

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

In the Matter of	)	
	)	
<b>AMENDMENT OF PARTS 73 AND 74</b>	)	MB Docket No. 08-253
<b>OF THE COMMISSION'S RULES FOR</b>	)	
<b>REPLACEMENT DIGITAL LOW POWER</b>	)	
<b>TELEVISION TRANSLATOR STATIONS</b>	)	
	)	
In re Applications of	)	
	)	
<b>WITHERS BROADCASTING COMPANY OF</b>	)	File No. BDRTCT-20090217AFW
<b>WEST VIRGINIA</b>	)	File No. BDRTCT-20090217AFX
	)	
For New Digital TV Translator	)	
Stations at Clay, WV and	)	
Parkersburg, WV	)	

TO: Honorable Marlene H. Dortch  
Secretary of the Commission

ATTN: The Commission

**OPPOSITION TO REQUEST FOR STAY**

Withers Broadcasting Company of West Virginia (Withers), permittee of operating Digital Television Station WDTV-DT, Weston, West Virginia and applicant for "replacement service" digital television translator stations at Clay, West Virginia and at Parkersburg, West Virginia, by its attorney, hereby respectfully submits this Opposition to the "Request for Stay" in the above-entitled matter filed by KMCE, Inc. (KMCE). In so doing, the following is shown:

1. KMCE seeks a blanket "stay" on the processing of "replacement service" digital television translator stations across the nation. In order to obtain a stay, a party such as KMCE must meet the time honored four part test of **Virginia Petroleum Jobbers Association v. Federal Power Commission**, 259 F.2d 921, 925 (D. C. Cir. 1985): (1) likelihood of success on the merits; (2) the petitioner will suffer irreparable harm if the *status quo ante* is not preserved; (3) no party interested in the proceeding would be substantially harmed if the stay were granted; and (4) "where lies the public interest?".

2. Leaving aside the question of whether KMCE will succeed on the merits of its petition, KMCE utterly fails to demonstrate that it would be "irreparably" harmed were the Commission to grant Withers' pending "replacement service" television translator applications in Clay and Wood counties in west central West Virginia, on the fringe of WDTV's former analog service area.

3. Obviously, KMCE is an LPTV broadcaster operating in the Salinas-Monterey television market, which is over 2,000 miles west of the Clarksburg-Weston market served by WDTV. Withers has no present plans to enter the Salinas-Monterey television market, and the proposed Clay and Parkersburg translator stations would have no impact on television broadcasting in the state of California

whatsoever. KMCE therefore has no standing, Article III or otherwise, to seek a stay against the granting of the above-captioned Clay and Parkersburg applications, on any ground ever recognized by the Commission or the appellate courts (economic competition, electrical interference or "listener standing").

4. In Withers' case, as more fully explained below, it was directed by the Commission in a letter dated January 15, 2009 relative to WDTV-DT's so-called "maximization application", File No. BMPCDT-20080618ACH, to file the above-captioned applications by February 17, 2009. Withers complied with the Commission's directive. Withers maximized its digital television facility by relocating its transmitter site roughly 20 miles north of its former analog transmitter site on Fisher Mountain near Weston to a tower in Clarksburg, which is centrally located in the Clarksburg-Weston market and allows for better coverage of the largest city in northern West Virginia, Morgantown, which is part of WDTV's market even though the Nielsen organization considers it part of the Pittsburgh DMA. ***Withers Broadcasting Company of West Virginia***, 21 FCC Rcd 5909 (Video Div., 2006).

5. In order that WDTV continue to provide over the air service to areas at the west and southwest ends of its former analog signal, the Commission required Withers to file the "replacement coverage" translator applications at

Clay and Parkersburg in order to get the maximization application for WDTV-DT processed and granted.

6. It would be manifestly unfair to the local off-the-air television viewers in Clay and Wood Counties in West Virginia, who no longer have analog television service from WDTV, to put off authorized over-the-air digital television service from WDTV to those areas, as KMCE requests. Therefore, the public interest does not lie with KMCE.

7. Furthermore, the granting of a few "replacement translator" stations around the country does not constitute "irreparable harm" to KNCE. In the history of the FCC, it has granted unique station authorizations on a limited basis, and then not granted similar authorizations nationwide. For example, many years ago the Commission granted "super power" FM authorizations in the Richmond, Virginia, Roanoke, Virginia and Grand Rapids, Michigan markets. The four stations thus authorized (WRVQ in Richmond, WSLQ in Roanoke, and WBCT and WOOD-FM in Grand Rapids) are still operating<sup>1</sup>; their grants did not cause "irreparable harm" to broadcasters in the western United States, as the Commission decided to grandfather them in and set effective radiated power limits at 50 kilowatts in the Class B zone and 100 kilowatts elsewhere. Another example

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<sup>1</sup>WBCT (originally WJFM) operates with effective radiated power (ERP) of 500 kW; WOOD-FM operates with ERP of 265 kW; WRVQ operates with

of a technology only allowed a limited use is an AM "synchronous amplifier" station. The Commission has only permitted this type of station in limited circumstances, for example, in the Lowell/Lawrence/Haverhill area in Massachusetts and at Albuquerque and Santa Fe, New Mexico. That these stations were allowed to exist did not cause irreparable harm to any other broadcaster in the country.

8. Therefore, even if KMCE is successful on its "Petition for Reconsideration", it will suffer no harm of any kind should the above-captioned applications be granted. Whatever remedy that needs to be fashioned to accommodate KMCE can be crafted without denying authorizations to Withers to establish digital television translator stations at Clay and Parkersburg, West Virginia, over 2,000 miles away from KMCE's operations on the Monterey Peninsula in California.

WHEREFORE, it is urged that the "Request for Stay" filed by KMCE, Inc. **BE DENIED** and that the applications of Withers Broadcasting Company of West Virginia for construction permits for new digital television translator stations at Clay, West Virginia and at Parkersburg, West Virginia **BE GRANTED**.

Respectfully submitted,

**WITHERS BROADCASTING COMPANY  
OF WEST VIRGINIA**

A handwritten signature in black ink, appearing to read "D. Kelly", written in a cursive style.

By

Dennis J. Kelly  
Its Attorney

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DATED AND FILED: June 25, 2009

### CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing "Opposition to Request for Stay" was served by first-class mail, postage prepaid, on this 25<sup>th</sup> day of June, 2009 upon the following:

Michael Couzens, Esquire  
6536 Telegraph Avenue, Suite B201  
Oakland, CA 94609  
Counsel for KMCE, Inc.

A handwritten signature in black ink, appearing to read "D. Kelly", written in a cursive style.

Dennis J. Kelly

NOTE: This pleading is being filed on paper with the Secretary's Office filing location at 236 Massachusetts Avenue, NE, Washington, DC, and on the Commission's ECFS electronic filing system.