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November 25, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Nov 30 1 27 PM '98

Ms. Magalie Sales
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: MM Docket No. 97-234; GC Docket No. 92-52, GEN Docket No. 90-264

Dear Ms. Salas:

On behalf of Davis Television Duluth LLC, applicant for a construction permit for Channel 27 at Duluth, Minnesota, and Davis Television Topeka, LLC, applicant for a construction permit for Channel 43 at Topeka, Kansas, I am transmitting herewith an original and nine copies of their Reply to Opposition to their Petition for Partial Reconsideration in the above-referenced proceeding.

Should there by any questions concerning this matter, please contact the undersigned.

Very truly yours,

Dennis P. Corbett

Dennis P. Corbett

Enclosure

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

NOV 25 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

To: The Commission

REPLY TO OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION

Davis Television Duluth, LLC, applicant for a construction permit for a new television broadcast station to operate on Channel 27 at Duluth, Minnesota, and Davis Television Topeka, LLC, applicant for a construction permit for Channel 43 at Topeka, Kansas ("Davis Topeka Application") (collectively "Davis Duluth/Topeka"), by their attorneys and pursuant to 47 C.F.R. § 1.429, hereby reply to the November 12, 1998 Opposition of Montgomery Communications, Inc. ("Montgomery") to Davis Duluth/Topeka's petition for reconsideration of the Commission's First Report and Order, FCC 98-194, released August 18, 1998 in the above-captioned proceeding ("First R&O"). In support whereof, the following is shown.

Montgomery argues that: the Davis Topeka Application should not be considered a singleton application because no "filing window" was ever opened for Topeka's Channel 43; Davis Topeka's DTV freeze waiver request should be not granted because it is insufficient on the

merits, and Topeka enjoys significant competition already, including Montgomery's existing low power Channel 43 operation; and the Davis Topeka Application raises certain issues because of Fox Television Stations, Inc.'s ("FTS") ownership interest in the application. None of these contentions has merit.

On the central issue posed by Davis Duluth/Topeka's Reconsideration Petition, Montgomery merely recites several facts that Davis Duluth/Topeka has already addressed,[1] and then, perhaps unwittingly, provides support for Davis Duluth/Topeka. That is, Montgomery concedes that it was aware of the September 20, 1996 deadline for filing applications for vacant NTSC allotments but voluntarily elected to let the deadline pass without filing its own application. Montgomery's professed reason for "sitting on its hands" in August-September 1996 was that the Commission had stated in Advanced Television Systems and Their Impact on Existing Television Service, 76 R.R.2d 843 (1987) ("Freeze Order") that, in the absence of compelling waiver showings, it would return applications for vacant allotments in frozen markets. Montgomery totally ignores the fact that the Commission, in establishing the September 20, 1996 deadline, had specifically invited applicants to seek freeze waivers as necessary. Sixth Further Notice of Proposed Rule Making, MM Docket No. 87-268, 11 FCC Rcd 10968, 10992 (1996) ("we will continue our current policy of considering requests for waiver of our 1987 freeze Order on a case-by-case basis") (footnote omitted). The salient facts are that Montgomery was aware of the deadline and chose not to meet it. Montgomery, in other words, has succeeded in describing the

[1]For example, Montgomery relies on the fact that the FCC said in the First R&O that the purpose of the September 20, 1996 filing deadline was "to afford an opportunity to file any applications that were currently being prepared for filing, not to solicit competing applications." Opp. at 2, citing First R&O at ¶ 70. Davis Duluth/Topeka acknowledged and distinguished this FCC finding in its Reconsideration Petition at 3-5.

very process of a filing window — a publicized deadline for filing (September 20, 1996) of which it was aware, coupled with potentially draconian consequences for the failure to file (i.e., deletion of a vacant channel). Montgomery's "bottom line" was just different — it elected to let the window close without filing, while Davis Duluth/Topeka elected to file.

Montgomery's voluntary election not to file a timely application has put it in the very awkward (indeed, untenable) position of arguing that it should nonetheless be treated as a competing Topeka applicant with Davis. But Montgomery points to no filing deadline to which it responded. Rather, Montgomery literally "threw" its application into the "hopper" on a random date in August 1997 after it became alarmed that it might be displaced by Davis' proposed full power operation on Channel 43. Montgomery's application was, however, not filed until after the June 30, 1997 deadline established by the Balanced Budget Act, and it accordingly is not a competing application within the meaning of that legislation.

Montgomery's attacks on Davis Duluth/Topeka's freeze waiver request and legal qualifications are entirely misplaced in this rule making proceeding. The Commission is now resolving the "big picture" issues that apply to all parties. The specifics of the Davis Topeka Application are simply not properly addressed here. Davis Duluth/Topeka notes, however, that Montgomery's glib arguments about the inadequacy of Davis Duluth/Topeka's freeze waiver request are potentially suicidal for an entity like Montgomery, which is ostensibly committed to providing full power service to Topeka on Channel 43. Without the freeze waiver and a viable Davis application, the entire allotment could vanish because no one would have successfully met the September 20, 1996 deadline. As the low power "incumbent," such a result would apparently suit Montgomery's purposes. See Opp. at 4. Montgomery, in other words, is acting as an

entrenched market incumbent and its arguments should be viewed from that perspective.[2] Indeed, the fact that there is no full power Fox affiliate in the Topeka market provides prima facie evidence of the underserved nature of that market, at least from the perspective of the public interest, rather than Montgomery's private interests.

Davis' legal qualifications will be addressed as necessary in the individual application context, not in this rule making proceeding. It is sufficient for present purposes to state that Davis' ownership structure is compliant with FCC rules, regulations and policies and Montgomery's speculation to the contrary is groundless.

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[2] Montgomery's view of the Topeka market would apparently equate its low power station on Channel 43 with a full power station. Opp at 4 n.3. The Commission has never equated low power and full power stations. See Second Report and Order/Further Notice of Proposed Rule Making, 7 FCC Rcd 3340 (1992) at ¶ 39-42. Montgomery has provided no rationale for doing so here.

CONCLUSION

For the reasons stated above and in Davis Duluth/Topeka's Reconsideration Petition, Montgomery's Opposition should be rejected and Davis Duluth/Topeka's Reconsideration Petition should be expeditiously granted.

Respectfully submitted,

DAVIS TELEVISION DULUTH, LLC
DAVIS TELEVISION TOPEKA, LLC

By: Dennis P. Corbett

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November 25, 1998

Their Attorneys

CERTIFICATE OF SERVICE

I, Randy L. Pannell, hereby certify that on this 25th day of November, 1998, copies of the foregoing "Reply to Opposition to Petition for Partial Reconsideration" have been served by first class mail, postage prepaid, upon the following:

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Randy L. Pannell

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