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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

JUN 23 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM DOCKET NO. 92-6
NORMANDY BROADCASTING CORP.)	File No. BRH-910129UR
For Renewal of License of)	
Station WYLR(FM) (95.9 MHz))	
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)	

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To: Administrative Law Judge
Richard L. Sippel

RESPONSE TO PROFFER OF EVIDENCE

Pursuant to the Order FCC 92M-601 released in this proceeding on May 26, 1992, Lawrence N. Brandt ("Brandt"), by his attorneys, hereby responds to the "Proffer of Evidence" ("Proffer") that Normandy Broadcasting Corporation ("Normandy") filed in this proceeding on June 12, 1992.

The Proffer sets out the "exculpatory evidence" that Normandy intends to rely on at the hearing in this proceeding as exculpating or mitigating the misrepresentations that Normandy was found to have committed by the Review Board's decision in Barry Skidelsky, 7 FCC Rcd 1392 (Rev. Bd. 1992). In its Proffer, Normandy lists eight categories of evidence that it intends to submit for this purpose.

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It has been, and remains, Brandt's position, that, as a matter of law, there is no additional evidence that Normandy can present that would either "exculpate" or "mitigate" the misrepresentations found in Barry Skidelsky and that the only question that remains to be decided in this proceeding with respect to those misrepresentations is whether or not they disqualify Normandy from continuing as the licensee of WYLR(FM). However, in view of the presiding judge's ruling that Normandy must be afforded an opportunity to present exculpatory or mitigating evidence, Brandt offers the following brief comments on the Proffer of such evidence.

First, Brandt notes that, with the exception of the evidence referred to in ¶4 of the Proffer, none of the evidence that Normandy proposes to present is "exculpatory." To be exculpatory, the evidence must "clear from alleged fault or guilt." Webster's New Collegiate Dictionary (1981 ed.) Moreover, in so far as the evidence described in ¶4 of the Proffer would come within the definition of "exculpatory," the presiding judge has expressly ruled that "exculpatory" or "mitigating" evidence will only be received in so far as it "is not directed to the negative findings in Barry Skidelsky." Memorandum Opinion and Order, 92M-560 released May 15, 1992 at note 2. The evidence described in ¶4 is clearly directed at the negative findings in Barry Skidelsky and, thus, is barred by the presiding judge's previous ruling.

The balance of the evidence that Normandy proposes to offer is in the nature of mitigation. Brandt submits that none of the evidence described in the Proffer can properly be considered as mitigating the effects of the misrepresentations that Normandy has been found guilty of. The fact that Mr. Lynch may have had a commendable and honorable record of military service more than a decade prior to committing the misrepresentations of which Normandy was found guilty (Proffer ¶1) cannot mitigate the seriousness of the misrepresentations.^{1/}

The fact that the FCC has never found Normandy guilty of a rule infraction or received a complaint about Normandy (Proffer ¶¶2 & 5) cannot mitigate the fact that Normandy engaged in misrepresentations since (i) the mere fact that no infractions were ever discovered is not proof that none were committed and (ii), even if Normandy's technical operation over the years had been violation free, this fact would not excuse or mitigate the fact that Normandy has been found guilty of misrepresenting material facts to the Commission.^{2/}

The evidence that Normandy proposes to present regarding Mr. Lynch's integration into the community, his experience in serving

^{1/} Laudatory and heroic military service after a finding of serious misconduct might mitigate the prospective impact of the misconduct. But the fact that someone served his country honorably and even heroically many years past cannot be considered as mitigating the seriousness of recent misconduct.

^{2/} If Normandy is allowed to introduce evidence that its operation of WYLR has been violation free, Brandt will seek leave to present evidence that Normandy did violate the FCC's rules relating to the preparation of issues/programs lists and the public file requirements with respect to such lists.

the community, his local residence and his service to community groups (Proffer ¶¶3 and 7), all relates to the comparative issue and cannot possibly be considered in mitigation of misconduct. Moreover, in so far as Normandy seeks to adduce evidence as to WYLR's programming response to community issues, it is firmly established that evidence of meritorious programming service cannot be considered as mitigating misrepresentations. Character Qualifications, 102 FCC 2d 1179, 1211 n. 79 (1986).

The fact that Mr. Lynch attended a broadcasters convention to "educate himself in" the FCC's standards (Proffer ¶6) is of no relevance. What is at issue is what Mr. Lynch did. The fact that Mr. Lynch took the trouble to educate himself about the FCC's standards and, nevertheless, violated those standards would, if anything, add to the seriousness of the conduct of which Normandy has been found guilty.

Finally, pursuant to the presiding judge's ruling that the negative findings in Barry Skidelsky may not be challenged by evidentiary submissions in this case, the evidence that Normandy proposes to offer from the record in Barry Skidelsky (Proffer ¶8) cannot be considered.

WHEREFORE, for the foregoing reasons, it is respectfully submitted that none of the evidence referred to in Normandy

Broadcasting Corporation's June 12, 1992 Proffer of Evidence can properly be considered in this proceeding.

Respectfully submitted,

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

David Tillotson

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& Kahn

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Date: June 23, 1992

CERTIFICATE OF SERVICE

I, LESLIE A. GUILFOYLE, a secretary in the law office of Arent, Fox, Kintner, Plotkin & Kahn do hereby certify that a copy of the foregoing RESPONSE TO PROFFER OF EVIDENCE has been sent via U.S. Mail, First-Class postage prepaid this 23rd day of June 1992 to the following:

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Leslie A. Guilfoyle

* Hand Delivered