

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of the Television Table of)	
Allotments to Delete Noncommercial)	MB Docket No. 04-312
Reservation of Channel *39, 620-626 MHz,)	RM No. 11049
Phoenix, Arizona, and to Add Noncommercial)	
Reservation on Channel 11, 198-204 MHz,)	
Holbrook, Arizona)	

**MEMORANDUM OPINION AND ORDER
AND NOTICE OF PROPOSED RULE MAKING**

Adopted: August 3, 2004

Released: August 6, 2004

Comment Date: October 15, 2004

Reply Comment Date: November 30, 2004

By the Chief, Video Division:

1. The Video Division of the Media Bureau has before it for consideration a "Joint Petition to Amend the Television Table of Allotments" filed on August 7, 2003 by NBC Telemundo Phoenix, Inc. (Telemundo), licensee of stations KPHZ(TV), Channel 11, Holbrook, Arizona and KDRX-CA, Phoenix, Arizona, and Community Television Educators, Inc. (CTE), licensee of noncommercial educational television station KDTP(TV), Channel *39, Phoenix, Arizona. In their joint petition, Petitioners request that the Commission amend Section 73.606 of the Commission's rules, 47 C.F.R. § 73.606, pursuant to Section 1.420(h) of the rules, 47 C.F.R. § 1.420(h), to delete the noncommercial reservation of Channel *39 in Phoenix and reserve Channel 11 in Holbrook. They further request that the Commission modify Telemundo's license to specify Channel 39 and CTE's license to specify Channel *11, without opening the channels to competing applications.

2. We hereby commence a rule making proceeding to determine whether: (1) the proposed reservation of Channel 11 at Holbrook and the dereservation of Channel *39 at Phoenix will serve the public interest, convenience or necessity; (2) the channels, if their nature is changed, should be subject to competing applications, or whether modification of the license of KPHZ(TV) to specify operation on Channel 39 at Phoenix, and the license of KDTP(TV) to specify operation on Channel *11 at Holbrook would better promote the public interest, convenience or necessity; and (3) CTE is qualified to become the licensee of a noncommercial educational television station at Holbrook.

BACKGROUND

3. Section 73.606(b) of the Commission's rules set forth the Television Table of Allotments in which specific channels are allotted to specific communities.¹ Channels designated with an asterisk are

¹ Because a construction permit had not been issued for either station when the *Sixth Report and Order* in MM Docket 87-269 was adopted in 1997, neither station was assigned a paired digital channel. See *Advanced* (continued....)

reserved for noncommercial educational use and are licensed only to nonprofit educational organizations or municipalities. A reserved channel was allotted to Holbrook in 1965,² and Channel 11 was allotted in 1986.³ The reserved channel was never applied for, and was deleted by the Commission in 1996 with all other unapplied for NTSC channels in the TV Table of Allotments.⁴ There are nine commercial television stations allotted to Phoenix/Mesa, and two noncommercial educational channels, all of which are licensed. In addition, there are six Class A television stations licensed to Phoenix, including KDRX-CA, which carries Telemundo's programming.

4. In the instant petition filed August 7, 2003, Petitioners state that the Hispanic population of the United States is growing rapidly, and that Phoenix is the 9th largest Hispanic DMA, with more than 18% of its households comprised of Hispanics. According to Telemundo, "no existing full-power television licensee in Phoenix has shown any willingness to enter the Spanish-language market in competition with Univision [which] owns two full-power television stations (one licensed to Phoenix and one licensed to Flagstaff) and soon will acquire five FM radio stations . . . while Telemundo is carried on a low-power Class A television station, KDRX-CA." Petitioners requests that the Commission dereserve Channel *39 and reserve Channel 11, and modify the licenses of KPHZ(TV) and KDTP(TV) to change their authorized facilities to Channel 39 at Phoenix and Channel *11 at Holbrook, respectively, so that Telemundo can better compete with Univision and create "real diversity in news, information, and entertainment programming for hundreds of thousands of Spanish-language speakers . . ."

5. In addition, Telemundo asserts that KPHZ(TV), licensed to Holbrook, is unable to provide service to urban Phoenix, where a substantial Latino population resides, and that absent the channel exchange, "it is virtually certain that KPHZ will fail as a commercial outlet and will go dark, thereby creating a white area in Holbrook and causing a loss of total television service available in the DMA."⁵ Conversely, Petitioners state that "as an NCE facility, however, the [Holbrook] station has a more promising outlook because it can be expected to draw on sources of funding independent of advertising revenues," and also has more potential to serve as a local outlet for expression. Petitioners further state that in addition to Telemundo paying CTE cash consideration for moving to Holbrook, it will also assign KDRX-CA to CTE, which will allow it to continue to provide over-the-air service to Phoenix.⁶

6. Petitioners also contend that the Commission may grant the requested relief pursuant to Section 1.420(h) of the rules, which provides that:

(Continued from previous page) _____

Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Report and Order, 12 FCC Rcd 14588, 14639 (1997).

² See *Fostering Expanded Use of UHF Television Channels*, 41 FCC Rcd 1077, 1097 (1965).

³ *Amendment of Section 73.606(b), Table of Assignments, TV Broadcast Stations (Holbrook, Arizona)*, 1 FCC Rcd 1065 (MMB 1986).

⁴ *Sixth Report and Order*, 12 FCC Rcd at 14639.

⁵ Telemundo further states that "the station has never operated profitably and could not do so in the foreseeable future. Thus, it is virtually certain that the station, operating commercially, will not survive."

⁶ As a Class A television station, KDRX-CA is entitled to primary status vis-à-vis other television stations, including full power stations. See *Establishment of a Class A Television Service*, 15 FCC Rcd 6355, 6381-87 (2000).

Where licensees (or permittees) of television broadcast stations jointly petition to amend § 73.606(b) and to exchange channels, and where one of the licensees (or permittees) operates on a commercial channel while the other operates on a reserved noncommercial educational channel within the same band, and the stations serve substantially the same market, then the Commission may amend § 73.606(b) and modify the licenses (or permits) of the petitioners to specify operation on the appropriate channels upon a finding that such action will promote the public interest, convenience and necessity.

Petitioners admit that their proposal does not meet all the criteria set forth in § 1.420(h), but assert that it is consistent with the underlying purpose of the rule, in that it would not result in the elimination of a reserved channel and would provide substantial financial benefits to a noncommercial licensee. Moreover, as is the case of § 1.420(h) channel exchanges, “these benefits could not be obtained if the modified allotments were opened to competing applications because CTE could not afford the risk of losing its existing station and therefore would not pursue the proposal if the result were to put its channel in jeopardy.”

DISCUSSION

7. At the outset, we disagree that the petitioners’ proposal can be effectuated pursuant to § 1.420 of the Commission’s rules,⁷ because KPHZ(TV) and KDTP(TV) do not serve “substantially the same market.” Holbrook is located 228 miles from Phoenix and there is no overlap of the two stations’ predicted Grade B contours. While KPHZ(TV) presently operates at only 1.6 kW, even operating at the allowed maximum of 316 kW, no overlap would occur.⁸ Moreover, when the Commission adopted procedures permitting intraband channel exchanges between commercial and noncommercial stations, it did so based in part on the fact that the exchange would enable the noncommercial educational station to improve the quality of its service. Here, CTE would be exchanging a UHF facility licensed to Phoenix, the 6th largest city in the United States, with a population of 1,321,045, for a VHF facility operating at only 1.6 kW, licensed to a community with a population of 4,917.⁹ Thus, we find Section 1.420 inapplicable here.

8. It may be possible, however to effectuate Petitioners’ proposal through a rulemaking proceeding coupled with a license modification under Section 316 of the Communications Act, should the public interest be found to warrant dereservation of Channel *39, reservation of Channel 11, and modification of Telemundo’s and CTE’s licenses. The Commission has repeatedly utilized rulemaking procedures to amend the table of allotments, and Section 316 to modify a station’s license to conform to the change in allotment, where those actions have been found to serve the public interest, convenience and necessity. *See, e.g., Amendment of Section 73.606(b), Buffalo, New York*, 14 FCC Rcd 11856 (1999),

⁷ *See Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations*, 59 RR 2d 1455 (1986), *recon. denied*, 3 FCC Rcd 2517 (1988), *aff’d sub nom., Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405 (D.C. Cir. 1991) (*Intraband Television Channel Exchanges*).

⁸ *Compare Boca Raton and Lake Worth, Florida*, 8 FCC Rcd 6189 (1993)(Communities are located approximately 20 miles apart); *Clermont and Cocoa, Florida*, 5 FCC Rcd 6566 (1990)(Communities located 64 miles apart and upon channel exchange, both stations would serve a substantial portion of the other station’s service area).

⁹ Phoenix is located in Maricopa County, which has a population of 3,072,149. Holbrook is located in Navajo County, with a population of 97,470. *See* <http://www.census.gov>.

aff'd, 16 FCC Rcd 4013 (2000); *Intraband Television Channel Exchanges*, 59 RR 2d at 1461-62. We acknowledge that the *Sixth Report and Order* adopting the Television Table of Allotments contemplated that a noncommercial educational station operating on a reserved channel, which seeks to operate on a commercial basis, “would by appropriate rule making proceedings be required to petition for a change in the character of the channel assignment involved. It [would] then have to file an application for a new license, in competition with any others who may seek the channel.” *Sixth Report and Order*, 41 FCC 148, 212, n.51 (1952); *see also Intraband Television Channel Exchanges*, 59 RR 2d at 1458. However, the Commission may, in a rulemaking proceeding, limit potential applicants’ ability to apply for the channels if, in the Commission’s judgment, such action will promote the public interest, convenience and necessity. *Storer Broadcasting v. FCC*, 351 U.S. 192 (1956); *Malrite of New York, Inc.*, FCC 84-338, released July 31, 1984. Assuming we decide that dereservation of Channel *39 and reservation of Channel 11 is in the public interest, we seek comment on whether unique public interest considerations and benefits in this case outweigh the benefits of entertaining competing applications for a new commercial station in Phoenix (and a new noncommercial educational station in Holbrook), thus warranting a waiver of the uncodified rule set forth in the *Sixth Report and Order*, requiring that newly dereserved channels be made available for such applications.

9. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission make “distribution of licenses . . . among the several States and communities as to provide a fair, efficient and equitable distribution of radio service.” 47 U.S.C. § 307(b). In order to fulfill this mandate, the Commission has established certain television allotment priorities: (1) to provide at least one television service to all parts of the United States; (2) to provide each community with at least one television broadcast station; (3) to provide a choice of at least two television services to all parts of the United States; (4) to provide each community with at least two television stations; and (5) to assign any remaining channels to communities based on population, geographic location, and the number of television services available to the community from stations located in other communities.”¹⁰ With respect to the allotment of reserved noncommercial educational channels, the Commission reserved an allotted channel for noncommercial use in each community having a total of three or more allotments, and in the very largest cities, endeavored to reserve a second noncommercial channel.¹¹ Where a community had fewer than three allotted channels, no reservation was made except in 46 communities outside of metropolitan areas designated as “primary education centers.” As noted above, Phoenix is now the 6th largest city in the United States, and we seek comment on whether the dereservation of one of the two reserved channels allotted to Phoenix is consistent with the Commission’s prior implementation of its mandate to ensure a “fair, efficient and equitable distribution of radio service.” Similarly, we seek comment on whether the reservation of Holbrook’s sole commercial channel is consistent with our long-standing allotment policies, given the fact that in the majority of communities, the Commission first ensured that the community would receive a commercial channel before a reserved channel was allotted.

10. We also seek comment on whether the Phoenix community no longer needs two noncommercial educational stations, and also, whether the need for a 9th commercial allotment in Phoenix outweighs the need for a second noncommercial educational television station. Specifically, although Telemundo asserts that the needs of the Spanish-speaking population of Phoenix and its environs are underserved, we note that Univision, Telemundo, Telefutura and Azteca all provide a primary television service to the community, either via a full service or Class A television station. Thus, we seek comment

¹⁰ *See Sixth Report and Order*, 41 FCC at 167-173.

¹¹ *Id.* at 169.

regarding the extent to which the Spanish-speaking population is presently served by the Phoenix television stations, as well as cable and DBS, the extent to which unserved needs remain, and whether any unserved needs can be fully met by the commercial and noncommercial stations already serving the community. We also seek comment on Telemundo's assertion that allotment of an additional full service station is necessary to meet allegedly underserved needs. We note that the predicted coverage of Telemundo's Class A television station licensed to Phoenix is nearly identical to the coverage of station KDTP(TV), licensed to CTE and Phoenix station KTVW-TV, licensed to Univision.

11. With respect to Holbrook, we seek comment on whether there is a greater need at Holbrook for a noncommercial educational channel than for the presently allotted commercial channel. We also seek comment on whether Holbrook is capable of sustaining a noncommercial educational station. A reserved channel was allotted to Holbrook for educational use in 1965, and for over 30 years, the Commission received no expressions of interest in operating on that channel. Moreover, given the fact that Telemundo, a subsidiary of a large national network, asserts that KPHZ(TV) cannot exist as a stand-alone commercial facility, we seek comment on the continued viability of Telemundo's commercial operation on Channel 11, as well as the potential viability of a noncommercial operation on a reserved Channel 11 at Holbrook.

12. We also seek comment on whether, in the event we determine that the public interest would be served by reserving Channel 11 at Holbrook for noncommercial educational use, we can modify CTE's license pursuant to Section 316 of the Act to permit its operation on that channel, consistent with our rules and policies regarding the licensing of reserved channels. The channels reserved for educational use are intended to serve the educational and cultural broadcast needs of the entire community to which they are assigned. *Fostering Expanded Use of UHF Television Channels*, 2 FCC 2d 527, 542 (1965). The Commission also has recognized that Congress intended the noncommercial educational service to be "a service that is responsive to the overall public as opposed to the sway of particular political, economic, social or religious interests." *Noncommercial Nature of Educational Broadcast Stations*, 90 FCC 2d 895, 900 (1982). Because of the intended nature of the noncommercial educational broadcast service, the Commission requires noncommercial television applicants which are non-profit organizations, such as CTE, to submit "evidence that officers, directors and members of the governing board are broadly representative of the educational, cultural and civic groups in the community." (FCC Form 340, Section II, Paragraph 11(a)). The Commission has explained that:

There is good reason for having a slightly higher standard for a noncommercial, educational television applicant than for an FM applicant, in light of the former's greater spectrum use. In that regard, all 20 reserved FM channels use spectrum that is equal to two-thirds of one television channel, television stations typically cover greater area than their FM counterparts, and fewer television than FM channels can be allocated in a given area.

Way of the Cross, 101 FCC 2d 1368, 1371, n.3 (1985); see also *Board of Education of Jefferson County, Kentucky*, 80 FCC 2d 280 (1980); *Report and Order* in MM Docket No. 95-31, 15 FCC Rcd 7386, 7409, n.38 (2000). At present, CTE's officers, directors and governing board members are required to be broadly representative of educational, cultural and civic groups in Phoenix, its community of license. Before CTE's license may be modified, it must demonstrate that its officers, directors and governing board members are also broadly representative of the educational, cultural and civic groups in Holbrook. Thus, we seek comment on whether CTE can meet this eligibility burden.

13. Accordingly, we seek comments on the Joint Petition to Amend the Television Table of Allotments proposing amendment to the TV Table of Allotments, Section 73.606(b) of the Commission's rules, for the communities listed below to read as follows:

<u>City</u>	<u>Channel Number</u> ¹²	
	<u>Present</u>	<u>Proposed</u>
Holbrook, Arizona	11+, *18+	*11+, *18+
Phoenix, Arizona	3+, 5-, *8+, 10-, 15-, 21, 33, *39, 45, 61	3+, 5-, *8+, 10-, 15-, 21, 33, 39, 45, 61

14. Interested parties may file comments on or before October 15, 2004 and reply comments on or before November 30, 2004. An original and four copies of each filing must be sent to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served on Telemundo's and CTE's counsel, as follows:

Margaret L. Tobey, Esq.
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006
(Counsel for NBC Telemundo Phoenix, Inc.)

Robert L. Olender, Esq.
Koerner & Olender, PC
5809 Nicholson Lane
Suite 124
North Bethesda, Maryland 20852
(Counsel for Community Television Educators, Inc.)

Any comment which is not served on the petitioners constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which is not served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

15. For further information concerning this proceeding, contact Joyce Bernstein, Media Bureau, (202) 418-1600. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts this Memorandum Opinion and Order and Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the representation upon the other parties to the proceeding unless the Commission specifically waives this service requirement.

16. Interested parties may view the Joint Petition to Amend the Television Table of

¹² As discussed above, and pursuant to the *Sixth Report and Order*, the allotment of Channel *18+ in Holbrook cannot be applied for and will be deleted at the end of the digital transition.

Allotments filed by Telemundo and CTE on August 7, 2003 at <http://www.fcc.gov/mb/video/Phoenix.pdf> and at the KPHZ(TV) and KDTP(TV) main studios. The full text of the document, and comments and reply comments filed in this proceeding, are available for public inspection and copying during regular business hours at the FCC Reference Center, Portals II, 445 Twelfth Street, S.W., Room CY-A257, Washington, D.C. 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0270, TTY (202) 418-2555, or bcline@fcc.gov. The Joint Petition, as well as comments and reply comments filed in this proceeding, may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 Twelfth Street, S.W., Room CY-B402, Washington, D.C. 20554, telephone 1-800-378-3160, or via email at www.bcpweb.com.

17. This document is available in alternative formats (computer diskettes, large print, audio cassette, and Braille). Persons who need documents in such formats may contact Brian Miller at (202) 418-7426, TTY (202) 418-7365, or bmillin@fcc.gov.

18. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Sections 73.606(b) and 73.622(b), of the Commission's rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

ORDERING CLAUSE

19. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2(a), 4(I), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(I), 303, 307 and 309, the Memorandum Opinion and Order and Notice of Proposed Rulemaking is ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau