

ANN BAVENDER*
 ANNE GOODWIN CRUMP
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 PAUL J. FELDMAN
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 FRANK R. JAZZO
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 LEONARD R. RAISH
 JAMES P. RILEY
 ALISON J. SHAPIRO
 KATHLEEN VICTORY
 JENNIFER DINE WAGNER*
 HOWARD M. WEISS
 * NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW
 11th FLOOR, 1300 NORTH 17th STREET
 ARLINGTON, VIRGINIA 22209-3801

(703) 812-0400
 TELECOPIER
 (703) 812-0486
 INTERNET
 www.fhh-telcomlaw.com

July 17, 2000

FRANK U. FLETCHER
 (1939-1985)
 ROBERT L. HEALD
 (1956-1983)
 PAUL D.P. SPEARMAN
 (1936-1962)
 FRANK ROBERSON
 (1936-1961)
 RUSSELL ROWELL
 (1948-1977)

EDWARD F. KENEHAN
 (1960-1978)
 CONSULTANT FOR INTERNATIONAL AND
 INTERGOVERNMENTAL AFFAIRS
 SHELDON J. KRYS
 U.S. AMBASSADOR (ret.)
 OF COUNSEL
 EDWARD A. CAINE*
 MITCHELL LAZARUS*
 EDWARD S. O'NEILL*
 JOHN JOSEPH SMITH

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WRITER'S DIRECT
 812-0474

kersting@fhh-telcomlaw.com

Magalie R. Salas, Esquire
 Secretary
 Federal Communications Commission
 Room TW-B204
 445 12th Street, S.W.
 Washington, DC 20554

Re: Amendment to Petition for Rulemaking to Amend
 Section 73.606(b) of the Commission's Rules
 Channel 52 - Oro Valley, Arizona

Dear Ms. Salas:

Transmitted herewith on behalf of Oro Valley 52, L.L.C., are an original and four copies of an "Amendment to Petition for Rulemaking," by which Oro Valley 52, L.L.C. (successor-in-interest to Pete Myrl Warren) seeks to amend its pending Petition for Rulemaking, filed July 23, 1996.

Please be advised that this amended rulemaking petition is being filed pursuant to *Public Notice*, 14 FCC Rcd 19559 (1999) ("Mass Media Bureau Announces Window Filing Opportunity for Certain Pending Applications and Allotment Petitions for New Analog TV Stations"), as extended by *Public Notice*, 15 FCC Rcd 4974 (2000).

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,
 FLETCHER, HEALD & HILDRETH, P.L.C.



Andrew S. Kersting
 Counsel for Oro Valley 52, L.L.C.

Enclosure
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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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In the Matter of)
)
Amendment of Section 73.606(b))
TV Table of Allotments)
TV Broadcast Stations)
(Oro Valley, Arizona))

MM Docket No. _____
RM No. _____
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Chief, Allocations Branch

AMENDMENT TO
PETITION FOR RULEMAKING

ORO VALLEY 52, L.L.C.

Vincent J. Curtis, Jr., Esquire
Andrew S. Kersting, Esquire
FLETCHER, HEALD & HILDRETH, P.L.C.
1300 N. 17th Street, 11th Floor
Arlington, Virginia 22209
(703) 812-0400

July 17, 2000

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SUMMARY

As demonstrated herein, Oro Valley 52, L.L.C.'s ("LLC") pending rulemaking petition requesting the allotment of Channel 52 at Oro Valley, Arizona, is short-spaced to two DTV allotments. Accordingly, LLC seeks to amend its pending allotment rulemaking petition pursuant to the Commission's *Public Notice*, 14 FCC Rcd 19559 (1999) ("Mass Media Bureau Announces Window Filing Opportunity for Certain Pending Applications and Allotment Petitions for New Analog TV Stations") ("*Window Filing Notice*").

As demonstrated in the attached engineering statement, the proposed allotment of Channel 52 at Oro Valley would not cause prohibited interference to any NTSC or DTV station. Although the proposed allotment is short-spaced to a Channel 44 DTV allotment at Sierra Vista, Arizona, and a co-channel DTV allotment at Tolleson, Arizona, the attached engineering statement demonstrates that the operation of Channel 52 at Oro Valley would cause no interference to one short-spaced DTV allotment and less than 0.5% interference to the other.

Furthermore, a grant of this amended petition and the accompanying short-spacing waiver request would provide substantial public interest benefits which significantly outweigh the Commission's general regulatory interest in strictly adhering to its spacing rules. As demonstrated herein, the proposed allotment would promote the objectives of Section 307(b) of the Communications Act by providing the community of Oro Valley with its first local television service, and serve the second television allotment priority established in the *Sixth Report and Order* of providing each community with at least one television broadcast station. Moreover, the proposed allotment would provide an additional competitive broadcast station in a top 100 television market, which would help foster the development of new national networks by providing an additional

broadcast outlet with which to establish a primary affiliation. The proposed allotment also would (i) provide a new television service to 925,634 people in the Oro Valley area; (ii) provide an opportunity for new entry; (iii) promote viewpoint diversity in the Tucson television market; and (iv) increase competition in the local advertising market.

Further, because the *Window Filing Notice* represents the last opportunity to amend the NTSC Table of Allotments, a grant of the requested waiver would not open the floodgates to similar waiver requests in the future because there can be no further analog allotments after the close of this filing window. Indeed, as the Commission determined in the *Interim Policy* and *VHF Top 100 Markets*, strict adherence to the Commission's distance separation requirements in this case would achieve a result contrary to the public interest by preventing a new and much needed television service, while a waiver of the spacing rules would not undermine the Commission's general allotment policy.

For all of these reasons, LLC requests that the Commission amend the TV Table of Allotments by allotting Channel 52 to Oro Valley, Arizona, as the community's first local television service.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.606(b))	MM Docket No. _____
TV Table of Allotments)	RM No. _____
TV Broadcast Stations)	
(Oro Valley, Arizona))	

To: Chief, Allocations Branch

**AMENDMENT TO
PETITION FOR RULEMAKING**

Oro Valley 52, L.L.C. ("LLC"), by counsel, and pursuant to Section 1.401 of the Commission's rules and *Public Notice*, 14 FCC Rcd 19559 (1999) ("Mass Media Bureau Announces Window Filing Opportunity for Certain Pending Applications and Allotment Petitions for New Analog TV Stations") ("*Window Filing Notice*"),¹ hereby amends the Petition for Rulemaking, filed July 23, 1996, requesting the allotment of Channel 52 to Oro Valley, Arizona, as that community's first local television service.² In support of this amended petition, the following is stated:

¹ On March 9, 2000, the Commission extended the window filing period until July 15, 2000. *See Public Notice*, 15 FCC Rcd 4974 (2000) ("Window Filing Opportunity For Certain Pending Applications and Allotment Petitions For New Analog TV Stations Extended to July 15, 2000").

² Oro Valley 52, L.L.C. is the successor-in-interest to Pete Myrl Warren, who filed the original rulemaking petition. Mr. Warren serves as Managing Member of LLC. LLC also filed an accompanying application for a new television station to operate on Channel 52 at Oro Valley. The application was filed on July 23, 1996.

As demonstrated in the attached engineering statement of Keith J. Leitch, from the allotment reference point,³ the proposed allotment of Channel 52 at Oro Valley does not satisfy the distance separation requirements contained in Section 73.623(d) of the Commission's rules with respect to two DTV allotments.⁴ Specifically, the proposed allotment is short-spaced to a Channel 44 DTV allotment at Sierra Vista, Arizona, and a co-channel DTV allotment at Tolleson, Arizona. *See* Engineering Statement, p. 2 and Exhibit DTV-1. However, as demonstrated in the FLR studies attached to Mr. Leitch's engineering statement, the operation of Channel 52 at Oro Valley would cause no interference to the Channel 44 DTV allotment at Sierra Vista, and less than 0.5% interference to the co-channel DTV allotment at Tolleson, which is within the Commission's rounding tolerance.⁵ *See* Engineering Statement, p. 2 and Exhibits FLR-1 and FLR-3.

In response to the DTV Table of Allotments established in the *Sixth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 14588 (1997), LLC conducted an extensive search in an attempt to identify an alternative channel/transmitter site combination for its proposed allotment at Oro Valley that would be fully-spaced to all other NTSC and DTV stations. As indicated above, however, LLC's efforts were only partially unsuccessful. Nevertheless, LLC has proposed the allotment of Channel 52 because it poses the least technical concerns. Indeed, the proposed

³ The reference coordinates for the proposed allotment are North Latitude: 32° 24' 52"; West Longitude: 110° 42' 47". *See* Engineering Statement, p. 1. These coordinates represent LLC's proposed transmitter site.

⁴ In the *Window Filing Notice*, the Commission stated that amendments to existing petitions to add a new NTSC channel allotment must meet the distance separation requirements for DTV stations which are contained in Section 73.623(d) of the Commission's rules.

⁵ *See Report and Order* in MM Docket No. 00-10, *Establishment of a Class A Television Service*, FCC 00-115, ¶74 (released April 4, 2000) (NTSC applicants allowed a rounding tolerance of 0.5% in protecting DTV stations).

allotment of Channel 52 at Oro Valley would enable a new full-service television station to commence operation from the allotment reference point with 2,000 kilowatts omni-directional effective radiated power at an antenna height of 1,022 meters above average terrain without adversely affecting any other television station, including Class A LPTV stations. *See* Engineering Statement, pp. 1-2. The proposed NTSC facility would bring a new television service to 925,634 people in the Oro Valley area, and would provide an 80 dBu contour over the entire community of Oro Valley. *Id.* at 1. Accordingly, LLC is submitting below a request for waiver of Section 73.623(d) of the Commission's rules concerning the above-described short-spacings. As demonstrated therein, a grant of the requested waiver would provide substantial public interest benefits, and would cause no interference to the short-spaced DTV stations.

REQUEST FOR WAIVER OF THE FCC'S DISTANCE SEPARATION REQUIREMENTS

LLC respectfully requests that the Commission waive the distance separation requirements contained in Section 73.623(d) of the Commission's rules in order to permit the proposed allotment. As demonstrated in greater detail herein, a grant of the requested waiver would promote the emergence of new national television networks by providing an additional broadcast outlet in a top 100 television market with which to establish a primary affiliation. The proposed allotment also would provide the community of Oro Valley with its first local television service and thereby promote the objectives of Section 307(b) of the Communications Act of 1934, as amended (the "Act"). In support of this waiver request, the following is stated:

I. The Commission Previously Has Waived the Distance Separation Requirements to Permit the Allotment of New Television Stations In an Effort to Foster the Development of New Networks.

In Docket No. 13340,⁶ the Commission instituted a rulemaking proceeding in an effort to find a means of alleviating the need for additional channel assignments in the larger television markets in order to foster the development of a nationwide competitive television system. The Commission concluded that the most efficient means of accomplishing its objective would be to permit, under limited circumstances, channel assignments at substandard spacings. The short-spaced allotments were authorized subject to the requirement that the new stations provide protection to the existing short-spaced stations to assure that they would not receive interference in excess of the amount they otherwise would receive from a co-channel station operating with maximum facilities at full distance separation. The Commission designated ten markets in which such a “squeeze in” procedure would be considered. Many of these proposals, as well as those which arose out of the Commission’s *Interim Policy*, involved a third commercial VHF allotment in a market that was designed to provide an additional broadcast outlet which was critical to the establishment of a third competitive network. *See, e.g., Grand Rapids, Michigan*, 21 RR 1737 (1961) (Commission assigned a second VHF channel to Grand Rapids and a third to the Grand Rapids-Kalamazoo market);⁷ *Rochester, New York*,

⁶ *Interim Policy on VHF Television Channel Assignments*, 21 RR 1695 (1961), *recon. denied*, 21 RR 1710a (1961) (“*Interim Policy*”).

⁷ In *Grand Rapids*, the Commission allotted Channel 13 to Grand Rapids, which required the substitution of Channel 9 for Channel 13 at Cadillac, Michigan, and the substitution of Channel 7 for a Channel 9 allotment at Alpena, Michigan. *Id.* at 1745. The Commission’s action was designed to alleviate the “critical shortage of competitively comparable facilities in major markets” 21 RR at 1745.

21 RR 1748a (1961) (FCC assigned a third commercial VHF station to the community); *Syracuse, New York*, 21 RR 1754 (1961) (same).

The Commission later extended its policy of waiving its spacing provisions in appropriate circumstances to permit “move-in” applications. In *New Orleans Television Corp.*, 23 RR 1113, 1115 (1962), Station WVUA-TV, New Orleans, filed an application to move closer to its community of license to a site 30 miles short-spaced to co-channel Station WJTV, Jackson, Mississippi. Station WVUA-TV requested a waiver of the mileage separation requirements and proposed to provide equivalent protection to Station WJTV. In reviewing the application, the Commission noted that its long-standing policy of fostering the development of “at least three” competitive television networks had often been frustrated by its inability to assign a third competitive commercial VHF channel. *Id.* at 1115. The Commission also expressly acknowledged the concerns which led to the *Interim Policy*:

The problem with which the Commission grappled in Docket No. 13340 was the fostering of a nationwide competition network situation. *To accomplish this purpose it is necessary to assure the availability of competitive facilities to the networks within the major markets, for the economic ability of a network to survive and furnish the public with the benefits of its operation hinges ultimately on its access to competitive facilities within the major markets.* By assuring the existence of a third *competitive* station in New Orleans, the Commission benefits not only the viewing public of that city but, ultimately, the public of the entire nation. We believe that the benefits to be derived from furtherance of this policy justify the use of Channel 12 in New Orleans at substandard spacings.

Id. at 1117 (initial emphasis added), citing *Interim Policy*, 21 RR at 1710c. As reflected above, in granting Station WUVA-TV’s short-spaced application, the Commission not only provided a third competitive station in New Orleans, but the public interest benefits resulting from the grant of the

short-spaced application extended to the entire country due to the Commission's effort to promote a third national network. *Id.* at 1117.

Similarly, in *Television Broadcasters, Inc.*, 4 RR 2d 119 (1965), Station KBMT(TV), Beaumont, Texas, an ABC affiliate, sought to move its transmitter approximately 34 miles north of its existing site to a location which was 18.8 miles short-spaced to co-channel Station KSIA-TV, Shreveport, Louisiana. The applicant proposed to provide equivalent protection to KSIA-TV by directionalizing its signal away from the short-spaced station, and requested a waiver of Section 73.610 of the rules. *Id.* at 121. In support of its waiver request, KBMT claimed that, from its existing transmitter site, it could not effectively compete with the local CBS and NBC affiliates which served essentially the same area, and was operating at a substantial loss.⁸ *Id.* at 121. KBMT contended that a grant of its application would enhance its competitive position as well as that of ABC vis-a-vis the other stations and networks in the market, and would provide its coverage area with a third competitive network television service. *Id.* at 123. In granting KBMT's application and accompanying request for waiver of Section 73.610 of the rules, the Commission stated:

While it is neither our purpose nor function to assure competitive equality in any given market, we have a duty at least to take such actions as will create greater opportunities for more effective competition among the networks in major markets.

Id. at 123, citing *Peninsula Broadcasting Corporation*, 3 RR 2d 243 (1964).⁹

⁸ The Commission found that there was a substantial disparity between the advertising rates of KBMT and the other network affiliates in the market. *Id.* at 123.

⁹ In *Peninsula Broadcasting*, the applicant alleged that a grant of its application was warranted in order to provide three competitive network services in the Norfolk, Virginia, television market. In granting the application and the accompanying short-spacing waiver request, the Commission stated:

(continued...)

Furthermore, in *VHF Top 100 Markets*,¹⁰ the Commission granted requests for waiver of Section 73.610 to permit the allotment of new short-spaced VHF assignments to Charleston, West Virginia; Johnstown, Arizona; Salt Lake City, Utah; and Knoxville, Tennessee. Each of these short-spaced allotments was subject to the condition that the new station provide equivalent protection to the existing station to which it was short-spaced. *Id.* at 234.

In granting the petitioners' waiver requests, the Commission recognized that the four VHF drop-ins represented a significant departure from past Commission practice.¹¹ Nevertheless, the Commission concluded that the new VHF allotments would serve important public interest objectives such as providing new local service, the promotion of additional networks, and increased competition in advertising markets. The Commission found these to be substantial contributions to the public interest. *Id.* at 253. Moreover, on reconsideration, the Commission concluded that application of the distance separation rules would achieve a result contrary to the public interest by

⁹(...continued)

[We have] long been concerned with the problem of making three truly competitive network services available to the public in major markets and where the opportunity is presented to achieve this objective without detriment to anyone and with benefit to many, we think . . . it is clear that a grant of the application would be warranted.

3 RR 2d at 248.

¹⁰ *Petition for Rule Making to Amend Television Table of Assignments to Add New VHF Stations in the Top 100 Markets and to Assure that the New Stations Maximize Diversity of Ownership, Control and Programming*, BC Docket No. 20418, *Report and Order*, 81 FCC 2d 233 (1980) ("*VHF Top 100 Markets*"), *recon. denied*, 90 FCC 2d 160 (1982), *aff'd sub nom. Springfield Television of Utah, Inc. v. FCC*, 710 F.2d 620 (10th Cir. 1983).

¹¹ Despite the Commission's *Interim Policy*, there had been no short-spaced VHF allotments in the continental United States prior to its decision in *VHF Top 100 Markets*. 81 FCC 2d at 239.

preventing new and needed television services, and that a waiver of the rules would not undermine the policy behind them as set forth in the *Sixth Report and Order* in Docket Nos. 8736 *et al.*, *Amendment of Section 3.606 of the Commission's Rules and Regulations*, 41 FCC 148 (1952) ("*Sixth Report and Order*").

II. A Grant of the Requested Waiver Would Provide Substantial Public Interest Benefits Which Greatly Outweigh the Commission's Interest in Strictly Adhering to Its General Spacing Requirements.

The public interest benefits that would result from a grant of LLC's amended rulemaking petition are the same public interest objectives which the Commission sought to achieve in the *Interim Policy* and *VHF Top 100 Markets*.¹² Indeed, this amended rulemaking petition and accompanying request for waiver of the Commission's distance separation requirements would provide the same, if not greater, public interest benefits than the Commission previously found sufficient to justify a waiver of its distance separation requirements. As stated above, the allotment of Channel 52 will provide the community of Oro Valley with its first local television service, which will promote the objectives of Section 307(b) of the Communications Act of providing a fair, efficient and equitable distribution of television broadcast stations among the various states and communities. 47 U.S.C. §307(b). *See National Broadcasting Co. v. U.S.*, 319 U.S. 190, 217 (1943) (describing goal of Communications Act to "secure the maximum benefits of radio to all the people of the United States"); *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 359-62 (1955) (describing goal of Section 307(b) to "secure local means of expression"). In addition, the proposed allotment

¹² Although this waiver request involves a proposed UHF allotment, rather than a VHF station, the public interest objectives set forth in the *Interim Policy* and *VHF Top 100 Markets* are equally applicable to LLC's allotment proposal.

will promote the second television allotment priority established in the *Sixth Report and Order* of providing each community with at least one television broadcast station. 41 FCC at 167.

Even more importantly, however, LLC's pending rulemaking petition and its accompanying application for a new television station in Oro Valley, Arizona, which were both filed on July 23, 1996, were part of a series of coordinated filings consisting of approximately 20 rulemaking petitions and 40 construction permit applications for new television stations, many of which propose to bring a first local television service to the specified community. The various rulemaking petitions and accompanying applications all specified communities within the top 100 television markets in which there were no full-power television stations available to affiliate with The WB Television Network ("The WB"). Each of the various petitioners/applicants (collectively, "Petitioners") who comprised this coordinated filing effort then had affiliation agreements with The WB for some or all of their existing television stations. The WB indicated a willingness to enter into further affiliation agreements with the Petitioners in the event they were ultimately successful in obtaining a license for their proposed stations.¹³

As the Commission is well aware, almost two-thirds of all television markets have only four commercial stations. As a result, it is extremely difficult for any new network, including The WB, the United Paramount Network ("UPN"), or Paxson Network ("Paxnet") to find affiliates in the major markets. The WB generally has been the fifth, and often the sixth, network to enter those top 100 markets in which it has an affiliate. Indeed, The WB has explained to the Commission in a variety of proceedings that its primary challenge in establishing itself as a nationwide network has

¹³ LLC is inclined to enter into an affiliation agreement with The WB in the event Channel 52 is allotted to Oro Valley and it is successful in obtaining a construction permit for the proposed new NTSC station.

been finding a sufficient number of stations with which to affiliate.¹⁴ Thus, a grant of this waiver request and the allotment of Channel 52 to Oro Valley -- in conjunction with grants of the other pending rulemaking petitions and applications which comprise this larger overall proposal -- would provide much needed assistance in fostering the development of new national networks by helping to alleviate the critical need for additional broadcast outlets. Specifically, a grant of this waiver request would permit the allotment of a new television station in a top 100 market with which The WB or another emerging network could affiliate, and thereby make progress towards achieving national penetration and a competitive stronghold with the established networks. Although there is no guarantee that LLC will ultimately acquire the construction permit for the proposed new television station at Oro Valley or that the station will affiliate with The WB, the salient fact is that the allotment of Channel 52 to Oro Valley would provide an additional broadcast outlet for all of the new networks to have the opportunity to gain an affiliation and thereby strengthen their effort to obtain a nationwide audience.

As demonstrated above, this rulemaking petition and accompanying waiver request provide another opportunity for the Commission to fulfill the public interest objectives articulated in the *Interim Policy* and *VHF Top 100 Markets*. By waiving the minimum distance separation

¹⁴ See, e.g., Comments of The WB Television Network, *Establishment of a Class A Television Service*, MM Docket No. 00-10 (filed Feb. 10, 2000); Comments and Reply Comments of The Warner Bros. Television Network, *Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Network and Affiliates*, MM Docket No. 95-92 (filed Oct. 30, 1995, Nov. 27, 1995); Reply Comments of The Warner Bros. Television Network, *Reexamination of The Policy Statement in Comparative Broadcast Hearings*, GC Docket No. 92-52 (filed Aug. 22, 1994). UPN has expressed similar difficulties in attempting to establish a nationwide presence. See Comments of the UPN, *Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Network and Affiliates*, MM Docket No. 95-92 at 21-22 (filed Oct. 30, 1995).

requirements and allotting Channel 52 to Oro Valley, the Commission can provide an additional broadcast outlet in a top 100 television market,¹⁵ and thereby foster the development of a new national network. In addition, the allotment of Channel 52 to Oro Valley would (i) provide the community with its first local television service; (ii) provide a new television service to 925,634 people in the Oro Valley area; (iii) provide an opportunity for new entry into the television broadcast industry; (iv) promote viewpoint diversity in the Tucson television market; and (v) increase competition in the local advertising market. Indeed, in light of the Commission's relaxation of the local television ownership rule and the ever increasing consolidation in the broadcast industry, the substantial public interest benefits that would result from this allotment proposal have even more significance today than those that existed at the time the *Interim Policy* and *VHF Top 100 Markets* were adopted. Consistent with the requirements set forth in the *Interim Policy* and *VHF Top 100 Markets*, however, the Commission should impose an appropriate site restriction on the proposed allotment to ensure that the Channel 52 operation at Oro Valley would not cause interference to either of the short-spaced DTV stations.

III. A Grant of the Requested Waiver Would Not Undermine the Commission's General Policy Regarding Short-Spaced Allotments.

The full Commission articulated its policy regarding short-spaced allotments in *Pueblo, Colorado*, 16 Comm. Reg. (P&F) 610 (1999) (*Memorandum Opinion and Order on Remand*):

[B]y 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

¹⁵ The Tucson market currently is the 72nd television market. See *Broadcasting & Cable*, p. 246 (2000).

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.

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.”

Id. at 616, ¶¶23-24 (citations omitted). The full Commission has also stated that “[s]trict adherence to the spacing requirements set forth in the Table of Allotments is necessary . . . in order to provide a consistent, reliable and efficient scheme of [allotments].” *Chester and Wedgefield, South Carolina*, 5 FCC Rcd 5572 (1990).

LLC respectfully submits that the substantial public interest benefits that would result from the proposed allotment of Channel 52 to Oro Valley more than satisfy the Commission’s “compelling need” standard. However, even assuming, *arguendo*, that the Commission were to conclude that the significant public interest objectives articulated in the *Interim Policy* and *VHF Top 100 Markets* -- which would be promoted by a grant of LLC’s petition -- are insufficient to warrant the proposed short-spaced allotment, the Commission’s general policy regarding short-spaced allotments should not be applied in this case. Indeed, the public interest benefits that would result from the proposed allotment substantially outweigh the Commission’s general regulatory interest in protecting the “integrity of the Table of Allotments,” especially considering the specific

circumstances of this case. As demonstrated above, although the proposed allotment of Channel 52 at Oro Valley is short-spaced to two DTV allotments, the proposed allotment would cause no interference to one DTV station and less than 0.5% interference to the other DTV station, which is within the Commission's rounding tolerance.¹⁶ Therefore, the proposed allotment would, in fact, cause no greater interference than a fully-spaced allotment.

As reflected in the Commission's *Memorandum Opinion and Order on Remand in Pueblo, Colorado*, by requiring that a proposed allotment be fully-spaced at the outset, the Commission's general allotment policy is designed to "minimiz[e] potential adverse interference effects" that may result from "necessary adjustments" in the event no fully-spaced transmitter sites are available at the application stage. However, contrary to the Commission's general statement in *Pueblo, Colorado*, the proposed allotment reference point in this case does not represent a "hypothetical set of reference coordinates," but, instead, represents LLC's proposed transmitter site. Thus, although the proposed allotment reference point has not yet been specified in a construction permit application for the Channel 52 facility at Oro Valley, the allotment reference point is an available transmitter site in accordance with Section 73.611(a)(4) of the Commission's rules.¹⁷ LLC therefore requests that the

¹⁶ See *Report and Order* in MM Docket No. 00-10, *Establishment of a Class A Television Service*, FCC 00-115, ¶74 (released April 4, 2000) (NTSC applicants allowed a rounding tolerance of 0.5% in protecting DTV stations).

¹⁷ In a related context, the Commission has not hesitated to allot a new channel based upon the reference coordinates of a petitioner's proposed transmitter site. For example, in *Virginia Beach, Virginia*, 11 FCC Rcd 4715 (Allocations Branch 1996), the Commission allotted a new television channel to Virginia Beach even though the center city coordinates of the community of license were within the "freeze zone" established by the ATV freeze. See *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, RM-5811, 1987 FCC LEXIS 3477 (July 17, 1987), 52 Fed.Reg. 28346 (1987). See also *Wittenberg, Wisconsin*, 11 FCC Rcd 12231 (Allocations Branch 1996) (same).

Commission allot Channel 52 to Oro Valley with an appropriate site restriction to ensure that the short-spacings between the proposed transmitter site for the Channel 52 facility at Oro Valley and the Channel 44 and Channel 52 DTV allotments at Sierra Vista and Tolleson, respectively, will be no greater than that proposed in this amended petition.

Furthermore, LLC respectfully submits that the Commission's interest in maintaining the "integrity of the Table of Allotments" and providing "a consistent, reliable and efficient" allotment scheme should be given less consideration with respect to the rulemaking petitions and amended petitions filed in response to the *Window Filing Notice* because this is the last opportunity to amend the NTSC Table of Allotments. The deadline for filing allotment rulemaking petitions for new NTSC stations expired on July 25, 1996.¹⁸ Upon the close of this window filing period on July 17, 2000, there will be no further opportunity to amend the NTSC Table of Allotments. Therefore, because the allotment proposals filed during this window represent the last NTSC rulemaking petitions that will ever be filed with the Commission, a waiver of the Commission's distance separation requirements pursuant to the policy objectives set forth in the *Interim Policy* and *VHF Top 100 Markets* would not open the floodgates to similar waiver requests in the future. As in *VHF Top 100 Markets*, the *Window Filing Notice* provides a limited filing opportunity during which there can be only a small, finite number of short-spaced allotment proposals that would provide sufficient public interest benefits to warrant a waiver of the spacing rules.

Further, due to the relatively short time period before the end of the NTSC/DTV transition period, which is scheduled to occur at the end of 2006, the short-spacings that would result from the

¹⁸ See *Sixth Report and Order* in MM Docket No. 87-268, *Advanced Television Systems and Their Impact Upon the Existing Broadcast Service*, 12 FCC Rcd 14588, 14635-36 (1997).

proposed Channel 52 facility at Oro Valley amount to what essentially is an interim proposal. At the end of the transition period, when television stations are required to return one of their paired channels, the proposed Channel 52 facility at Oro Valley will be able to move to a fully-spaced digital allotment inside the core for its DTV operation.¹⁹ In light of the substantial likelihood that: (i) the Commission will not grant this amended petition before the fourth quarter of 2000; (ii) the Commission will not hold an auction for the competing applications for the new Oro Valley television station before the third quarter of 2001; (iii) a construction permit for the new Oro Valley station will not be issued before the first quarter of 2002; and (iv) it will take LLC or any other permittee at least one year to complete construction of the new television station; the proposed Channel 52 facility at Oro Valley is not likely to commence operation until sometime in 2003. Assuming that the transition period ends as scheduled, this would mean that the proposed new NTSC station at Oro Valley would operate from a short-spaced allotment for a period of less than four years before moving to a fully-spaced digital allotment inside the core.

Many industry observers believe, however, that although the DTV transition period is scheduled to end in 2006, due to the market penetration requirement contained in Section 309(j) of the Act, 47 U.S.C. §309(j)(14)(B), the transition deadline may be extended.²⁰ Assuming, *arguendo*, that the transition deadline were to be extended by several years, the substantial public interest benefits that would result from having the proposed Oro Valley NTSC station commence operation

¹⁹ Station KPPX(TV), Channel 51, Tolleson, Arizona, which has been assigned DTV Channel 52, also will be assigned an in-core channel at the end of the transition period upon which to continue its digital operation.

²⁰ See, e.g., *Completing the Transition to Digital Television*, Congressional Budget Office, Congress of the United States (Sept. 1999).

prior to the end of the transition period greatly outweigh the Commission's general policy of "protecting the integrity of the Table of Allotments" in this narrow context in which the licensing of analog television stations has come to an end.²¹

IV. The FCC Must Give This Waiver Request the Requisite "Hard Look."

It is well established that the Commission is "required to give waiver requests a 'hard look' and may not treat well-pleaded waiver requests in a perfunctory manner." *VHF Top 100 Markets*, 90 FCC 2d 160, 166 (1982) (reconsideration order), citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Indeed, as the D.C. Circuit has made clear:

. . . [A] general rule, deemed valid because its overall objectives are in the public interest, may not be in the "public interest" if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.

WAIT Radio, 418 F.2d at 1157. Therefore, in considering this waiver request, LLC respectfully submits that the Commission must look beyond its general policy regarding short-spaced allotments, and determine whether the rationale underlying that policy would be undermined in light of the substantial and broad-reaching public interest benefits that would result from a waiver of its spacing rules, especially considering the unique and extremely limited context in which this waiver request is presented.

²¹ See *Sixth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd at 14639 ¶12.

CONCLUSION

As demonstrated above, a grant of this amended petition and the accompanying waiver request would provide substantial public interest benefits by providing an additional competitive broadcast outlet in a top 100 television market which would help foster the development of new national networks. At the same time, the proposed allotment would provide the community of Oro Valley with its first local television service, which would promote the objectives of Section 307(b) of the Act and the second television allotment priority established in the *Sixth Report and Order*. Moreover, by allotting Channel 52 with an appropriate site restriction, the proposed allotment would create no more interference than a fully-spaced allotment. Furthermore, because this is the last opportunity to amend the NTSC Table of Allotments, a grant of this waiver request would not open the floodgates to similar waiver requests in the future because there can be no further analog allotments after the close of this filing window. Indeed, as the Commission determined in the *Interim Policy* and *VHF Top 100 Markets*, strict adherence to the Commission's distance separation requirements in this case would achieve a result contrary to the public interest by preventing a new and much needed television service, while a waiver of the spacing rules would not undermine the Commission's general allotment policy.

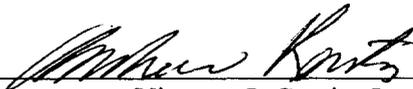
For all of these reasons, LLC requests that the Commission amend the TV Table of Allotments by allotting Channel 52 to Oro Valley, Arizona, as the community's first local television service. In the event Channel 52 is allotted to Oro Valley, LLC will amend its pending application (or submit a new application) in accordance with the Report and Order issued in this proceeding to specify the new channel, and modify its technical proposal as necessary so that the proposed Channel

52 NTSC facility will not cause harmful interference to any other television station. In the event its application is granted, LLC will promptly construct and operate the new NTSC facility.

WHEREFORE, in light of the foregoing, Oro Valley 52, L.L.C., respectfully requests that the Commission GRANT this amended petition for rulemaking, AMEND the TV Table of Allotments, and ALLOT Channel 52 to Oro Valley, Arizona, as that community's first local television service.

Respectfully submitted,

ORO VALLEY 52, L.L.C.

By: 
Vincent J. Curtis, Jr.
Andrew S. Kersting

Its Counsel

Fletcher, Heald & Hildreth, P.L.C.
1300 North Seventeenth Street
11th Floor
Arlington, Virginia 22209
(703) 812-0400

July 17, 2000

WES, INC.
6200 Valeria Ln.
El Paso, TX 79912

505-589-2224

**ENGINEERING EXHIBIT
PETITION TO MODIFY THE TABLE OF
ALLOTMENTS TO ALLOCATE
CHANNEL 52 TO ORO VALLEY**

July 12, 2000

ENGINEERING STATEMENT

Wes, Inc.

DECLARATION

I, Keith J. Leitch declare and state that I am a Certified Broadcast Engineer, by the Society of Broadcast Engineers, and my qualifications are a matter of record with the Federal Communications Commission, and that I am an engineer in the firm of Wes, Inc., and that the firm has been retained to prepare an engineering statement on behalf of Oro Valley 52, L.L.C.

All facts contained herein are true to my knowledge except where stated to be on information or belief, and as to those facts, I believe them to be true. All Exhibits were prepared by me or under my supervision. I declare under penalty of perjury that the foregoing is true and correct.



Keith J. Leitch

Executed on the 12th day of July, 2000

Narrative Statement

I. GENERAL

This engineering report has been prepared on behalf of Oro Valley 52, L.L.C. in support of its request for NTSC Channel 52 in Oro Valley, AZ.

II. ENGINEERING DISCUSSION

The applicant originally filed a petition for rule-making for Oro Valley on July 22, 1996. This new engineering statement demonstrates that Channel 52 will not cause interference to digital television above the Commission's guidelines.

The applicant proposes the following site:

North Latitude: 32° 24' 52"

West Longitude: 110° 42' 47"

It is proposed to amend Section 73.606(b) of the Commission's rules, NTSC Table of Allotments, to allot Channel 52 (746-752 MHz) for the NTSC television operation. As demonstrated below, the proposed Channel 52 NTSC operation would not cause any harmful interference to any other analog NTSC or DTV station or allotments exceeding the Commission's guidelines. Channel 52 would provide additional service to a population of 925,634 people.

The proposed NTSC Channel 52 has site availability and can operate from the proposed antenna site as a maximum facility with 2,000 kW omni-directional ERP and 1,022 meters HAAT (RC-AMSL of 2,555 meters) without adversely impacting other TV operations. The proposed Channel 52 would serve all of Oro Valley inside its 80 dBu contour.

Analog NTSC TV Allocation Situation

Channel 52, is fully spaced to all NTSC stations as shown in Exhibit NTSC-1.

Class A Situation

A complete study of all Class A LPTV stations has been conducted. Channel 52 causes no interference to any class A stations as shown in Exhibit CLA and FLR-2.

DTV Allocation Situation

The attached Exhibit DTV-1 lists all digital allotments that must be considered within 429 kilometers of the proposed rule-making. Two short spacings exist. The first is with Sierra Vista, AZ DTV Channel 44, and the second with Tolleson, Channel 52. The applicant has made use of the Commission's own Fortran Longley-Rice program in conducting its interference studies to digital television. As is shown in Exhibit FLR-1, the applicant causes only 566 people (0.026%) of interference to Tolleson, and the FLR program correctly predicts no interference to Channel 44 Sierra Vista. There would be no interference to the applicant.

III. Summary

The applicant filed a petition for rule-making to add channel 52 to Oro Valley. A Channel 52 in Oro Valley will not cause any interference to any NTSC stations or Class A stations and less than 0.5% interference to any Digital stations.

**Exhibit NTSC-1
Oro Valley, AZ
July 7, 2000**

**NTSC Spacing Study
by WES, Inc. Broadcast Consultants**

NTSC to NTSC TV Spacing Study

***** TV CHANNEL SPACING STUDY *****

Job title: Oro Valley
Channel: 52
Database file name: tv000117.edx

Latitude: 32 24 52
Longitude: 110 42 47

CH	Call	Record No.	City	ST	Z	STS	Bear.	Dist.	Reqd. Dist.	Result
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***** End of channel 52 study *****

Exhibit DTV-1
Oro Valley, AZ
June 24, 2000
Digital Spacing Study
by WES, Inc. Broadcast Consultants

NTSC to Digital TV Spacing Study

Study Location:
Oro Valley, AZ Channel 52

NTSC Study Station, Transmitter Coordinates: 32-24-54 N 110-42-47 W

Study distance: 429 km

NTSC TO DTV STUDY RESULTS

City of License	ST	Chan	Bearing	Distance	Req. Dist	Diff.
Sierra Vista	AZ	44	186.48	73.19	96.60	-23.41
Tolleson	AZ	52	308.95	162.15	244.60	-82.45
Nogales	SO	53	190.63	122.69	88.50	34.19
Nogales	SO	54	189.91	125.32	96.60	28.72

Station is short-spaced to 2 stations.

**Exhibit CLA
Oro Valley, AZ**

July 7, 2000

by WES, Inc. Broadcast Consultants

The Applicant is 14 channels above KUVB-LP in Tucson. The applicant does not cause any interference to KUVB-LP as demonstrated by the FCC's OET FLR program. See exhibit FLR-2 for study results. The applicant is free of all other protected class A stations in the UHF core band.

**Exhibit FLR-1
Oro Valley, AZ
July 7, 2000**

**Fortran Longley-Rice Interference Study
by WES, Inc. Broadcast Consultants**

Study run without the addition of Oro Valley, AZ Channel 52

Run begins Fri Jul 7 20:17:28 2000, host providence

Analysis of: 52A AZ TOLLESON

HAAT 588.0 m, ATV ERP 1000.0 kW

	POPULATION	AREA (sq km)
within Noise Limited Contour	2236484	40919.4
not affected by terrain losses	2223747	31515.3
lost to NTSC IX	0	0.0
lost to additional IX by ATV	0	0.0
lost to ATV IX only	0	0.0
lost to all IX	0	0.0

Finished Fri Jul 7 20:20:06; run time 0:02:26

10133 calls to Longley-Rice; path distance increment 1.00 km

Study run with the addition of Oro Valley, AZ Channel 52

(Note: the distance path increment was set to 0.10 km)

Run begins Fri Jul 7 16:48:15 2000, host providence

Analysis of: 52A AZ TOLLESON

HAAT 588.0 m, ATV ERP 1000.0 kW

	POPULATION	AREA (sq km)
within Noise Limited Contour	2236484	40919.4
not affected by terrain losses	2224685	31701.1
lost to NTSC IX	566	286.7
lost to additional IX by ATV	0	0.0
lost to ATV IX only	0	0.0
lost to all IX	566	286.7

Finished Fri Jul 7 17:13:40; run time 0:24:43

15683 calls to Longley-Rice; path distance increment 0.10 km

**Exhibit FLR-2
Oro Valley, AZ
July 7, 2000**

**Fortran Longley-Rice Interference Study
by WES, Inc. Broadcast Consultants**

Study run without the addition of Oro Valley, AZ Channel 52:

Run begins Fri Jul 7 11:56:04 2000, host providence		
Analysis of: 38N AZ TUCSON		
	POPULATION	AREA (sq km)
within Noise Limited Contour	599822	1606.3
not affected by terrain losses	591726	1545.8
lost to NTSC IX	0	0.0
lost to additional IX by ATV	0	0.0
lost to all IX	0	0.0
Finished Fri Jul 7 11:57:16; run time 0:01:09		
1647 calls to Longley-Rice; path distance increment 0.10 km		

Study run with the addition of Oro Valley, AZ Channel 52:

Run begins Fri Jul 7 11:59:35 2000, host providence		
Analysis of: 38N AZ TUCSON		
	POPULATION	AREA (sq km)
within Noise Limited Contour	599822	1606.3
not affected by terrain losses	591726	1545.8
lost to NTSC IX	0	0.0
lost to additional IX by ATV	0	0.0
lost to all IX	0	0.0
Finished Fri Jul 7 12:00:58; run time 0:01:19		
1978 calls to Longley-Rice; path distance increment 0.10 km		

**Exhibit FLR-3
Oro Valley, AZ
July 7, 2000**

**Fortran Longley-Rice Interference Study
by WES, Inc. Broadcast Consultants**

Study run to show no interference to Sierra Vista Digital Channel 44

Study run without the addition of Oro Valley, AZ Channel 52

Run begins Fri Jul 7 23:32:53 2000, host providence		
Analysis of: 44A AZ SIERRA VISTA		
HAAT 319.0 m, ATV ERP 1000.0 kW		
	POPULATION	AREA (sq km)
within Noise Limited Contour	759057	26566.1
not affected by terrain losses	715159	21032.4
lost to NTSC IX	0	32.0
lost to additional IX by ATV	0	0.0
lost to ATV IX only	0	0.0
lost to all IX	0	32.0
Finished Fri Jul 7 23:34:59; run time 0:01:46		
6747 calls to Longley-Rice; path distance increment 1.00 km		

Study run with the addition of Oro Valley, AZ Channel 52

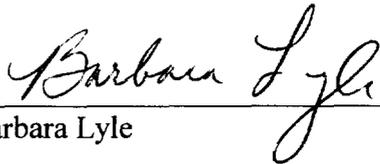
Run begins Fri Jul 7 23:37:53 2000, host providence		
Analysis of: 44A AZ SIERRA VISTA		
HAAT 319.0 m, ATV ERP 1000.0 kW		
	POPULATION	AREA (sq km)
within Noise Limited Contour	759057	26566.1
not affected by terrain losses	715159	21032.4
lost to NTSC IX	0	32.0
lost to additional IX by ATV	0	0.0
lost to ATV IX only	0	0.0
lost to all IX	0	32.0
Finished Fri Jul 7 23:39:59; run time 0:01:46		
6747 calls to Longley-Rice; path distance increment 1.00 km		

CERTIFICATE OF SERVICE

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 17th day of July, 2000, copies of the foregoing "Amendment to Petition for Rulemaking" were hand delivered to the following:

Mr. Roy J. Stewart
Chief, Mass Media Bureau
Federal Communications Commission
The Portals II, Room 2-C347
445 Twelfth Street, S.W.
Washington, DC 20554

Mr. Keith Larson
Assistant Chief, Engineering
Mass Media Bureau
Federal Communications Commission
The Portals II, Room 2-C420
445 Twelfth Street, S.W.
Washington, DC 20554



Barbara Lyle