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September 4, 2003

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SEP - 4 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Honorable Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
Washington, DC 20554

RE: MB Docket No. 02-277  
MM Docket No. 01-235  
MM Docket No. 01-317  
MM Docket No. 00-244  
MM Docket No. 03-130

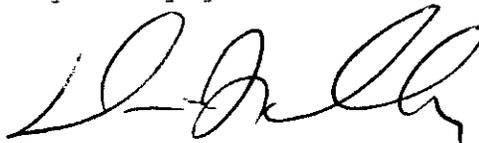
Dear Madame Secretary:

Please accept for filing on behalf of our client WTCM Radio, Inc. an original and ~~four~~<sup>11</sup> copies of a "Petition for Reconsideration" relative to the **Report and Order and Notice of Proposed Rulemaking** in the above-referenced consolidated dockets, FCC 03-127, published in the Federal Register on August 5, 2003.

Out of an abundance of caution this pleading is being filed both at the Secretary's filing location at 236 Massachusetts Avenue, N. E., Washington, DC prior to 7:00 p.m. today and the ECFS electronic filing system prior to 11:59 p.m. today.

Should additional information be desired in connection with the above matter, kindly communicate with this office.

Very truly yours,



Dennis J. Kelly

cc: See Attached Certificate of Service

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BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D C 20554

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SEP - 4 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
2002 Biennial Regulatory Review - ) MB Docket 02-277  
Review of the Commission's Broadcast )  
Ownership Rules and Other Rules )  
Adopted Pursuant to Section 202 of )  
the Telecommunications Act of 1996 )  
)  
Cross-Ownership of Broadcast Stations ) MM Docket 01-235  
And Newspapers )  
)  
Rules and Policies Concerning Multiple ) MM Docket 01-317  
Ownership of Radio Broadcast Stations )  
in Local Markets )  
)  
Definition of Radio Markets ) MM Docket 00-244  
)  
Definition of Radio Markets for Areas ) MB Docket 03-130  
Not Located in an Arbitron Survey Area )  
  
TO: The Commission

**PETITION FOR RECONSIDERATION**

Dennis J. Kelly

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Counsel for:

September 4, 2003

**WTCM RADIO, INC.**

## SUMMARY

The Commission's rules as adopted in the above-entitled matter as they pertain to commercial broadcast radio are flawed and constitute reversible error as arbitrary and capricious pursuant to 5 U.S.C. §706(2)(A). This is because the Commission relies on the nefarious methodology of the Arbitron ratings organizations for the all-important determination of what constitutes a radio market. Arbitron has a history of errors in market determinations. Arbitron's determination of "Arbitron Metro" radio markets is not uniform, impartial, rational and coherent, but rather is based upon Arbitron's need to sell its ratings data to subscribers and the various agendas of its subscribers. Indeed, at least in one case, the market in which WTCM operates radio stations, Arbitron defers to its subscribers as to what counties are included in and excluded from the "Arbitron Metro" market. Also, the Commission's failure to publish a list, state by state, market by market, of the geographic composition of each of the "Arbitron Metro" radio markets, violates 5 U.S.C. §553(d), because the incorporation by reference into FCC rules of Arbitron and BIA data constitutes a "rule" as defined by 5 U.S.C. §551(4), and the Commission had a

statutory obligation to publish the "rule" in the Federal Register.

Further, WTCM requests that the Commission on reconsideration recognize "satellite" radio stations in a manner similar to its recognition of "satellite" television stations (MM Docket No. 87-8), so that such "satellite" radio stations would not could against the maximum quota of radio stations in a given market that a broadcaster is permitted to own.

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	)	
TO: The Commission		

**PETITION FOR RECONSIDERATION**

WTCM Radio, Inc. ("WTCM"), by its attorney, and pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. §405, and Section 1.106 of the Rules and Regulations of the Commission, 47 C.F.R. §1.106, hereby respectfully submits this Petition for Reconsideration of the **Report and Order and Notice of Proposed Rulemaking** in the above-entitled matter, FCC 03-127, 18 FCC Rcd --, 29 Communications Reg. (P&F) 564, 2003 WL 21511828 (2003) (the

"Order"). As this pleading is being filed on the 30<sup>th</sup> day subsequent to publication of the **Order** in the Federal Register, 68 FR 46286 (August 5, 2003), it is timely filed. In support whereof, the following is shown:

**Preliminary Statement**

1. WTCM is the licensee of AM Broadcast Station WTCM and FM Broadcast Station WTCM-FM, Traverse City, Michigan, and is an applicant for a construction permit for a new FM Broadcast Station on Channel 283A at Traverse City, Michigan, File No. BPH-19941020MI<sup>1</sup>. WTCM is the pioneer broadcasting organization in the region, having owned and operated WTCM since 1941; the same family has owned WTCM since its inception, some 62 years. WTCM Radio, Inc. is a subsidiary of Midwestern Broadcasting Company ("Midwestern"), which is 100% shareholder of WCCW Radio, Inc., licensee of AM Broadcast Station WCCW and FM Broadcast Station WCCW-FM, Traverse City, Michigan and FM Broadcast Station WCZW,

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<sup>1</sup>This application was filed on October 20, 1994—almost **nine** years ago—in response to a so-called "first come-first serve" window. Five other applications were filed for this channel. Because of the freeze on comparative hearings as the result of **Bechtel v. FCC**, and then the prohibition in 47 U.S.C. §309(j) against holding an auction in cases involving mutually-exclusive commercial and non-commercial FM broadcast applications, this application is still pending, and it is unclear when the FCC will initiate a proceeding (auction or otherwise) to resolve this case. WTCM has stood ready, willing and able since October 20, 1994, and is ready, willing and able today, to construct this station.

Charlevoix, Michigan. Midwestern is 100% shareholder of WKJF Radio, Inc., licensee of AM Broadcast Station WKJF and FM Broadcast Station WJZQ, Cadillac, Michigan. Additionally, Midwestern is 100% shareholder of WBCM Radio, Inc., licensee of FM Broadcast Station WBCM, Boyne City, Michigan.

2. Midwestern is aggrieved by the **Order** in that it sets in stone a decision by the Arbitron organization to classify seven counties in northwestern lower Michigan as the "Northwest Michigan Arbitron Metro" radio market—a decision taken not by objective criteria applied to markets nationwide, but rather a decision undertaken by Arbitron pursuant to its own enlightened self-interest, in order to sell its ratings books to as many subscribers as possible.

3. At present, under the rules which obtained prior to June 2, 2003, the Commission has determined that in the case of WTCM/Midwestern's Traverse City-Cadillac operations, they are in a different market than Midwestern's operations in Boyne City-Charlevoix. There is no city-grade overlap between WTCM-FM, WCCW-FM and WJZQ on the one hand, and WBCM and WCZW on the other.

4. In order to serve northwestern lower Michigan, WTCM/Midwestern have arranged to have (1) WBCM rebroadcast the programming of WTCM-FM, (2) WCZW rebroadcast the programming of WCCW-FM, and (3) WKJF rebroadcast the

programming of WCCW(AM) (there is no city-grade overlap between the signals of these two stations). This is simply because the distances between population centers in this market are quite large, and no one station can provide adequate service to all population centers in the market.

5. Under the existing rules in effect prior to June 2, 2003, WTCM would be legally qualified to receive a grant of its FM construction permit application at Traverse City, because it would not exceed the number of stations (4 FMs, 3 AMs) that it could own in the Traverse City-Cadillac market (as defined by the city-grade contours of WTCM-FM, WCCW-FM and WJZQ). However, under the rules adopted in the **Order**, WTCM would no longer be legally qualified to maintain its Traverse City FM construction permit application, because it would be deemed to own seven stations (5 FM, 2 AM) in the "Northwest Michigan Arbitron Metro" market (WTCM, WTCM-FM, WCCW, WCCW-FM, WCZW and WBCM are licensed to communities in counties within the market, and WJZQ is a so-called "above the line" station licensed to a community in a county outside the market). WTCM objects to this, because the composition of the "Northwest Michigan Arbitron Metro" market is based on an arbitrary and capricious determination of a for-profit entity not connected with the Commission or the federal government, which made the determination for its own economic

self-interest, and not based on uniform criteria impartially applied nationwide.

6. WTCM believes that the Commission's reliance upon Arbitron market determinations and/or the BIA database is arbitrary and capricious, and is rulemaking not based upon substantial evidence in the whole record. This is so because: (1) Arbitron makes determinations as to what counties are or are not in a market are often based upon negotiations between Arbitron and potential subscribers, and decisions made by Arbitron based on what it needs to do to sell its "ratings books"; (2) there is no consistent methodology or formula applied uniformly nationwide either by the Commission or Arbitron as to what counties (or radio stations) are either in or out of a given market, and certainly none that are subject to either public or judicial scrutiny; (3) the Commission has not conducted a proper notice and comment rulemaking to determine the geographical boundaries of radio markets throughout the nation; and (4) because Arbitron and BIA data are not publicly available and apparently will not be published either in the Federal Register or the Code of Federal Regulations, the public will not be able to effectively comment on any future radio acquisition without having to make a substantial payment to

either Arbitron or BIA to obtain data which should be publicly available.

**The Commission's Use of Arbitron Radio Markets  
Fails to Comport With the Administrative Procedure Act**

7. In ¶657 of the *Order*, the Commission summarized its decision as to the future determination of the definition of the largest radio markets:

In the Local Radio Section of this *Order*, we replaced our current contour-overlap methodology for defining radio markets with a geography-based market definition. For areas of the country covered by Arbitron Metro markets, we adopted the Metro market as the relevant radio market for purposes of determining compliance with the local radio ownership rule.

8. It is WTCM's position that the foregoing ruling violates the Administrative Procedure Act, 5 U.S.C. §551 et seq in a number of respects. The Commission relies on Arbitron data because Arbitron is an organization which gathers and sells radio station audience data to radio stations and advertisers. However, the Commission never discussed exactly how Arbitron gathers its data and makes determinations as to (1) what geographic areas comprise a given "Arbitron Metro" market and (2) how Arbitron (and another commercial gatherer and seller of radio data, BIA) select the stations which are credited to an "Arbitron Metro" market. In particular, WTCM urges that the following Commission findings are not based on substantial evidence upon the whole record: (1) that Arbitron is qualified to

make determinations of what counties or areas comprise an "Arbitron Metro" market; (2) that Arbitron's criteria for making such "Arbitron Metro" market determinations is "rational and coherent" (**Order** at ¶249); (3) that Arbitron's scheme of nationwide "Metro Markets" is "objectively determined" (**Order** at ¶273).

9. Furthermore, the inclusion or exclusion of counties or geographic areas from "Arbitron Metro" markets was never considered by the Commission in the context of this rulemaking. In order to "set in stone" in agency regulations the determinations of a non-governmental organization, the Commission was required to include as a part of its notice and comment rulemaking proceeding the identities and constituent counties or geographic areas, at least as an appendix. It should have invited comment on these determinations. It failed to do so. Furthermore, the Commission apparently has no plans to publish the identities and constituent counties/areas of individual "Arbitron Metro" markets in either the Federal Register or the Code of Federal Regulations. Thus, for an interested citizen or entity to knowledgeably comment on a proposed station acquisition in the future, the interested party would have to pay Arbitron or BIA for the data. In a country where the applicable

ruling law is supposed to be published and available to everyone, this seems totally outrageous and totally illegal.

10. The failure of the Commission to consider these things is a violation of the Administrative Procedure Act.

11. **Arbitron's Qualifications.** WTCM does not concede the Arbitron organization's qualifications to make determinations as to the geographic composition of radio markets across the country. Arbitron is a for-profit entity which is out to make as much money as it can from the gathering and selling of radio audience listening information. At least some of its decisions as to data gathering, market decisions and data sales are not based upon uniform nationwide objective criteria, but rather on what Arbitron needs to do to sell its "books" to subscribers. The undersigned is personally aware of a number of instances in which Arbitron's data and/or market determinations are either clearly erroneous and/or based on either the failure to sell a "book" to any subscribers in a given market or pressure by potential subscribers as to what counties to include or exclude in a given market.

12. The problems with Arbitron's data are not new. For example, in the study included as Appendix B to the 1972 **Reconsideration of the Cable Television Report and Order**, 36 FCC 2d 326, 25 RR 2d 1501 (1972), Arbitron remarkably found

that New York City television station WNEW-TV (Channel 5) was "significantly viewed" off-the-air in Chemung County, New York, in which Elmira is the county seat<sup>2</sup>. Elmira is located 173 miles northwest of New York City<sup>3</sup>, and off-the-air viewing of WNEW-TV (now WNYW) in Chemung County was (and still is) a physical impossibility.

13. As discussed above, in northwestern lower Michigan, Arbitron created a "market" called the "Northwest Michigan" market, and included in the "Arbitron Metro" seven counties (Antrim, Benzie, Charlevoix, Emmet, Grand Traverse, Kalkaska and Leelanau), despite the fact that no one radio station in this "Metro" covers the entire market, and in fact a number of station operators need to utilize two radio stations to deliver one program signal to the entire market. Furthermore, on information and belief, one of the radio station operators in this market convinced Arbitron to exclude from the "Northwest Michigan" market Wexford County, where Cadillac is the county seat, despite the fact that the area's television market is called "Traverse City-Cadillac". The radio operator in question owns stations in Cadillac. There clearly was no "rational and objective" criteria

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<sup>2</sup>**Pike & Fischer Radio Regulation Current Service**, p. 85:993.

<sup>3</sup>**Air-Line Distances Between Cities in the United States** (U. S. Coast and Geodetic Survey, Special Publication No. 238, 1947) at p. 103.

applied by Arbitron as to the county composition of this market. Also, the selection of counties by Arbitron in this instance appears to have nothing to do with U. S. Census determinations.

14. Another market determination by Arbitron which has no apparent connection with reality is the Rochester, Minnesota radio market. While the Rochester "Metropolitan Statistical Area" consists only of Olmsted County, Minnesota (where Rochester is county seat and largest community), Arbitron included in the "Metro" the rural Minnesota counties of Dodge and Wabasha in addition to Olmsted. However, it is a total mystery why Arbitron (or BIA) did not include the neighboring county of Mower, in which Austin is the county seat and largest community. One of the radio stations which Arbitron and BIA include as "above the line" stations in the Rochester market is KNFX(AM), 970 kHz, Austin, Minnesota. Furthermore, another market station, KYBA(FM), a Class C2 facility licensed to Stewartville, Minnesota, operates from a transmitter site roughly halfway between Rochester and Austin. Mysteriously, Arbitron/BIA fail to mention Class C FM Station KAUS-FM, Austin, which provides primary service to both Austin and Rochester and aggressively sells time in Rochester. Most of the high power Rochester FM stations serve Austin as well as Rochester. The local television

market is known as "Rochester-Austin-Mason City". Interestingly, Clear Channel is a player in both Rochester and in Mason City, Iowa. If Arbitron can combine neighboring counties to form one market, such as, for instance, South Bend-Elkhart, Indiana, why does the Rochester market not include neighboring Austin, Minnesota? We don't know. On the basis of this record, the Commission does not know either.

15. Therefore, it is arbitrary, capricious and irrational for the Commission to accept, without more, that Arbitron is somehow qualified to make crucial determinations as to the composition of radio markets which provides the foundation of the new Section 73.3555 as it pertains to commercial broadcast radio. By adopting Arbitron's radio market determinations, the Commission has acted in an arbitrary and capricious manner, and thus has violated 5 U.S.C. §706(2)(A).

16. **Arbitron's Criteria Is Not "Rational and Coherent"**.

As demonstrated above, Arbitron's criteria as to the geographic composition of broadcast radio markets is not rational and coherent. In fact, on this record, the public has no idea what the criteria for market determinations might be. The Commission's statement that Arbitron's criteria are "rational and coherent" is utterly arbitrary and capricious,

and is unsupported by substantial evidence on the whole record. Again, the Commission's action violates the Administrative Procedure Act, 5 U.S.C. §706(2)(A)-(E).

17. **Arbitron's Markets Are Not "Objectively Determined"**. As noted above, Arbitron's markets are not "objectively determined", as contended by the Commission. Arbitron has a long history of determining markets, both in television and in radio, based on whether it can sell its "books" in a given city. For example, several years ago, when Arbitron was still engaged in producing television audience ratings data, the undersigned has personal knowledge that Arbitron combined Victoria, Texas with San Antonio, Texas as one market, despite the fact that these two cities are 100 miles apart, when the Victoria television stations would not buy ratings data from Arbitron (Nielsen has found Victoria to be a "DMA" separate from San Antonio). On the radio side, Arbitron cobbled together the seven county region of northwestern lower Michigan described in paragraph 14 above as one market, despite the fact that most of the stations in the Traverse City area cannot be heard in the Petoskey-Charlevoix area and vice versa, and also despite the fact that the television market is centered on the cities of Traverse City and Cadillac, and the Arbitron radio market arbitrarily excluded the county in which Cadillac is located.

Arbitron did this in order to sell its ratings data. Furthermore, Arbitron has left the door open to change the composition of counties in the market if three of the four subscribers to its ratings data want such a change.

18. Again, the Commission has engaged in rulemaking which is arbitrary and capricious, because it has stated that Arbitron's radio market determinations are "objectively determined", when in fact they are not. Once again, the Commission has violated 5 U.S.C. §706(2)(A).

19. **FCC Has a Statutory Obligation to Publish the Geographic Composition of the New Radio Markets.** The Administrative Procedure Act, at 5 U.S.C. §551(d), defines the term "rule" as follows:

"rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

When the Commission adopts a "rule", it has a statutory requirement to publish it in the Federal Register. 5 U.S.C. §553(d) provides as follows:

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

20. The appellate court has found that the term "rule" as used in the Administrative Procedure Act includes "nearly every statement an agency may make". **Batterton v. Marshall**, 648 F.2d 694 (D. C. Cir. 1980). One of the things that the Commission has done in the above-entitled proceeding is to virtually set in stone radio market determinations made by a private, for-profit entity, Arbitron, as a part of Commission regulations. However, unlike the Cable Television Report and Order, where the Commission published "Appendix B" and listed "significantly viewed stations" state by state and county by county, the Commission did not publish any appendix or other table or chart in connection with the above-entitled station listing state by state and market by market the geographic composition of radio markets. None of the exceptions to 5 U.S.C. §553 apply to this matter. Thus, an agency such as the Commission is required to publish the entire final rule in the Federal Register. **N.L.R.B. v. Wyman-Sanders Co.**, 394

U.S. 759, 764 (1969). When an agency violates the publication requirement, the agency rule is void and has no legal effect. **W.C. v. Bowen**, 807 F.2d 1592 (9<sup>th</sup> Cir. 1987).

21. Clearly, the Arbitron market determinations and the BIA reports upon which the Commission relies have been incorporated by reference into the FCC Rules. This is not good enough to comply with the statute. The Commission has a statutory obligation to publish a listing (perhaps in a format resembling the above-described "Appendix B") of the composition of the various "Arbitron Metro" radio markets around the country. Furthermore, it is unfair to require members of the public to have to pay Arbitron or BIA for market data which the Commission has incorporated into its rules by reference. That market data must be published by the Commission in the Federal Register and either the Code of Federal Regulations or the FCC Record, and should be made available on the FCC's website for public consumption. That is the very reason for 5 U.S.C. §553—that the Commission publish its rules in the source for agency regulations which is provided for by Congress—the Federal Register and Code of Federal Regulations.

**The Commission Should Recognize  
"Satellite" Radio Station Status**

22. The Commission for many years has recognized so-called "satellite" television stations—that is, television stations generally located in rural areas (which could not otherwise economically support an independently operated station) which rebroadcast a parent station. **See e.g. Report and Order in MM Docket No. 87-8**, FCC 91-182 (July 8, 1991). These stations are categorically exempted by NOTE 5 to Section 73.3555 of the Commission's Rules (as they existed prior to June 2, 2003) from being attributable to a licensee's multiple ownership "quota".

23. Interestingly, in the media market in which WTCM operates, the four major over-the-air television networks are delivered by means of respective parent-and-satellite operations.<sup>4</sup> The radio stations in the market generally have the same problem as the television stations—few if any of them can cover the real media market in the region, which stretches from south of Cadillac in north central Michigan to

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<sup>4</sup>CBS: WWTV(TV) and WWUP-TV, Cadillac and Sault Ste. Marie, Michigan; NBC, WPBN-TV and WTOM-TV, Traverse City and Cheboygan, Michigan; ABC, WGTU(TV) and WGTQ(TV), Traverse City and Sault Ste. Marie, Michigan; and Fox, WFQX-TV and WFUP, Cadillac and Vanderbilt, Michigan.

the Straits of Mackinac, the northernmost point in Michigan's lower peninsula.

24. Were the Commission to confer "satellite" status on those stations which rebroadcast a "parent" radio station in order for the broadcaster to adequately cover the entire media market with a quality broadcast service, so that the "satellite" stations would not be counted against a broadcaster's quota in a given market, this would be a fair way of treating broadcasters in rural markets who have a totally different marketplace than their counterparts in metropolitan area markets. WTCM urges the Commission on reconsideration to adopt a procedure for the conferral of "satellite" status upon radio stations similar to that which it uses for television stations.

**Conclusion**

25. The Commission's rules as adopted in the above-entitled matter: (1) abrogate the right of parties who filed Petitions to Deny under the rules as they existed prior to June 2, 2003, in violation of 5 U.S.C. §706(2)(C); (2) in several respects are arbitrary and capricious in violation of 5 U.S.C. §706(2)(A), in the sense that Arbitron has a history of errors in market determinations, Arbitron's determination of "Arbitron Metro" radio markets is not uniform, impartial, rational and coherent, but rather is based upon Arbitron's

need to sell its ratings data to subscribers and the various agendas of its subscribers; and (3) the Commission's failure to publish a list, state by state, market by market, of the geographic composition of each of the "Arbitron Metro" radio markets, violates 5 U.S.C. §553(d), because the incorporation by reference into FCC rules of Arbitron and BIA data constitutes a "rule" as defined by 5 U.S.C. §551(4), and the Commission had a statutory obligation to publish the "rule" in the Federal Register.

26. WTCM urges the Commission to vacate all portions of FCC 03-127 that relate to commercial broadcast radio stations. Further, WTCM urges the Commission to issue a new "Notice of Proposed Rulemaking", which lays out all Arbitron and BIA determinations of "Arbitron Metro" media markets and calls for public comment upon them before they become set in stone in communications law. In WTCM's particular case, the FCC should rule that WTCM/Midwestern stations in the Traverse City-Cadillac, Michigan area are in a different market than their stations in Boyne City-Charlevoix, Michigan. Finally, WTCM urges that the Commission adopt a procedure for the designation of "satellite" radio stations similar to the procedure for designation of "satellite" television stations, so that such stations would not be counted against the

maximum quota of stations that a broadcaster is permitted to own in a given market.

**WHEREFORE**, WTCM Radio, Inc. urges that this Petition for Reconsideration **BE GRANTED**.

Respectfully submitted,

**WTCM RADIO, INC.**

By



Dennis J. Kelly

Its Attorney

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