

ORIGINAL

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

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AUG 22 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Section 73.606(b),)	MB Docket No. 02-154
Table of Allotments,)	RM-10490
Television Broadcast Stations)	
(Topeka, Kansas))	

To: Chief, Video Services Division
Mass Media Bureau

COMMENTS OF MONTGOMERY COMMUNICATIONS, INC.

1. Montgomery Communications, Inc. ("Montgomery") hereby submits these comments in response to the *Notice of Proposed Rule Making* ("Notice") in the above-captioned proceeding, DA 02-1482, released July 1, 2002. The Notice proposes to change the analog Channel 43 allotment at Topeka, Kansas, to analog Channel 22.^{1/} Montgomery is a prospective applicant for the channel, regardless of which channel ultimately remains in the Table of Allotments.

2. Montgomery has made no independent evaluation of the technical aspects of the Channel 22 proposal or the comparative merits of Channel 43 and Channel 22. It takes no position on whether the proposed substitution should be made.

3. Montgomery does wish, however, to ensure that the Report and Order in this proceeding reaffirms clearly that if the pending tendered application of Davis Television Topeka,

^{1/} This allotment has no paired digital channel.

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LLC ("Davis"), the proponent in RM-10490, is accepted for filing,^{2/} the surviving channel -- whether it be 43 or 22 -- will be opened up for competing applications.^{3/}

4. The Commission has already ruled that, if the Davis application is accepted, the Balanced Budget Act of 1997^{4/} requires an opportunity for competing applications. See Letter from James Brown, Deputy Chief, Video Services Division, Mass Media Bureau, dated June 11, 1999.^{5/} The letter stated explicitly:

In the event that Davis' freeze waiver request is ultimately granted and its Topeka application accepted, then the Commission will provide an opportunity for the filing of applications mutually exclusive with Davis' application, and Montgomery may submit a competing application at that time. See *Memorandum Opinion and Order in MM Docket No. 97-234, GC Docket No. 92-52, and GEN Docket No. 90-264, FCC 99-74* (rel. April 20, 1999).^{6/}

2/ It is not clear that the Davis application is acceptable for filing, because acceptance will require a waiver of the freeze imposed in 1987 on applications for new analog television stations in the vicinity of a list of specified urban areas, 52 Fed. Reg. 28346 (July 29, 1987). Topeka is within the freeze radius of one of the listed urban areas (Kansas City, MO). The Commission has not yet ruled on Davis' request for a waiver of the freeze.

3/ The alternative is that the Davis application will be dismissed, no applications will be accepted, and the allotment will be deleted in light of the Commission's policy not to accept any more applications for new analog stations.

4/ 105 P.L. 33, Sec. 3002(a)(3) (Aug. 5, 1997) and 47 USC Sec. 309(l) (June 28, 2002), which states that the Commission shall have the authority to conduct competitive bidding proceedings for initial licenses or construction permits for commercial television stations that were filed before July 1, 1997. However the statute also states that the Commission shall treat only competing applicants as the only persons eligible to be qualified bidders for purposes of such proceedings; see 47 USC Sec. 309(l)(2). In this case, there is no competing applicant, so Sec. 309(l)(2) does not apply.

5/ A copy of this letter is attached to these Comments.

6/ This letter was issued when the Mass Media Bureau ("Bureau") rejected Montgomery's attempt to file a competing application in 1997. The Bureau stated that it would not accept any application filed after September 20, 1996, until a window was opened, but that Montgomery was statutorily entitled to that window.

5. It is thus firmly established that a filing window must be afforded for whatever allotment survives this rule making. Montgomery hereby states that it will file an application for that allotment; and, if authorized, it will construct and operate a station on the surviving channel.^{7/}

Respectfully submitted,



Peter Tannenwald
Gregory V. Haledjian^{8/}

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Counsel for Montgomery
Communications, Inc.

August 22, 2002

^{7/} Montgomery is the licensee of Station KTLJ-LP, which operates on Channel 43 at Topeka. KTLJ-LP is eligible for Class A status and has a Class A application pending, File No. BLTTA-20010413AAF. Davis has opposed this Class A application. If the Class A application is granted, the Channel 43 allotment will not be usable at Topeka, because it will conflict with KTLJ-LP's primary spectrum status as a Class A station. See *Establishment of a Class A Television Service*, 15 FCC Rcd 6355 (2000) (at par. 44), *recon den.*, 16 FCC Rcd 8244 (2001) (at par. 53), establishing clearly that a singleton pending full power application has priority over a Class A application only where the singleton is cut off from further filings. As demonstrated herein, the Davis application is not cut off from further filings.

^{8/} Bar admission pending.

Federal Communications Commission
Washington, D.C. 20554

June 11, 1999

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Re: Application for a New Television Station on Channel 43, Topeka, Kansas

Dear Counsel:

Montgomery Communications, Inc. (Montgomery) has petitioned for reconsideration of the return of its application for a new commercial television station on Channel 43 at Topeka, Kansas. For the reasons set forth in detail below, we deny Montgomery's petition.

Background. By a letter dated April 9, 1999, from the Chief, Television Branch, Video Services Division (Branch Letter), Montgomery's application for a new television station on Channel 43 in Topeka, tendered on August 21, 1997, was returned. As explained in the Branch Letter, Montgomery's application was untimely and subject to return, as it was submitted 11 months after the September 20, 1996 deadline for the filing of applications for new NTSC stations. See *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*). Montgomery had, however, asserted in Exhibit 6 of the returned application that the application was in fact timely because it was mutually exclusive with an application submitted by Davis Television Topeka, LLC (Davis) for Channel 43 in Topeka on September 20, 1996. While the Commission stated in the *Sixth Further Notice* (11 FCC Rcd at 10992) that it would continue its "process of issuing Public Notices that 'cut-off' the opportunity for filing competing, mutually-exclusive applications [and] allow additional competing applications to be filed," with respect to pending applications and applications filed by September 20, 1996, the Branch Letter noted that Davis' application had not yet been accepted for filing or placed on a cut-off list. Thus, Montgomery's application, if tendered as an "additional competing" application against Davis' application, was premature. Finally, the Branch Letter explained that, in the event the Commission allows applications to be filed that are mutually exclusive with Davis' application, then Montgomery could submit a competing application, consistent with the Commission's broadcast competitive bidding rules.¹

¹ However, as explained in the Branch Letter, before Davis' application could be accepted and additional competing applications solicited, a determination would have to be made as to the grantability of Davis' request for a waiver of the 1987 freeze placed on the filing of applications for new analog television stations in substantial areas surrounding 30 major television markets. See *Order*, RM 5811 (Mimeo No. 4074,

In its reconsideration petition filed May 7, 1999, Montgomery argues that its application must be retained by the Commission, or Davis' application returned, because Montgomery and Davis "are essentially similarly situated and thus are entitled to equal treatment." Petition at 2. Montgomery asserts that neither its application nor Davis' application complied with the rules on the date it was filed; Davis' application did not comply with the freeze on filing analog television applications in the top 30 markets, and Montgomery's application did not comply with the top 30 market freeze and the September 20, 1996 deadline. According to Montgomery, the fact that it needs two waivers and Davis "needs only one is a distinction without a difference." *Id.* In sum, Montgomery contends that there is no justification for treating two applications both requesting waivers differently, and that the return of its application has resulted in Montgomery being denied equal protection of the law.

Discussion. We disagree with Montgomery's arguments set forth above. As stated in the Branch Letter, Montgomery's application is clearly untimely, as it was submitted 11 months after the September 20, 1996 deadline for applications for new NTSC stations. As such, the application is patently defective and subject to return. *See* 47 C.F.R. § 73.3566(a). Moreover, Montgomery has presented no persuasive arguments as to why the Commission should waive its September 20, 1996 deadline in this instance. Given that the *Sixth Further Notice* expressly stated that the Commission would "not accept additional applications for new NTSC stations that are filed after" September 20, 1996 (*see* 11 FCC Rcd at 10992), we see no circumstances here warranting a waiver of that deadline and retention of an application submitted nearly a year after that date.²

We also reject Montgomery's contention that there is no justification for treating its application differently than Davis' application and that Montgomery has been denied equal protection of the law. On the contrary, there is ample justification for this disparate treatment, as Davis' application complied with the September 20, 1996 deadline and Montgomery's application did not. Thus, we believe that Montgomery's application was properly returned as untimely, and Davis' application (along with numerous other applications requesting freeze waivers that complied with the September 20, 1996 deadline) was properly retained at the Commission.

Finally, we do not believe that Montgomery has been materially prejudiced by the return of its Topeka application. In the event that Davis' freeze waiver request is ultimately granted and its Topeka application accepted, then the Commission will provide an opportunity for the filing of applications mutually exclusive with Davis' application, and Montgomery may submit a competing application at that time. *See Memorandum Opinion and Order* in MM Docket No.

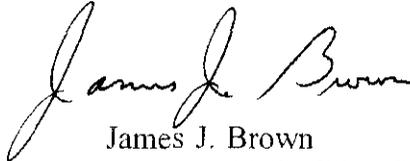
rel. July 17, 1987).

² Certainly Montgomery has not met the "high hurdle" required to justify a waiver of our clearly established filing deadline. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("applicant for waiver faces a high hurdle even at the starting gate" and "must plead with particularity the facts and circumstances" warranting the waiver).

97-234, GC Docket No. 92-52 and GEN Docket No. 90-264, FCC 99-74 at ¶ 22 (rel. April 20, 1999). To the extent that Montgomery believes it has been "damaged by forfeiting its not insubstantial filing fee of \$3,080" submitted with its returned Topeka application (Petition at 3), Montgomery may submit a formal request for a refund of that filing fee.

In view of the foregoing, the petition for reconsideration filed by Montgomery Communications, Inc. IS DENIED.

Sincerely,

A handwritten signature in cursive script, appearing to read "James J. Brown".

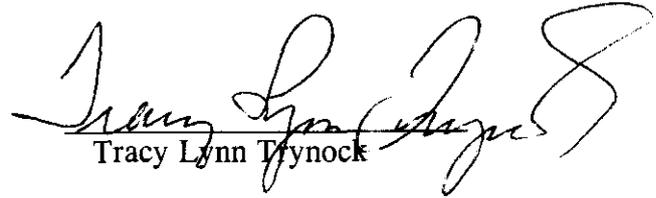
James J. Brown
Deputy Chief, Video Services Division
Mass Media Bureau

cc: Montgomery Communications, Inc.

CERTIFICATE OF SERVICE

I, Tracy Lynn Trynock, do hereby certify that I have, this 22nd day of August, 2002, caused to be sent by first class United States mail, postage prepaid, copies of the foregoing "Comments of Montgomery Communications, Inc." to the following:

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