

**REQUEST FOR DUOPOLY WAIVER UNDER SECTION 73.3555(b)**

**I. INTRODUCTION**

By this application, Withers Broadcasting Company of Clarksburg, LLC (“Withers”) seeks Commission grant of a “failing station waiver”<sup>1</sup> of the FCC’s television duopoly rule<sup>2</sup> to permit the assignment of the license for UHF Television Station WVFX, Channel 46, Clarksburg, West Virginia (“WVFX” or the “Station”), from Davis Television Clarksburg, LLC (“Davis”) to Withers. Davis holds a permit for a DTV facility on Channel 10 (“WVFX-DT”) and is operating DTV Channel 10 pursuant to Special Temporary Authority. On May 18, 2007, WVFX-DT was granted a six-month waiver of the FCC’s July 1, 2006 replication/maximization (“use or lose”) deadline based on a demonstration of financial hardship. *See DTV Build-Out*, FCC 07-90 (released May 18, 2007). This proposed license assignment requires a waiver because Withers is the FCC licensee of Television Station WDTV(TV), Channel 5, Weston, West Virginia (“WDTV”). Both WVFX and WDTV are in the Nielsen Designated Market Area for Clarksburg-Weston (the “Clarksburg-Weston DMA”), their predicted Grade B contours

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<sup>1</sup> *See Review of the Commission’s Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, Report and Order*, 14 FCC Rcd 12903, ¶¶ 42-91 (adopted August 5, 1999) (“*TV Local Ownership Order*”) and Appendix B (amending 47 C.F.R. § 73.3555(b)). *See also Review of the Commission’s Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, Memorandum Opinion and Second Order on Reconsideration*, 16 FCC Rcd 1067, ¶ 25-33 (rel. Jan. 19, 2001) (“*Second Order on Reconsideration*”).

<sup>2</sup> *See* 47 C.F.R. § 73.3555(b) (2002) (the “Duopoly Rule”).

overlap, and the Clarksburg-Weston DMA is home to three full power over-the-air television broadcast stations.<sup>3</sup>

Withers' proposed acquisition of WVFX fulfills each of the Commission's four criteria for the so-called "failing station waiver."<sup>4</sup> First, WVFX has low audience share ratings. Its all-day audience shares have regularly fallen below the four-percent benchmark, including during the last three years. Second, WVFX's financial condition is poor. As demonstrated below, WVFX has endured negative cash flow for the last three years. Third, Withers, an in-market buyer, is the only reasonable candidate willing and able to acquire and operate the Station, and a sale to an out-of-market buyer would result in an artificially depressed price. Since 2003, Davis

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<sup>3</sup> Under the currently effective Duopoly Rule, the same entity may own or control in the same market two commercial television stations with overlapping Grade B contours so long as: (i) at the time the application is filed, at least one of the stations is not ranked among the top four stations in audience rankings in the DMA; and (ii) at least eight independently owned and operated full-power commercial and non-commercial educational television stations would remain in the market after the proposed acquisition. *See* 47 C.F.R. 73.3555(b)(2)(ii). *See also Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, Order on Reconsideration*, 14 FCC Rcd 20571, ¶ 18 (rel. November 10, 1999), *Second Order on Reconsideration*, ¶ 14, n.19. This application does not meet these requirements, and a waiver is therefore needed.

<sup>4</sup> The *TV Local Ownership Order* sets forth four criteria that must be satisfied for a failing station waiver, as follows:

- (1) One of the merging stations has had low all-day audience share (*i.e.*, 4% or lower).
- (2) The financial condition of one of the merging stations is poor.
- (3) The merger will produce public interest benefits. A waiver will be granted where the applicant demonstrates that the tangible and verifiable public interest benefits of the merger outweigh any harm to competition and diversity. . . .
- (4) The in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station, and selling the station to an out-of-market buyer would result in an artificially depressed price.

*See TV Local Ownership Order*, ¶ 81. *See also Second Order on Reconsideration*, ¶ 25 ("We reaffirm the elements of our presumptive waiver standards.").

has sought to sell WVFX with the assistance of Kalil and Company, but Withers ultimately was the only party that pursued negotiations concerning the Station.

Under the fourth criterion, the applicant must demonstrate that the tangible and verifiable public interest benefits of the merger will outweigh any harm to competition and diversity. Here, Withers has a compelling case that the merger will produce significant public interest benefits. As explained below, by granting a failing station waiver, the Commission can create an effective local television voice in place of a station that for years has broadcast very little locally produced news and information programming. If WVFX is purchased by a new owner that can benefit from the economies of scale of a duopoly and that is willing and able to take the financial risk of a substantial investment in WVFX's programming, WVFX could become a viable local voice in the Clarksburg-Weston DMA. Withers' demonstrated ability to improve television stations through focus on local programming, needs, and interests, coupled with Withers' resources and its familiarity with the Clarksburg-Weston market, uniquely position Withers to turn this failing station into an effective local outlet for its community of license consistent with the purpose of the failing station waiver standard.<sup>5</sup> As set forth in detail below, Withers has offered specific commitments consistent with its local service strategy, including a daily 10 p.m. local news program, together with its commitment to regular weather bulletins, coverage of local college and high school sports, and local special events. Withers knows this DMA, and Withers is committed to making WVFX a Clarksburg television station rooted in the needs and interests of its local community.

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<sup>5</sup> The underlying premise of the Commission's duopoly waiver provisions is that permitting the proposed merger "will, consistent with [the FCC's] competition and diversity goals, provide relief in a more tailored fashion for stations . . . that are unable to compete effectively." *See TV Local Ownership Order*, ¶ 70. The Commission acknowledges that "[a]llowing a 'failing' station to join with a stronger station in the market can greatly improve its ability to improve its facilities and programming options, thus benefiting the public interest." *Id.* at ¶ 80.

The Commission adopted the failing station waiver standard because, even if a television market has fewer than eight independent television voices, a particular proposed combination with an in-market buyer might demonstrably serve the public interest and should be permitted if the station to be acquired meets the criteria for a failing station waiver. WVFX presents a compelling case study of a failing station, and grant of the requested waiver can reasonably be expected to allow WVFX to become a meaningful television voice for the community.

## **II. WITHERS' PROPOSED ACQUISITION OF WVFX MEETS EACH OF THE COMMISSION'S CRITERIA FOR GRANT OF A FAILING STATION WAIVER**

### **A. WVFX Has Not In The Last Three Years Had An All-Day Audience Share Equal To Or Greater Than 4%.**

To meet the first prong of the failing station waiver test, one of the merging stations must have a low audience share, at or below 4%.<sup>6</sup> In evaluating a failing station waiver request, the Commission typically examines audience share ratings covering the three years prior to the proposed assignment of the "failing" station.<sup>7</sup>

WVFX clearly satisfies this first criterion. The chart provided at *Attachment A* shows the Nielsen reported audience shares for WVFX for the so-called "all-day" share, which is the measurement period examined by the Commission.<sup>8</sup> As shown in that chart, WVFX averaged a 0.4995% household audience share in 2004, a 0.9872% household audience share in 2005, and a 0.9135% household audience share based on a Nielsen 2- book average (**February and May,**

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<sup>6</sup> See *TV Local Ownership Order*, ¶ 81(1); *Second Order on Reconsideration*, ¶ 27.

<sup>7</sup> See, e.g., *Hispanic Keys Broadcasting, Inc. and Sonia Broadcasting Company, LLC*, *Memorandum Opinion and Order*, 19 FCC RCD 4603, ¶ 5 (2004).

<sup>8</sup> The Nielsen Station Index (NSI) reports all day coverage between the hours of 7:00 a.m. and 1:00 a.m. NSI "County By County" Coverage Ratings for the years 2004 and 2005 have been published and are the basis for the household audience shares for those years stated in this exhibit.

**2006 books**)<sup>9</sup>, Mondays through Fridays from 7:00 a.m.-to-11:30 p.m.. As such, WVFX's all-day audience share has fallen below 4% for at least three years, and therefore easily satisfies the first prong of the failing station waiver showing.

**B. WVFX's Financial Condition Has Been Poor In The Last Three Years.**

The second prong of the failing station waiver standard requires a showing that the financial condition of one of the merging stations is "poor." The Commission has stated that a waiver is "more likely to be granted where one or both of the stations has had a negative cash flow for the previous three years."<sup>10</sup> The Commission suggests the inclusion of data "such as detailed income statements and balance sheets" to support the waiver showing under this criterion.<sup>11</sup> WVFX falls within these parameters, as shown by the detailed financial statements for WVFX separately submitted by Davis in connection with this application pursuant to a request for confidential treatment. Those statements reflect WVFX's poor financial condition throughout at least the last three years.

The financial data provided in connection with this waiver request show that WVFX has struggled financially and sustained cumulative operating losses during at least the last three years. The data demonstrate a negative cash flow as well as net operating losses in each of the past three years (2004, 2005 and 2006). In summary, WVFX indeed has been "struggling for an extended period of time in terms of its . . . financial performance," and its financial situation

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<sup>9</sup> The 2006 Nielsen "County By County" Coverage Ratings Data is not yet available; the showing for 2006 was prepared from an examination of the quarterly ratings data, Monday-Friday, 7 a.m.-11:30 p.m..

<sup>10</sup> See *TV Local Ownership Order*, ¶ 81(2).

<sup>11</sup> See *id.*

more than “hamper[ed]” its “ability to be a viable ‘voice’ in the market.”<sup>12</sup> Since at least 2004, WVFX has struggled financially. The Station’s financial data covering 2004 through 2006 portray the Stations’ consistent and continuing financial losses. The record of WVFX’s poor financial condition satisfies the second prong of the failing station waiver test.

**C. Withers Is The Only Reasonably Available Purchaser Willing And Able To Operate WVFX.**

Beginning in July, 2003, Davis made an extensive, good-faith effort to find buyers for WVFX. During that month, Davis retained the services of Kalil and Company (“Kalil”), a nationally recognized independent broker with substantial experience in TV ownership/consulting and station brokerage, to market WVFX. Kalil has made considerable efforts to sell WVFX. As described in the attached Declaration of Kalil Vice President Kelly Callan, Kalil contacted approximately fifteen potential out-of-market parties to solicit interest for the purchase of WVFX. Of those fifteen parties, only seven signed non-disclosure agreements relating to WVFX. Not one of those seven parties submitted an offer on WVFX.

Kalil next contacted two potential in-market buyers of WVFX, including Withers, and both signed non-disclosure agreements. Davis received a non-binding expression of interest from Withers in November 2004 and, after extensive and extended negotiations, ultimately reached this year the agreement with Withers that is the basis of this license assignment application. Despite Kalil’s active and serious efforts on behalf of Davis, no reasonable offer to purchase WVFX was received from any party other than Withers.

Withers submits that this showing, which demonstrates that Davis attempted to sell WVFX for an extended period of time with the help of an experienced broker, more than satisfies the requirement under the failing station waiver test that “active and serious efforts” be

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<sup>12</sup> See *TV Local Ownership Order*, ¶ 79.

made to sell a station and that “no reasonable offer from an entity outside the market has been received.”

**D. Consolidated Operations Of The Two Stations Will Result In Tangible And Verifiable Public Interest Benefits That Far Outweigh Any Conceivable Harm To Competition And Diversity.**

To satisfy the last prong of the Commission’s failing station waiver standard, the applicant must demonstrate that the “tangible and verifiable public interest benefits of the merger outweigh any harm to competition and diversity.”<sup>13</sup> The consolidated operations of WVFX and WDTV will result in substantial tangible and verifiable public interest benefits: (a) new, unique and high-quality programming geared to the local population, some of which will be locally produced; and (b) substantial cost savings.

Clarksburg-Weston is the nation’s 166<sup>th</sup> largest DMA. Despite this, only 5.4% (or approximately 5,900) of the 108,730 households in this 12 county DMA are relying on off-the-air reception of their television signals. The Television Bureau of Advertising (TVB) has determined that, as of May, 2006, 94.6% of all television households in the DMA receive their television via cable and or “alternative delivery systems” (which includes direct broadcast satellite providers)—61.0% of households in the DMA are connected to wired cable television, and another 34.5% of households in the DMA subscribe to an alternative delivery system.

Therefore, from the point of view of the vast majority of television households, WVFX is not merely one of four local television stations (along with WDTV, WBOY-TV and educational station WNPB-TV). Rather, WVFX is effectively competing for viewers and revenues with at least 100 television channels available on cable, DirecTV or DISH Network. With respect to advertising dollars, there are no shortage of advertising options available to local businesses,

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<sup>13</sup> *TV Local Ownership Order*, ¶ 81.

including daily newspapers in Clarksburg, Fairmont and Morgantown which circulate in the DMA, the local cable television system's regional sales apparatus (soon to be operated by Comcast), local radio stations, direct mail, local "shopper"-type newspapers and outdoor advertising.

Thus, the "merger" of WVFX and WDTV would have negligible adverse affects on either competition or diversity of program choices. Rather, the merger would allow for a strong local Fox affiliate going forward, with an established, motivated owner (who has been in the Clarksburg-Weston market for some 34 years) able to provide news, public affairs and other programming of local interest over both WVFX and WDTV.

In particular, Withers will institute local newscasts on WVFX (there is no local news on WVFX at present). Currently, Withers has a news operation which airs local newscasts during the CBS Daybreak Show between 6:00 a.m. and 7:00 a.m., at noon, at 5:00-5:30 p.m., 5:30-6:00 p.m., 6:00-6:30 p.m. and at 11 p.m. As FOX's evening prime-time programming ends at 10 p.m., Withers would air a local newscast in the 10 p.m. time slot. Withers would evaluate newscasts at other times during the day. Withers' news department has a staff of 17 full-time employees and has a "live eye" satellite uplink truck to facilitate coverage of stories in hard to reach mountainous areas of northern West Virginia, such as the recent Sago coal mine tragedy in Upshur County. Withers Broadcasting provides a significant local weather service, which will be made available to WVFX. Withers Broadcasting also provides extensive coverage of West Virginia University sports and also covers local high school sports. WVFX will be the beneficiary of these resources going forward.

The joint ownership of WDTV and WVFX will allow for significant economies of scale going forward. WDTV's studio and office building at 5 Television Drive in Bridgeport, West Virginia (approximately 3 miles east of downtown Clarksburg, and centrally located in the DMA at the junction of the region's two major highways, east-west U. S. 50 and north-south Interstate 79, is large enough to house the studio and business operations of WVFX. This will result in an estimated annual savings of \$25,000.00 in rent and utilities. WDTV and WVFX will be able to share technical operations employees, such as engineering and maintenance staff, resulting in an estimated annual savings of \$70,000.00. WDTV and WVFX will be able to share a joint sales staff, resulting in an estimated annual savings of \$28,000.00. WDTV and WVFX will be able to share station administration personnel, resulting in an estimated annual savings of \$125,500.00. WVFX will share WDTV's news staff, which will provide a very large public interest benefit to the entire twelve county region within the Clarksburg-Weston DMA.

### **Conclusion**

All of the public interest factors relative to the "failed station waiver" are present here. It is clear that the public interest inherent in strong local network affiliated off-the-air television stations would be served by permitting Withers Broadcasting to operate WVFX in tandem with WDTV. Therefore, the public interest, convenience and necessity would be served by a grant of this waiver request and a grant of the instant Form 314 application.

ATTACHMENT A

**WVFX(TV), CHANNEL 46, CLARKSBURG, WV**

**NSI 2005 COUNTY/COVERAGE STUDY, AVERAGE QUARTER HOUR SHARES, SUNDAY THROUGH SATURDAY, 7:00 AM-1:00 AM**

WV County	TVHH	All Homes	Cable	Non-Cable
Barbour	6,220	1	2	0
Doddridge	2,890	1	4	1
Gilmer	2,650	0	1	0
Harrison	27,980	3	4	2
Lewis	7,230	3	4	2
Marion	24,150	3	4	1
Randolph	11,060	4	6	0
Ritchie	4,270	1	0	1
Taylor	6,450	3	4	1
Tucker	3,060	0	0	0
Upshur	9,200	2	4	1
Webster	4,320	0	0	0
	109,480			

**WVFX 2005 MARKET-WIDE SHARE IN NON-CABLE HOMES = 0.9872%**

**NSI 2004 COUNTY/COVERAGE STUDY, AVERAGE QUARTER HOUR SHARES, SUNDAY THROUGH SATURDAY, 7:00 AM-1:00 AM**

WV County	TVHH	All Homes	Cable	Non-Cable
Barbour	5,910	2	4	0
Doddridge	2,790	0	0	0
Gilmer	2,680	1	2	0
Harrison	27,390	4	4	1
Lewis	6,880	4	6	0
Marion	23,400	3	3	0
Randolph	10,970	3	5	0
Ritchie	4,080	0	1	0
Taylor	6,430	4	4	4
Tucker	2,820	0	0	0
Upshur	9,030	2	2	0
Webster	3,950	0	0	0
	106,330			

**WVFX 2004 MARKET-WIDE SHARE IN NON-CABLE HOMES = 0.4995%**

**WVFX CLARKSBURG FEBRUARY 2006 RATINGS**

**MONDAY THRU FRIDAY**

	6-Feb RTG	6-Feb SHR	6-May RTG
7A-730	0	0	0.1
730A-8A	0	0	0.1
8A-830A	0	0	0.1
830A-9A	0	0	0.1
9A-930A	1	2	0.7
930-10A	1	3	0.7
10A-1030A	2	5	1
1030A-11A	2	5	1
11A-1130A	1	4	0.4
1130A-12A	1	4	0.4
12A-1230P	1	3	0.2
1230P-1P	1	3	0.5
1P-130P	0	0	0.5
130P-2P	0	0	0.2
2P-230P	0	0	0.2
230P-3P	0	0	0.2
3P-330P	0	0	0.5
330P-4P	0	0	0.5
4P-430P	0	0	0.4
430-5P	0	0	0.4
5P-530P	1	1	0.1
530P-6P	0	0	0.2
6P-630P	0	0	0.5
630P-7P	0	0	0.6
7P-730P	1	2	0.5
730P-8P	1	1	0.5
8P-830P	6	10	5
830P-9P	7	11	5
9P-930P	5	8	6
930P-10P	4	7	5
10P-1030P	1	2	1
1030P-11P	1	2	1
11P-1130P	1	2	0.2

<b>Total Daily Average Points.</b>	<b>38</b>	<b>75</b>	<b>33.8</b>
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<b>Average per</b>	<b>1.027027</b>	<b>2.027027</b>	<b>0.913514</b>
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ATTACHMENT B

**Declaration of Kelly Callan  
Vice President, Kalil and Company**

I, Kelly Callan, do hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information and belief:

1. I am Vice President of Kalil and Company ("Kalil"), a media and brokerage consulting firm based in Tucson, Arizona. Kalil has provided full service to clients in the media brokerage business for more than thirty-five years, and its six brokers have more than a hundred combined years of experience in media brokerage. For the last three years, Kagan Research has rated Kalil the top media brokerage firm in the country in terms of total deal volume, and over the same period Kalil has brokered media transactions totaling more than a billion dollars.

2. As Vice President of Kalil, I have extensive knowledge of the television industry in general, having worked as a media broker for the past 20 years. I have both consulted for and appraised television stations for a variety of purposes, including acquisitions, divestitures, mergers, financing, and restructuring of debt. I have been personally involved in the acquisition or sale of hundreds of broadcast properties, including stations in small, medium, and large markets. Prior to joining Kalil, I held a position in sales in the communications industry for three years.

3. In July 2003, Kalil was retained by Davis Television, LLC to make an independent appraisal of the fair market value of television station WVFX-TV, FOX Channel 46, Clarksburg, West Virginia, and to undertake efforts to locate a qualified buyer.

4. WVFX-TV, which is affiliated with the FOX Network, is located in the Clarksburg-Weston, West Virginia, Nielsen Designated Market (the 166th ranked DMA).

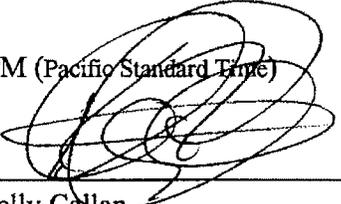
5. After a review of our regional and national television station marketplace contacts, Kalil developed a list of fifteen out-of-market prospective buyers for WVFX-TV. After following up with these prospects, it became clear that WVFX-TV did not represent even a potentially attractive opportunity to the majority of broadcast companies that Kalil contacted. Specifically, only seven signed the non-disclosure agreement, and not one out-of-market prospect who executed a non-disclosure agreement with Kalil submitted an offer. In light of its extensive marketing efforts, Kalil concluded that it would be unable to obtain any reasonable offer for the station from an entity located outside the market.

6. Given the lack of bona fide interest in WVFX-TV at the national and regional levels, Kalil and Davis decided to pursue potential buyers in the Clarksburg market. Kalil contacted two

prospective in-market buyers, and both signed non-disclosure agreements, and submitted interest in WVFX-TV. In November 2004, Davis received a non-binding expression of interest from Withers Broadcasting. Since that time there have been extensive discussions, which have only recently resulted in an Asset Purchase Agreement.

7. In light of these facts, it is the considered judgment of Kalil that, despite an extensive marketing process, including an independent valuation and significant outreach to prospective out-of-market buyers, the only potential bona fide purchaser of WVFX-TV is an in-market buyer.

Executed on this 20th day of June 2007 at 3:16PM (Pacific Standard Time)

  
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Kelly Callan