

ORIGINAL  
RECEIVED

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

ORIGINAL FILE  
OCT 28 1992

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 )

MM DOCKET NO. 92-787 )  
File No. BRH-910129UR )  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

File No. BPH-910430MB

To: Administrative Law Judge  
Richard L. Sippel

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

Lawrence N. Brandt ("Brandt"), by his attorneys, hereby submits his Reply Findings of Fact and Conclusions of Law in the above-captioned proceeding.

I. Preliminary Statement.

The Mass Media Bureau ("Bureau") and Normandy Broadcasting Corp. ("Normandy") each filed Proposed Findings of Fact and Conclusions of Law in this proceeding. In this Reply pleading, Brandt will address the following issues: (1) whether Issue (b) ("the Skidelsky issue") must be resolved against Normandy and (2) whether Normandy is entitled to a renewal expectancy.<sup>1/</sup>

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

The Bureau concludes in its Proposed Findings of Fact and Conclusions of Law ("Bureau Findings") that the Skidelsky issue does not disqualify Normandy from remaining the licensee of WYLR because the misconduct found in Skidelsky was confined to that proceeding. Bureau Findings at 10. However, such a conclusion ignores the evidence that Normandy has continued its pattern and

<sup>1/</sup> Brandt's silence with respect to any allegations made by opposing parties to this proceeding should not be construed as acquiescence.

No. of Copies rec'd  
List A B C D E

076

practice of misrepresenting facts to the Commission in this proceeding in the same manner as it did in Skidelsky.

In Skidelsky, the ALJ reached the following conclusions with respect to the Threshold Showing Concerning Past Broadcast Record ("Threshold Showing") that Normandy had submitted in that case and with respect to Lynch's testimony concerning how the Threshold Showing had been prepared:

It was apparent from Mr. Lynch's oral testimony that his written testimony was unreliable. His explanation of what was done to insure the accuracy of the Threshold Showing could not be substantiated. Example after example during his examination revealed his claims to be inaccurate. He was so careless in preparing the Threshold Showing that the basic assertions were untrue. In the end there is no objective means of testing Lynch's assertions about Normandy's stations' programs.

Skidelsky Initial Decision, FCC 91D-21 at ¶58.

The above-description of the unreliability and inaccuracy of Normandy's Threshold Showing in Skidelsky and of the unreliability of Lynch's testimony concerning that showing applies with equal force to Normandy's written evidence regarding WYLR's programming concerning how that evidence was prepared. The unreliable and exaggerated nature of Normandy's written programming claims was made apparent during the cross-examination of Lynch regarding Normandy's written representations as to the frequency and duration of "Tri-County Notebook" and the number of public service announcements aired by WYLR. In its programming exhibit, Normandy claimed that "Tri-County Notebook" ran, on average for 30 seconds; however, according to WYLR's program logs, "Tri-County Notebook" typically ran for a mere 15 seconds or half the length (and thus half the total minutes per week) that Normandy claimed it had run. See Brandt Findings at 8-9. Normandy also claimed in its written submission that WYLR had run approximately 110 PSA's per week (or 15 PSA's per day). However, WYLR's program logs for two randomly selected dates during the relevant license term did not reflect a single public service announcement having been aired on either date. Id. Thus, Normandy's evidence regarding its programming was nothing more than a self-serving claim, with no supporting documentation to verify its accuracy.

Not only was Normandy's written programming submission shown to be unreliable, but Lynch's oral testimony established that Lynch had made no attempt as the sponsoring witness of this testimony to assure that it accurately reflected WYLR's programming. Although Normandy's written programming exhibits were presented as accurately reflecting programming that had aired on WYLR during the period from June 1, 1984 through April 30, 1991, Lynch testified at the hearing that the representations in Normandy's programming exhibit as to the air times, frequency, and durations of the programs listed in the exhibit were based on Lynch's review of WYLR's program log for the week of February 11, 1992. According to Lynch he personally had counted up the number of times, and the durations, of programs reflected on the logs for the week of February 11, 1992 and then had used this information as the basis for his written testimony regarding the programming that WYLR had aired during the relevant time frame which had ended some 10 months previous. Hearing Transcript, 564-68. Lynch admitted, however, that he made no effort to verify from program logs for days during the relevant time period, or other records, that the programming reflected on WYLR's February 1992 logs accurately reflected the programming that had aired over WYLR during the renewal period. Id.

Brandt is aware of the cases cited by the Bureau for the proposition that the loss of one license due to misrepresentation or other serious misconduct does not automatically preclude the grant of another license to the same broadcaster. However, in this case, the misconduct found in Skidelsky is not, as the Bureau claims, an isolated incident that is not likely to be repeated. As shown in the discussion above, Lynch apparently learned nothing from his experience in Skidelsky regarding the importance of taking care to insure that representations that he makes to the Commission are accurate and reliable. Normandy's written submission regarding WYLR's programming during the renewal term suffered from precisely the same infirmities as did Normandy's Threshold Showing in Skidelsky and Lynch's testimony concerning how Normandy's programming exhibits were prepared for this hearing reflects a

fundamental failure on Lynch's part to understand the importance of taking steps to assure that representations that he makes to the Commission are accurate and reliable. Unlike the situation in WIOO, Inc., 95 FCC 2d 974 (1963), the "misconduct" that disqualified Normandy in Skidelsky has been repeated in this very case.

Even if the record in this case did not reflect that Lynch learned nothing as a result of Normandy's disqualification in Skidelsky, the nature and extent of the violations in Skidelsky would still require that Normandy be disqualified here. WIOO, supra, does not hold, as the Bureau suggests (Bureau Findings at ¶15) that where a party has been penalized for serious misconduct in one proceeding such misconduct "is not disqualifying" in an unrelated proceeding. Quite the contrary is the case. As clearly stated in the Commission's Policy Statement Regarding Character Qualifications in Broadcast Licensing ("Character Qualifications"), 102 FCC 2d 1179, 1223 (1986), serious misconduct, such as misrepresentations to the Commission, in one proceeding "is relevant to [an applicant's] qualifications to hold any station license." Thus, while disqualifying misconduct by a party in one proceeding does not automatically require the disqualification of that party in all other proceedings, it is Brandt's position that the nature and extent of Normandy's disqualifying conduct in Skidelsky requires that Normandy be disqualified in this case.

In Skidelsky, Normandy was found to have made three separate and distinct misrepresentations to the Commission. Any one of the misrepresentations, standing alone, might not be sufficient to lead to the conclusion that Normandy, and its sole stockholder, Lynch, are so untrustworthy, as to be disqualified from holding any FCC license. But, as the ALJ concluded in Skidelsky, when the three misrepresentations are considered together, "it is evident that the Commission can not rely on Normandy's representation...and that there is a substantial likelihood that Normandy will not make a trustworthy licensee." Skidelsky Initial Decision, supra, at ¶62 (emphasis added). In view of this significance that the

Commission places on truthfulness on the part of its licensees, the conclusion of the Skidelsky ALJ that Normandy's pattern of misrepresentations in Skidelsky make it unlikely that Normandy can be trusted to be truthful in its dealings with the Commission, requires that Normandy be disqualified in this case.

Normandy's contention at ¶6 of its Proposed Findings of Fact and Conclusions of Law ("Normandy Findings") that Brandt has not met its "burden of proof" to prove that the misrepresentations found against Normandy in Skidelsky were "serious misconduct" and that Normandy had a "motive or intent to deceive" in connection with the Skidelsky findings, reflects a fundamental misunderstanding on Normandy's part of the nature of Issue (b) and where the burden of proof in this proceeding lies. Under Issue (b), the burden of proof was placed squarely on Normandy to present some type of evidence to mitigate the three misrepresentations found against it in Skidelsky. This point was made clear in the Memorandum Opinion and Order, 92M-560, released May 12, 1992 ("Order") where the Presiding Judge held that he would deny Brandt's Motion for Summary Decision, because, under KOED, Inc., 5 FCC Rcd. 1784 (1990), Normandy was permitted to adduce additional exculpatory evidence, other than evidence regarding meritorious programming, to mitigate the Skidelsky misrepresentations. Order at ¶ 4. Therefore, the burden was on Normandy to present mitigating evidence and not, as Normandy claims, on Brandt to prove that Normandy's misrepresentations in Skidelsky amounted to "serious misconduct"<sup>2/</sup> or that Normandy had both a "motive" and the "intent" to engage in the misrepresentations.<sup>3/</sup>

---

<sup>2/</sup> All misrepresentations to the Commission, no matter how trivial the matter to which they pertain, amount to "serious breaches of trust," and, therefore, the Commission may treat even the most insignificant misrepresentations as disqualifying." Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 179, 1210-11 (1986).

<sup>3/</sup> Although Normandy has repeatedly maintained that its misrepresentations in Skidelsky were the result of innocent "clerical errors" or "inadvertance," and that it had no possible "motive" for engaging in the misrepresentations, these claims fly in the face of the ALJ's findings and conclusions in  
(continued...)

The Bureau suggests (Bureau Findings at 12) without actually proposing the suggestion as a conclusion, that Normandy has presented evidence sufficient to mitigate the misrepresentations found against it in Skidelsky. There is no merit to this suggestion. The only "mitigating" evidence offered by Normandy consisted of a showing that Lynch had engaged in certain "community activities" and had attended a broadcasters convention in what Lynch claims was an effort "to ensure and upgrade compliance with Commission requirements." It is clear from the record, that Lynch's "community activities" were neither extensive nor particularly distinguished and that they were not done in Lynch's individual capacity as a Glens Falls resident. In fact, for most of these activities, Lynch's involvement was based on his position as General Manager of WYLR or WWSC, Normandy's AM station. See e.g., Normandy Ex. 3/56, 11/6, 11/10, 11/14, 11/16. Moreover, in most cases the work that Lynch did for these organizations was also directly tied to some programming or promotional event sponsored by WYLR, such as, for example, promoting the Adirondak Balloon Festival or publicizing the Cerebral Palsy Walkathons. Normandy Ex. 3/5, 3/6. Because these activities all relate to WYLR programming, under KOED, they cannot be considered to be mitigating evidence in any respect.<sup>4/</sup>

### III. Renewal Expectancy

---

<sup>3/</sup>(...continued)

Skidelsky. Normandy's "motive" for having made the misrepresentations is obvious. Had it not misrepresented that it had obtained site assurance when it had not, it would not have been able to compete in the Queensbury FM proceeding. Therein lies the "motive" for the false site certification. And by misrepresenting its past programming record in its Threshold Showing of Meritorious Past Broadcast Record, Normandy had clearly hoped and intended to gain what could have been a decisive comparative advantage in the Queensbury FM proceeding.

<sup>4/</sup> If the "mitigating" evidence presented by Normandy were found to be sufficient to mitigate serious misconduct, then every broadcaster who has been a member of a community organization and has attended a broadcasters' convention could sleep comfortably knowing that, no matter how serious its misconduct, it need not be concerned about losing its license. Surely this is not what the Commission has in mind by way of a showing that could "mitigate" the consequences of serious misconduct.

The Bureau also concludes in its Findings that Normandy is entitled to a renewal expectancy because it has presented a "substantial amount" of non-entertainment programming during the license period. Bureau Findings at 12. The Bureau bases this conclusion on the following findings regarding Normandy's programming:

- (1) Normandy broadcasts news, weather and PSA's.
- (2) Normandy conducts live remotes promoting local events and fundraisers for charitable organizations.
- (3) Normandy scheduled election and emergency weather coverage .

Bureau Findings at 6-7.

However, the above-listed evidence hardly meets the Commission's requirement that, in order to receive a renewal expectancy, a licensee must prove that its past performance has been "meritorious" or "substantial." Cowles Broadcasting, Inc., 86 FCC 2d 993, 1012-1014 (1981). In order to demonstrate substantial performance, the licensee must show that it has rendered public service over and above what would be considered minimal. Broadcast Communications, Inc., 93 FCC 2d 1162, 1166 (1983).

The decision in Cowles provides an example of what constitutes substantial performance. In that case, the television licensee was awarded a renewal expectancy based on its broadcasts of several substantive regularly scheduled public affairs programs each week, including: "Topic," a weekly 30 minute program featuring community leaders interviewed by a panel of news personnel; a 3-5 minute segment of the 5:30 news featuring a currently newsworthy person; "Focus," a 15 minute Monday through Friday program with guest interviews; "Opinion," a 3-5 minute segment of the weekend newscasts featuring opinions by newsmakers, community leaders and average citizens, and several other similar public affairs programs. Id. at 1006-1007.

Another Commission decision which illustrates what sort of programming is necessary to earn a renewal expectancy is Radio Station WABZ, Inc., 90 FCC 2d 818 (1982). In this case, the Commission concluded that WABZ's past performance was "meritorious" based on the following list of public service

programming: three regularly scheduled agricultural reports; informative programs such as the "City Managers Report," the "County Managers Report," the "Social Security Reports" and the "Employment Security Commission;" "Progress Report," a 5 minute segment on education; "Danger of Apathy," a 15 minute program on foreign affairs; "What's the Issue," a 20 minute program on the economy; and one and a half hours per week of religious programming. Id. at 836-841. Overall, the station devoted more than 20% of its broadcast time to non-entertainment programming. Id. at 840.

In contrast, Normandy's public affairs programming consisted solely of brief news and weather reports, PSA's and remote broadcasts from the sites of various community or charitable events. Normandy aired no substantive public affairs programming whatsoever. Brandt Findings at § C(3). Moreover, although Lynch made self-serving claims both in his written and oral testimony that WYLR's limited nonentertainment programming addressed significant issues and problems of the station's service area, these claims were belied by WYLR's Issues/Programs lists for the relevant license term. These lists revealed that during most quarters of the license term Normandy did not broadcast a single program that it regarded as being responsive to community needs and problems, and that during the few quarters where some programming was listed, the listed programs consisting of news, public service announcements and remotes are not tied to any ascertained community issues. See Brandt Exhibit 3. The Issues/Programs lists merely confirm what Richard C. Dusenbery, a WYLR employee put forward by Normandy as a witness in support of its case for a renewal expectancy, candidly stated about Normandy's basic approach to public service programming on WYLR during the renewal period: "WYLR was, at the time, a music intensive radio station, so, no, we would not -- we would not format a talk public affairs program." Hearing Transcript at 705.

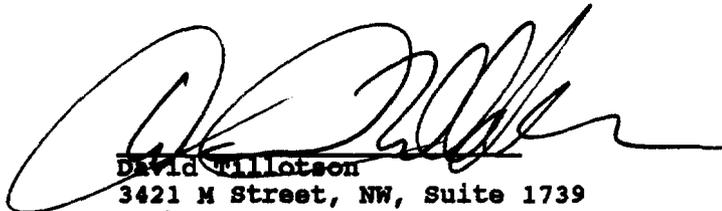
The burden was on Normandy to establish by reliable evidence that it was entitled to a renewal expectancy. As discussed above and in Brandt's Findings, the evidence that Normandy presented in support of its claim for a renewal expectancy was so self-serving, unreliable and inaccurate, that it

cannot be accepted as accurately representing the programming that WYLR presented during the renewal period. However, even if WYLR's programming evidence were accepted without question or qualification, it is clear that the programming Normandy claims to have aired over WYLR during the renewal term is, at best, mediocre, and falls far short of the sort of issue-oriented public affairs, news and public service programming that the Commission has found in other cases to warrant the award of a renewal expectancy. Indeed, to grant Normandy a renewal expectancy based on the record of this case would make a mockery of the efforts that the Commission has made to give meaning to the term "substantial performance."

IV. Conclusion

WHEREFORE, Based on the record of this case as a whole, Brandt respectfully submits that its Proposed Findings of Fact and Conclusions of Law, as supplemented through this Reply, should be adopted, that Normandy's application for renewal of WYLR should be denied and that Brandt's application for a new FM station in Glens Falls, New York should be granted.

Respectfully submitted,



David Tillotson  
3421 M Street, NW, Suite 1739  
Washington, D.C. 20007  
(202) 625-6241

Counsel for Lawrence N. Brandt

October 28, 1992

**CERTIFICATE OF SERVICE**

I, David Tillotson do hereby certify that a copy of the foregoing **REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW OF LAWRENCE W. BRANDT** has been sent via U.S. Mail, First-Class postage prepaid this 28th 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.  
Federal Communications Commission  
Hearing Branch, Enforcement Division  
2025 M Street, N.W., Room 7212  
Washington, D.C. 20554

Christopher P. Lynch, President  
Normandy Broadcasting Corp.  
217 Dix Avenue  
Glens Falls, NY 12801

  
David Tillotson