

RECEIVED

FEB 10 1993

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of
NORMANDY BROADCASTING CORP.
For Renewal of License of
Station WYLR(FM) (95.9 MHz)
Glens Falls, New York

) MM DOCKET NO. 92-6
)
) File No. BRH-910129UR
)
)

and

LAWRENCE N. BRANDT
For a Construction Permit for
a New FM Station on 95.9 MHz
at Glens Falls, New York

) File No. BPH-910430MB
)
)
)
)

To: The Review Board

CONSOLIDATED REPLY TO EXCEPTIONS
OF
NORMANDY BROADCASTING CORPORATION AND MASS MEDIA BUREAU

David Tillotson
3421 M Street, N.W., #1739
Washington, DC 20007
Tel: 202/625-6241

Attorney for Lawrence N.
Brandt

February 10, 1993

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

0+11

TABLE OF CONTENTS

	Page
I. Statement of the case	1
II. Argument	2
A. The Presiding Judge Did Not Err in Disqualifying Normandy Based on the Adverse Character Conclusions in <u>Skidelsky</u>	2
B. The Presiding Judge Did Not Err in Denying Normandy a Renewal Expectancy	12
III. Conclusion	18

TABLE OF AUTHORITIES

	Page
<u>COURT CASES:</u>	
<u>Pantex Towing Corp. v. Glidwell</u> , 763 F. 2d 11th Cir. 1985)	4
<u>FCC DECISIONS:</u>	
<u>Barry Skidelsky</u> , 6 FCC Rcd 2221	<u>passim</u>
<u>Deregulation of Radio</u> , 84 FCC 2d 968 (1981)	.12, 13, 15, 16
<u>Metroplex Communications, Inc. (WHYI-FM)</u> , 67 RR 2d 185 (1989), <u>aff'd</u> 68 RR 2d 475 (1990)	12, 13, 16, 17
<u>Policy Statement Regarding Character Qualifications in Broadcast Licensing ("Character Qualifications")</u> , 102 FCC 2d 1779, 1223 (1986)	2, 11
<u>RKO General, Inc.</u> , 82 FCC 2d 291 (1980)	4
<u>WIOO, Inc.</u> , 95 FCC 2d 974 (1963)	10

SUMMARY

Normandy was found guilty of three separate misrepresentations in a recent proceeding for a new FM station in Queensbury, New York (the "Queensbury Proceeding"), and the Review Board has ruled that the findings and conclusions regarding those misrepresentations in the other proceeding are binding on Normandy in this case. The Commission made it clear in its Policy Statement Regarding Character Qualifications in Broadcast Licensing ("Character Qualifications") "the trait of "truthfulness is one of the two key elements of character necessary to operate a broadcast station in the public interest." Therefore, absent some evidence that would mitigate or exculpate the misrepresentations that Normandy made in the Queensbury Proceeding, the policies set out in Character Qualifications require that Normandy be disqualified in this proceeding. Not only did Normandy fail to present any evidence that would mitigate or exculpate its previous misrepresentations, but Normandy made additional misrepresentations on the record of this case which confirm that it cannot be relied upon to be truthful in its dealings with the Commission. Accordingly, the presiding judge correctly concluded that Normandy is not qualified to continue as the licensee of Station WYLR.

Even if Normandy were not disqualified, since it suffers a serious comparative demerit under the diversification criterion of the standard comparative issue by virtue of the fact that it is the licensee of full-time AM station, WWSC, which is licensed

to the same community as WYLR, Normandy cannot prevail on the comparative aspects of this case unless it is entitled to a renewal expectancy. The case law makes clear that a renewal expectancy will only be awarded where the incumbent licensee demonstrates that it has ascertained community needs, issues and problems and has presented substantive programming to address such needs, issues and problems. Although Normandy seeks a renewal expectancy, it failed to present any evidence that it has broadcast any programming over WYLR during the past license term that focused on issues, needs, or problems that it had identified as being of concern to the community. Moreover, the record reflects that during all but 6 of the 28 calendar quarters in the license term, Normandy failed to place issues/programs lists in its public file reflecting any programming aired on WYLR, and in the 6 quarters where FM programs are listed on Normandy's issues/programs lists, the programs are few in number and did not involve any substantive discussion of, or attention to, community needs, issues or problems. In the absence of evidence that WYLR aired programming to address significant community needs, issues and problems during the license term, and faced with the evidence from Normandy's own issues/programs lists that no such programming was aired, the presiding judge correctly concluded that Normandy was not entitled to a renewal expectancy.

RECEIVED

FEB 10 1993

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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)	

To: The Review Board

CONSOLIDATED REPLY TO EXCEPTIONS
OF
NORMANDY BROADCASTING CORPORATION AND MASS MEDIA BUREAU

Lawrence N. Brandt, by his attorney, hereby Replies to the Exceptions to the Initial Decision of Administrative Law Judge Richard L. Sippel, FCC 92D-72 released December 30, 1992 (the "I.D.") which were filed by Normandy Broadcasting Corporation ("Normandy") and the Mass Media Bureau (the "Bureau") on January 29, 1993. For the reasons set out below, Brandt submits that the Exceptions are without merit and that the I.D. should be affirmed.

I. Statement of the Case

Brandt adopts the Statement of the case set out in the Bureau's Exceptions with the following modifications. First,

paragraph 4 to the Bureau's Exceptions should be augmented to reflect that (i) Normandy had been disqualified for three separate and distinct misrepresentations by the Initial Decision in Barry Skidelsky, 6 FCC Rcd 2221 (ALJ 1991) ("Skidelsky"), and (ii) applying principals of collateral estoppel and acting pursuant to the Review Board's ruling as to how the conclusions adverse to Normandy in Skidelsky were to utilized in this proceeding,¹ the presiding judge "adopted as written" the findings and conclusions in Skidelsky relating to the three distinct misrepresentations (the "Adverse Character Conclusions") which led to Normandy's disqualification in that case. Second, Brandt does not agree with the Bureau's assertions in the last two sentences of paragraph 5 of its Exceptions to the effect that the presiding judge "committed reversible error" in holding that Normandy was not entitled to a "renewal expectancy" and that the I.D. should be reversed.

II. Argument

A. The Presiding Judge Did Not Err in Disqualifying Normandy Based on the Adverse Character Conclusions in Skidelsky

In its 1986 Policy Statement Regarding Character Qualifications in Broadcast Licensing ("Character Qualifications"), 102 FCC 2d 1179, 1209-10 (1986), the Commission stated that "the trait of 'truthfulness' is one of the two key elements necessary to operate a broadcast station in the public interest," and, noting that acts of misrepresentation or lack of

¹ Normandy Broadcasting Corporation, 7 FCC Rcd 1392 (Rev. Bd. 1992).

candor by applicants and licensees are "proximately relevant" to its "core concern" with truthfulness, the Commission held that it would "continue to view misrepresentation and lack of candor in an applicant's dealings with the Commission as serious breaches of trust." In view of the significance that the Commission attaches to misrepresentations, Normandy was confronted from the outset with a heavy burden of persuading the presiding judge that, notwithstanding the Adverse Character Conclusions that were based on three discrete misrepresentations, Normandy remained qualified to be a Commission licensee.

Normandy was afforded an opportunity to offer "exculpatory" or "mitigating" evidence relevant to its qualifications to continue as the licensee of WYLR notwithstanding the Adverse Character Conclusions. The presiding judge gave careful consideration to such evidence and concluded that "[t]here has been no evidence introduced by Normandy in this case which counters the conclusion in Skidelsky that there is a substantial likelihood that Normandy will not make a trustworthy licensee." I.D. at ¶59. While both the Bureau and Normandy dispute the portion of the quoted conclusion regarding the likelihood of Normandy being a trustworthy licensee, neither Normandy nor the Bureau argues in its Exceptions that the presiding judge erred in his basic conclusion that Normandy failed to present evidence that mitigated or exculpated the Adverse Character Conclusions in

Skidelsky.² Therefore, the only issue that is to be resolved is whether the Adverse Character Conclusions in Skidelsky, standing alone, or viewed in the light of other indications of Normandy's untrustworthiness on the record of this case, require that Normandy be disqualified.

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." 6 FCC Rcd 2221 at ¶62 (emphasis added). In view of the significance that the Commission places on truthfulness on the part of its licensees, and the absence of any evidence that would exculpate or mitigate the Adverse Character Conclusions, it would have been reversible error for the presiding judge not to have

² Normandy's discussion in its Exceptions of the Adverse Character Conclusions consists entirely of arguments to the effect that those conclusions were erroneously reached. Such a collateral attack on the Adverse Character Conclusions in Skidelsky was expressly prohibited by the Review Board's ruling in this case, 7 FCC Rcd 1392 (Rev. Bd. 1992) and is barred by principles of collateral estoppel. Pantex Towing Corp. v. Glidwell, 763 F. 2d 11th Cir. 1985); RKO General, Inc., 82 FCC 2d 291 (1980).

The Bureau does take issue with the presiding judge's conclusion that Normandy failed to carry its "burden of proof" on the issue of mitigation. But this is a quibble with the presiding judge's phraseology, not an exception to the basic conclusion that the Normandy did not present evidence that would exculpate or mitigate the Adverse Character Conclusions.

concluded that the Adverse Character Conclusions require disqualification of Normandy in this case.

However, there is additional evidence in the record of this case that Normandy cannot be relied upon to be honest and truthful with the Commission. As part of Normandy's evidentiary showing in support of its claim that it was entitled to a renewal expectancy, Normandy submitted a typewritten affidavit from one Stephen Borgos in which Mr. Borgos referred to various ways in which WYLR's sister station, WWSC(AM), had responded programmatically to community issues. "WYLR" had been written in on the affidavit, by hand, in three separate places so as to make it appear that where Mr. Borgos was describing programming presented to deal with local emergencies and to provide live coverage of community events, he was referring to programming presented on WYLR as well as WWSC. I.D. at ¶¶32 & 60; Normandy Exh. 3 page 7.³ When asked about the fact that WYLR had been written in by hand on the affidavit, Normandy's President, Christopher Lynch ("Lynch") gave the following explanation (Tr. at 290-91):

Mr. Lynch: I clear up -- that's me putting in "WYLR." That just slipped by me when I was reviewing these affidavits. What this means is that at WWSC, while the new is also on WYLR, the first one -- Adirondack Balloon Festival -- WYLR has broadcast 19 of them in a row, and WWSC has -- Mr Borgos just put in WWSC 'cause that's the station that he was most

³ Although the presiding judge states at ¶32 of the I.D. that "WYLR" was entered in handwriting on Borgos' affidavit in "two places," it is noted at page 289 of the hearing transcript, and it is clear from looking at the affidavit itself which, though not received into evidence, accompanies the record, that WYLR was written in in three different places.

familiar with. I would cross out the "YLR." Again, it's not anything to confuse the issue ...

Judge Sipple: Well, who wrote in "WYLR."

Mr. Lynch: I did all three times. I was just making notes.

Judge Sipple: This was after Mr. Borgos signed it.

Mr. Lynch: Yes, your Honor.

Judge Sipple: He doesn't even know that you did that.

Mr. Lynch: No, I just -- that was my error. I crossed them out. They weren't meant to alter the affidavit.

The presiding judge who had an opportunity to view Lynch's demeanor did not accept his explanation that the altered Borgos affidavit had been included in Normandy's evidentiary submission in error. Rather, he concluded that Lynch had intentionally attempted "to submit the alter Borgos affidavit" and that this action "shows a continuing disposition on the part of Lynch to alter the truth." I.D. at 60. Both Normandy and the Mass Media Bureau note exceptions to this conclusion, and both claim that Lynch had somehow "inadvertently" included the altered affidavit with his other hearing exhibits. This claim is on a par with Lynch's efforts in Skidelsky to excuse his false submissions in that case regarding the programming on WYLR as "clerical errors."⁴ Moreover, the explanation that Normandy offers at

⁴ Normandy's lack of care with the truth was also noted by the presiding judge in his discussion of Normandy's rejected Exhibit 7. At ¶30 of the I.D. the presiding judge notes that in rejected Exhibit 7 Normandy characterizes the problems with Normandy's "Threshold Showing" in Skidelsky which led to the finding of misrepresentation as negligent errors in calculating the amount of time devoted to nonentertainment programming when, in reality, the problems with the Threshold Showing were "not the type of miscalculation error that Normandy advances in its rejected Exh. 7" and states that "if Normandy's Exh. 7 were received in evidence it would serve to enhance the Skidelsky findings and not exculpate or mitigate them." [Emphasis added]

page 6 of its Exceptions as to how and why WYLR came to be written in on the Borgos affidavit differs significantly from the explanation that Lynch gave, under oath, when the issue first came up at the admissions session.⁵ As the presiding judge's finding that Lynch's inclusion of the altered Borgos' affidavit among Normandy's hearing exhibits "shows a continuing disposition on the part of Lynch to alter the truth" (I.D. at ¶60) was based upon his observance of Lynch's demeanor as a witness, and is not inconsistent with the record as a whole, the finding must be sustained.

In addition to the alteration of the Borgos affidavit, the record contains other evidence as to Lynch's continuing disposition...to alter the truth" which supports the presiding judge's conclusion that Normandy "will not make a trustworthy licensee." In its programming exhibit, Normandy claimed that "Tri-County Notebook" ran, on average for 30 seconds and Lynch repeated this claim at the hearing (Normandy Exh. 6 at 15; Tr. 583); 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

⁵ In its Exceptions, Normandy claims that Lynch wrote WYLR in on the Borgos affidavit in the course "of sifting through literally hundreds of letters...to remember to ask if Mr. Borgos could testify in this regard" and that, "because of time constraints Borgos was never contacted and the original document was used...to establish Mr. Lynch's community integration only and Lynch did forget to erase these notes." Normandy Exceptions at ¶8 [Emphasis in original]. Although Normandy asserts that this "situation was straightforwardly explained under oath," this explanation is materially different, and much more elaborate, than the one that Lynch gave under oath when he was initially confronted with the altered affidavit. Moreover, it does not explain why, if Lynch had only made the notes to remind himself to check with Borgos to see whether he could testify regarding WYLR's contribution to the community, Lynch included the Borgos affidavit among Normandy's hearing exhibits.

it had run. Brandt Exhs. 4 and 5. Normandy also claimed in its written submission that WYLR had run approximately 110 PSA's per week (or 15 PSA's per day). Normandy Exh. 6 at 15. 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. Brandt Exhs. 4 and 5.

Not only were 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. Tr. 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.

Although the presiding judge did not specifically cite unreliability of Normandy's written programming exhibits and the lack of care that Lynch took to assure that Normandy's written submissions were accurate as additional evidence that Normandy cannot be relied upon to be truthful with the Commission, he did note generally the unreliability of Normandy's programming submissions, and of Lynch's testimony concerning WYLR's programming. I.D. at 40 - 44. The unreliability of Normandy's written exhibits is of particular significance because it was precisely the same sort of unreliability, and lack of care on Lynch's part to assure that his written testimony was accurate, that led to the conclusion in Skidelsky that Normandy had made material misrepresentation in its Threshold Showing.⁶ This fact further supports the presiding judge's conclusion that Normandy

⁶ The following excerpt from the findings in Skidelsky regarding the unreliability of the evidence submitted by Normandy concerning its Threshold Showing would be an accurate summary of the findings in this case regarding Normandy's programming submissions:

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.

6 FCC 2d 2221 at ¶58.

cannot be trusted to be truthful with the Commission.

Brandt is aware of the cases cited by the Bureau and Normandy 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 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.⁷ Moreover, WIOO, Inc. did not involve affirmative misrepresentations and was decided prior

⁷ The Bureau "recognizes that the misrepresentation...found in Skidelsky concerned, at least in part, programming on the facility at issue here." Therefore, to fit this case into the mold of WIOO, Inc., *supra*, the Bureau argues that "the exaggerated claims which formed the basis for the conclusions in Skidelsky were confined to that proceeding." As shown in the discussion above, this simply is not so. The "exaggerations" and the failure to check program logs and other records to verify programming claims which occurred in Skidelsky were clearly repeated in this case and, thus, render WIOO, Inc. inapposite.

to the Character Qualifications.⁸ As misrepresentations have been properly recognized as being "proximately relevant to the core concern of truthfulness," id. at 1209, the consequences of a finding that an applicant has made several misrepresentations to the Commission cannot logically be confined to the case in which the misrepresentations occurred.

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. While the Bureau is correct in arguing that "a broadcaster's loss of one license does not invariably compel the conclusion that grant of another license to that same broadcaster would be contrary to the public interest" [emphasis added], as discussed above, the Commission made it clear in its Character Qualifications, supra, that serious misconduct, such as misrepresentations to the Commission, in one proceeding is highly relevant to an applicant's qualifications to hold any station license. Thus, while disqualifying conduct by an applicant in one proceeding does not automatically require the disqualification of that applicant in all other proceedings, the presiding judge correctly concluded based on the nature and extent of Normandy's

⁸ It is curious that the Mass Media Bureau does not even cite Character Qualifications, let alone try to reconcile the Commission's pronouncements in that policy statements as to the significance of misrepresentations with its contention that the presiding judge erred in relying upon the Adverse Character Conclusions in Skidelsky as a basis for disqualifying Normandy.

disqualifying conduct in Skidelsky and the record in this proceeding that Normandy "has not established that it can be relied upon to provide truthful and candid information to the Commission," and thus, is not qualified to continue as the licensee of WYLR. I.D. at ¶87.

B. The Presiding Judge Did Not Err in Denying Normandy a Renewal Expectancy

In order to receive a renewal expectancy, an incumbent licensee must establish that its performance over the past license term in the area of programming has been "substantial." In Deregulation of Radio, 84 FCC 2d 968 (1981) which the Bureau relies upon heavily to support its position that the presiding judge erred in denying Normandy a renewal expectancy, the Commission provided the following explanation of the difference between "minimal performance" which would support a renewal in the absence of a challenge but would not be a "comparative plus" and "substantial performance" which would entitle an incumbent licensee to a comparative plus:

Minimal performance is only that which would justify renewal in the absence of a challenge by a competing applicant. It would consist of performance of all statutory obligations...and minimal, although adequate, attention to the issues confronting the licensee's community. ... Substantial performance would include this, but would additionally contemplate a showing that more or better programming than that which would be considered "minimal" is being devoted to addressing issues facing the community.

Id. at 989, note 53. The Review Board gave further definition to what would constitute "substantial performance" warranting award of a renewal expectancy in Metroplex Communications, Inc. (WHYI-

FM), 67 RR 2d 185 (1989), aff'd 68 RR 2d 475 (1990) wherein it articulated five criteria against it would measure "the potential of a meritorious service record, thereby to calibrate the strength of any resultant renewal expectancy to the incumbent licensee." These five criteria are:

1. The licensee's efforts to ascertain the needs, problems and interests of its community.
2. The licensee's programmatic responses to those ascertained needs.
3. The licensee's reputation in the community for serving the needs, problems and interests of the community.
4. The licensee's record of compliance with the Communications Act and the FCC's Rules and policies.
5. The presence or absence of any special effort at community outreach or towards providing a forum for local community expression.

67 RR 2d at 190.

In light of the Commission's explanation in Deregulation of Radio, supra of what is required for an incumbent licensee to earn a renewal expectancy and the Review Board's articulation and application of the five criteria that are to be used in evaluating a claim for a renewal expectancy in Metroplex Communications, supra, it is indisputable that a renewal expectancy may only be awarded where an incumbent licensee demonstrates, by substantial and reliable evidence, that it has ascertained the issues, needs and problems of its community and has broadcast programs that addressed such ascertained issues, needs and problems. The presiding judge analyzed the evidence presented by Normandy in support of its claim for a renewal

expectancy in light of the these criteria and concluded that Normandy had failed to meet its burden of proof that it was entitled to a renewal expectancy. I.D. at ¶¶75 - 79, 87. As will be shown below, based on the record, the presiding judge's conclusion in this regard is unassailable.

Although Normandy claimed generally in its written testimony that it had contacted various organizations over the course of the past license term as part of "ongoing public ascertainment" (Normandy Exh. 6 at 3), nowhere in Normandy's entire evidentiary submission did it identify a single significant community need that it had identified through these efforts. In the absence of such information, it is impossible to assess whether the programming that Normandy aired on WYLR was responsive to the issues, needs and problems that Normandy identified in its "ongoing ascertainment" efforts. Moreover, the nine page list of programs (including PSA's and fund charitable fund raising events) broadcast over WYLR during the past license that constituted Normandy's entire evidentiary showing in support of its claim that WYLR's programming efforts entitled it to a renewal expectancy did not relate the programs listed to any community issues, needs or problems, let alone significant issues needs and problems identified through Normandy's ascertainment efforts.⁹ Normandy Exh. 6.

⁹ In a couple instances the title of the program and the brief description provided does identify what might be a significant community issue or problem. E.g., "WYLR Bloodmobile ... Responding to AID's scare and blood shortage, WYLR annually sponsored its own bloodmobiles...." Normandy Exh. 6 at 17. However, even where some issue or problem is apparent from the description, it is not possible to

Not only did Normandy fail to offer evidence that WYLR broadcast programs to address community issues and concerns, but there is substantial and reliable evidence that WYLR did not broadcast such programming. As part of the rule changes adopted by Deregulation of Radio, supra, licensees were required to prepare quarterly lists of the most significant issues in their communities and their programmatic responses to such issues. In the course of discovery, Normandy produced all of its issues/programs lists for WYLR for the license term at issue. These lists which pertained to both WWSC and WYLR reflected "absolutely no FM programs" for 1984, 1985, 1986, or 1987. I.D. ¶72; Brandt Exh. 3. The lists for the first and third quarter of 1988, the first quarter of 1989, the last three quarters of 1990 and the first two quarters of 1991 also reflected no FM programming. During the few calendar quarters in which FM programming listed, the FM programming was very limited and consisted of newscasts, PSA's, a live concerts, election returns, and remote broadcasts from charitable or community events. Brandt Exh. 3.

Normandy was required by the Commission's rules to prepare quarterly issues/programs lists for WYLR for the purpose of creating a record of how that station carried out its obligation to present programming responsive to community issues and concerns. It may properly be assumed, therefore, that the

determine whether the program listed was responding to an issue of significance, or was merely responsive to a request for PSA time.

issues/programs lists that Normandy did prepare are an accurate reflection of the issue-oriented and community service programming that WYLR aired. The lists constitute overwhelming evidence that during most quarters of the last seven year license term, Normandy aired no programs over WYLR that, in its judgment, addressed community issues or problems and that, therefore, Normandy is not entitled to a renewal expectancy.

The Bureau's exceptions to the presiding judge's conclusion that Normandy is not entitled to a renewal expectancy do not point to any evidence in the record that would justify awarding Normandy a renewal expectancy under the criteria set out in Deregulation of Radio, supra, and Metroplex Communications, supra.¹⁰ Rather, the Bureau argues that the judge erroneously faulted Normandy for the type of nonentertainment programming it aired over WYLR and because Normandy's records made it impossible to ascertain the percentage of time that WYLR devoted to nonentertainment programming.¹¹ The Bureau's arguments which focus on isolated portions of the I.D., are without merit. It is

¹⁰ The Bureau appears to be unaware of the Metroplex Communications decision or any other decision in which the issue of a renewal expectancy was considered that was decided on the basis of the policy changes that were adopted in Deregulation of Radio.

¹¹ Normandy's exceptions to being denied a renewal expectancy consist of conclusory statements regarding the quality and quantity of WYLR's programming which are not supported by the record and of Lynch's standard excuse that all of Normandy's problems, including its inability to document its programming claims, are the result of poor record keeping. Assuming, arguendo, that Normandy's inability to establish that WYLR aired programs responsive to community issues is attributable, as Lynch claims, to poor record keeping rather than an absence of issue-oriented programming, as the Commission's rules required Normandy to keep adequate records as to WYLR's issue-oriented programming, and as Normandy bore the burden of proving that it is entitled to a renewal expectancy, acceptance of the excuse of "poor record keeping" cannot save Normandy from the consequences thereof -- denial of a renewal expectancy and loss of its license for WYLR.

clear from reading the presiding judge's findings and conclusions as a whole that the presiding judge applied the correct template for evaluating whether Normandy was entitled to a renewal expectancy and that the presiding judge's conclusion that Normandy was not entitled to one is supported by substantial evidence, or, more accurately, the absence of any evidence that would justify the award of a renewal expectancy.

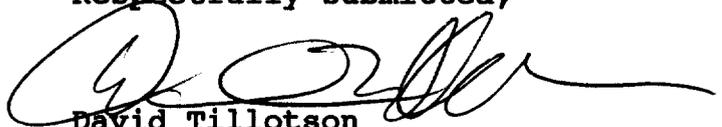
Finally, the Bureau argues that the presiding judge erred in "fault[ing] Normandy under the renewal expectancy issue, because shortcomings in its issues/programs lists "defeats a proposed policy." Here again, the Bureau is quibbling over the presiding judge's phraseology, not raising a substantive exception. As discussed above, the fact that Normandy's issues/programs lists reflect only minimal FM programming is evidence that WYLR did not air the sort of issue responsive programming that is essential to a finding that an incumbent licensee is entitled to a renewal expectancy. Moreover, Normandy's failure to comply with the requirement that it prepare quarterly issues/programs lists for WYLR is relevant under the fourth criteria for evaluating a claim of entitlement to a renewal expectancy set out in Metroplex Communications, supra -- the licensee's record of compliance with the Communications Act and the FCC's Rules and policies. Normandy's failure to comply with the issues/programs list requirement which is designed to provide a means to evaluate whether licensees are fulfilling their obligation to operate in the public interest further supports the presiding judge's

the public interest further supports the presiding judge's conclusion that Normandy is not entitled to a renewal expectancy.

III. Conclusion.

WHEREFORE, for the foregoing reasons, the Exceptions of the Mass Media Bureau and of Normandy Broadcasting Corporation to the Initial Decision in this case should be denied and the Initial Decision should be affirmed.

Respectfully submitted,



David Tillotson
3421 M Street, N.W., #1739
Washington, DC 20007
Tel: 202/625-6241

Attorney for Lawrence N.
Brandt

Dated: February 10, 1993

CERTIFICATE OF SERVICE

I, DAVID TILLOTSON hereby certify that a copy of the foregoing **CONSOLIDATED REPLY TO EXCEPTIONS OF NORMANDY BROADCASTING CORPORATION AND MASS MEDIA BUREAU** has been sent via U.S. Mail, First-Class postage prepaid this 10th day of February, 1993 to the following:

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