

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

In re Request of)
)
W. RUSSELL WITHERS, JR.)
WDHS(TV) and WDHS-DT)
Iron Mountain, Michigan)
)
DTV Build Out/)
Request for Waiver of July 1, 2006)
July 1, 2006 "Use or Lose" Deadline)

FRN # 0003-7805-66
Facility ID No. 15498

FILED/ACCEPTED

JUN 18 2007

Federal Communications Commission
Office of the Secretary

TO: Honorable Marlene H. Dortch
Secretary of the Commission

ATTN: The Commission

PETITION FOR RECONSIDERATION

W. Russell Withers, Jr. (Withers), licensee of Television Broadcast Station WDHS, Iron Mountain, Michigan, pursuant to Section 405 of the Communications Act of 1934, as amended (the Act), and Section 1.106 of the Commission's Rules, hereby respectfully submits this Petition for Reconsideration of the **Order**, FCC 07-90, released May 18, 2007, denying Withers a waiver of the so-called "use it or lose it" policy of the current transition program for analog television stations moving to digital operation. In support whereof, the following is shown:

Timeliness

1. Section 405 of the Act and Section 1.106(f) of the Rules require a petition for reconsideration of an adverse FCC order to be filed within 30 days of the release date of such an order. In the instant case, the thirtieth day subsequent to May 18, 2007 was Sunday, June 17, 2007. Section 1.4(e)(1) of the FCC's Rules states that, when a deadline falls on a Sunday, the

deadline then becomes the next business day, which is Monday, June 18, 2007. As this pleading is being filed on June 18, 2007, it is timely filed.

Background

2. In paragraph 117 of the *Order*, the Commission wrote:

The licensee of WDHS-DT, Iron Mountain, Michigan, and WDTV-DT, Weston, West Virginia, vaguely claims that it cannot install its DTV equipment on its existing towers and is exploring other options for the siting of its permanent DTV facilities. WDHS-DT is returning to its analog channel (channel 8) as is WDTV-DT (channel 5).

3. In paragraph 123 of the *Order*, the Commission concluded, based on the foregoing discussion, that “We find that these stations have not provided sufficient justification for a waiver of their applicable “use or lose” deadline”. In paragraph 124 of the *Order*, the Commission stated the penalty to be imposed, inter alia, on WDHS-DT:

Because these stations failed to meet the applicable replication/maximization requirements, they will lose interference protection to the unused portion of the associated area as of the applicable interference protection deadline. In addition, these stations will lose the ability to “carry over” their interference protection to their unserved DTV service area on their post-transition channel.

Grounds for Reconsideration

4. We request reconsideration for a number of reasons. First, and foremost, the Commission in its *Third Periodic Review*, FCC 07-70, released May 18, 2007 (the same day as the *Order*), emphasized that a policy goal of the Commission is to permit television licensees in the smaller markets to devote their resources to the construction of the post-transition facility, as opposed to a temporary facility that will have to be radically changed on February 17, 2009, less than two years from now. Station WDHS is ready to convert to digital operation immediately on

its post-transition allotment of Channel 8, which is the same as its present analog allotment. The *Order* fails to take this into consideration. Second, the *Third Periodic Review* indicates that a loss of service to the public from an existing television station of more than 5 percent is not in the public interest. If this is the case, then it is not in the public interest to punish a licensee such as Withers, which operates an independent station in the nation's 178th largest market, because the FCC is punishing viewers on the fringes of WDHS's existing analog Grade B contour at least as much as it is punishing Withers. Third, it appears that the Commission arbitrarily and capriciously granted some waivers, such as those granted to KMTV-DT, Omaha, Nebraska and WSAZ-DT, Huntington, West Virginia (*Order* at ¶ 85), while denying a similar waiver to Withers' WDHS, in violation of the Administrative Procedure Act, 5 U.S.C. §706(2)(A) and the principles annunciated in *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D. C. Cir. 1965).

Argument

5. WDHS is licensed to Iron Mountain, Michigan, located in the Marquette DMA, the nation's 178th largest television market. The 2000 Census population for Iron Mountain was just 8,154, and the 2000 Census population for Dickinson County, of which Iron Mountain is county seat, was 27,472. Marquette County, where Marquette (2000 Census population 19,661) is the county seat, is the most populous county in the DMA, with a 2000 Census population of 64,634. As the Commission can see, this is a small market.

6. W. Russell Withers, Jr., a sole proprietor, has operated WDHS since 1997. When commercial television stations were required to commence broadcasting on a digital channel, Withers did initiate a digital television service to satisfy the Commission's rules and policies on digital television on pre-transition channel 22. However, because of the small population of WDHS's market, the temporary nature of the pre-2009 digital television assignment, the fact

that, post-transition, WDHS will operate digitally on Channel 8, it became an economic necessity for Withers to focus its resources on a permanent digital television facility. Withers has acquired all necessary equipment, and is prepared to “flash cut” from analog to digital operations on WDHS’s Channel 8, at technical parameters which replicate the respective analog primary service contour immediately. When we filed our request for a waiver of the “use or lose” aspect of the FCC’s regulatory program for digital television, we believed that the Commission would grant such a waiver, because of the relative waste of scarce resources to construct a full-fledged digital facility that would have to be radically altered by February 17, 2009.

7. We note that the Commission’s *Third Periodic Review, supra*, proposes to afford those digital television stations which have not commenced operations with their post-transition digital facilities a number of measures of relief. When the Commission announced this action on April 25, 2007 in a “Public Notice”, *FCC Initiates Third Review of DTV Transition*, (Document 272655A1), it emphasized that, in order to facilitate the transition for full-power television stations, the Commission would “**permit stations that have different pre-transition and post-transition channels to devote their resources to building their post-transition channel**” [emphasis supplied].

8. In the formal text of the further notice released on May 18, 2007, at ¶ 2, the Commission elaborated on its policy initiatives:

- We examine the circumstances in which a station may be allowed to reduce or terminate its analog service to facilitate construction of its final, DTV facility on its post-transition channel. [Section V.A.]
- We propose to allow stations to operate on newly allotted post-transition facilities before the transition deadline provided they would not interfere with existing, pre-transition service. [Section V.C.5.]
- We request comment on additional proposals to provide stations with regulatory flexibility to facilitate stations' construction of their post-transition facilities by the statutory deadline. [Section V.C.6.]

- We propose to offer expedited processing to a station applying for a CP to build its post-transition channel, provided that its application (i) does not seek to expand the station's noise-limited service contour in any direction beyond that established by the new DTV Table Appendix B; (ii) specifies facilities that match or closely approximate those new DTV Table Appendix B facilities (i.e., if the station is unable to build precisely the facilities specified in the new DTV Table Appendix B, then it must apply for facilities that deviate no more than five percent from those new DTV Table Appendix B facilities with respect to predicted population); and (iii) is filed within 45 days of the effective date of Section 73.616 of the rules adopted in the Report and Order in this proceeding. We propose to revise FCC Forms 301 and 340 accordingly. [Section V.D. and Appendix B]

9. We also note that the Commission in the Third Periodic Review, at ¶ 44, indicated that, as a general matter, it would not be in the public interest for a television station to have its service area reduced by more than 5 percent, and also if the reduction would prevent the station from delivering its signal to cable television headends and alternative video providers.

10. At ¶ 61 of the *Third Periodic Review*, the Commission affirmed that, as of May, 2007, “we believe the focus must turn to facilitating stations' efforts to construct their permanent DTV facilities that will be used to provide service after the transition”. This has been Withers' position all along. The Commission's ruling of May 18, 2007 in *DTV Build Out*, FCC 07-90, in which the Commission denied the WDHS request for waiver of the “Use It or Lose It Deadline”, seems to fly in the face of the policy platitudes that are stated in the *Third Periodic Review*. For example, it would appear that, through its order in FCC 07-90, the Commission, by ruling that WDHS may request only a permanent digital operating authority which matches its STA digital operation, has significantly reduced the predicted 28 dBu interference free contour of WDHS's digital television service. Given the uneven terrain of Michigan's Upper Peninsula and the fact that Iron Mountain is approximately 55 airline miles from Marquette, this is a real punishment for Withers.

11. As noted above, WDHS is ready to “flash cut” from analog operation on Channel 8 to digital operation on Channel 8 and to provide digital service to the same areas and populations to which it currently provides analog over-the-air television service. WDHS has been ready to do this for at least one year. It seems both arbitrary and capricious, and contrary to the FCC’s stated public interest policy goals, to deny WDHS the ability to carry out this “flash cut”.

12. The KMTV and WSAZ situations are similar to the WDHS situation—both those stations have digital facilities which are side mounted on their long-established transmitting towers, and, so far as we can tell from the *Order*, they were either unable or unwilling to construct a second tower for their pre-transition digital facility. Yet, they were granted a waiver of the “use it or lose it” policy.

13. In perusing the *Order*, we also noticed the treatment afforded KCSG-TV, Cedar City, Utah (*Order* at ¶23). In granting it a six month extension of the “use it or lose it” policy, the Commission wrote:

KCSG-DT, Cedar City, Utah, was recently sold. The new owner states that its consulting engineer examined the station’s tower and discovered that it would not support both an analog and digital antenna. The station reports that it is now in the process of identifying a site for a new tower that will house both of its facilities

14. Other than the station being sold, there is no difference between KCSG’s situation and WDHS’s situation concerning a supporting antenna. In WDHS’s case, WDHS has been told by its landlord that another tower at its existing Millie Hill transmitter site will not be allowed. The existing WDHS tower will not support both the weight of both WDHS’s existing analog antenna and the antenna required to operate on pre-transition digital Channel 22 at full effective radiated power. Therefore, it would interfere with the WDHS’s analog service to build out the

digital station at full facilities at this time, as the analog and digital antennas would have to be “switched”. WDHS is prepared to “flash cut” on February 17, 2009. It seems to us that the public interest, convenience and necessity would be best served by the FCC taking such actions as to encourage WDHS’s plan to bring digital service to Michigan’s Upper Peninsula, rather than taking actions to circumscribe such service.

15. To summarize, reconsideration of the **Order** is warranted because Withers is merely following the FCC’s announced policy that licensees of small market stations be allowed to focus their resources on the construction and operation of post-transition facilities. Second, the effect of the **Order** on WDHS would be to reduce its post-transition service area by some 50% of the area currently served by WDHS’s analog station. This is inimical to the public interest, because the FCC has stated that diminution of service by more than 5% is *per se* not in the public interest. Finally, the denial of the WDHS waiver denies Withers the relief which was granted to similarly situated parties, such as the licensees of KMTV, WSAZ and KCSG, which is a violation of the Administrative Procedure Act and the rule of **Melody Music**, *supra*.

Conclusion

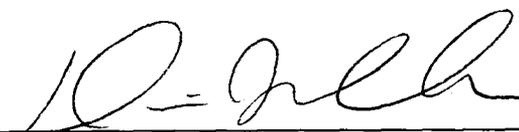
16. Therefore, we would request the Commission to fashion some relief that will allow WDHS to be authorized a digital television facility on its post-transition channel, Channel 8, which will replicate the coverage of its current analog television facility on Channel 8. Such a result would be in the public interest, convenience and necessity

WHEREFORE, W. Russell Withers, Jr. urges that this Petition for Reconsideration BE GRANTED and that it (1) be granted a waiver of the "use it or lose it" policy through February 17, 2009 and (2) be permitted to apply for a construction permit and then covering license for a digital television facility on Channel 8 at Iron Mountain, Michigan which will allow coverage that at least replicates the Grade B contour of analog WDHS(TV), Channel 8, Iron Mountain, Michigan.

Respectfully submitted,

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By



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