

FCC MAIL SECTION

Federal Communications Commission

FCC 99-162

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

In the Matter of	)	
	)	
Amendment of Section 73.606(b)	)	MM Docket No. 93-191
Table of Allotments	)	RM-8088
TV Broadcast Stations.	)	
(Pueblo, Colorado)	)	

## MEMORANDUM OPINION AND ORDER ON REMAND

Adopted: July 2, 1999

Released: July 7, 1999

## By the Commission:

1. This *Memorandum Opinion and Order on Remand* concerns the petition for rulemaking to exchange channels filed by the University of Southern Colorado (USC) and Sangre De Cristo Communications, Inc., (Sangre) (referred to jointly as Petitioners). Upon further reconsideration, we affirm our earlier decision denying the exchange of channels. *See Report and Order*, 10 FCC Rcd 7662 (1995), *review denied*, 11 FCC Rcd 19649 (1996). This action is taken in response to the order of the United States Court of Appeals for the District of Columbia Circuit remanding for further consideration our prior decision denying the exchange of channels. *See Sangre de Cristo Communications, Inc. v. FCC*, 139 F. 3d 953 (D.C. Cir. 1998) (*Court Decision*).

## I. Background

2. *Cheyenne Mountain Construction Permit*. USC is the licensee of noncommercial educational television station KTSC(TV), Channel \*8, Pueblo, Colorado. Sangre is the licensee of commercial television station KOAA-TV, Channel 5, Pueblo, Colorado. Both stations currently operate from transmitter sites located on Baculite Mesa which is north of Pueblo. At one time, USC operated a television translator providing service to Colorado Springs, Colorado, but that station was forced to cease operation to accommodate a full service station. USC subsequently applied for and, on February 28, 1991, was granted a construction permit to relocate its transmitter to a new site on Cheyenne Mountain, so that KTSC(TV) could once again provide service to Colorado Springs. *See File No. BPET-900122KE*. However, USC's proposed transmitter site on Cheyenne Mountain was short-spaced by 8.8 kilometers (296.1 kilometers instead of 304.9 kilometers or 2.9%) to KJCT(TV), Grand Junction, Colorado, and 13 kilometers (291.9 kilometers instead of 304.9 kilometers or 4.3%) to the reference coordinates for the vacant allotment on Channel 8 at Laramie, Wyoming. To reconcile these short-spacings, USC requested and was granted a waiver of Section 73.610 of the Commission's Rules. *See Letter from Chief,*

*Video Services Division to Thomas Aube, Ref: 8940-MLB, February 28, 1991 (Short-Spacing Letter).*

3. In the *Short-Spacing Letter*, the staff focused on the fact that KTSC(TV), as a noncommercial educational television station, was serving both Pueblo and Colorado Springs, Colorado, and that permitting KTSC(TV) to relocate its transmitter site to Cheyenne Mountain would improve service to the latter of these communities. The staff further found that USC had been unable to find another translator to serve Colorado Springs, and that it would not be possible for USC to apply for a new full power television station in that community given the freeze on the filing of applications for new stations. In addition, the staff recognized that USC could not modify the existing facilities of KTSC(TV) on Baculite Mesa to provide a viewable signal to Colorado Springs. The staff also found that USC had demonstrated the unsuitability of any other transmitter sites and that the mountainous terrain and USC's offer to reduce effective radiated power to the north and west would greatly reduce the possibility that objectionable interference would be caused to KJCT(TV) and any future station at Laramie, Wyoming. Finally, the staff noted that the licensee of KJCT(TV) had not objected to USC's proposal. Based upon these facts, the staff found that grant of USC's request for short-spacing waiver would serve the public interest and it granted the Cheyenne Mountain permit application.<sup>1</sup>

4. *Petition for Rulemaking.* On September 8, 1992, USC and Sangre filed a petition for rulemaking proposing an exchange of channels pursuant to Section 1.420(h) of the Commission's Rules, 47 C.F.R. § 1.420(h). Under their proposal, Channel 5 at Pueblo, Colorado, would be reserved for noncommercial educational use and Channel \*8 at Pueblo would become a non-reserved allotment. The Petitioners proposed that KTSC(TV)'s noncommercial license would be modified to specify operation from KOAA-TV's licensed site at Baculite Mesa, and KOAA-TV's commercial license would be modified to specify operation on KTSC(TV)'s new construction permit site on Cheyenne Mountain. Therefore, it would be KOAA-TV that would be operating on Channel 8 from the short-spaced Cheyenne Mountain site. The Petitioners argued that the exchange of channels would permit Sangre to enhance KOAA-TV's service to Pueblo and its surrounding area by the more favorable facilities at Cheyenne Mountain. USC argued that it would benefit from the channel exchange because, although KTSC(TV) would continue to operate from the same transmitter site, only with a different channel, it would receive donated facilities and funds that USC could use to improve the station's facilities and enhance its existing translator services.

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<sup>1</sup> On February 16, 1993, USC filed an application to extend the permit. See File No. BMPET-930216KE. By a separate letter issued today, the staff granted the extension application and, pursuant to the Commission's new extension procedures, extended the permit for one year. See *Letter to University of Southern Colorado from Chief - Video Services Division*, DA 99-1338, released July 7, 1999; and *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules and Processes, Report and Order*, 13 FCC Rcd 23056 (1998).

5. *Notice of Proposed Rulemaking.* In the *Notice of Proposed Rulemaking*, 8 FCC Rcd 4752 (1993) (*Notice*), the staff stated that the channel exchange appeared to comply with the Commission's criteria established for channel exchanges. See *Intraband Television Channel Exchanges*, 59 RR 2d 1455 (1986). The staff noted that both stations are within the same band and serve the same community of license. *Notice*, 8 FCC Rcd at 4753. At the same time, the staff expressed some concerns about the proposal and only proposed to permit KOAA-TV to operate from KTSC(TV)'s existing site on Baculite Mesa and not from the proposed new site on Cheyenne Mountain. The staff did not consider the construction permit for the Cheyenne Mountain site because USC had not completed construction of those facilities. The staff further stated that, because USC's short-spacing waiver was based upon the need to continue to provide noncommercial educational television service to Colorado Springs, it was not appropriate at the rulemaking stage to consider whether a similar short-spacing request from Sangre, a commercial licensee, would be granted at the application stage. *Id.* at n. 5.

6. *Report and Order.* The staff subsequently denied the channel exchange in its *Report and Order*, 10 FCC Rcd 7662 (1995) (*Report and Order*). The staff found that Section 1.420(h) of the Rules did not require that the Cheyenne Mountain permit be included as part of the Petitioners' channel exchange. *Report and Order*, 10 FCC Rcd at 7667. The staff rejected the Commission precedent cited by the Petitioners, where channel exchanges involving unbuilt construction permits were permitted, finding that none of those cases involved a short-spaced transmitter site. *Id.* In the staff's view, the Petitioners' proposal was a request to amend the TV Table of Allotments to propose a short-spaced allotment, and it noted that the vast majority of such requests have been denied because the Commission has a "strong interest in preserving the integrity of the Table of Allotments and the mileage separation criteria upon which the Table is based." *Report and Order*, 10 FCC Rcd at 7668 (citing *Chester and Wedgefield, South Carolina*, 5 FCC Rcd 5572 (1990)). The only time the Commission has allowed short-spaced allotments, stated the staff, was based on highly unusual circumstances. See, e.g., *Amendment of Television Table of Allotments to Add New VHF Stations in the Top 100 Markets, Memorandum Opinion and Order*, 63 FCC 2d 840 (1977) (*VHF Drop-In*). The staff found that short-spaced allotments are only permitted where the public interest benefits of the short-spaced allotment outweigh the public interest benefits of the minimum spacing rules. See, e.g., *London, KY*, 7 FCC Rcd 5936, 5937 (MMB 1992). The staff also noted that a petitioner seeking a short-spaced allotment must show a "compelling need for departure from established interstation separation standards." See, e.g., *Portland, TN*, 35 FCC 2d 601, 602 (1972).

7. In this case, the staff found that the Petitioners had failed to make a compelling case for allowing the short-spaced allotment that would occur if Sangre were permitted to operate on Channel 8 from USC's previously-authorized Cheyenne Mountain transmitter site. *Report and Order*, 10 FCC Rcd at 7667. The staff found that the public interest benefits to be derived from the short-spaced allotment would not be great enough to outweigh the public interest benefits of the integrity of the TV Table of Allotments. Most of the noncommercial benefits to be gained

from the channel exchange, reasoned the staff, would be achieved through the use of translators which may be displaced by full power stations and, as such, it would be inappropriate to consider them. The staff also found that USC appeared ready to implement service to the Western slope of Colorado through a series of translators whether or not the channel exchange was approved. The staff concluded that, if the channel exchange were approved, only 5,398 persons would gain a new noncommercial educational service not attributable to translators. This was not a great enough public interest benefit to warrant a short-spaced allotment. Therefore, the staff concluded that it would not consider the Cheyenne Mountain permit as part of the channel exchange proposal. Because the Petitioners had stated that their channel exchange was conditioned upon inclusion of the Cheyenne Mountain permit, the staff decided that there was no need to further consider whether the proposal was in the public interest and the channel exchange was denied.

8. *Memorandum Opinion and Order*. In their Application for Review, the Petitioners argued that grant of USC's short-spacing waiver for Cheyenne Mountain was based on USC's technical showing under Section 73.610 and not KTSC(TV)'s noncommercial educational status. The Petitioners maintained that the staff's application of allotment waiver policies to the channel exchange proposal was improper and the question of whether to permit Sangre to take over the Cheyenne Mountain permit should have been considered as if it were an assignment or transfer application in which technical waivers are not revisited. The Petitioners also argued that the staff should not have discounted the service gains that KTSC(TV) would achieve by expanding its translator service.

9. We affirmed the staff's decision in our *Memorandum Opinion and Order*, 11 FCC Rcd 19649 (1996). We disagreed with Sangre that technical factors were the only appropriate matters considered in the *Short-Spacing Letter* and that there was no reason to revisit these matters again in the context of the rulemaking proceeding. *Id.* at 19652. We found that the waiver granted to USC was also based upon the clear and substantial benefits to noncommercial educational service which the relocation of KTSC(TV)'s transmitter site to Cheyenne Mountain would permit. Simply because the technical characteristics of Sangre operating from Cheyenne Mountain on Channel 8 would be identical to those of USC operating from that site, we did not believe that the short-spacing waiver granted to USC must be transferred to USC. *Id.* at 19653. We concluded that USC would no longer enjoy the noncommercial benefits of the short-spaced Cheyenne Mountain site under the subject channel exchange proposal and that the staff was required to determine anew, for a commercial station, whether a short-spacing waiver would be appropriate. *Id.* We concurred with the staff's conclusion that a waiver for a short-spaced commercial allotment at Cheyenne Mountain was not justified.

10. In support of that finding, we noted the staff's determination that the overall public interest is better served by denial of the waiver request and preservation of the integrity of the spacing requirements in this case. We noted the staff's finding that as many as 20,000 people or more would lose their only commercial off-air service if the waiver were granted and KOAA-

TV were to change its transmitter site. *Id.* Finally, we rejected the Petitioners' claim that we should not have considered the noncommercial educational status of KTSC(TV) in deciding whether to grant the short-spaced allotment because such consideration violated the First Amendment. *Id.* at 19654. We found that the Commission and Congress has long recognized a need, grounded in substantial public interest reasons, to take into account the differences between commercial and noncommercial educational stations in the regulatory scheme for broadcasting, particularly the development of the TV Table of Allotments and in creating the channel exchange rule. *See Sixth Report and Order* in Docket Nos. 8736 and 8975, 41 FCC 148 (1952) and *Rainbow Broadcasting Co. v. FCC*, 949 F. 2d 405 (D.C. Cir. 1991).

11. *Court of Appeals Decision.* In its opinion released April 17, 1998, the U.S. Court of Appeals for the District of Columbia Circuit found that it was "unclear what the FCC believes to be the 'relevant factors' in its ruling." *Court Decision*, 139 F. 3d at 962. The Court noted it was undisputed that, prior to the issuance of the *Short-Spacing Letter*, we did not consider the commercial or noncommercial educational status of short-spacing waiver applicants. The Court found that we did not adequately explain why the public interest benefits of the TV Table of Allotments and the minimum spacing rules would be outweighed by USC's operation on Cheyenne Mountain but not by Sangre's operation from the same location. *Id.* at 963. The Court remanded this case to us with the instruction to "better explain the basis" for our action particularly in light of our past practice in which we did not consider the commercial/noncommercial status of the applicant. Should we decide to consider the commercial/noncommercial status of an applicant, the Court stated that we must ground our modification in a manner consistent with the First Amendment.

12. *Supplemental Filings.* In response to the Court's remand, the staff issued a letter on August 10, 1998, seeking updated technical information regarding the proposed channel exchange. On September 18, 1998, the Petitioners submitted their updated information and on October 16, 1998, we received responsive filings from Pikes Peak Broadcasting Company (Pikes Peak), licensee of KRDO-TV, Colorado Springs, Colorado, and KJCT(TV), Grand Junction, Colorado; AK Media Group, Inc. (AK Media), licensee of KKTV(TV), Colorado Springs, Colorado, and Central Wyoming College (Central), applicant for Channel 8 at Laramie, Wyoming, all of whom were original commenters in the rulemaking proceeding.<sup>2</sup>

13. In their filing, the Petitioners focus on the service gains and loss that will result from the change to both stations' transmitter sites. According to the Petitioners, the only change will be that some areas will no longer receive commercial programming from the NBC television network currently broadcast on KOAA-TV (loss area). According to their current engineering figures, the Petitioners find that KOAA-TV's operation from Cheyenne Mountain would result

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<sup>2</sup> AK Media is the successor-in-interest to KKTV, Inc., the previous licensee of KKTV(TV).

in a gain in commercial service covering an area of 8,668 sq. kilometers and 1,272,075 persons with a loss of the only commercial service covering an area of 13,047 sq. kilometers and 23,012 persons.<sup>3</sup> The Petitioners note that much of the loss area is south of Pueblo on the fringe of KOAA-TV's current Grade B contour in rural, sparsely populated areas. The Petitioners note that, in the *Short-Spacing Letter*, the staff found this area to be "largely unpopulated" and that the withdrawal of service to this area would not have an adverse impact on the public interest. Therefore, the Petitioners conclude that the loss area would be *de minimis*.

14. According to the Petitioners, the loss area is also well-served by existing and proposed television translators, cable television service, and direct broadcast satellite (DBS) service. The Petitioners note that at least five existing television translators provide commercial service (albeit not from the NBC television network) to 10,423 persons within the loss area. One of these translators, K15EC, Westcliffe, Colorado, rebroadcasts the signal of KOAA-TV and, therefore, approximately 600 recipients of the signal of K15EC will continue to receive NBC service. Sangre also notes that it is planning on constructing a series of television translators that would reduce the number of persons in the loss area to 1,322 persons. Furthermore, the Petitioners cite to the fact that the outlying portions of the loss area are served by DBS and cable television service. Only two communities located in the loss area (Cheraw and La Veta, Colorado) do not have cable service, but both communities have DBS service.

15. The Petitioners argue that their proposal to reduce the size of the loss area by calculating existing service from translators, cable and DBS is consistent with Commission precedent. The Petitioners maintain that the Commission has explicitly recognized that in rural remote areas, the availability of translator, cable and satellite services can be used to reduce loss area size. See *KTVO, Inc.*, 57 RR 2d 648 (1984); *Elba Development Corp.*, 5 FCC Rcd 6767 (1990); *Coronado Communications Co.*, 8 FCC Rcd 159 (1992); *Daytona Broadcasting Co.*, 59 RR 2d 1303, 1305 (1985); *Apogee, Inc.*, 59 RR 2d 941, 945 (1986); and *Tele-Broadcasters of California, Inc.*, 58 RR 2d 223, 232, n. 38 (Rev. Bd. 1985). The Petitioners argue that there is no reason to depart from Commission precedent in this case.

16. With respect to the proposed change in KTSC(TV)'s transmitter site at Baculite Mesa, the Petitioners demonstrate that there will be no loss of noncommercial educational service and there will be a gain in noncommercial service of 16,317 kilometers and 5,324 persons (gain area). The Petitioners also argue that the service gains will be even larger if the Commission were to consider that, as part of the channel exchange, Sangre will be donating to USC its translator, K30AA, Colorado Springs, Colorado. This translator provides service to approximately 334,077

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<sup>3</sup> The Petitioners also provided figures based upon KOAA-TV's operation from a transmitter site proposed in USC's application for modification of construction permit, File No. BMPCT-931129KE. By a letter released today, the staff has denied that application. See *Letter to University of Southern Colorado from Chief - Video Services Division*, DA 99-1338, released July 7, 1999. Therefore, we will not consider those figures.

persons and an area of 929 sq. kilometers. The Petitioners maintain that it is highly unlikely that this translator will be displaced. With this translator, the Petitioners argue that USC will greatly improve its service to the shadowed areas of Colorado Springs. In addition, the Petitioners contend that the Commission should consider increased service from the network of translators that USC intends to construct with funds received as a result of the channel exchange. The total gain, taking into account the proposed translators, would be 10,406 persons and KTSC(TV) would be providing a first noncommercial service in a majority of the gain areas.

17. AK Media and Pikes Peak continue to oppose a grant of channel exchange, arguing that it would violate the fundamental objectives of Section 1.420(h) of the Rules.<sup>4</sup> Pikes Peak compares the coverage if KTSC(TV) were to relocate to the transmitter site specified in the Cheyenne Mountain permit to the coverage it would provide from the KOAA-TV transmitter site (the site KTSC(TV) would be using following the channel exchange). Pikes Peak notes that from the Cheyenne Mountain site, KTSC(TV) would provide service to 1,853,009 persons and 34,053 square kilometers. From the KOAA-TV site, KTSC(TV) would provide service to only 603,946 persons and 48,698 square kilometers. Because KTSC(TV) would serve 1,249,063 fewer persons as a result of the channel exchange than it would if it simply constructed its facilities at its authorized transmitter site on Cheyenne Mountain, Pikes Peak maintains that the channel exchange would be inconsistent with the fundamentals of Section 1.420(h). In addition, AK Media submits engineering data to show that of the 5,324 persons in the gain area that will result from KTSC(TV) changing transmitter sites, only 2,906 persons will be gaining their first noncommercial educational service.

18. As for KOAA-TV, Pikes Peak argues that the alleged gain area is already served by the Grade B signal from between 13 and 15 other full-power television stations. AK Media argues that the channel exchange will not provide first commercial service (or first NBC service for that matter) to anyone. Pikes Peak also argues that the Commission properly did not include the Cheyenne Mountain permit in the channel exchange because of the loss of commercial and network service to 23,012 persons that would result if KOAA-TV is permitted to relocate to Cheyenne Mountain. AK Media actually calculates the loss to be 29,367 persons. Both Pikes Peak and AK Media conclude that any loss of service is *prima facie* inconsistent with the public interest. See *Coronado Communications*, 8 FCC Rcd 159 (VSD 1992).

19. Both AK Media and Pikes Peak continue to argue that service gains that would result from both Sangre's and USC's implementation of television translators should not be considered, because they are too speculative due to the secondary nature of such service. Finally, AK Media

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<sup>4</sup> Pikes Peak, AK Media and Central also make arguments concerning the pending applications to extend and modify USC's Cheyenne Mountain permit. Those arguments have been considered in conjunction with the *Memorandum Opinion and Order* released today wherein the staff granted the extension application and denied the modification application. *Id.*

and Pikes Peak contend that service gains that would occur from USC operating existing translator K30AA must also not be considered because K30AA is subject to displacement by a pending application for full-power television station to operate on Channel 32 at Pueblo. Pikes Peak maintains that K30AA ultimately will be displaced by Channel 32 at Pueblo and that this will substantially reduce the proposed KTSC(TV) secondary service to Colorado Springs that the Petitioners are relying on to justify their channel exchange.<sup>5</sup>

20. Finally, AK Media argues that the existence of cable and DBS service in the loss area should not be considered as a mitigating factor because the Petitioners have not provided specific calculations on the number of cable and DBS subscribers in that area. AK Media notes that, even if the Commission considers service from translators as a mitigating factor in the loss area, there would still be 21,886 persons that would lose their only commercial service. Such a large population losing their only commercial service is not in the public interest, AK Media contends.

## II. Discussion

21. In its decision remanding this proceeding to us, the Court concluded that we had not adequately explained why we permitted USC to operate on Channel 8 from a short-spaced transmitter site on Cheyenne Mountain, but not Sangre. *Court Decision* at 10. The Court directed us to better explain this distinction and, if the distinction was predicated on the commercial/noncommercial status of the entity seeking the short-spacing waiver, then to support this distinction in a manner consistent with the First Amendment. *Id.* at 10-11. In reconsidering this case on remand, we determine the grant of a short-spacing waiver to USC and the denial of a short-spacing allotment to Sangre may be justified on two independent grounds, neither having to do with the commercial/non-commercial status of the applicants. In addition, because we do not base our decision on the commercial/noncommercial differences in USC's and Sangre's proposed operations, we need not reach the question, as posed by the Court and argued by the Petitioners, of whether such a distinction is consistent with the First Amendment of the Constitution. *See Court Decision* at 11.

22. The Petitioners view a channel exchange proceeding as one in which issues relating to the permit for an unbuilt station, whose exchange is a part of the proposal before us, are beyond the scope of the proceeding. We reject Petitioners' understanding of the scope of a channel exchange proceeding in a situation where the proposal calls for the exchange of a permit for an unbuilt station which required a short-spacing waiver at the time of its initial grant. Our rejection is for two independent reasons, each of which is explained more fully herein. First, a channel exchange proceeding involves rulemaking and we have long been more demanding in the rulemaking, as distinguished from the adjudicatory, context before we will approve a short-

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<sup>5</sup> Pikes Peak also makes Constitutional arguments as to whether the Commission may distinguish between commercial and noncommercial applicants for short-spacing waivers.

spacing. Second, even from the less demanding adjudicatory perspective, a short-spacing waiver analysis is highly fact specific and the considerations that on balance persuade us that a waiver is appropriate in the case of the original waiver applicant may not be present in the case of the subsequent party to a proposed exchange who seeks to benefit from the original short-spacing waiver grant.

23. Upon reconsideration of this case, we conclude that a critical distinction justifying our dissimilar treatment of the two apparently similar short-spacing proposals is that USC sought and received its short-spacing waiver at the application stage, while Sangre effectively sought a short-spaced allotment through a rulemaking proceeding. The Commission has for over a quarter century applied stricter standards to short-spaced allotments than to short-spaced application waivers. Following public comment in MM Docket No. 85-41, the Commission concluded that the appropriate method for implementing its new channel exchange policy was through allotment rulemaking proceedings. See Report and Order, entitled "Amendments to the Television Table of Assignments to Change Noncommercial Education Reservations," 59 RR 2d 1455 (1986). Because they require a change to Section 73.606 of the Commission's Rules (the TV Table of Allotments), channel exchanges are treated as allocation rulemakings. If a channel exchange involves a short-spacing, then it is treated as a proposed short-spaced allotment. While we occasionally permit short-spacings at the application stage, short-spaced allotments are rarely permitted. We first explained our rationale for adopting this distinction in *Portland, ME*, 35 FCC 2d 601 (1972), where we stated that:

While we have on occasion granted requests for waiver of the minimum mileage requirements, this has only been done in connection with applications for existing channels. In each situation, our favorable action has been premised on the impossibility of attainment of the expectation of compliance or of other new matters sufficient to demonstrate the clear public gain in so doing. In rule making, on the other hand, we have never granted such waiver, for to do so would be to knowingly undermine the very objectives we are attempting to serve. When assigning (or reassigning) channels, it is on the expectation that obstacles to their effectuation can be overcome -- be they in terms of spacing, city coverage or whatever. Needless to say, not all expectations are realized, and when an applicant demonstrates that in fact realization is not possible, we have permitted minor deviations so that the purposes of the assignment may be served. This is a far cry from intentionally making a sub-standard assignment, as is sought here. If such a course of action could ever be justified, it would only be on the basis of an extraordinary situation warranting such unusual remedial relief.

35 FCC 2d at 602; see *Section 73.610 of the Commission's Rules and also Toms River, NJ*, 43

FCC 2d 414 (1973).<sup>6</sup> In short, by maintaining strict adherence to a fully-spaced allotment scheme, we preserve the capacity to permit necessary adjustments to spacing where the construction of actual facilities so requires, while minimizing potential adverse interference effects from such adjustments. This is because, when a party files a petition for rulemaking to amend the Table of Allotments, a hypothetical set of reference coordinates are used for purposes of making the allotment. The petitioner is not required to specify an actual transmitter site where the station will be operated, only a theoretical fully-spaced transmitter site location. At this point, the Commission disfavors making a short-spaced allotment because it does not want to begin the process with a substandard allotment. In order to protect the integrity of the Table, the Commission demands that the process of creating a new station begin with an allotment that is not already short-spaced. However, later, when a party files an application to construct its actual transmitter site, and the Commission examines the actual facilities that will be constructed to operate the station, it may be determined that no fully-spaced transmitter sites are available. At that later point in the process, the Commission may allow a deviation of its spacing rules when it is demonstrated that the public interest benefits are great enough to support a waiver.

24. Consistent with that approach, we have only permitted short-spaced allotments where the petitioner has demonstrated a "compelling need for departure from the established interstation separation standards." See *London, Kentucky*, 7 FCC Rcd 5936, 5937 (MMB 1992); see also *Chester and Wedgefield, South Carolina*, 5 FCC Rcd 5572 (1990). This was the threshold question in determining whether to permit the channel exchange in this case because it involved a short-spaced allotment. See *Report and Order*, 10 FCC Rcd at 7667-8. In this case, the staff found that the Petitioners had not met the "compelling need" standard and we affirmed that decision.

25. We recognize the Court's concern that, in our prior *Memorandum Opinion and Order*, we did not simply review the staff's decision under the "compelling need" standard, but we also focused on the benefits to be gained from USC's proposed noncommercial educational operation on Cheyenne Mountain and the fact that those benefits would be lost if we were to permit Sangre to operate a commercial station from that site. See *Court Decision* at 10-11. The Court stated that we may well decide to factor the commercial status *vel non* of an applicant into our short-spacing waiver decisions, however, the Court found that such a decision would be inconsistent with our earlier decision in *Open Media Corp.*, 8 FCC Rcd 4070 (1993). *Id.* at 10. The Court stated that, whatever we decide, we should better explain the basis for our action. We now find that our examination of the effects the channel exchange would have upon USC's noncommercial operation, in conjunction with our consideration of the Sangre short-spacing allotment waiver request, was unnecessary. In reviewing the staff's decision in this case, we can properly confine our concern to whether the staff examined independently the technical considerations of Sangre's

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<sup>6</sup> While those cases involved FM allotments, and this is a TV allotment case, that is a distinction without a difference as both FM and TV stations are allocated based upon a table of allotments.

requested short-spacing allotment waiver and properly applied the "compelling need" standard with respect to that proposal. We find that, in its *Report and Order*, the staff properly evaluated the service gains and losses that would result from Sangre's proposed Cheyenne Mountain operation and, based upon that technical analysis, found that Sangre had not shown a "compelling need" to adopt a short-spaced allotment. As the staff found, the loss of service from KOAA(TV) that would result is substantial - 23,012 persons would lose their only commercial and NBC network service.<sup>7</sup> Therefore, the staff correctly found that the service gains that would result from Sangre's short-spaced allotment did not outweigh this significant loss of service.<sup>8</sup> *Report and Order*, 10 FCC Rcd at 7668.

26. Moreover, even if there had been no loss of service resulting from KOAA-TV's proposed operation from the short-spaced Cheyenne Mountain site, creation of a short-spaced allotment would not have been warranted in this case. The principal public interest benefit to be gained by permitting KOAA-TV to operate from the short-spaced Cheyenne Mountain site would be the addition of television service to 1,272,075 persons. However, the entire population within the gain area is already well-served by the Grade B signal from between 13 and 15 other full-power television stations including another NBC affiliate (KUSA-TV, Channel 9, Denver). Therefore, the short-spaced allotment would not provide first NBC network service to anyone. With respect to the asserted benefits to KTSC(TV)'s service from the proposed channel exchange, we do not find them to be a convincing basis for granting KOAA-TV a short-spaced allotment. While it is alleged that 5,324 persons will now receive KTSC(TV)'s service as a result of that station's use of KOAA-TV's site at Baculite Mesa, this gain is relatively small and substantially less than the gain in service that KTSC(TV)'s use of its Cheyenne Mountain site would have provided. Such a slim public interest benefit to be derived from creation of a short-spaced allotment certainly does not meet the "compelling need" standard to justify such an allotment.

27. Furthermore, even if we accept the Petitioners' argument and we review the proposal to permit KOAA-TV to operate from the short-spaced Cheyenne Mountain site under the criteria employed for reviewing short-spacing waivers at the application stage, we find that a grant of a short-spacing waiver would not have been justified. We examine short spacing waiver requests under a number of public interest factors, including: (1) the unsuitability of the existing site, either in terms of the economic viability of the station, in technical terms, or in a licensee's

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<sup>7</sup> AK Media's engineering analysis finds the loss area population to be 29,367. However, as we previously found, the difference between these figures is not significant in this consideration. *See Memorandum Opinion and Order*, 11 FCC Rcd at 19653, n. 8.

<sup>8</sup> Although the Commission has a policy of generally "refusing to base waivers of rules designed to prevent interference upon non-technical considerations such as ownership or programming," *see e.g., Open Media Corp.*, 8 FCC Rcd 4070, 4071 (1993), this policy does not preclude us from denying a technical waiver where it would result in the loss of service to a large number of viewers or listeners.

inability to reach areas containing a significant number of viewers who lack service, a network service, or "independent" service; see *Roy H. Park Broadcasting, Inc.*, 45 RR 2d 1083 (B/C Bur. 1972); and *WSET Incorporated (WSET-TV)*, 80 FCC 2d 233 (1980); and (2) the nature and extent of any predicted loss of service that would result from a grant of the short-spacing;<sup>9</sup> see *Roy H. Park Broadcasting, Inc.*, *supra*; and *Blair Broadcasting of California, Inc.*, 55 RR 2d 619 (MMB 1984).

28. Under those factors, we would not have found that grant of a short-spacing waiver to permit KOAA-TV to operate from the short-spaced Cheyenne Mountain site was justified. While the staff permitted KTSC(TV) to relocate to the short-spaced Cheyenne Mountain site, that decision was largely based upon the gain of unique programming for approximately 1,149,529 persons compared to a loss of only 19,591 persons. As outlined above, the Petitioners will only provide a duplicative network service to a well-served area if KOAA-TV were allowed to relocate to the same Cheyenne Mountain short-spaced site. Therefore, even if examined under the criteria used for reviewing short-spacing waivers sought at the application stage, the Petitioners would not have been able to justify a short-spacing waiver.

29. For the above outlined reasons, we continue to believe that the staff properly found that the public interest benefits to be derived from the channel exchange proposal were simply too small to outweigh the greater loss of service. Without considering the commercial or noncommercial status of the parties, we find that there was ample basis for the staff to deny the channel exchange proposal, which was expressly contingent on a grant of Sangre's short-spacing allotment waiver request, and we once again affirm that decision.

30. ACCORDINGLY, IT IS ORDERED, That pursuant to the authority of Sections 4(i) and (j) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 403, the *Memorandum Opinion and Order*, FCC 96-451, released December 16, 1996, IS AFFIRMED.

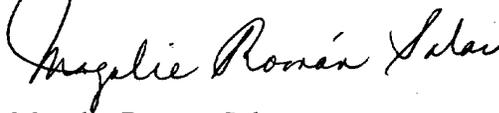
31. IT IS FURTHER ORDERED, That a copy of this Memorandum Opinion and Order on Remand WILL BE SENT by Certified Mail, Return Receipt Requested, to the University of Southern Colorado and to Sangre de Cristo Communications, Inc.

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<sup>9</sup> In this regard, we will evaluate the extent to which a proposal creates or eliminates unserved or underserved areas. See *Hall v. FCC*, 237 F. 2d 567, 572 (D.C. Cir. 1956); *Television Corporation of Michigan v. FCC*, 294 F. 2d 730, 732 (D.C. Cir. 1961); and *KTVO, Inc.*, 57 RR 2d 648 (1984).

32. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script that reads "Magalie Roman Salas". The signature is written in black ink and is positioned above the printed name and title.

Magalie Roman Salas  
Secretary