

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j))	MM Docket No. 97-234
of the Communications Act)	
-- Competitive Bidding for Commercial)	
Broadcast and Instructional Television)	
Fixed Service Licenses)	
)	
Reexamination of the Policy)	GC Docket No. 92-52
Statement on Comparative Broadcast)	
Hearings)	
)	
Proposal to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearing Process)	
to Expedite the Resolution of Cases)	

To: The Commission - Mail Stop 1170

OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION

1. Montgomery Communications, Inc. ("Montgomery") hereby opposes the Petition for Partial Reconsideration ("Davis Petition") filed by Davis Television Duluth, LLC and Davis Television Topeka, LLC (collectively "Davis") of the *First Report and Order* ("Order"), in the above-captioned proceeding, FCC 98-194, adopted August 6, 1998.¹ The Davis Topeka Application should not be considered a singleton application, not subject to further competing applications for purposes of the broadcast auction rules, as it was never subject to "a filing window" as required by

¹ Davis has two applications at issue in its Petition, including Channel 43, Topeka, Kansas, File No. BPCT-960920__ ("Davis Topeka Application").

the Commission's new competitive bidding rules, and there is, in fact, a competing application already filed for the same channel as the Davis Topeka Application.²

2. As pointed out in the Davis Petition, the key to determining whether singletons can be granted without auction is whether the "Commission has yet to open a filing window" with respect to the singleton in question. Davis Petition at ¶ 65. In the case of the Davis Topeka Application no filing window was ever opened or closed, and no cut-off list was ever issued by the Commission.

3. The Commission established a filing deadline of September 20, 1996, for applications for new NTSC stations, after which time only new digital stations could be proposed. *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Further Notice of Proposed Rule Making*, 11 FCC Rcd 10968, 10992 (1996) ("*Sixth Further Notice*"). As the Commission recognized in the *Order*, "[t]he intent of that 30-day period was to afford an opportunity to file any applications that were currently being prepared for filing, not to solicit competing applications." *Order* at ¶ 70. Evidence of this intent is contained in the *Sixth Further Notice*, where the Commission stated:

When applications for new stations are accepted for filing, we will continue our process of issuing Public Notices that "cut-off" the opportunity for filing competing, mutually-exclusive applications. In connection with these cut-off notices, we will allow additional competing applications to be filed after the end of this filing opportunity. *Sixth Further Notice* at ¶61.

² Montgomery also has a pending application for construction permit for a new commercial analog television station to operate on Channel 43, Topeka, Kansas filed on August 20, 1997 (file number not yet assigned). Montgomery has filed its own Petition for Reconsideration in this proceeding discussing its application.

Obviously, the Commission did not intend that the 30-day period ending September 20, 1996, to be a filing “window”; rather, the Commission intended to afford a later opportunity for competing applications. Therefore, the Davis Topeka Application is certainly no different under the statute from other pre-July 1, 1997 applications that were not subject to a cut-off period and should not be granted as singleton application. If the logic contained in the Davis Petition were accepted, it would result in all applications filed before the September 20, 1996 deadline (whether or not a filing window or further cut-off opportunity was subsequently provided) being granted or going to auction without any further opportunity at all for competing applications.

4. Montgomery has filed an application that is mutually exclusive with the Davis Topeka Application. Therefore, the Davis Topeka Application cannot be considered a singleton application in any case. The only reason Montgomery did not file an application for the channel within the 30-day filing period ending September 20, 1996, was that the Commission had frozen all requests to amend the TV Table of Allotments and applications for construction permits for vacant television allotments in the top 30 markets, which included the Topeka market. *Advanced Television Systems and Their Impact on Existing Television Service, Order*, 76 RR 2d 843 (1987) (“*Freeze Order*”). There was no indication the Commission would be inclined to grant waivers of the “freeze”. The Commission stated in the *Freeze Order* that it would return applications along with any accompanying filing fees. *Freeze Order* at ¶ 3. Any waiver requests would be considered only

on a case-by-case basis for applicants which provided compelling reasons why the freeze should not apply to their particular situations or class of stations.³

5. Montgomery took the Commission at its word and did not file an application for the Topeka market due to the “freeze” which applied to that market. However, after learning about the Davis Topeka Application and becoming aware of possible impending statutory changes the 1997 Budget Act, Montgomery became concerned that it might lose a broadcasting opportunity in the Topeka market that was very important to it as a Fox affiliate and so filed its application for Channel 43 in Topeka, Kansas. Montgomery followed all appropriate Commission rules and regulations, so there are now two mutually exclusive applications on file, and the Davis Topeka Application is not a singleton.

6. Not only is the Davis Topeka Application not a singleton but even if the Davis Topeka Application were considered a singleton, there are substantial issues to be resolved before the application could be granted. The Commission would be required to grant Davis’s request to

³ Davis’s waiver request is generic and not specific to the market or class of station relevant to the Davis Topeka Application. Davis posits in its waiver request that the television industry has changed and that the waiver request should be granted to foster development of networks competing with the so-called “Big 3” over-the-air television networks. This is not an argument unique to the Topeka market or the Davis Topeka Application and should more appropriately be considered by the Commission generally. It certainly does not justify a waiver contrary to the stated intent of the freeze to “preserve sufficient broadcast spectrum to insure reasonable options relating to spectrum issues for these new technologies”. *Freeze Order* at ¶ 2. Additionally, Davis neglected to mention that Fox Network service is currently provided to the Topeka market by Montgomery on Montgomery’s low power station in Topeka. Montgomery is also a secondary affiliate of the new UPN network. Obviously, the Topeka market has more competition than Davis indicated in its waiver request, which calls into question the merits of Davis’s waiver request. It would be more appropriate to deny the waiver request and dismiss the Davis Topeka Application than to treat it as a singleton.

waive the *Freeze Order*, and the grounds for the rule waiver request are questionable at best.⁴ Additionally, even if the Commission granted the waiver of the *Freeze Order*, it would also be required to address the ownership structure of Davis and the ownership of a station owned by an associated entity of the applicant with predicted contour overlap with the facility contemplated by the Davis Topeka Application.

7. The Davis Topeka Application states that there is predicted contour overlap between WDAF-TV, Kansas City, Missouri, and the facility proposed in the Davis Topeka Application. Davis Topeka Application at Exhibit 4. Fox Television Stations, Inc. (“Fox”) is the licensee of WDAF-TV. *NWCG (Parent) Holdings Corp. & NWCG Holdings Corp. and Fox Television Stations, Inc.*, 11 FCC Rcd 16318 (1996). Davis has entered into an Agreement in Principle dated July 8, 1996, with Fox to form a joint venture to pursue the construction and operation of Fox affiliate television stations whereby Fox will invest half of the money for the construction and operation of the new station(s). Davis Topeka Application at Exhibit 2. Also as part of the Agreement in Principle, any license acquired by the joint venture will enter into a ten (10) year standard form affiliation agreement with Fox Broadcast Company. *Id.* Therefore, Fox is the licensee of a station with overlapping contours and has an interest in the Davis Topeka Application. This level of involvement suggests a degree of control which should may implicate the cross-ownership and cross-interest policies.⁵

⁴ See note 3, *supra*.

⁵ See *Letter to The Walt Disney Company and Young Broadcasting of Los Angeles*, 11 FCC Rcd 11647 (1996), where the Chief of the Video Services Division of the Mass Media Bureau considers the cross-interest policy and comments that the ownership of a non-attributable, non-
(continued...)

8. The Davis Topeka Application is not and should not be considered a singleton application for purposes of broadcast auctions. Not only is there a properly-filed mutually exclusive application filed for the same channel, but there has never been a proper filing window or cut-off period for the channel and application. Additionally, there are several issues still to be considered by the Commission before it is even determined if Davis has an acceptable application. Accordingly, Montgomery respectfully requests that the Commission deny the Petition filed by Davis and to

⁵(...continued)

voting equity interest raises greater concerns about the potential effect on competition and diversity than a non-attributable, non-voting equity interest alone. *See also BBC License Subsidiary L.P. , et. al.*, 10 FCC Rcd 10968 (1995), where the Commission conditionally granted the assignment applications of a television station to an entity associated with Fox. The applications presented issues concerning whether Fox's interest in the station should be attributed to Fox under the Commission's multiple ownership rules. The Commission determined that the interests and relationships between Fox and the proposed licensee did not fall squarely within any of the cases in which the Commission has previously found multiple relationships between a network and its affiliate nonattributable. *Id.* Additionally, the Commission said, whether and under what circumstances multiple relationships, which taken individually are nonattributable, should be considered attributable in the aggregate, is a question posed in the pending rulemaking on attribution. *Id.* The facts in the Davis Topeka Application also do not fall squarely within the cases. The combination of 50% investment and an affiliation agreement confers significant control over the programming in addition to financial matters. Additionally, the Davis Topeka Application only contains an Agreement in Principle. The specific terms of the involvement of Fox in the proposed station are not yet available for review. Without the specifics, the review for purposes of this proceeding and the ensuing broadcast auctions is inadequate at best and will be required to determine the qualifications of Davis.

reconsider and modify the broadcast auction rules as set forth by Montgomery in its Petition for Reconsideration.

Respectfully submitted,



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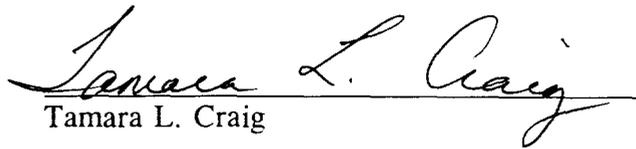
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November 12, 1998

CERTIFICATE OF SERVICE

I, Tamara L. Craig, hereby certify that on this 12th day of November, 1998, copies of the foregoing "Opposition to Petition for Partial Reconsideration" have been served by hand delivery or first class mail, postage prepaid, upon the following:

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