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

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

To: The Commission

MASS MEDIA BUREAU'S COMMENTS ON RESPONSE TO ORDER RELEASED JULY 24, 1997 AND MOTION TO REOPEN RECORD AND ESTABLISH DISQUALIFYING ISSUES AGAINST LAWRENCE N. BRANDT

1. By Order, FCC 97I-28, the Commission directed the Mass Media Bureau to respond to the "Response to Order Released July 24, 1997 and Motion to Reopen Record and Establish Disqualifying Issues against Lawrence N. Brandt" ("Response") filed August 13, 1997, by Normandy Broadcasting Corp. ("Normandy"). In accordance with the Commission's Order, the Mass Media Bureau ("Bureau") submits the following comments.

2. As previously explained by the Bureau in comments filed April 30, 1997, 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). The three issues

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pending for consideration involve: 1) the impact upon Normandy of findings and conclusions concerning Normandy reached in *Barry Skidelsky*, 6 FCC Rcd 2221 (ALJ 1991); 2) the standard comparative issue; 3) the standard conclusory issue. *ID*, 8 FCC Rcd at 1.

3. In his Motion to Reopen Record and Enlarge Issues ("Motion"), Lawrence N. Brandt ("Brandt") seeks to reopen the record and enlarge the issues in this proceeding 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 has the requisite qualifications to continue as licensee of Station WYLR(FM). In this regard, Brandt claims that: Normandy has turned over 100% of the air time of WYLR(FM) and its companion AM station, WWSC, to Calvin H. Carr ("Carr") pursuant to a Time Brokerage and Asset Purchase Agreement ("TBA"); Normandy does not employ a general manager and a chief engineer as contemplated in the TBA; rather, Christopher Lynch ("Lynch"), Normandy's sole stockholder, fills both roles even though he is seldom at the stations and does not maintain an office there; the stations' issues lists not only fail to 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. Brandt has supplied a copy of the TBA, copies of issues' lists, and affidavits from two Glenns Falls' residents, Michael Seidel and Thomas Erdman, who visited the stations on Brandt's

behalf. Given the above, Brandt argues that the record must be reopened and the requested issues added.

4. In its Response, Normandy, by its president Christopher Lynch, claims that: 1) Normandy maintains control over WYLR(FM)'s programming in that it designs, institutes and monitors the station's public interest programming; 2) Normandy maintains office space at 217 Dix Ave; 3) Lynch is the station's general manager and chief operator; and 4) all station employees are directly accountable to Lynch. Normandy also claims that it maintains WYLR(FM)'s "quarterly public service file" and that Brandt's allegations regarding Normandy's issues lists "are baseless" and a "calculated lie." Specifically, Normandy contends that Brandt's agent did not want public file copies regarding the programs broadcast, which it contends are "copiously documented by both the station's logs and public files," but only the lists of issues ultimately included with Brandt's motion to reopen the record and enlarge the issues. Finally, Normandy claims that a Commission field inspection occurred during the period covered by Brandt's allegations, and it suggests that no wrongdoing regarding programming or the public file was noted.[1]

5. To justify reopening the record, the movant must demonstrate: (1) that it relies on

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[1] In his Reply, filed August 18, 1997, Brandt observes that Normandy's claims are general and unsubstantiated. Brandt notes that Normandy provides no information as to how much time Lynch spends at the stations and that Normandy's claim that all station employees are directly responsible to Lynch is inconsistent with the TBA's provisions indicating that all station employees, other than the positions held by Lynch, report to Carr. Brandt concludes that Normandy has not only failed to dispel the questions raised in Brandt's motion but has in its Response made material false statements. Accordingly, Brandt not only seeks addition of the issues requested in his motion but also a misrepresentation issue.

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). After reviewing Normandy's response, the Bureau reiterates that it is by no means apparent at this stage 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. At the same time, however, as explained herein, Brandt's Motion and Normandy's Response raise a question as to whether the public file rule has been violated. The Bureau thus proposes to investigate the question raised and, depending on the outcome of that investigation, take appropriate action.

6. With regard to the alleged unauthorized transfer of control, there is no dispute concerning the existence of the TBA and its terms. However, as we previously stated, the mere existence of the TBA does not mean that Normandy has abdicated control to Carr. This is so because Normandy has the responsibility under Section 8 of the TBA for the "personnel necessary for the over-all control of the Stations." According to both Normandy and Brandt, the general manager and chief engineer for both WYLR(FM) and WWSC is Lynch, Normandy's president and sole stockholder, which suggests that Normandy has the necessary personnel to maintain over-all control of the stations. Likewise, under Section 10 of the TBA, 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 . . . ." Normandy, albeit unartfully, in a general manner and without verification of its claims,[2] basically asserts that Lynch maintains control over the station's public service programming. Considering that Lynch apparently functions both as general manager and chief engineer and, as such, retains control over the stations' programming and policies, Brandt has not raised a substantial and material question regarding an unauthorized transfer of control. Consequently, addition of an issue regarding an unauthorized transfer of control is not warranted.

7. Brandt's second requested issue seeks to determine whether Normandy has failed to operate the stations in the public interest. The basis for this issue is the apparent absence of any documentation showing what programs have been aired since 1991 which are responsive to community issues. See Section 73.3526(a)(9). Specifically, Brandt has provided copies of issues' lists which, on their face, do not identify a single program. Brandt therefore reasons that "Normandy has not presented a single program over either station responsive to an issue that it has identified as significant since at least 1991." Motion at 8. At the same time, however, Brandt failed to allege that he had monitored the stations' programming while Normandy claims: 1) it maintains a "quarterly public service file, which is volumous [sic]

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[2] Arguably, the absence of verification by Normandy is insignificant in light of Section 1.229(d), which provides that "[t]he failure to file an opposition . . . will not necessarily be construed as an admission of any fact or argument contained in a pleading."

and reflects Normandy's efforts" (Response at p. 2, ¶ 7); 2) "[p]rogramming for public service was designed by Normandy, instituted by Normandy, and is continuously monitored by Normandy and is copiously documented by both the station's logs and public files" (Response at p.2, ¶ 11a); and 3) "the agent told Lynch the agent's employer did not want any copies of the programs broadcast, whereupon Lynch copied those items requested." Response at p. 3.

8. Had Normandy actually supported its general claims with appropriate affidavits and copies of the documentation referenced, namely, program logs and lists of the programs broadcast, which included the information specified in Section 73.3526(a)(9) of the Commission's Rules, the matter could be laid to rest. However, Normandy did not do so. Moreover, and in apparent contradiction of Normandy's claims, the affidavit of Thomas Erdman states that "Lynch said he would make copies of the LMA and the program and issues lists." Motion, Erdman affidavit at p. 4, ¶ 8. Considering that the lists included with the Motion do not reflect any program information whatsoever and that Normandy does not dispute the accuracy of the lists filed by Brandt (see Response at p. 4, ¶ 13), a question is raised as to whether the public file contains the lists required by the rules. Thus, while Brandt has not met the standard for reopening the record in this proceeding, he has raised a question regarding Normandy's compliance with the public file rule, which the Bureau intends to investigate.

9. Next, Brandt's allegations regarding Normandy's compliance with the main studio rule, when viewed in light of Normandy's Response, do not constitute a reason for reopening

the record. In this regard, Brandt's agents acknowledge that persons understood to be managers were present at the stations on most of the visits reportedly made by them. Moreover, although there may be some confusion as to who is a Normandy employee, it appears that both Lynch and Paul Vega, the station manager, are paid by Normandy. Thus, a main studio issue is not warranted.

10. Finally, Brandt, in his rebuttal, has failed to raise a substantial and material question that misrepresentations occurred. In this regard, Brandt identifies two statements with which he takes issue. The first is that "Lynch . . . spends whatever time is necessary to ensure both FCC compliance and a high level of public service." Reply at 4. According to Brandt, this statement is questionable because "Normandy provides no information as to how much time Lynch spends at the stations on a daily, weekly or monthly basis." However, the affidavits accompanying Brandt's Motion reflect that Lynch appeared at the stations and directed the actions of Vega, a Normandy employee and the stations' "manager." See Motion, Thomas Erdman affidavit at p. 1, ¶¶ 1, 5, 7, 8, 9, 11 and 12; Michael Seidel affidavit at ¶¶ 1 and 2. Thus, Normandy's statement, which is basically an opinion, not a statement of fact, does not appear to be untruthful. Compare, Gaines, Bennett Gilbert, 9 FCC Rcd 533, 534 ¶ 5 (1994). See also, Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983). The second statement challenged by Brandt is "[a]ll station employees are directly responsible to Lynch." According to Brandt, this statement is false because Normandy has no employees other than Lynch in that all of the stations' employees per the TBA are those of Carr. The Bureau disagrees. Initially, the Bureau notes that the statement in question reads: "All station

employees are directly accountable to Lynch in these respects." From the preceding portions of the Response, it appears that Normandy is claiming that Lynch has the ultimate authority with respect to the stations' programming and operations. Indeed, such is the import of the TBA at ¶ 10. Likewise, the actions of the stations' employees as described in the affidavits supplied by Brandt indicate that they sought guidance from Lynch before acting. Indeed, Carr, the person with whom Normandy has the TBA, is not even mentioned by Brandt's agents as being at the stations or being consulted by the stations' employees. Thus, the statement challenged does not appear to be untruthful. Consequently, addition of a misrepresentation issue is not warranted.

11. Accordingly, the Bureau reiterates that the Motion to Reopen Record and Enlarge Issues filed April 16, 1997, by Lawrence N. Brandt should be denied.

Respectfully submitted,
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September 11, 1997

CERTIFICATE OF SERVICE

CurTrisha Hicks, a secretary in the Complaints/Political Programming Branch, Mass Media Bureau, certifies that she has on this 11th day of September, 1997, sent by first class United States mail, copies of the foregoing "Mass Media Bureau's on Comments on Response to Order Released July 24, 1997 and Motion to Reopen the Record and Establish Disqualifying Issues against Lawrence N. Brandt" to:

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