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

In the Matter Of Ronald Brasher, Patricia Brasher, and DLB Enterprises, Inc. dba Metroplex Two-Way Radio Service	))))	EB Docket No. 00-156

Before: The Commission

Reply to Opposition to Request for Special Permission to File Exceptions Exceeding Twenty [sic] Pages

DLB Enterprises, Inc. ("DLB") hereby files its Reply in response to the Enforcement Bureau's ("Bureau") Opposition[1] to Request for Special Permission to File Exceptions Exceeding Twenty [sic] Pages ("Opposition"). On September 8, 2003, in response to the Initial Decision of Administrative Law Judge Arthur I. Steinberg, FCC 03D-02, released August 8, 2003 (the "Initial Decision"), Ronald Brasher, Patricia Brasher and DLB each filed their own appeal of the Initial Decision, and each appeal was titled "Exceptions." The three defendants collectively filed two additional documents. The three defendants filed one appeal titled "Combined Exceptions" and a document titled "Request for Special Permission to File Combined Exceptions Exceeding Twenty Five Pages" ("Request"). In their Request, the defendants asked for the Commission, for the sake of clarity, to accept their Combined Exceptions in lieu of the three individual Exceptions concurrently placed on file, and to grant permission for the Combined Exceptions to exceed the twenty five (25) page limit imposed by Section 1.277(c) of the Commission's rules.

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[1] The Bureau provides no citation to rule in support of its Opposition. If the Commission deems the Bureau's Opposition not properly brought, Defendant respectfully requests dismissal of the instant Reply as moot.

On September 12, 2003 the Enforcement Bureau ("Bureau") filed its Opposition. The Opposition states that the Bureau is opposed to the Commission's acceptance of the Exceptions filed by each individual defendant, the Combined Exceptions and the Request. The Bureau's arguments can be summarized as follows: (1) the individual defendants were not each entitled to file their own appeal, (2) the individually filed Exceptions should collectively be deemed to exceed the page limitation prescribed in Section 1.277(c) of the Commission's rules, and (3) there is no precedent to support the filing of the Combined Exceptions. The Bureau suggests that the Commission should dismiss the Request, the Combined Exception and the individual Exceptions, order the defendants to immediately and collectively file a single set of Exceptions, and grant the Bureau ten (10) additional days to respond to the refiled single, twenty-five (25) page set of Exceptions. As discussed below, the Bureau's arguments and suggestions are wholly without merit, are unsupported by precedent, seek to deprive the defendants of their right to due process under the law, were presented in a pleading that is not in compliance with the Commission's rules, and should be dismissed by the Commission.

1. <u>The Individual Defendants Are Each Entitled to File Their Own Appeal</u>

The Bureau proffers the argument that defendants who have cooperated to collectively forward a unified defense during a hearing are prohibited from each individually submitting their own appeal. In support of this proposition, the Bureau states in its Opposition the defendants are "playing fast and loose with the Commission's requirements" by each electing to individually file their own Exceptions to the Initial Decision. Opposition at 2. To establish that the individual defendants are prohibited from filing their own Exceptions, the Bureau cites no relevant precedent, but instead relies on a showing that the defendants have in the past pooled their

resources to collectively defend what they deem to be common interests The Bureau accurately notes that the defendants were represented by one set of attorneys, collectively filed a single Proposed Findings of Fact and Conclusions of Law, and collectively filed a single Reply to the Bureau's Proposed Findings of Fact and Conclusions of Law [2]

The Bureau's analysis reflects no more than the fact that the defendants pooled their resources to defend themselves in a matter in which they admittedly had a close commonality of interest However, the Bureau ignores the fact that the Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing ("Hearing Designation Order") *individually* named each separate party defendant, directed that each separate party defendant be *individually* served a copy of the Hearing Designation Order, and warned that a failure by any *individual* party to make an appearance would act as a waiver of that party's right to be heard - but not of the right for other defendants to be heard It has been clear from the very inception of this matter that each individual defendant had individual interests In that regard, Ronald Brasher, Patricia Brasher and DLB Enterprises, Inc each filed a separate Notice of Appearance on September 15, 2000

The illogic of the Bureau's position is evident from a cursory review of the rule entitling parties to appeal an Initial Decision The Commission's rules state "[w]ithin 30 days after the date on which public release of the full text of an initial decision is made, or such other time as the Commission may specify, **any of the parties** may appeal to the Commission by filing exceptions to the initial decision " 47 C F R § 1 276(a)(1) (emphasis added) It could not be

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[2] Defendant avers that the defendants' earlier combined efforts spared the resources of the Court and the Bureau, and that the Request would have the same positive effect for the Bureau and the Commission

clearer that the Commission intended to allow any parties to a proceeding to file their own appeal

The plain language of the rule contains no limitation on an individual party's right to appeal other than the page limit and other extraneous administrative matters described later in the rule The Commission's rule is necessary to effectuate the due process rights of each defendant The Bureau's argument that the individual defendants have no individually-held right to appeal is unsupported by precedent, law or rule, and none is offered by the Bureau in support of its strangely shrill submission The right to due process entitles any defendant an opportunity for its grievances to be heard, even if that defendant is married to a codefendant The Bureau's proposal to amalgamate the defendants' individual rights to appeal into a single, collective right is legally unsupportable as those rights cannot be reduced by merger for the convenience of the Bureau, as each party's right is inextinguishable and inalienable

The Commission must note that had any individual defendant failed to file a Notice of Appearance, that defendant would have been deemed to have waived its right to a hearing in accord with 47 C F R § 1 92(a), causing the facts as described in the Hearing Designation Order to be presented to the Commission for the Commission's disposition at its discretion 47 C.F.R § 1 92(c) and (d) Accordingly, if DLB failed to enter its notice of appearance, its individual interests in this matter would have been ruled upon by the Commission long ago Since the Commission's Rules would have applied to DLB individually under those circumstances, and not to any other named party, it is apparent that defendants alone hold the right and obligation to appear before the agency

Similarly, had DLB failed to appeal the Initial Decision, the licenses held by DLB would have automatically cancelled in accord with the terms of 47 C F R § 1 276(e) In such an instance, the licenses of the remaining two defendants would nevertheless continue to be valid despite the election of DLB to file Exceptions Furthermore, the right of the remaining defendants to appeal the Initial Decision would be unchanged Thus, as with the example described above, it is clear that DLB's rights are individual to it, and severable from the other defendants As such is the case, the Bureau's position is simply contrary to logic and law.

2 The Individual Defendant's Exceptions Cannot be Deemed a Single Appeal for the Purposes of Calculating Compliance With the Page Limitation Expressed in Section 1 277(c) of the Commission's Rules

The Commission's rules afford each of the defendants an absolute right to file their own Exceptions to the Initial Decision Accordingly, the combined page length of the individual Exceptions is irrelevant towards the calculation of the page limit expressed in 47 C F R § 1 277(c) So long as each of the Exceptions complied with the page limit prescribed in Section 1 277(c) each of the Exceptions is valid, and because DLB's Exceptions was less than twenty five (25) pages in length, it is validly before the Commission

The Bureau argued "that the intent of the 25-page limit is to focus exceptions to germane matters, and to avoid re-litigating the entire case before the Commission "[3] Opposition at 4 DLB does not question or oppose the Commission's desire for concise expression within Exceptions, and filed his document within the codified page limitation Accordingly, employing

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[3] The Bureau states that the passage they quote is from *In the Matter of Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of the Cases*, 6 FCC Rcd 157, 163 (1990), but counsel was unable to find the quoted statement in the document cited by the Bureau

the only codified yardstick, the Bureau's statement of the Commission's intent is not relevant for any explicable purpose. Therefore, the precedent cited by the Bureau does no more than restate the purpose of the page limit, but does not demonstrate that DLB has acted in violation.

More importantly, the Commission's rules do not grant a right for individual defendants to combine their appeals. The rules allow individual parties to file exceptions, 47 C.F.R. § 1.276(a)(1), but nowhere describe a right to collectively appeal. Essentially, the Bureau's demand that the Commission order DLB and the other defendants to file a single set of Exceptions limited to twenty five (25) pages[1] is a demand for a pleading that is not contemplated by the Commission's rules. Thus, contrary to the Bureau's claims that the three individual Exceptions violate the Commission's rules, those three individually filed Exceptions were the only form of Exceptions DLB and the other defendants were permitted to file in accord with the Commission's rules.

3. <u>The filing of the Combined Exceptions Is No More Than The Logical Adjunct To A Party's Right, By Rule, to File A Request for Special Permission To File Exceptions Exceeding Twenty Five Pages</u>

The Bureau characterizes the defendants' Combined Exceptions as contrary to the Commission's rules and usupported by precedent because it was filed concurrently with, and offered in lieu of, the individually filed exceptions, and states that the length of the document establishes that it is "three times the length allowed by Section 1.277." Opposition at 4. DLB does not argue that the Combined Exceptions is indeed nearly three times the length of an

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[1] Opposition at 5-6.

Exception permitted by the rules[1] Nevertheless, the Commission's rules allow that any party filing exceptions to an Initial Decision is entitled to file with the Commission a request for special permission to file a brief that exceeds the twenty five (25) page limit. Thus, DLB's and the other defendants' Request was clearly contemplated by the Commission's rules and allowable thereunder

DLB and the other defendants, having already prepared their individual Exceptions, realized that the Commission's review of the Initial Decision and the Exceptions would be facilitated by having to review only a single Combined Exceptions rather than three individual sets of Exceptions Request at 2 Accordingly, the defendants prepared a single set of Combined Exceptions and filed that document along with their individual Exceptions The Commission should note, the Combined Exceptions contains no argument not already expounded upon in the individual Exceptions In point of fact, the Combined Exceptions is no more than a full recitation of each defendant's arguments compiled for convenience in a single document.

Having already complied with the clearly articulated requirement to timely file an individual Exceptions, DLB participated in filing a document that the Commission may reject, adopt or ignore Since the arguments within the combined document are equal to those within the individual Exceptions, the Bureau would not be prejudiced by acceptance of the Combined Exceptions and, in fact, would likely find response easier

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[1] The Bureau attempts to argue that the length of the Exceptions is contrary to the rules and represents an attempt to relitigate the entire case Opposition at 4-5 The subject matter generated more than 10,000 pages of transcripts, depositions, evidence, and pleadings, which could not be relitigated within a scant 75 pages In fact, the ALJ's decision would not fit within 75 pages, double spaced

4 The Bureau Has Ignored The Commission's Rules in Filing Its Opposition

In its effort to characterize the defendants as attempting to skirt the Commission's rules for their own purposes, the Bureau has itself ignored the Commission's rules Entirely absent from the Bureau's Opposition is a certificate of service All pleadings filed before the Commission are required to contain a certificate of service 47 C F R §§ 1 47(g), 1.211 and 1 296 Accordingly, if the Bureau is seeking to defame DLB for an alleged violation of the Commission's procedures, the Commission should hold that the it is incumbent upon the Bureau to, at least, file a pleading this is not procedurally deficient and subject to summary dismissal

5 The Bureau's Request for Additional Time Is Not Opposed

DLB finds it curious that the Bureau went to such vitriolic lengths to, in essence, request an extension of time in which to reply Had the Bureau simply called undersigned counsel, the Bureau would have discovered that DLB does not oppose any such request. Having wrestled furiously with the complexity of this case, DLB understands fully the difficulties involved.

The Bureau seeks an additional ten (10) days to respond to the Exceptions filed by the defendants DLB hereby urges the Commission to grant to the Bureau the ten-day extension and, to further assist the Bureau, DLB again respectfully requests that the Commission grant the Request so that the Bureau is left to respond only to one pleading

6 Conclusion

DLB respectfully reminds the Commission that the matter before it is complex, involves multiple parties, defendants, witnesses, and reams of testimony More significantly, the matter involves whether the Commission will take the unusual step of invoking the "death penalty " Under such circumstances, the rights of DLB must be strictly protected and the persons appearing

in this matter should be allowed to develop a full record Thus, for the reasons stated above, DLB urges the Commission to grant the Bureau the ten-day extension and to grant the Request For Special Permission for good cause shown and to otherwise rule in accord with the requests herein

Respectfully submitted,
DLB Enterprises, Inc

By _____
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Dated September 22, 2003

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CERTIFICATE OF SERVICE

I, Ava Leland, do hereby certify that I have on this 22nd day of September, 2003, caused a copy of the foregoing "Reply to Opposition to Request for Special Permission to File Exceptions Exceeding Twenty [sic] Pages" to be served by U S first class mail, postage prepaid, upon the following

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