Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Television Table of	)	MB Docket No. 03-____
Allotments to Delete Noncommercial	)	RM No. _______
Reservation on Channel *39, 620-626 MHz,	)	
Phoenix, Arizona, and to Add Noncommercial	)	
Reservation on Channel 11, 198-204 MHz,	)	
Holbrook, Arizona	)	

To: Media Bureau

JOINT PETITION TO AMEND THE TELEVISION TABLE OF ALLOTMENTS

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TABLE OF CONTENTS

Page

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Amendment of the Television Table of Allotments to Delete Noncommercial Reservation on Channel *39, 620-626 MHz, Phoenix, Arizona, and to Add Noncommercial Reservation on Channel 11, 198-204 MHz, Holbrook, Arizona	)	MB Docket No. 03-____ RM No. _______

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JOINT PETITION TO AMEND THE TELEVISION TABLE OF ALLOTMENTS

I. SUMMARY AND INTRODUCTION

NBC Telemundo Phoenix, Inc. ("Telemundo"), licensee of commercial television station KPHZ, Channel 11, Holbrook, Arizona, and Community Television Educators, Inc. ("CTE"), licensee of noncommercial educational ("NCE") television station KDTP, Channel *39, Phoenix, Arizona (collectively, the "Joint Petitioners"), hereby petition the Federal Communications Commission ("FCC" or "Commission") to amend the television Table of Allotments, 47 C.F.R. § 73.606 (2002), as set forth herein. Specifically, based on the unique constellation of facts and circumstances described herein, the Joint Petitioners request the Commission to amend the Table of Allotments to reflect the dereservation of Channel *39 in Phoenix and the reservation of Channel 11 in Holbrook (the "Proposal"), both of which are located in the Phoenix Designated Market Area ("DMA"), and to authorize Telemundo to operate KPHZ on Channel 39, Phoenix, and CTE to operate KDTP on Channel *11, Holbrook. The Proposal will result in the following public interest benefits, each of which is sufficient to compel its adoption:

- It will give nearly one million Hispanics in the Phoenix DMA a choice in Spanish-language full power television stations. Denial of the Proposal will leave Phoenix with only one full-power Spanish-language television station that, by itself, claims 94% of the market's Spanish-language audience share.

- It will create real competition in the Phoenix Spanish-language market for the first time – advertisers who wish to reach the Phoenix Spanish-language population, and who see little choice but to deliver over 90% of their advertising dollars to the lone full-power Spanish-language station, now will be able to choose between two full-power stations.

- It will ensure that the residents of Holbrook and the surrounding communities do not lose their only over-the-air full-power television station, as Channel 11 can survive only as a noncommercial outlet.

- It will enable Telemundo to develop and offer quality local Spanish-language news programming to Phoenix's Spanish-speaking residents, who rely primarily on free, over-the-air broadcasts for most of their news, information, and video entertainment.

Significantly, the Proposal also will result in neither the loss of substantial established service – each station has been on the air for fewer than three years[1] – nor a net reduction in the number of NCE or total stations assigned to the Phoenix DMA because both stations are assigned to the Phoenix DMA. The Commission, recognizing the substantial public interest benefits that commercial-noncommercial channel exchanges can offer, adopted rules in 1986 allowing for such an exchange in cases in which the stations serve substantially the same market. Even if this rule is read not to apply to large western DMAs like Phoenix, the overwhelming public interest benefits of this exchange – including creating access to real diversity in news, information, and

[1] Indeed, because a construction permit had not been issued for either station when the *Sixth Report and Order* in MM Docket 87-268 was adopted in 1997, neither station was assigned a paired digital channel. *See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Sixth Report and Order, 12 FCC Rcd 14588, 14639, ¶ 112 & n 192 (1997) ("*Sixth Report and Order*").

entertainment programming for hundreds of thousands of Spanish-language speakers – compel adoption of the Proposal.

A. Despite Being a Key Segment of the Country's Largest Minority, Spanish-Language Speakers Have Far Fewer Choices for Understandable News and Information Both Nationally and Particularly in Phoenix

1. The Hispanic population of the United States has grown 65% since 1990 (compared with a 10% growth in the non-Hispanic population during the same time period) and, according to the Census Bureau, is now the largest minority in the U.S. Hispanics currently comprise 14% of the U.S. population (a figure projected to increase to 19% by 2020), and the Spanish language remains an important part of Hispanic life and culture. No language other than English is spoken by more people in the U.S. than Spanish[2] with 10.7% of all U.S. households speaking Spanish or Spanish Creole.[3] Indeed, in the majority (64%) of U.S. Hispanic households, Spanish is the dominant language. Moreover, the percentage of Spanish-dominant households actually has increased over the last ten years, and by 2020, the number of Spanish speakers in the home is expected to increase by 16 million people.[4]

2. The Commission recognizes that its commitment to content diversity and competition must extend to this huge segment of the U.S. population. For example, in its recent media ownership ruling, the Commission revised its long-standing definition of

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[2] U.S. Census Bureau Homepage at http://www.census.gov; *see also Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, 5154-55, ¶¶ 28-30 (2000) (*"TRS Report and Order"*)

[3] U.S. Census Bureau Homepage at http://www.census.gov

[4] Global Insight, Snapshots of the U.S. Hispanic Market (report commissioned by Telemundo)

"daily newspaper" to include, for the first time, "non-English dailies printed in the primary language of the market."[5] This significant revision of the rules flowed directly from the Commission's conclusion that "[t]hose whose primary language is not English deserve the same protections of diversity and competition as do English speakers."[6] The Commission's philosophical change with respect to the definition of daily newspapers supports Telemundo's position that encouraging viewpoint diversity and fostering competition among broadcasters serving the nation's very large Spanish-speaking audience are worthy goals. Indeed, because the U.S. Hispanic population relies more heavily on free, over-the-air broadcast media for news and information than English-language speakers, in part because of the far more limited number of other Spanish-language media,[7] it is particularly important that the Commission's policies and actions foster content diversity and competition among Spanish-language broadcasters.

3. The purchasing power of Hispanics is growing with the population. As evidence of the rising importance of the Hispanic population as a target for advertisers, total advertising spending directed to Hispanics reached $2.2 billion in 2001: 59% for television, 26% for radio, 10% for newspapers, 3% for magazines, and 3% for other.[8] The substantially higher percentage of advertising dollars spent on television ads

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[5] *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Report and Order and Further Notice of Proposed Rulemaking, FCC 03-127, ¶ 458 (July 2, 2003) (*"Media Ownership Order"*).

[6] *Id*

[7] *See* Strategy Research Corporation, 2002 U.S Hispanic Market Report. In 14 of the top 20 Hispanic markets, there is no daily Spanish-language newspaper. In the fourth-largest Hispanic market – Chicago – there is not a single daily newspaper published in Spanish.

[8] *See* Gale Group's Market Share Reporter, Advertising to Hispanics (13th ed. 2003).

underscores the importance of this medium as the primary source of news, information, and entertainment programming for the Latino population. Moreover, Hispanic spending power is projected to grow an estimated ***400%*** between 2003 and 2020 – to $2.5 trillion.[9]

4. The advertisers who seek to reach this group need and deserve healthy competition among broadcast outlets. The market for Latino-oriented advertising, however, is dominated by Univision Communications Inc. ("Univision"), which currently owns 50 television stations, including 24 full-power television stations in the top 20 Hispanic markets.[10] Univision also owns two of the top three television networks aimed at Hispanics, Univision and Telefutura, as well as the Spanish-language cable programming network Galavision. Following Univision's planned merger with Hispanic Broadcasting Corp. ("HBC"), the combined company will add control of 57 Spanish-language AM and FM radio stations. In seven of the top ten Spanish-language broadcast markets, the Univision/HBC market share in terms of combined television-radio advertising revenues will equal or exceed 60%, and in two of the top ten markets, the combined entity's market share will exceed 70%.[11]

B. The Phoenix DMA Offers No Competition or Content Diversity to Its Sizeable Hispanic Population from Full-Power Television Stations

5. Phoenix is the ninth-largest Hispanic DMA, with more than 18% of its households comprised of Hispanics, and home to 3% of the entire U.S. Hispanic

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[9] *See* Steve McClellan, *Telemundo Trumpets Hispanic Power,* Broadcasting & Cable, Apr 28, 2003, at 19 (citing Global Insight Report commissioned by Telemundo).

[10] The top ten Hispanic DMAs are Los Angeles, New York, Miami, Houston, Chicago, Dallas-Ft Worth, San Francisco, San Antonio, Phoenix, and Harlingen-Weslaco-Brownsville-McAllen, Texas.

[11] Los Angeles (60%), Chicago (63%), Houston (74%), San Francisco (62%), Dallas-Ft. Worth (69%), San Antonio (80%), and Phoenix (69%) *See* Letter from Philip L Verveer, Counsel, Spanish Broadcasting System, Inc to Marlene H Dortch, Secretary, FCC, MB Docket No. 02-235 (June 11, 2003)

population. In fact, Phoenix's Hispanic population alone – 270,000 households – is larger than more than 100 DMAs.[12] Phoenix is projected over the next five years to be one of the fastest-growing of the top 20 DMAs.[13] The majority of Hispanic households in Phoenix (58%) regularly speak Spanish, including 47% who use Spanish as their primary language and another 11% who consider themselves bilingual.[14]

6. Despite the long-standing importance of Phoenix as a Spanish broadcasting market, no existing full-power television licensee in Phoenix has shown any willingness to enter the Spanish-language market in competition with Univision. Nor are full-power stations whose service areas cover urban Phoenix – where the core Latino population resides – available for purchase. Thus, the barriers to entry are very high. As a result, Univision's dominance of Spanish-language broadcasting is magnified in the Phoenix DMA, where Univision owns two full-power television stations (one licensed to Phoenix and one licensed to Flagstaff) and soon will acquire five FM radio stations in the merger with HBC,[15] while Telemundo is carried on a low-power Class A television station, KDRX-CA.[16] Significantly, Phoenix is the ***only*** top-ten Hispanic market lacking

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[12] Nielsen Media Research, Nielsen NHSI 2002 Universe Estimates (research commissioned by Telemundo).

[13] Clarita's, Inc., Report for United States (2003).

[14] Nielsen Media Research, NHSI 2001-2002 Estimates of Hispanic TV HHs by Language Strata by DMA (research commissioned by Telemundo combining results of 2000 and 2001 Telephone Enumeration Surveys in each DMA, adjusted to the combined 1999 and 2000 NHTI Enumeration Survey results for these DMAs collectively.).

[15] Univision owns the following stations assigned to the Phoenix DMA: Station KTVW-TV, Phoenix (affiliated with the Univision network) and Station KFPH(TV), Flagstaff (affiliated with Univision's Telefutura network) *See* FCC File Nos. BTC-20020723ABL, *et seq* (Univision/HBC merger applications).

[16] Telemundo acquired KDRX-CA in January 2003 *See* FCC File No. BPTTA-20021205ABS. In contrast to the situation in Phoenix, Telemundo has been able to acquire new stations to compete with Univision in (cont'd)

two full-power, over-the-air, Spanish-language television competitors. As a result of Univision's dominant position, and the lack of any full-power television competition, Univision commands ***94%*** of the Spanish-speaking audience and over ***90%*** of the Spanish-language television advertising revenues in Phoenix.

C. Telemundo and KPHZ

7. Telemundo operates the second-largest Spanish-language television programming network in the nation and owns 15 full power and more than 20 Class A, low power or translator stations that are affiliated with or rebroadcast the Telemundo network. In April 2002, Telemundo became a direct, wholly owned subsidiary of General Electric Company ("GE"), which also owns National Broadcasting Company, Inc. ("NBC"). With the acquisition of Telemundo, GE and NBC have made a long-term and very substantial commitment to Spanish-language broadcasting and to viewers of Hispanic descent – the nation's largest minority. Despite Telemundo's impressive growth since its debut in 1987 and, more recently, since its acquisition by GE,[17] Univision continues to outpace it by a wide margin in all of the key broadcasting measurements, including advertising revenues, ratings, number of owned and operated stations, and number of affiliated stations. Because Univision has exclusive agreements

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other important Hispanic markets below the top ten, such as Fresno and Tucson, where the barriers to entry are lower

[17] Since GE's acquisition of Telemundo was consummated in April 2002, NBC and GE have launched an intensive campaign to improve Telemundo's standings by acquiring five new full power stations, one Class A station, and one low power station, while enhancing the facilities of existing stations. All but one of Telemundo's owned and operated stations have completed construction of their digital facilities. The one remaining station, WNJU-DT, Linden, NJ, was to have been located atop the World Trade Center.

with the producers of the most popular and consistently watched Spanish-language programming ***and*** has a superior distribution network, Telemundo faces an enormous challenge in seeking to wrest market share away from it. Nowhere is the challenge greater than in Phoenix.

8. Channel 11 (KPHZ) was first allotted to Holbrook in 1986, but remained vacant until 1996, when an application for a construction permit was filed by Channel 11 Television, LLC.[18] The original construction permit was issued to that entity on January 23, 1998. The permit was subsequently sold to Venture Technologies Group, LLC ("VTG") in a transaction that was consummated in December 2000. Construction of the station was completed shortly thereafter, and the covering license application was filed on January 22, 2001. From its sign-on in 2001 until July 2003, when it began to air Telemundo programming, KPHZ has been an affiliate of the America's Collectibles Network, a home shopping format. During this period, the station has provided no local programming, has sold no local advertising, and has run nothing but annual deficits.

9. Telemundo acquired KPHZ on September 26, 2002, in the hope that the station could be upgraded or otherwise modified to serve the Hispanic residents of Phoenix as a Telemundo affiliate and to compete effectively with Univision in the market.[19] After acquiring the station, Telemundo, with the assistance of outside consulting engineers, undertook a thorough examination of means to improve the station's over-the-air coverage of the market's Hispanic population centers. After considering potential power increases, transmitter site moves, and other avenues for

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[18] *See* BPCT-19960405LW

[19] *See* BALCT-20020426AAP.

achieving improved coverage, however, Telemundo reached the conclusion that the station simply is not viable for the purpose of serving Phoenix's Hispanic population. A strong, reliable over-the-air signal is particularly important for reaching Hispanic viewers, because these viewers have much lower cable penetration rates (only 24% among Phoenix Spanish-language television viewers compared with the Phoenix average for non-Hispanics of 62%)[20] and are less likely to employ roof-top antennas than the non-Hispanic population. Therefore, GE and NBC/Telemundo have concluded that in the absence of the channel exchange proposed herein, 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. Accordingly, Telemundo has entered into an agreement to acquire the license for Channel *39 from CTE and to assign the license for Channel 11 to CTE contingent upon the dereservation of Channel *39 and the reservation of Channel 11 in this proceeding.

D. CTE and KDTP

10. The Reverend Marcus Lamb is the President and director of CTE, licensee of KDTP, and the founder and President of Word of God Fellowship, Inc. d/b/a The Daystar Television Network. Daystar is America's second largest Christian television network, behind Trinity Broadcasting (which also operates a noncommercial station on a commercial channel allotted to Phoenix). Daystar owns and operates 40 television stations in major markets across the United States with production facilities in Dallas,

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[20] Nielsen Media Research, NHSI County Coverage, Phoenix: February 2001 (research commissioned by Telemundo).

Atlanta, Houston, and Denver. Daystar's programming also is carried nationally on DirecTV, DISH Network, Sky Angel, and various cable systems.[21]

11. The Channel *39 allotment remained vacant in Phoenix for more than 30 years before CTE applied for the channel on September 23, 1996.[22] The original construction permit was issued to CTE on January 1, 2000, and CTE filed its covering license application on February 5, 2001. KDTP thus has been operational for approximately two and a half years. Since signing on in 2001, KDTP has been an affiliate of Daystar. In addition to the Daystar national programming, the station currently broadcasts occasional local church services, but because KDTP is a noncommercial station, it has limited resources to provide extensive local programming, including locally produced news, public affairs, children's or entertainment programming.

II. THE LEGAL STANDARD

A. Channel Exchanges Under Section 1.420(h)

12. Section 1.420(h) of the FCC's rules authorizes an NCE television licensee and a commercial television licensee to file a joint petition for a rule making to amend the Television Table of Allotments to exchange channels where the two stations operate within the same band and "serve substantially the same market."[23] If the Commission finds that such action will "promote the public interest, convenience, and necessity," it may amend the Table of Allotments and modify the licenses or permits of the petitioners

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[21] Daystar homepage at http://www daystar.com/

[22] Channel *39 has been allotted to Phoenix since at least 1965. *See Fostering Expanded Use of UHF Television Channels*, 41 F.C.C. 1082 (1965) (*"Fostering UHF Fourth R&O"*), and ¶¶ 24-25 *infra*.

[23] 47 C F. R § 1 420(h) (2002).

to specify operation on the appropriate channels without opening the modified allotments to competing applications.[24]

13. In adopting Section 1.420(h), the Commission concluded that such channel exchanges may benefit both of the stations involved, with consequent advantages for the public.[25] The Commission noted, for example, that both the commercial station and the noncommercial station may benefit in terms of more appropriate site or service area locations and through cost savings or other financial advantages. These benefits accrue particularly to NCE licensees because they receive consideration in such transactions that enables them to improve the quality of their facilities or even to initiate broadcast operations where it would not otherwise be possible to do so.[26] The Commission concluded that such channel exchanges ultimately could benefit the public by fostering new or improved commercial and noncommercial service.

14. The Commission also noted, however, that its existing processes frustrated the achievement of these demonstrated public interest benefits because channel exchanges were discouraged by the possibility that third parties would express interest in applying for the "affected and already occupied channels," which in turn resulted in a reluctance to propose beneficial exchanges and a propensity to withdraw proposals once a third party expressed interest.[27] As a result, exchanges that would benefit both the

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[24] *See id*

[25] *See Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations*, 59 RR 2d 1455, ¶ 19 (1986), *recon denied,* 3 FCC Rcd 2517 (1988) ("*Channel Exchange Order*")

[26] *Id*, ¶ 19

[27] *Id.*, ¶ 20

affected stations and the public were not pursued, and Commission resources were wasted. Accordingly, the FCC concluded that the modified allotments resulting from channel exchanges undertaken pursuant to Section 1.420(h) would not be opened to third parties.[28] The FCC's adoption of Section 1.420(h) was affirmed in all respects by the U.S. Court of Appeals for the District of Columbia Circuit in *Rainbow Broadcasting Company v. FCC*, 949 F.2d 405 (1991).

15. The proposal set forth in this Petition shares many of the essential attributes of a channel exchange pursuant to Section 1.420(h). Most important, as in a Section 1 420(h) channel exchange, the Commission would not be eliminating a reserved channel, but rather would be providing for more effective use of commercial and noncommercial channels by shifting reservations "in light of evidence of substantial public interest benefits proffered in [the] rule making proceeding[]."[29] Further, the proposal would provide substantial financial benefits to a noncommercial licensee, which would enable the nonprofit entity to improve its service to the public.[30] Finally, as in the case of Section 1.420(h) channel exchanges, these benefits could not be obtained if the modified allotments were opened to competing applications because CTE could not

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[28] *Id* , ¶¶ 26, 29

[29] *See id*, ¶ 23. Because the proposal will not result in a net reduction in reserved channels assigned to the DMA, this case is clearly distinguishable from the Commission's decision in *Amendment of the Television Table of Allotments to Delete Noncommercial Reservation on Channel *16 (482-488 MHz), Pittsburgh, Pennsylvania*, 17 FCC Rcd 14038 (2002) ("*WQED*"). In this respect, the instant proposal is more closely aligned to the exchange of commercial and reserved noncommercial designations for two stations owned and operated in Buffalo, New York, by Western New York Public Broadcasting Association and approved by the FCC in *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations and Section 73 622(b), Table of Allotments, Digital Television Broadcast Stations (Buffalo, New York)*, 14 FCC Rcd 11856 (MMB 1999) (*"Buffalo"*), *on recon* , 16 FCC Rcd 4013 (2000), *aff'd Coalition for Noncommercial Media v FCC*, 249 F 3d 1005 (D.C. Cir. 2001).

[30] *See Channel Exchange Order*, ¶ 19.

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.[31] In these respects, the proposal set forth in this Petition fits within the rule and advances the goals the Commission sought to foster when it adopted Section 1.420(h).

16. Admittedly, the Proposal would broaden the application of the Rule in certain minor respects. For example, Section 1.420(h) is currently limited to intraband exchanges, because the Commission did not want noncommercial VHF licensees "trading down" for a UHF allotment. When the FCC originally proposed Section 1.420(h), however, it noted the specific advantages that could be derived from allowing a commercial ***UHF*** operator to exchange its channel with a noncommercial ***VHF*** operator. The Commission also observed that a noncommercial operator might well conclude that its switch to UHF operation would likely result in little if any audience erosion due to the unique nature of the noncommercial programming. Although the rule as adopted contained the "same band" restriction, the Commission noted expressly that "Because of the need for expediting [the rule change], we are dealing only with intra-band exchanges. Nothing we do herein is intended to prejudice any future decision by the Commission on the inter-band exchange proposal."[32]

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[31] Normally, this concern would influence both parties' decision to go forward. In this case, however, NBC and Telemundo face the very real prospect of having to turn in the license for KPHZ to avoid continuing operating deficits

[32] Adoption of Section 1 420(h) was prompted by a petition filed by the permittees of reserved Channel 50 in Gary, Indiana, and nonreserved Channel 56, also assigned to Gary. The petitioners in that case asked the Commission to bifurcate the proceeding to address only intraband exchanges in order to expedite the resolution of the proceeding *Channel Exchange Order* at n.1.

17. The Commission has not substantively reexamined the intraband requirement since it adopted the rule more than sixteen years ago.[33] During that period, however, it ***has*** mandated a transition to digital transmission technologies – a transition that is well underway and that is expected to eliminate the disadvantages traditionally associated with operating in the UHF band. Accordingly, the "same band" limitation should not be a bar to a channel exchange in an appropriate case. Moreover, in this case, the Joint Petitioners propose that the noncommercial operator be assigned the technologically preferred VHF channel. Therefore, to the extent the "same band" limitation was motivated originally by a desire to protect against a migration of NCE stations to the UHF band, that concern is not presented by this case.

18. Further, Section 1.420(h) does not specify what is meant by serving "substantially the same market." Although the Commission has addressed this issue in at least one of its decisions under Section 1.420(h), where the stations were located some 64 miles apart but were – as here – assigned to the same DMA,[34] it has never adopted a specific definition or standard applicable to that element of the rule. In the present case, the two stations are located approximately 145 miles apart and their analog signal contours do not overlap. However, both unquestionably are assigned to the same DMA,

[33] When the Commission amended its rules to provide for a change in community of license without opening the allotment to competing applications where the two allotments would be mutually exclusive, it extended this procedure to commercial/noncommercial channel exchanges under Section 1.420(h) and noted the existence of the intraband limitation in the rule. *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, Report and Order, 4 FCC Rcd 4870 (1989).

[34] *See Amendment of Section 73 606(b), Table of Allotments, Television Broadcast Stations (Clermont and Cocoa, Florida)*, 4 FCC Rcd 8320 (MMB 1989), *aff'd Rainbow Broadcasting Co v FCC*, 949 F 2d 405 (D.C. Cir. 1991). The Clermont/Cocoa channel exchange was challenged on appeal, *inter alia*, on the "same market" requirement. The court of appeals concluded that this question raised a technical issue, the resolution of which by the FCC was entitled to deference by the court.

which, for nearly all FCC purposes, defines a television station's market. Although the Phoenix market is substantially larger geographically than that involved in Cocoa Beach, this distinction should not be reason to reject application of Section 1.420(h) to this case.

19. If Section 1.420(h) is applied to this same-market exchange, the public interest benefits of the Proposal overwhelmingly justify its adoption. However, even if the Commission concludes that it cannot rely on Section 1.420(h) in approving the modified allotments, the Proposal should still be adopted under the traditional public interest requirements applicable to all allotment proceedings, in which the Commission weighs the public interest benefits of adopting the proposed amendments to the Table of Allotments against maintaining the status quo.

B. Allotment Priorities and Noncommercial Channel Reservation Policies for Television Stations

20. The Commission established its television allotment priorities in 1952 following numerous hearings and consideration of an extensive record.[35] The priorities established in that proceeding were (and remain today): (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 stations; (4) to provide each community with at least two television stations; and (5) with respect to any channels which remain unassigned under the foregoing priorities, to assign such channels to the various communities depending on the size of the population of each community, the geographical locations of such community, and the number of television

[35] *See Amendment of Section 3 606 of the Commission's Rules and Regulations,* Sixth Report and Order, 41 F.C.C. 148 (1952) ("*TV Allotment Order*")

services available to such community from television stations located in other communities.[36] Reallotment proposals are evaluated using these same criteria.[37]

21. The Commission also established its reservation policies for noncommercial educational television stations in the 1952 proceeding. In the proceedings leading up to adoption of the *TV Allotment Order*, the FCC proposed as a matter of policy to reserve certain allotments in the VHF and UHF bands for the exclusive use of noncommercial television stations.[38] Despite opposition to the policy, the Commission, finding that the record supported the proposal, adopted it in the public interest. On the basis of that record, the Commission concluded that there is a need for noncommercial educational television stations and that reservation of noncommercial channels was necessary to ensure that educational institutions had enough time to obtain financing and construct stations, but that such reservations should not be maintained "for an excessively long period and should be surveyed from time to time. . . ."[39] Under the policy as adopted, the Commission reserved one allotted channel for noncommercial use in each community having a total of three or more allotments (whether VHF or UHF). 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

[36] *See id*, ¶ 63, *Amendment of Section 73 606(b), Table of Allotments, Television Broadcast Stations (Bessemer and Tuscaloosa, Alabama)*, 11 FCC Rcd 2967 (1996).

[37] *Id*

[38] *See TV Allotment Order*, ¶ 33. In other words, the allotments were determined first, based primarily on geographic, economic, and population conditions *Id.*, ¶¶ 63-65, 84. Thereafter, channels were selected for noncommercial reservation from among a community's allotments based on the principles summarized in Paragraph 21.

[39] *Id*, ¶ 36.

centers," where reservations were made even if the community had only one or two allotments.[40] In the very largest cities, the FCC endeavored to reserve a second noncommercial channel.[41]

22. In this case, the Joint Petitioners do not propose to allot a new channel or to move a channel from one community to another. Rather, they propose to shift the noncommercial reservation from the Phoenix station to the Holbrook station and to exchange licenses to operate on the respective channels as so modified, both in order to provide an immediate choice in Spanish-language full-power television service to Phoenix and to ensure that the area in and near Holbrook does not become a white area. Accordingly, the Commission should be guided both by allotment priority one's need to ensure at least one over-the-air source of television service and by the general public interest principles embodied in allotment priority five. In this case, the public interest benefits of the Proposal are overwhelming:

(1) It avoids the creation of a white area in Holbrook.

(2) It preserves the total number of full-power stations in the Phoenix DMA.

(3) It eliminates an NCE white area in Holbrook.

(4) It expands the quantity and quality of local programming in Phoenix, especially in the underserved area of Spanish-language news and information.

(5) It substantially improves service (and provides a ***first*** full-power competitive service) to a large and underserved segment of the population of Phoenix, *i.e.*, Hispanics.

[40] *Id.*, ¶¶ 60, 69.

[41] *See Fostering Expanded Use of UHF Television Channels*, Supplement No. 2 to Third Report and Order, 41 F.C.C. 1069 (1964) (*"Fostering UHF"*)

(6) It provides significant financial assistance to an NCE licensee, which, in light of the new expenses associated with the digital transition, could very much use the funds.

23. Each of these multiple public interest benefits is compelling when considered alone. Indeed, the Commission has concluded that a showing of 1, 2, 4, 5 ***or*** 6 can be sufficient to justify a waiver of its new ownership rules.[42] Further, as we describe more fully below, each of these facts also has been sufficient to result in waivers of other Commission rules, including essential technical rules such as spacing requirements, and modifications of longstanding Commission policies. Collectively, they hallmark the Proposal as a unique and critical opportunity for the Commission to provide essential public interest benefits immediately to a vastly underserved, but vitally important, segment of the U.S. population.

III. THE PUBLIC INTEREST BENEFITS OF THE PROPOSAL FAR OUTWEIGH THE BENEFITS, IF ANY, OF MAINTAINING THE STATUS QUO

A. Maintaining the Status Quo Will Thwart the Commission's Public Interest Objectives for Both Commercial and Noncommercial Licensees

24. Status Quo. As noted above, the Commission historically has sought to reserve at least one noncommercial allotment in all major markets and educational centers and to reserve a second channel in the very largest cities.[43] To that end, the Commission allotted reserved Channel *8 to Phoenix when it adopted the Television

[42] *See Media Ownership Order*, ¶¶ 221-32 (noting that (1) the benefits of preserving a failing or failed station outweigh any competitive harm to competition or diversity, (2) mergers that reduce the competitive disparity between the merging stations are particularly likely to be pro-competitive; (3) mergers that facilitate the transition to digital transmission serve the public interest; and (4) mergers that result in a significant increase in news and local programming increase localism and diversity).

[43] *See TV Allotment Order.*

Table of Allotments in 1952.[44] In 1964, the Commission agreed to allot a second reserved channel to Phoenix (Channel *26, which was subsequently changed to Channel *39).[45] However, that second reserved allotment lay fallow for more than 30 years and would have been deleted from the Table by the Commission's own action if a party unrelated to CTE had not applied for the channel on July 10, 1996 – just ***10 weeks*** before the final deadline of September 20, 1996, established by the FCC for filing applications specifying vacant NTSC allotments.[46] (Indeed, as noted below, the vacant reserved allotment on Channel *18+ in Holbrook ***will*** be eliminated by the FCC under this same rule at the end of the DTV transition.) In fact, CTE's application was filed ***after*** the September 20, 1996, deadline pursuant to a special exception for applications filed in response to pre-September 20 cut-off notices.[47]

25. Ironically, in the same 1964 proceeding in which it allotted the second reserved channel to Phoenix, the Commission also allotted commercial channel 14 to Phoenix at the request of an entity proposing to broadcast primarily in Spanish. In support of the allotment, the proponent argued that there was "***a pressing need for a TV station to serve the large Spanish-speaking population of Phoenix and its environs.***

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[44] *Id*, ¶ 938.

[45] *See Fostering Expanded Use of UHF Television Channels*, Supplement No. 2 to Third Report and Order, 41 F.C C. 1069 (1964); *Fostering UHF Fourth R&O,* 41 F.C.C. at 1097 App II (Table of Assignments in Appendix II listing Channel *39 in place of Channel *26 in Phoenix)

[46] *See Sixth Report and Order,* 12 FCC Rcd at 14639, ¶ 112 & n.192.

[47] *See* FCC Public Notice, *TV Broadcast Applications Accepted for Filing and Notification of Cut Off Date*, 1996 FCC LEXIS 4520 (Aug. 16, 1996) (accepting for filing application for Channel *39 filed by The American Legacy Foundation and establishing October 1, 1996, as cut-off date). CTE filed its application on September 23, 1996. The competing and mutually exclusive applications for Channel *39 in Phoenix were ultimately resolved by a global settlement that resulted in the award of the construction permit to CTE *See also Sixth Report and Order*, 12 FCC Rcd at 14634-40, ¶¶ 103-113.

The station it proposes would be programmed largely in the Spanish language and would provide service to an estimated 100,000 people who are inadequately served by the local TV stations because of the language difficulty."[48] The Commission found that this proposal served the public interest and therefore allotted the channel as requested.[49] As we have demonstrated above, the same pressing need exists today in Phoenix, and the importance of serving this underserved segment of the population has only grown in the intervening years.

26. The Commission is thus presented with a clear choice: it can maintain an allotment scheme in Phoenix and Holbrook that does not advance its allotment priorities, does not foster content diversity, and deprives Phoenix's Hispanic population – and the advertisers who seek to reach them – of a competitive full-power Spanish-language television service ***or*** it can amend the Table in a manner that is fully consistent with its allotment priorities while also fulfilling its core public interest objectives of increasing the quantity and quality of local programming (including news), improving commercial broadcasting through technical upgrades, and enhancing both content diversity and economic competition by giving Phoenix's Spanish-speaking viewers a choice of free, over-the-air television stations tailored to their needs and interests.

B. The Proposal Will Fulfill Traditional Allotment Priorities

27. Avoiding the Creation of a White Area in Holbrook and Preserving Two Full Power Stations. KPHZ is not viable operating as a commercial outlet in Holbrook,

[48] *Fostering UHF*, ¶ 16 (emphasis added).

[49] *Id.*, ¶ 18 In a further bit of irony, the Commission was required to delete Channel 14 at Holbrook, AZ, in order to accommodate this request, an action it was willing to take because "there is no immediate prospect of a use of a UHF channel in Holbrook . . . ." *Id.* Channel 14 at Phoenix apparently was subsequently deleted from the Table of Allotments.

Arizona. 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.[50] As an NCE facility, however, the station has a more promising outlook because it can be expected to draw on sources of funding independent of advertising revenues.[51] The Proposal therefore will preserve two full-power television outlets in the Phoenix DMA, including one assigned to the otherwise unserved community of Holbrook, thereby enabling continued free, over-the-air television service to Holbrook. This outcome serves the public interest by fostering choice and diversity in programming.

28. In a recent decision involving a radio station acquisition in which the application was "flagged" pursuant to the FCC's "50/70" screen, the Commission granted the assignment application – despite the fact that the assignee, Radio South, and Clear Channel would collectively control 94.9% of the revenue share in the Tuscaloosa, Alabama, metro radio market – based primarily on the public interest benefits of preserving the station as an operating media outlet.[52] The Commission concluded that the station to be acquired – like KPHZ in this case – was not economically viable as a stand-alone station. The Commission found that there appeared to be no imminent alternative

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[50] The history of vacant commercial allotments in Holbrook referred to in Note 49 *supra* corroborates the infeasibility of operating a successful commercial television station in this small community.

[51] In approving the exchange of commercial and noncommercial channels licenses to Gary, Indiana, resulting in the relocation of the commercial station to the Sears Tower in Chicago, the Commission specifically pointed to the fact that the NCE operator did not need the same wide-area coverage as the commercial station because it did not intend to compete for advertising revenues. *See Amendment of Section 73 606(b), Table of Assignments, Television Broadcast Stations (Gary, Indiana)*, FCC 86-374, 1986 FCC LEXIS 2845 (1986) ("*Gary*"). It is true that NCE stations also must generate revenues to remain in operation. In the case of the Daystar outlets, these revenues come from direct financial contributions from the viewers and other supporters of the Daystar mission, and thus are far less dependent on the station's geographic location.

[52] *See Birmingham Christian Radio, Inc and Radio South, Inc ,* 18 FCC Rcd 7909 (2003)

to Radio South's purchase of the station that could reasonably be expected to improve the station's prospects and that the probable alternative to the proposed transaction was that the station would "become silent."[53] On this basis, the Commission concluded that the "significant public interest benefits resulting from the continued operation [of the station] and technical improvements to the station, together with the program improvements Radio South plans as owner of the station, particularly with respect to local news, outweighs the potential harm to competition in the Tuscaloosa market."[54] The Commission's reasoning applies with even more force to the Proposal presented here because – in contrast to the well-served Tuscaloosa market – the silencing of KPHZ will create a white area.

29. Eliminating an NCE White Area. As discussed above, although Holbrook has allotted to it a reserved channel (Channel *18+), no applications have been filed for that channel, which therefore remains vacant. The Commission concluded in the *Sixth Report and Order* that, to facilitate the digital transition, it will no longer accept applications for vacant NTSC allotments and that ultimately all such vacant allotments will be deleted from the Table of Allotments.[55] Accordingly, a new NCE station on Channel *18 in Holbrook can never be built. The instant proposal, however, would provide a first over-the-air NCE service to Holbrook, which otherwise would remain an NCE white area. This outcome furthers the Commission's allotment priorities and serves the public interest.

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[53] *Id* at 7921-22

[54] *Id*

[55] *See Sixth Report and Order*, 12 FCC Rcd at 14639, ¶ 112 & n 192

30. Although the proposal would result in a net decrease in the number of people who receive Daystar's service over-the-air in Phoenix, the impact of this change is outweighed by the other public interest benefits of the proposal. In the *Boca Raton/Lake Worth* proceeding, the Commission proposed to permit an exchange of commercial and noncommercial channels, as well as a change in the communities of license,[56] even though the result would be a net reduction in the number of persons receiving the noncommercial service. The Commission noted that the reduction in overall service was offset by the fact that the relocated NCE station would provide a second NCE reception service to 10,898 persons and a third noncommercial reception service to 910,818 persons. It further noted that the proposal in *Boca Raton/Lake Worth* would not deprive either community of its sole local television transmission service, as each community would ultimately retain one television transmission service.

31. The present case presents an even more compelling public interest benefit because the exchange of channels will eliminate an NCE white area and bring a ***first*** noncommercial reception service to the community of Holbrook, while also preserving Holbrook's sole local television transmission service.

C. The Proposal Will Fulfill the Commission's Longstanding Goal of Expanding the Quantity and Quality of Local Programming

32. As noted above, KDTP broadcasts occasional local church services, but otherwise airs no local programming. Until July 2003, KPHZ had a home shopping format with no local programming. Thus, neither KDTP nor KPHZ in their present incarnations has provided any local news programming to their respective communities

[56] *See Amendment of Section 73 606(b), Table of Allotments, TV Broadcast Stations (Boca Raton and Lake Worth, Florida)*, 10 FCC Rcd 9254 (MMB 1995).