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

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

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To: The Commission

**MASS MEDIA BUREAU'S COMMENTS ON
MOTION TO REOPEN RECORD AND ENLARGE ISSUES**

1. On April 16, 1997, Lawrence N. Brandt ("Brandt") filed a motion to reopen record and enlarge issues. The Mass Media Bureau submits the following comments.

2. By way of background, this case is now before the Commission on exceptions to the presiding Administrative Law Judge's *Initial Decision*, 8 FCC Rcd 1 (1992) ("*ID*"). See *Order*, 11 FCC Rcd 5251 (Rev. Bd. 1996); and *Memorandum Opinion and Order*, 11 FCC Rcd 3559 (Rev. Bd. 1996). At present, there are three issues pending for consideration. The first issue involves the impact upon Normandy Broadcasting Corp. ("Normandy") of findings and conclusions concerning Normandy reached in *Barry Skidelsky*, 6 FCC Rcd 2221 (ALJ 1991). The second issue is the standard comparative issue, while the third issue is the standard conclusory issue. *ID*, 8 FCC Rcd at 1. Considering that the Commission does not

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now have viable comparative criteria, this case will continue to languish in limbo until there is a settlement and/or voluntary dismissal, new comparative criteria are adopted, or one of the applicants is disqualified. By his instant motion, Brandt seeks the means to disqualify Normandy.

3. Brandt requests that the record in this proceeding be reopened and the issues in this proceeding be enlarged to determine: whether Normandy has transferred control over WYLR(FM) and its companion AM station WWSC without Commission consent; whether Normandy has failed to operate the stations in the public interest; whether Normandy has failed to maintain a main studio in accordance with the rules; and, in light of the evidence adduced, whether Normandy had the requisite qualifications to continue as licensee of Station WYLR(FM). In support of his motion, Brandt alleges that on January 15, 1996, Normandy entered into a Time Brokerage and Asset Purchase Agreement ("Agreement") with Calvin H. Carr ("Carr"). Brandt further relates that sections 3 and 5.1 of the Agreement provide that Carr may program the stations 24 hours per day, seven days per week for a term of 20 years and that Normandy has reserved no regularly scheduled time for presentation of public service programming. Brandt then states that, after learning of the Agreement in late 1996 and being told that Normandy had no employees, he retained a private investigator to gather knowledge about the stations' operations. Based on the investigator's probe, which involved "numerous visits" to the stations' studios during which documents were gathered and conversations with Christopher Lynch, Normandy's sole stockholder, occurred, Brandt alleges that: Normandy has turned over 100% of the stations' air time to Carr; Normandy does not employ a general

manager and a chief engineer as contemplated in the Agreement, rather, Lynch fills both roles even though he is seldom at the stations and does not maintain an office there; the issues lists not only do not list a single program responsive to issues as having been aired in any quarter since the first quarter of 1991, but they also appear to have been "fabricated" since they are basically copies of one another except for the dates which have been handwritten over the date appearing on the original list. Given the above, Normandy concludes that the record must be reopened and the requested issues added.

4. To justify reopening the record, the movant must demonstrate: (1) that it relies on new or newly discovered evidence not previously available to it; (2) that the new evidence, if proven, would raise a substantial and material question of fact affecting the ultimate outcome of the proceeding; and (3) that there is a substantial likelihood of proving the allegations if the case is remanded for further hearings. *E.g., Harry S. McMurray*, 8 FCC Rcd 8554, 8556 (1993). Assuming, *arguendo*, that Brandt relies on newly discovered evidence not previously available, it is by no means apparent that the new evidence, if proven, would raise substantial and material questions of fact that would affect the ultimate outcome of this proceeding or that there is a substantial likelihood that the allegations would be proven.

5. Essentially, Brandt's motion looks toward institution of a revocation proceeding. In this regard, the issues sought do not relate to the period for which Normandy is seeking renewal. Specifically, Brandt's first claim is that an unauthorized transfer of control of the stations occurred concurrent with the execution of the Agreement in 1996. However, the

mere existence of the Agreement does not mean that Normandy has abdicated control to Carr. Likewise, the provisions cited by Brandt do not mean that Normandy has transferred control of the stations. Normandy has the responsibility under Section 8 of the Agreement for the "personnel necessary for the over-all control of the Stations," while, under Section 10, Normandy has retained "control, to be reasonably exercised, over the policies, programming and operations of the Stations, including, without limitation, the right to decide whether to accept or reject any programming or advertisements, the right to preempt any programs in order to broadcast a program deemed by the Licensee to be of greater . . . interest than programming offered by the Broker, and the right to take any other actions necessary for compliance with the laws of the United States"

6. Thus, at this point, there is simply too little information presented to indicate whether Normandy has failed to exercise the requisite degree of control since the onset of the Agreement. In any event, while the Bureau agrees that the Commission views an unauthorized transfer of control as serious, such a violation is generally not potentially disqualifying. Rather, the appropriate remedy is a forfeiture. *E.g., FM Broadcasters of Douglas County*, 10 FCC Rcd 10429, 10430 (1995). Likewise, Brandt's claims regarding Normandy's compliance with the main studio rule, while also serious, would not result in loss of license, but a forfeiture. *E.g., KLDT-TV 55, Inc.*, 10 FCC Rcd 3198 (1995). Finally, with respect to Brandt's claims that the stations' public file does not contain the requisite program lists, the Bureau concurs that such apparent violations are serious and merit further inquiry. However, because they do not warrant, except in cases involving misrepresentation, loss of

license, it is inappropriate to reopen the record to explore whether such violations actually occurred. *Id.* Thus, Brandt's claims that Normandy has abandoned the stations to a time broker, violated the main studio rule, and violated the public file rule do not raise substantial and material questions of fact that warrant reopening the record in this proceeding.¹

7. Accordingly, the Commission should deny Brandt's motion to reopen the record and enlarge the issues.

Respectfully submitted,
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¹ However, the Bureau wishes to advise the Commission that Brandt's allegations and supporting evidence, unless adequately rebutted by Normandy, appear sufficient to warrant an investigation by the Bureau to determine whether rule violations have occurred. If an investigation occurs, the Bureau may ultimately decide to institute forfeiture proceedings and/or seek enlargement of the issues in this proceeding, and/or advocate institution of revocation proceedings with respect to the license for Station WWSC.

CERTIFICATE OF SERVICE

CurTrisha Hicks, a secretary in the Complaints/Political Programming Branch, Mass Media Bureau, certifies that she has on this 30th day of April, 1997, sent by first class United States mail, copies of the foregoing "Mass Media Bureau's on Comments on Motion to Reopen the Record and Enlarge Issues" to:

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