

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

FCC 92M-560
02794

MAY 13 9 14 AM '92

In re Application of)	MM DOCKET NO. 92-6
)	DISPATCHED BY
NORMANDY BROADCASTING CORP.)	File No. BRH-910129UR
)	
For Renewal of License of)	
Station WYLR(FM))	
Glens Falls, New York)	
)	
and)	
)	
LAWRENCE N. BRANDT)	File No. BPH-910430MB
)	
For a Construction Permit)	
for a New FM Station on 95.9 MHz)	
at Glens Falls, New York)	

MEMORANDUM OPINION AND ORDER

Issued: May 13, 1992;

Released: May 15, 1992

1. This is a ruling on a Motion For Summary Decision that was filed by Lawrence N. Brandt ("Brandt") on April 7, 1992. Mass Media Bureau's Comments on Motion For Summary Decision was filed on April 21, 1992. Normandy Broadcasting Corporation ("Normandy") filed its opposition styled Reply To Petition For Summary Judgment on May 5, 1992. Also, on May 5, 1992, Brandt filed an unopposed Request For Leave To File and a proposed Reply to the Bureau's Comments which will be considered.

2. The following issue was set in the hearing designation order, as modified by the Presiding Judge:

To determine whether the findings and the conclusions about the character qualifications of Normandy in Barry Skidelsky, 6 F.C.C. Red 2221 (Admin. L.J. 1991) should disqualify Normandy in the Glens Falls proceeding.

See Order FCC 92M-81, released March 26, 1992. It is that issue on which Brandt seeks summary disqualification against Normandy, the renewal applicant. As Brandt notes, the Presiding Judge in an unrelated comparative proceeding for an FM station in Queensbury, New York resolved three basic qualifications

1 Normandy has relied on the Bureau Comments in which it joins. Brandt represents in its Request For Leave that the Bureau has indicated that it has no objection to consideration being given to Brandt's Reply. Since Normandy has committed its position to the Bureau's, Brandt's Reply is considered as an unopposed pleading.

issues against Normandy based on misrepresentations concerning site availability, a threshold showing of past broadcast record, and a misrepresentation of ownership interests. There the Judge ultimately concluded that "it has not been established that [Normandy] can be relied upon to provide truthful information to the Commission." Barry Skidelsky, 6 F.C.C. Rcd 2221, 2232 (Admin. L.J. 1991).

3. The Bureau agrees with Brandt that the findings and conclusions with respect to Normandy's qualifications which were made by the Judge in the Queensbury Initial Decision "cannot be revisited and that Normandy is bound by the findings and conclusions in the Initial Decision." Since Normandy has in its Reply pleading adopted the Bureau's argument and analysis, there is nothing further to consider from the parties with respect to the collateral estoppel effect that will be given herein to the Queensbury Judge's findings and conclusions against Normandy. See RKO General, Inc., 82 F.C.C. 2d 291, 312 (Comm'n 1980) (doctrine of collateral estoppel spares the necessity of relitigating the same matters heard before). See also RKO General, Inc., 94 F.C.C. 2d 890, 894 n. 15 (Comm'n 1983) (collateral estoppel bars relitigation of the same issues in subsequent proceedings involving the same parties or their privies) and Ocean Pines FM Broadcasting Partnership, 4 F.C.C. Rcd 3490 (Review Bd 1989) (held not error for presiding judge in adding issue to consider the real party-in-interest findings and conclusions of another judge in a collateral proceeding).

4. Moreover, in this case, this Presiding Judge has been instructed by the Review Board to "not relitigate the programming misrepresentation issue tried in this instant [Queensbury] proceeding." Barry Skidelsky, 7 F.C.C. Rcd 1392 (Review Bd 1992). The same outcome of collateral estoppel would equally apply to the other two misrepresentation issues resolved against Normandy in the Barry Skidelsky Initial Decision. Then the ultimate issue for resolution here is whether those prior adverse findings and conclusions should disqualify Normandy in this proceeding where he is the renewal applicant for the Glens Falls Station WYLR(FM). Id. In that regard, the Review Board further noted that:

[T]he Ocean Pines ALJ permitted the applicant to adduce any additional evidence it believed was exculpatory. [Citations omitted.]

Id. (Emphasis in original.) The Bureau argues that the receipt of relevant exculpatory evidence must be taken. Brandt argues that no such exculpatory evidence need be received. It appears that the law of the case as set by the Review Board prescribes that there be no relitigation of the Queensbury misrepresentation issues but that Normandy be permitted to adduce additional exculpatory evidence. Id. Therefore, this case is not ripe for summary decision at this time. See also KQED, Inc., 5 F.C.C. Rcd 1784 (Comm'n 1990) (subsequent history omitted) (Comm'n findings of misrepresentation concerning one station does not require a denial of renewal for other stations).²

² Normandy will receive its day in court so long as its evidence is not directed to the negative findings in Barry Skidelsky. The burden remains with

Accordingly, IT IS ORDERED that the Motion For Summary Decision filed by Lawrence N. Brandt on April 7, 1992, IS DENIED at this time.

IT IS FURTHER ORDERED that the findings and conclusions with respect to the qualifications of Normandy Broadcasting Corp. which were made in the Initial Decision in Barry Skidelsky (6 F.C.C. Red 2221) cannot be revisited in this proceeding ³ and Normandy Broadcasting Corp. is bound by the findings and conclusions in that Initial Decision.

IT IS FURTHER ORDERED that the procedural and trial dates set in Order FCC 92M-381 ARE NOW REACTIVATED ⁴ and the parties shall prepare for hearing previously set for **September 8, 1992**, to receive the exculpatory evidence of Normandy Broadcasting Corp.

IT IS FURTHER ORDERED that **by June 5, 1992**, Normandy SHALL SERVE AND FILE its proffer and contentions of relevant exculpatory evidence that it intends to rely on at the hearing. ⁵

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Richard L. Sippel
Administrative Law Judge

Normandy 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 KQED supra at 1785. It is recognized that there is an apparent tension created between permitting Normandy to put on exculpatory proof and the policy of the Commission that meritorious programming does not mitigate serious deliberate misconduct such as misrepresentations to the Commission. Character Qualifications, 102 F.C.C. 2d 1179, 1211 n.79 (1986). But the holding of the Commission in KQED, Inc. and the Review Board's instruction in Barry Skidelsky to consider exculpatory evidence will be applied here and Normandy will be required to disclose its exculpatory evidence, after which the parties will need to focus on the "complex legal and policy issues" in the context of a complete record. Barry Skidelsky at 1393, Para. 10.

³ See WI00, Inc., 54 Radio Reg. 2d 1291, 1299 (Comm'n 1983) (proffered exhibits relevant to motivation in connection with previously litigated and decided violations were properly rejected by trial judge under doctrine of collateral estoppel).

⁴ The previously set procedural dates start with June 22, 1992 (complete discovery and submit Status Report on Stipulations).

⁵ A copy of this ruling was mailed to Normandy's pro se principal on the date of its issuance.