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

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

To: Video Division

JOINT MOTION TO CHANGE *EX PARTE* STATUS

NBC Telemundo Phoenix, Inc. ("NBC Telemundo) and Community Television Educators, Inc. ("CTE") (collectively, the "parties"), by their attorneys and pursuant to Sections 1.1200(a) and 1.1208, Note 2, of the Commission's Rules, 47 C.F.R. §§ 1.1200(a), 1.1208, Note 2 (2003), hereby submit this motion to change the *ex parte* status of the above-captioned proceeding from "restricted" to "permit-but-disclose." On August 7, 2003, the parties filed a Joint Petition to Amend the Television Table of Allotments ("Joint Petition") in which they request the Commission to delete the noncommercial reservation of Channel *39 in Phoenix (licensed to CTE), reserve Channel 11 in Holbrook (licensed to NBC Telemundo), modify NBC Telemundo's license to specify Channel 39, and modify CTE's license to specify Channel *11. The purpose of the Joint Petition is two-fold: (1) to introduce a full-power Spanish-language competitor to Univision in Phoenix, the nation's ninth-largest Spanish-language television market and the *only* market among the top ten Hispanic Designated Market Areas lacking such a full-power competitor to Univision and (2) to preserve Holbrook's only television station, which cannot be sustained as a commercial outlet.

On August 6, 2004, the Commission, through its Video Division, adopted a *Memorandum Opinion and Order and Notice of Proposed Rule Making* ("*NPRM*") in which the Division ruled (i) that Section 1.420(h) governing channel exchanges between commercial and noncommercial television station licensees was inapplicable to the proposal, but (ii) that it may possible to effectuate the parties' proposal through a rule making proceeding pursuant to Section 316 to amend the television table of allotments and modify the parties' licenses if the public interest, convenience and necessity would be served thereby. Pursuant to Section 1.1208, rule making proceedings to amend the table of allotments are restricted proceedings for purposes of the *ex parte* rules, and the NPRM so provides. 47 C.F.R. § 1.1208 (2003). As the NPRM makes clear, however, the outcome of this proceeding will be determined based on an analysis of a number of public interest considerations that transcend the specific rights and responsibilities of the individual parties and have the potential to bring substantial benefits to affected groups who are not parties to the proceeding. Accordingly, for the reasons set forth herein, the parties believe a permit-but-disclose designation would be more appropriate for this proceeding.

The Commission's rules designate certain proceedings as restricted to ensure that the agency conducts its adjudications in a manner that preserves fairness and the appearance of fairness to the parties.[1] Where proceedings involve policy issues and determinations beyond the rights of individual parties, however, the Commission's rules typically classify such proceedings as permit-but-disclose rather than restricted.[2] Informal rule makings, for example, are designated permit-but-disclose proceedings

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[1] *See Amendment of 47 C.F.R.§. 1.1200 et. seq. Concerning Ex Parte Presentations in Commission Proceedings*, 12 FCC Rcd 7348, 7351-52 (1997) ("*Ex Parte Report*").

[2] *Id.* at 7358.

under the Rules because they "often involve a need for continuing contact between the Commission and the public to develop policy issues."[3]

The Commission also recognizes that a particular proceeding may involve both a determination of individual rights and responsibilities *and* a determination of important policy considerations that have broader applicability. In such cases, the public interest may be better served by facilitating the free flow of information to the Commission and its staff that is characteristic of informal rule making proceedings.[4] Similarly, in proceedings involving interpretations of FCC rules and decisions that have applicability beyond the parties, the Commission may conclude that a more open process is preferable.[5] For these reasons, the Commission's rules expressly authorize the Commission or its staff to modify the *ex parte* status of a particular proceeding.[6]

Specifically, Section 1.1200(a) of the Commission's rules grants to the Commission and its staff the "discretion to modify the applicable *ex parte* rules by order,

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[3] *Id.* at 7358-59; *see* 47 C.F.R. 1.1206(a)(1) (2003).

[4] *See, e.g.,* FCC Public Notice, *Satellite Space Applications Accepted for Filing,* 2003 LEXIS 3721 (rel. July 3, 2003). The Commission changed the *ex parte* status of this proceeding from restricted to permit-but-disclose "[b]ecause these applications present complex, interrelated legal, technical and policy issues associated with the implementation of direct broadcast satellite systems, and because a change in the ex parte status would facilitate a transparent resolution of these issues . . ."; *see also* FCC Public Notice, *Application of Skybridge L.L.C. for Authority to Launch and Operate the Skybridge System and Its Requested Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-frequency with GSO and Terrestrial Systems in the Ku Band and to Establish Technical Rules Governing NGSO and FSS Operations in this Band,* 13 FCC Rcd 11076 (1998). In the latter proceeding, the FCC changed the *ex parte* status of the proceeding from restricted to permit-but-disclose because the Skybridge application "raises complex technical, legal and policy issues, making it essential that the Commission obtain the most current information available, subject to appropriate procedural safeguards." The Commission further reasoned that a change in *ex parte* status was required "to assist the Commission in developing a complete record on which a well-reasoned decision can be made . . . ."). *Id.* at 11076.

[5] *See, e.g.,* FCC Public Notice, *Change in Ex Parte Status of the State of Tennessee's, Education Networks of America's, and Integrated Systems and Internet Solutions, Inc.'s Requests for Review of the Decision of the Universal Service Administrative Company with Regard to the State of Tennessee's Request for Discounts Pursuant to Section 254 of the Communications Act,* 14 FCC Rcd 7707, 7707 (1999) (changing status from restricted to permit-but-disclose because "[t]hese proceedings raise issues involving interpretation of the Commission's rules and decisions with regard to the schools and libraries program that have application broader than to just these parties").

letter or public notice."[7] Note 2 to Section 1.1208 of the Commission's Rules provides the standards to be applied by the Commission or its staff in determining whether to modify the *ex parte* status of a particular proceeding:

> [c]onsistent with §1.1200(a), the Commission or its staff may determine that a restricted proceeding not designated for hearing involves primarily issues of broadly applicable policy rather than the rights and responsibilities of specific parties and specify that the proceeding will be conducted in accordance with the provisions of §1.1206 governing permit-but-disclose proceedings.[8]

The Commission and its staff, including staff of the Media Bureau,[9] have frequently exercised this authority to change the *ex parte* designation of restricted proceedings involving the rights of specific parties that have broader applicability to "permit a fuller exchange on the issues under consideration"[10] and to "provide an opportunity for all interested parties to receive notice of various technical, legal and policy issues raised."[11]

The Phoenix/Holbrook rule making presents a classic example of a proceeding that involves both public interest determinations with broader applicability and, potentially, the determination of individual rights. In particular, while the NPRM duly notes the core legal questions at issue in the proceeding, such as the Section 307(b) analysis,[12] the overwhelming practical benefits of the proposal are not fully explored in

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6 Thus, the staff of the Media Bureau has the authority to grant this motion.

7 47 C.F.R. § 1.1200(a) (emphasis added).

8 47 C.F.R. § 1.1208, n.2.

9 *See* FCC Public Notice, *Application of Dotcast, Inc. for Approval of System for Insertion of Non-Video Data Pursuant to Section 73.682,* "Permit But Disclose" *Ex Parte* Status Accorded, 17 FCC Rcd 6109 (2002).

10 *See, e.g.,* FCC Public Notice, *Office of Engineering and Technology Declares Utsarcom and Drew University Request for Waiver of Part 15 for Operation in the 1910-1920 MHz Band to be a "Permit-But-Disclose" Proceeding for Ex Parte Purposes*, 15 FCC Rcd 23562, 23562 (OET 2000).

11 *See, e.g., Bell Atlantic Telephone Companies Revisions to Tariff FCC Nos. 1 and 11*, 16 FCC Rcd 12967, 12985 (CCB 2001); *see also supra* notes 4 & 5.

12 *NPRM* ¶ 9.

the NPRM and cannot be until the record is developed. These benefits include, among others, the introduction of meaningful competition in Spanish-language programming in Phoenix, the preservation of Holbrook's only television station, and NBC Telemundo's commitment to increase locally produced Spanish language news if the proposal is granted. The value of these benefits to the affected constituencies, including Phoenix's substantial Latino population and the residents of Holbrook, can best be assessed by encouraging these constituencies to participate fully in this proceeding without the procedural formalities and constraints imposed in a restricted proceeding. Indeed, these formalities and constraints may well act as a disincentive or obstacle to participation by these parties. In this respect, the proceeding is indistinguishable from informal rule making proceedings in which the FCC seeks input from the broadest spectrum of potentially affected parties. As the Commission observed in the *Ex Parte Report*, "rulemakings, unlike adjudications, often involve a need for continuing contact between the Commission and the public to develop policy issues. . . . Further, . . . a permit-but-disclose procedure in rulemakings gives interested persons fair notice of presentations made to the Commission and ensures the development of a complete record."[13]

In contrast to cases in which the Commission has denied requests to change *ex parte* status, this is not a complaint proceeding; [14] nor does it involve an adjudication. Further, both parties to the proceeding join in making this request. Therefore, no party will be harmed by a change to permit-but-disclose status, which will encourage greater participation by potentially affected constituencies and foster a fuller exchange on the

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[13] *Ex Parte Report* at 7359.

[14] *See, e.g., AT&T Corp. v. Business Telecom, Inc.*, 16 FCC Rcd 18159 (2001) (denying request to alter status of Section 208 formal complaint proceeding).

issues under consideration, particularly with respect to the beneficial impact of the proposal on those constituencies.

WHEREFORE, in view of the foregoing, the parties respectfully request the Commission to change the *ex parte* status of this proceeding from restricted to permit-but-disclose.

Respectfully submitted,

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Dated: August 26, 2004

dc-388670

CERTIFICATE OF SERVICE

I, Theresa L. Rollins, do hereby certify that a copy of the foregoing "Joint Motion to Change *Ex Parte* Status" was served by hand delivery and electronic mail this 26th day of August, 2004, on the following:

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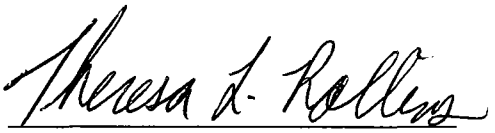

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