1009.

20/ See Henderson Broadcasting Co., Inc., 63 FCC 2d 419, 426 (Rev. Bd. 1977), Billy D. Pirtle, 43 FCC 2d 670, 671 (Rev. Bd. 1973), East St. Louis Broadcasting Co., Inc., 29 FCC 2d 170, 175 (1971), and Snake River Valley Television, Inc., 26 FCC 2d 380, 384-385 (Rev. Bd. 1970), review denied, FCC 71-549, released May 26, 1971.

21/ 1 FCC 2d at 395, 396.

22/ See Radio Gaithersburg, Inc., 72 FCC 2d 821, 828 (Rev. Bd. 1979), review
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attempt to diminish this preference is inconsistent with the clear mandate of the 1965 Policy Statement and, like its approach to diversification, strikingly similar to the analysis rejected by the court in Central Florida, supra. The majority's treatment of integration deprives Geller of his right to a full hearing and is unreasonable on its face. 23/

Proposed Programming

In our judgment, the record amply supports the ALJ's conclusion that on the proposed programming issue a choice between Geller and Grandbanke cannot reasonably be made. Both proposals have merit and each in its own way would provide a meritorious service. 24/ Assuming for the sake of argument, however, that Grandbanke does deserve a preference under this issue, the record does not warrant the substantial credit granted by the majority.

The record shows that, although Grandbanke proposes to devote 16.9% of its broadcast time to news (45% non-local and 55% local and regional) Grandbanke has not related its superiority in this regard to ascertained community needs, as required by Commission precedent. 25/ In Exhibit 11 of its application, for instance, Grandbanke admits that other stations in the area provide non-local news. Moreover, not one of the respondents of Grandbanke's community leader and general public surveys for Gloucester identified the city's lack of local news coverage as a problem. 26/ Grandbanke has merely inferred a need for local news from an unsupported conclusion that "people want to know what their government leaders are

denied, FCC 80-734, released December 4, 1980.

23/ 598 F.2d at 56. In my opinion, the majority also errs by considering Geller's programming under the integration factor, thereby giving his alleged program deficiencies double weight. See n.18, supra.

24/ Initial Decision Conclusions 17, 18.

25/ See Chapman Radio and Television Co., 7 FCC 2d 213 (1967).

26/ Exhibits 5-C and 5-D of Grandbanke's application. Such a finding would be consistent with the testimony of WVCA listeners that they relied on Gloucester's local newspaper and other area stations for news coverage. Initial Decision Finding 11.

doing." 27/ Regarding the regional news proposal, it is also significant that only two of the 56 leaders of communities near Gloucester cited the lack of news coverage as a problem. 28/ Against this background, we believe that Grandbanke deserves no credit for its 16.9% news proposal. 29/ Moreover, unlike the majority, we believe Grandbanke should receive no additional preference for its longer hours of operation, since those of Geller are adequate. 30/ Accordingly, we believe it should receive no more than a slight to moderate preference for its proposed programming

Overall Comparison

In sum, we believe that under the standard comparative criteria Geller deserves substantial preferences for his diversification and integration proposals, while Grandbanke should receive no more than a moderate preference for its proposed programming and a slight preference for its efficient use of the spectrum. Since diversification stands alone as one of the two primary objectives of the 1965 Policy Statement, under applicable Commission precedent Geller's substantial preference in this area clearly outweighs the lesser preferences Grandbanke deserves for individual elements of best practicable service. 31/ Geller's preferences for integration and his past broadcast record enhance his superiority even more. On balance, therefore, Geller is the best qualified applicant in this proceeding and his license should be renewed.

For seventeen years, the Commission has struggled to interpret its Policy Statement in a fair and just manner, and not once has it determined that a licensee

27/ Exhibit 6 of Grandbanke's application.

28/ Exhibit 5-C of Grandbanke's application (surveys of Rockport and Essex).

29/ Cf. Community Broadcasters, Inc., 35 FCC 2d 714, 720 (Rev. Bd. 1972), where a requested programming issue was denied because only one reference to local news was found in the applicant's ascertainment survey.

30/ See WHDH, Inc., 16 FCC 2d 1, 16 (1969) and Flower City Television Corp., 9 FCC 2d 264 (1967).

31/ See Terre Haute Broadcasting Corp., 25 FCC 2d 348 (Rev. Bd. 1970), and cases cited therein. Accord, Colorado West Broadcasting, Inc., 57 FCC 2d 526, 530 (Rev. Bd. 1976), review denied, FCC 76-839, released September 8, 1976; and Snake River Valley Television, Inc., 26 FCC 2d at 387.

was so deficient in serving its community that denying renewal on comparative grounds was warranted. 32/ In its eagerness to reach that result today, the majority distorts our comparative renewal policy beyond recognition and, in the process, disserves the people of Gloucester, who have enjoyed Simon Geller's service for eighteen years. We dissent.

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32/ Central Florida Enterprises, Inc. v. FCC, 598 F. 2d at 61. This does not include the case of WHDH-TV, Boston, Massachusetts, which was treated as though it were a comparative proceeding between "new" applicants. See Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).