

DOCKET # 92-6
 Before the
 Federal Communications Commission
 Washington, D.C. 20554
 MAR 72

MM Docket No. 92-6

In re Applications of

NORMANDY
 BROADCASTING CORP. File No. BRH-910129UR

For Renewal of License of
 Station WYLR(FM)
 Glens Falls, New York

LAWRENCE N. BRANDT File No. BPH-910430MB

For Construction Permit for
 New FM Station, 95.9 MHz,
 Glens Falls, New York

MEMORANDUM OPINION AND ORDER

Adopted: March 12, 1996;

Released: March 21, 1996

By the Review Board: MARINO (Chairman) and GREENE.

1. On January 16, 1996, Lawrence N. Brandt filed a Petition for Extraordinary Relief. Brandt requests the Board "to reassume jurisdiction over this case" from the settlement judge to whom it was assigned following the Commission's general freeze on further adjudication of cases involving comparative analysis, see *Public Notice*, 9 FCC Rcd 1055 (1994), and "render a decision on the issues relating to the qualifications of Normandy Broadcasting Company to continue as the licensee of Station WYLR." Pet. at 5. We will deny the petition because Brandt has not justified his request.

2. In an *Initial Decision*, 8 FCC Rcd 1 (1992) (*I.D.*), Administrative Law Judge Richard L. Sippel (ALJ) denied the license renewal application of Normandy Broadcasting Corp. for Station WYLR(FM), Glens Falls, New York. He held that Normandy was unqualified to be a Commission licensee because it failed to adequately mitigate adverse character violations found against it in another proceeding, *Barry Skidelsky*, 6 FCC Rcd 2221 (ALJ 1991). *I.D.* at ¶ 86. Alternatively, the ALJ concluded that Normandy failed to prove that it was entitled to a renewal expectancy and could not prevail comparatively. *Id.* at ¶ 87. Both the licensee and the Mass Media Bureau filed exceptions urging reversal of the *I.D.* and renewal of WYLR(FM)'s license. Oral argument was held on April 30, 1993. The case was included among the comparative cases the Board referred to the Chief Administrative Law Judge for the appointment of settlement judges, see *News Release*, Mimeo No. 42334, March 25, 1994, pursuant to the Commission's *Public Notice*, *supra*.

3. Brandt initially contends that this case never should have been referred to a settlement judge because the *Public Notice* "explicitly stated that the Review Board was to continue to issue decisions 'in cases in which consideration of the applicants' comparative qualifications is unnecessary to resolve the case.'" Pet. at 2. It argues that because the ALJ disqualified Normandy, the case is exempt from the freeze order until the Board reverses the ALJ's conclusions, and the Board therefore had an obligation to issue a decision on the exceptions to the *I.D.* at 2-3. Brandt also contends that the continued operation of Station WYLR is contrary to the public interest in light of the ALJ's adverse character findings. *Id.* at 4-5.

4. *Discussion.* Brandt's request rests upon the presumption that Normandy's disqualification is inevitable because of the character findings in *Skidelsky*. We note, however, that the Bureau and the licensee disagreed with the *I.D.*'s disqualification conclusions, both urging in exceptions that the station's license be renewed. Brandt's request also fails to appreciate that the character findings in *Skidelsky* were never affirmed on appeal, see *Barry Skidelsky*, 7 FCC Rcd 1, 7-8 ¶ 35 & n.12, and that the Commission held in *Georgia Public Telecommunications Commission*, 7 FCC Rcd 7996, at 7999 n.29 (1992), that it is inappropriate to give findings of an Initial Decision collateral estoppel effect where those findings have not actually been litigated to a final decision in which they were necessary to the outcome. See also *WFGP, Inc.*, 24 RR 419, 425-426 ¶ 10 (1962) (final Initial Decision unreviewed by Commission is not binding precedent). Additionally, after oral argument in this case, the Board tentatively voted not to affirm the *Skidelsky* issue, but to resolve the case instead on the comparative factors set out in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), and *Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982). Thus, when the Commission imposed its freeze on cases that could not be decided without resolution of the comparative issue, this case was referred to a settlement judge in accordance with the procedures set out by the Commission. To the extent that Brandt complains that an earlier Board resolution of this case would have avoided the freeze, Pet. at 2, we note that other contested cases decided considerably earlier than this one did not become final before the freeze order and were also referred to settlement judges. See, e.g., *Atlantic City Broadcasting, Inc.*, 5 FCC Rcd 3388 (ALJ 1990), modified, 6 FCC Rcd 925 (Rev. Bd. 1991), modified, 8 FCC Rcd 4520 (1993), settled, FCC 96I-09, released March 5, 1996; *Rancho Mirage Radio, a General Partnership*, 6 FCC Rcd 2523 (ALJ 1991); *aff'd*, 7 FCC Rcd 480 (Rev. Bd. 1992), review denied, 7 FCC Rcd 4337 (1992), settled, FCC 96I-37, released January 30, 1996; *Isis Broadcast Group*, 7 FCC Rcd 599 (ALJ 1992), reversed, 7 FCC Rcd 5125 (Rev. Bd. 1992), recon. denied, 8 FCC Rcd 24 (1992), review denied, 8 FCC Rcd 7040 (1993), recon. dismissed, FCC 93I-71, released December 8, 1993, settled, FCC 95I-28, released November 28, 1995.

5. Under the circumstances, Brandt has failed to demonstrate that in this case "consideration of the applicants' comparative qualifications is unnecessary to resolve the case," and, therefore, failed to justify its petition for extraordinary relief. See *Elinor Lewis Stephens*, 9 FCC Rcd 5259 (Rev. Bd. 1994); review dismissed, 10 FCC Rcd 2863 (1995).

6. ACCORDINGLY, IT IS ORDERED, That the Petition for Extraordinary Relief, filed on January 16, 1996, by Lawrence N. Brandt IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board