

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

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

MEMORANDUM OPINION AND ORDER

Adopted: October 5, 2005

Released: October 13, 2005

By the Commission: Commissioner Copps concurring and issuing a statement.

I. INTRODUCTION

1. The Commission has before it a *Memorandum Opinion and Order and Notice of Proposed Rulemaking (NPRM)*,¹ concerning a proposal by NBC Telemundo Phoenix, Inc. (Telemundo), licensee of stations KPHZ(TV), Channel 11, Holbrook, Arizona, and KDRX-CA and KPHZ-LP, Phoenix, Arizona, and Community Television Educators, Inc. (CTE), licensee of noncommercial educational television station KDTP(TV), Channel *39, Phoenix, Arizona (collectively, “petitioners”), to amend the Television Table of Allotments to remove the noncommercial reservation of analog Channel *39 at Phoenix and reserve analog Channel 11 for noncommercial educational use at Holbrook. The petitioners further propose that the Commission modify Telemundo’s KPHZ(TV) license to specify Channel 39, Phoenix and CTE’s KDTP(TV) license to specify Channel *11, Holbrook without opening the channels to competing applications. For the reasons set forth below, we grant the proposal with conditions.

II. PROCEDURAL BACKGROUND

2. In their Joint Petition to Amend the Television Table of Allotments (Joint Petition), the petitioners requested that the Commission amend Section 73.606 of the Commission’s Rules² pursuant to Section 1.420(h) of the rules³ to delete the noncommercial reservation of analog Channel *39 at Phoenix and reserve analog Channel 11 for noncommercial educational use at Holbrook. They further requested that the Commission modify Telemundo’s KPHZ(TV) license to specify Channel 39, Phoenix and CTE’s

¹ *Amendment of the Television Table of 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*, 19 FCC Rcd 14930 (2004)(NPRM).

² 47 C.F.R. § 73.606.

³ 47 C.F.R. §1.420(h) states that: “[W]here licensees (or permittees) of television broadcast stations jointly petition to amend Section 73.606(b) and to exchange channels, and where one of the licensees (or permittees) operates on a commercial channel while the other operates on a reserved noncommercial educational channel within the same band, and the stations serve substantially the same market, then the Commission may amend Section 73.606(b) and modify the licenses (or permits) of the petitioners to specify operation on the appropriate channels upon a finding that such action will promote the public interest, convenience, and necessity.”

KDTP(TV) license to specify Channel *11, Holbrook, without opening the channels to competing applications. In support of the proposed channel changes, petitioners asserted that their proposal would give nearly one million Hispanics in the Phoenix area, as well as advertisers, a choice between two Spanish-language full service television stations – station KTVW-TV, Channel 33, Phoenix, licensed to Univision Communications, Inc. (Univision), and station KPHZ(TV) on dereserved Channel 39 in Phoenix. They also asserted that their proposal would ensure that Holbrook would not lose its only over-the-air service because, according to petitioners, Channel 11 can only survive as a noncommercial educational outlet. Petitioners also stated that the channel change would give Telemundo “much-needed credibility with advertisers, who are disinclined to buy time on low power television stations,” and that the increased revenue flow would support an increase in local news on its Phoenix outlet directed to the Hispanic audience.

3. In the *NPRM*, the Division concluded that based upon the petitioners’ submission, it did not appear that the exchange would result in an improvement of the quality of service by the educator, a basic tenet of the Commission’s intraband swap policy.⁴ The Division also concluded that the proposal did not meet the threshold requirement of Section 1.420(h) that stations serve “substantially the same market.”⁵ The Division did acknowledge that it might be possible to effectuate the petitioners’ proposal through a rulemaking proceeding coupled with a license modification under Section 316 of the Communications Act⁶ should the proposal be found to be in the public interest. Thus, the Division sought comment on whether grant of the proposal is consistent with the Commission’s prior implementation of its mandate, under Section 307(b) of the Communications Act,⁷ to ensure a “fair, efficient and equitable distribution of radio service.” The Division also asked commenting parties to address the extent to which the Spanish-speaking population is presently served by video providers, and whether any unserved needs could be fully met by the commercial and noncommercial stations already serving the community, without the need to dereserve Channel *39.

III. COMMENTS

4. Comments were filed by Telemundo, CTE, Univision, which, through a subsidiary, is the licensee of KTVW-TV, Phoenix; CoxCom, Inc. d/b/a Cox Communications Phoenix (Cox), a provider of cable television service in Phoenix and its suburbs; and Council Tree Communications (Council Tree), a media investment company. Telemundo and Univision both filed reply comments, and Council Tree filed supplemental comments.⁸

5. Petitioners contend that their proposal is unique both in its underlying factual circumstances and the benefits it will deliver to the public. According to petitioners, both stations have operated for less than five years, and neither received a paired digital channel. The proposal will not result in a net reduction of the number of reserved channels in the Phoenix DMA, and if approved, Telemundo will assign KDRX-CA, its Class A television station in Phoenix, to CTE, which CTE can use to continue to provide the noncommercial educational service currently available to viewers on

⁴ See *NPRM*, *supra*.

⁵ 47 C.F.R. § 1.420(h); *MO&O*, 19 FCC Rcd at 14932, ¶7.

⁶ 47 U.S.C. § 316.

⁷ 47 U.S.C. § 307.

⁸ We also received numerous letters from Phoenix area political and educational leaders supporting the proposal, which petitioners also submitted as an attachment to their joint reply comments. In addition, 28 people identified as noncommercial or religious broadcasters signed a petition supporting the channel exchange, in which they argue that Section 1.420 is applicable because the stations are located in the same DMA and that unique public interest benefits justify the proposal.

KDTP(TV). They also contend that approval of the proposal will serve the public interest by promoting local television competition and diversity for almost one million Spanish-language viewers in the Phoenix area.

6. With respect to Holbrook (population 4,917), KPHZ(TV) is the only station allotted to that community and is the only full-service television station which places a predicted Grade B or better signal over the community. Thus, Holbrook is a gray area for allotment purposes.⁹ According to petitioners, KPHZ(TV) has generated no revenue since it started operating in 2000, and the station cannot reach most of Telemundo's target audience, particularly Hispanics living in Phoenix, many of whom rely on over-the-air signals, rather than cable or satellite. Under these circumstances, "it is virtually certain," states Telemundo, that it will cease operating the station as a commercial outlet, thus creating a white area in and around Holbrook¹⁰ and a net loss of television service available in the DMA. Petitioners state, however, that the proposed channel exchange would forestall the creation of a white area, because, "CTE is ready, willing and qualified to preserve Holbrook's only local full-power television outlet."

7. Although the Commission allotted Channel *18 to Holbrook in 1965, that reserved channel was never applied for and was deleted thirty years later with all other unapplied for NTSC channels in the TV Table of Allotments.¹¹ As to whether Holbrook is capable of sustaining a noncommercial educational station, petitioners state that "[t]he answer is simple – CTE should be given an opportunity to try to save free, over-the-air, full-power television service in Holbrook." Although they acknowledge that the reserved channel earlier allotted to Holbrook was never applied for, they argue that this merely underscores the fact "that Holbrook is a very challenging broadcast market for noncommercial and commercial broadcasters alike." According to petitioners, CTE, with an existing base of committed financial supporters, "clearly is better suited than other groups to sustain the station." Moreover, they assert that the consideration to be paid to CTE by Telemundo will provide further support and assist CTE in making the transition to full digital broadcasting.

8. Petitioners also claim that their proposal is unique in that Phoenix -- the sixth-largest Hispanic population center and ninth-largest Hispanic DMA in the country -- is the only top ten DMA that lacks a full-service competitor to Univision.¹² Thus, according to petitioners, permitting the channel exchange would eliminate a television "gray area" for Spanish-language services. Petitioners further state that:

The Commission unquestionably views speakers of Spanish as a distinct segment of the population that requires special FCC protections with regard to their access to multiple and diverse television programming choices. . . . Indeed, the Commission has repeatedly found that the substantial public interest in achieving this goal justifies waiving certain of its rules and modifying long-standing policies. That goal has become even more important as Univision solidifies its dominant position in Spanish-language programming. . . . There is much evidence that the Spanish-language television market should be viewed as a distinct market for Commission purposes. That the only parties –

⁹ A TV gray area is an area served by only one Grade B television signal. *See Service Rules for the 746-764 and 776-794 Bands*, 15 FCC Rcd 20845, 20871, n.125 (2000).

¹⁰ A TV white area is an area that is not served by any Grade B television service. *See KNTV License, Inc.*, 19 FCC Rcd 15479, 15486, n. 8 (2004).

¹¹ *See Fostering Expanded Use of UHF Television Channels*, 41 FCC 1077, 1097 (1965); *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Report and Order*, 12 FCC Rcd 14588, 14639 (1997).

¹² According to petitioners, the Los Angeles DMA has six full-service Spanish-language stations, Houston has five, and the New York, Miami and Dallas-Ft. Worth DMAs have four in their major urban cores.

other than Telemundo – who have been willing to enter this fast-growing market in any substantial way are Mexico’s top two television services itself is an indication of the uniqueness of (and entry barriers to) this market.

9. Although there are three Class A television stations in the Phoenix area that air Spanish-language programming and these stations all have approximately the same predicted over-the-air signal coverage as Univision’s full-service station, petitioners claim that Telemundo’s Class A television station (and presumably the other two Spanish-language Class A stations) cannot adequately compete with Univision. Petitioners assert that under Commission precedent, Class A stations are not counted as independent media voices in a market to assess compliance with the local and cross-ownership rules, or considered in determining whether an area is unserved or underserved in ruling on requests for satellite status by full-service stations. According to petitioners, if the Commission “truly believed that these stations were adequate substitutes for full-power stations, they would be counted in measuring the competitive profile of the market.” They also claim that because Class A stations are accorded fewer rights in the digital transition and are not accorded must-carry rights except in very limited circumstances, they cannot be considered to be competitively equal with full-service stations. Further, the petitioners point out that Cox, the largest cable operator in the market, carried KDRX-CA on an expanded basic tier that costs significantly more than the basic tier on which the Univision full-service station is carried. Finally, although the Spanish-language Class A stations are available via cable and satellite, petitioners also argue that pay services are not an adequate substitute for free, over-the air television under any Commission precedent. This is especially the case in Phoenix, they maintain, where fewer than one-third of Spanish-dominant television viewers subscribe to cable, compared with the overall Phoenix average of 60%.¹³

10. As further evidence of Telemundo’s inability to compete with Univision, petitioners state that at the time they filed their comments, Univision claimed 84% of the Spanish-language television advertising revenues and 93% of the Hispanic viewers in the market.¹⁴ Petitioners also submitted letters from dozens of advertisers and other media buyers, stating that they “have little choice but to limit our purchases of advertising time on Low Power Class A television stations such as KDRX-CA, which, due to regulatory constraints, have a less robust signal, far more limited potential audience reach and no guarantee of basic-tier cable carriage.” Telemundo states that it is confident these advertisers will support a full-service station and pledges to broadcast a minimum of one hour of locally-produced programming each week day once it commences operations on Channel 39.

11. Univision responds that Section 1.420(h) is inapplicable here. Univision argues that amending the table of allotments and using Section 316 of the Act to modify a station’s license to conform to the change in allotment would be an unique application of the Commission’s discretion under the public interest standard and Section 316 of the Communications Act, because the Commission has only done so in connection with channel exchanges between commercial and noncommercial licenses where the number of reserved and unreserved channels available to provide service to a given community

¹³ In support, petitioners cite to a February 2001 Nielsen Media Research study commissioned by NBC/Telemundo, which concluded that cable subscribership among Spanish-dominant viewers in Phoenix was 24.1%. In a more recent telephone survey commissioned by NBC/Telemundo, 34% of the Spanish-dominant viewers reported subscribing to cable, 11% reported subscribing to satellite, and 7% specified another source for receiving local programming.

¹⁴ They state that the television revenues not claimed by Univision are attributable to KDRX-CA. A review of the BIA Publications Media Access Pro database by Commission staff indicates that the database reports that KDRX-CA had revenue of \$4.2 million in 2003 and that Univision’s station had revenue of \$19.5 million during the same period.

remained the same. Here, Holbrook's only commercial television allotment would be replaced with a reserved channel, despite the fact that Channel *18 was fallow for 30 years, strongly suggesting that there is no demand for, or ability to financially support, a noncommercial educational service in Holbrook. Univision also argues that such relocation would run counter to an efficient and equitable distribution of radio services, and to the primary premise of the Commission's channel swap -- which is that the noncommercial station will be financially aided by the proposed change in channels -- because it would reduce the service presently provided by noncommercial educational station KDTP from 3 million persons residing within its current predicted Grade B contour to only 7,147 persons. Univision also questions how long KDTP could survive as a Holbrook station reaching only 7,000 persons, even with the unspecified amount of compensation that would be paid to CTE if the proposal is implemented.

12. With respect to Phoenix, Univision argues that grant of the proposal would not improve commercial television service, since KDRX-CA already reaches a population of 3,105,109 viewers, which is almost exactly the reach of Univision's full-service station, KTVW-TV, as well as that of station KDTP(TV). According to Univision, the fact that Telemundo's station is a Class A station is not relevant to its ability to compete with KTVW-TV.¹⁵ Univision also argues that "the Commission has . . . left no doubt in its prior rulings that Spanish-language and English-language stations do not compete in separate markets."¹⁶ Therefore, Univision argues, the Commission cannot base its decision in this case on that distinction.

13. Univision also argues that the proposed channel swap is contrary to the public interest as it would deprive the Phoenix community of one of only two reserved noncommercial educational television stations in the market. Univision states that the Commission has a long-standing commitment to encourage and preserve noncommercial educational television stations.¹⁷ The channel swap, Univision maintains, would run contrary to the Commission's policy of ensuring that the top television markets have more than one reserved noncommercial channel.

14. In its comments and supplemental comments, Council Tree states that, although channel exchanges between commercial and noncommercial stations may, at times, clearly serve the public interest, this proposal does not. Instead, Council Tree believes grant of the proposal would exacerbate the continuing consolidation of media ownership and the erosion of localism in media, and provide no additional benefits to Phoenix. Council Tree agrees that Section 1.420(h) is not applicable here because the stations do not serve substantially the same market. Council Tree also argues that there are insufficient public interest reasons to waive the requirement. Council Tree argues that this case is distinguishable from the WQED Pittsburgh case¹⁸ because, in that case, the Commission deserved one of two reserved channels in Pittsburgh, which were licensed to the same entity and being simulcast, permitting the commercial station to be sold, ensuring that the financially-ailing licensee could continue to operate on its remaining channel and adding an independent voice to the market. Council Tree also points out the

¹⁵ Univision also argues that, in addition to Telemundo's ownership of the Holbrook and Phoenix stations, Telemundo's parent, National Broadcasting Company, Inc. (NBC), holds a network affiliation agreement with KPNX(TV), Mesa, KMOH-TV, Kingman, and KNAZ-TV, Flagstaff, and holds a 32% non-voting equity interest in Paxson Communications, licensee of station KPPX(TV), Tolleson, a suburb of Phoenix. Telemundo's parent corporation also holds, among other interests, an ownership interest in approximately 90 full power stations, affiliation agreements with over 250 additional stations, two television networks, and numerous cable channels such as USA Networks, MSNBC, CNBC and Bravo. Thus, Univision argues, Telemundo is well suited to compete with Univision in Phoenix.

¹⁶ See, *Shareholders of Hispanic Broadcasting Corporation*, 18 FCC Rcd 18834, 18855-57 (2003)(HBC).

¹⁷ See, e.g., *WQED Pittsburgh*, 15 FCC Rcd 202 (1999), *recon .granted*, 15 FCC Rcd 2534 (2000).

¹⁸ *Amendment of Section 73.606(b), Pittsburgh, Pennsylvania*, 17 FCC Rcd 14038 (2002)(*WQED Pittsburgh*).

Commission cannot modify CTE's license to specify channel 11 in Holbrook because CTE has not demonstrated its eligibility to become the licensee of a reserved channel in Holbrook.

15. Cox operates a cable system serving Phoenix and surrounding areas, and confines its comments to addressing the Division's request for comment on the extent to which the Spanish-speaking population is served by cable and the extent to which the channel exchange would affect the mandatory carriage rights of KPHZ(TV) and KDTP. Cox currently carries 24 channels of Spanish-language programming, including KTVW (Univision), KDRX-CA (Telemundo), KPDF-CA (Azteca) and KFTU-CA (Telfutura). In addition to the local Spanish-language programming channels, Cox co-created, with Belo Communications, a 24-hour Spanish-language news and sports channel called MasArizona, and Mas Notas, a locally-produced Spanish-language channel which features music videos and a local news ticker. In addition to these local channels, Cox also carries Univision's Galavision on an analog tier, as well as 19 other national and international Spanish-language programming channels on its "Paquette Latino" digital tier, including Spanish-language versions of various popular cable channels such as ESPN, CNN, Discovery, History and Bloomberg.¹⁹

IV. DISCUSSION

16. After a review of the record and comments in this case, we believe that compelling and unique circumstances justify waivers of the Commission's policy disfavoring dereservation of reserved noncommercial educational channels and the uncodified rule requiring opening of dereserved channels for competing applications.²⁰ When analyzing a request for a waiver of Commission rules or policies, agency rules are presumed valid, and "an applicant for waiver faces a high hurdle even at the starting gate."²¹ A rule or policy may be waived where the particular facts make strict compliance inconsistent with the public interest.²² In addition, we may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²³ Waiver is, therefore, appropriate if special circumstances warrant a deviation from the general rule or policy, and such deviation would better serve the public interest than strict adherence to the general rule.²⁴

17. As we noted in the *NPRM* in this docket, the Joint Petition does not meet the requirements of the intraband swap policy set forth in Section 1.420(h) of our rules. It is our general policy to disfavor dereservation of reserved channels. We believe, however, that the Joint Petition shares some of the essential attributes with the channel exchange policy set forth in 1.420(h) and advances some of the Commission's goals underlying that rule.²⁵ Specifically, as discussed further below, we conclude

¹⁹ Cox states that if NBC/Telemundo operated on Channel 39 in Phoenix, Cox would be required by the must-carry provisions to carry the station. According to Cox, CTE's operation on Channel 11 at Holbrook would not be entitled to must-carry rights on the Phoenix cable system.

²⁰ See *WQED Pittsburgh*, 17 FCC Rcd at 14048, n.33 and accompanying text citing *Deletion of Noncommercial Reservation of Channel *16, Pittsburgh, Pennsylvania*, 11 FCC Rcd 11700, 11707-11710 (1996); *WQED Pittsburgh*, 17 FCC Rcd at 14055, n.58 and accompanying text citing *Sixth Report and Order*, 41 FCC 148, 212 n.51 (1951) (if a noncommercial educational television station operating on reserved channel seeks to operate on a commercial basis it must petition to change the character of the channel assignment and file an application for a new license, in competition with any others who make seek the channel).

²¹ See *WAIT Radio v. FCC*, 418 F. 2d 1153, 1158 (D.C. Cir. 1969), cert denied, 409 U.S. 1027 (1972).

²² *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²³ *WAIT Radio*, 418 F.2d at 1157.

²⁴ *Northeast Cellular*, 897 F.2d 1266.

²⁵ See *Intraband TV Channel Exchanges*, 59 RR 2d 1455 (1986) (stating that the Commission is not providing for the elimination of any reservation but rather is providing for more effective use of [NCE] channels by shifting (continued...))

that waiver of the rule is warranted because the proposal facilitates a potentially beneficial exchange, with consequent advantages for the public.²⁶ This is the rare situation in which a waiver of our dereservation policy is warranted. Council Tree argues that grant of the Joint Petition would be contrary to precedent because the Commission has only granted proposals like this one in connection with channel exchanges between commercial and noncommercial licensees where the number of reserved and unreserved channels available to provide service to a given community remained the same. Univision similarly argues that Section 1.420(h) defines the exact boundaries of what constitutes sufficiently compelling circumstances to justify a channel swap.²⁷ By definition, however, waiver requests demand consideration of specific circumstances that might warrant deviation from a general rule or policy.²⁸ Therefore, under the waiver standard, we are not limited by the constraints suggested by Council Tree and Univision and we must consider the proposal on its individual merits.

18. It seems clear to us that creating a more competitive environment for the continuing growth and development of Spanish language network programming in the Phoenix market is in the public interest.²⁹ The hallmark of our regulatory responsibility is to increase and strengthen program diversity and thereby provide multiple viewing choices in the community.³⁰ We conclude that grant of the Joint Petition will create the first and only full-power Spanish-language competitor to Univision's KTVW-TV in Phoenix. This is important because we recognize Phoenix's importance as a top-ten Hispanic DMA and the fact that it is the only top-ten DMA without two full-power commercial Spanish-language TV stations.³¹ We also recognize that there is a marked disparity between Univision and Telemundo, the two major Spanish language networks, in terms of market share and viewers reached, both nationally and locally in Phoenix.³² In the eight major markets where Univision and Telemundo compete directly, Univision serves anywhere from two to three times more viewers than Telemundo.³³ Although there are many possible reasons for this disparity, we believe we should, where possible, eliminate facilities-based disadvantages so as to facilitate competition based on the merits of program services.³⁴

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reservations within the same band from one channel to another in light of evidence of substantial public interest benefits); Joint Petition at 12-13 (arguing that the proposal serves 1.420(h)'s goals by benefiting both stations involved, with consequent advantages for the public).

²⁶ See Joint Petition at 12-13; *Intraband TV Channel Exchanges*, 59 RR 2d 1455 at ¶ 20 (explaining that purpose of 1.420(h) is to allow potentially beneficial exchanges that otherwise would be discouraged by the possibility that third parties may express an interest in applying for the affected and already occupied channels).

²⁷ See Univision Comments at 9.

²⁸ See *Northeast Cellular*, 897 F.2d at 1266.

²⁹ See, e.g., *Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13695 (2003) (stating the Commission's continued interest in promoting competition at the network level).

³⁰ See *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12910 (1999) (stating that one of the ultimate objectives of the broadcast ownership rules is to promote diversity).

³¹ See Joint Comments at iii.

³² See Joint Petition at 5-8 and 35-36; Joint Comments at 2-4, 10-11 and 31; see also *HBC*, 18 FCC Rcd at 18866-18867 (dissenting statements of Commissioners Adelstein and Copps).

³³ BIA Publications Media Access Pro database.

³⁴ Univision also argues that Telemundo is able to successfully compete because it is able to rely on the financial resources of NBC. We conclude, however, that Telemundo's potential access to NBC's financial resources does not make up for its facilities-based disadvantages.

19. The record demonstrates that Telemundo is unable to be competitive with the Class A station it now operates – KDRX-CA. We agree with the petitioners that, although Class A stations may have coverage areas that equal some full-power stations, Class A stations are not competitive substitutes for full-power stations because such stations have fewer rights in the digital transition³⁵ and are not accorded must-carry rights except in very limited circumstances.³⁶ Although Univision argues that KDRX-CA is currently carried on cable systems in the Phoenix market, the fact remains that Cox, the largest cable operator in the market, carries the station on an expanded basic tier that costs potential viewers more than twice as much as its basic tier.³⁷ Furthermore, KDRX-CA is not carried on Direct Broadcast Satellite systems offering “local-into-local” service in the Phoenix market.³⁸

20. Univision maintains that our action is contrary to the Commission’s decision in *HBC*. We find that our decision is consistent with, and would further the public policy underlying that decision. The Commission has previously supported changes in its policies and waivers of its rules partly or sometimes solely on the basis that such waivers would result in greater consumer access to foreign-language programming and, more specifically, Spanish-language programming. For example, the Commission’s grant of network representation rule waivers were based in part on its finding that such waivers would “encourage the growth and development of new networks” and “foster foreign language programming.”³⁹ In addition, on a number of occasions, the Commission has granted waivers of the minimum interference spacing rules based in part on “substantial service gains to Spanish- and Asian-language viewers.”⁴⁰ The Commission also approved a channel exchange in *San Francisco/San Mateo*⁴¹ based in part on a commercial station’s improved ability to serve “an important part of the total Spanish language population in a 10-county area by virtue of the new equipment it can use on Channel 14.” In 1980, the Commission based its change in policy concerning time brokerage agreements in part on its desire to increase foreign-language program diversity.⁴² The Commission also recognized the importance of serving the Spanish-language community when it adopted its rules concerning closed captioning and the telecommunications relay service.⁴³ In connection with its recent revision of its multiple ownership

³⁵ Unlike full-service stations, Class A television stations were not allocated a paired digital channel as part of the Commission’s digital television transition. Class A stations will have an opportunity to obtain digital channels but not until after the full service digital channel election process has been completed. See Amendment of the Commission’s Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations, *Report and Order*, 19 FCC Rcd 19331 (2004). Also, digital channels assigned to Class A stations will be assigned on a secondary or non-interference protection basis. *Id.* Therefore, unlike the digital channels of full service stations that are licensed on a primary or interference-protected basis, the digital channels of Class A stations are not afforded such status.

³⁶ Sections 614(c) and (h)(2) of the Communications Act of 1934 provides limited must carry rights for certain low power television stations including Class A stations. See 47 U.S.C. §614(c) and (h)(2).

³⁷ See Joint Comments at 20-21. The petitioners also rely on a telephone survey of Phoenix’s Hispanic residents in support of their contention that a second full-power TV station is needed to adequately serve Spanish-language viewers in the market. See Joint Petition at 37-39. However, we decline to place any weight on the survey because of concerns about its reliability.

³⁸ See Joint Reply Comments at n.39.

³⁹ See *Network Representation of TV Stations in National Spot Sales*, 5 FCC Rcd 7280, 7281-7182 (1990).

⁴⁰ See, e.g., *KRCA License Corp.*, 15 FCC Rcd 1794 (1999).

⁴¹ 68 FCC 2d 860 (1978) (*San Francisco/San Mateo*).

⁴² See *Petition for Issuance of Policy Statement of Notice of Inquiry on Part-Time Programming*, 82 FCC 2d 107, 108 (1980).

⁴³ See *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996*, 13 FCC Rcd 3272 (1997); and *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 15 FCC Rcd 5140, 5154-5155 (2000).

rules, the Commission revised its definition of “daily newspaper” to include non-English dailies based on the conclusion that “[t]hose whose primary language is not English deserve the same protections of diversity and competition as do English speakers.”⁴⁴ In 1964, when the Commission granted a second commercial television allotment to Phoenix it relied on an argument from the proponent that there was “a pressing need for a TV station to serve the large Spanish-language speaking population of Phoenix and its environs.”⁴⁵ Finally, with respect to cable carriage, the Commission has distinguished foreign-language stations to account for distinct characteristics of such stations or their audiences.⁴⁶

21. In the *HBC* decision, the Commission approved a merger between Univision, which held 32 full service television licenses and Hispanic Broadcasting Corp which held 62 full service radio station licenses. The Commission rejected the argument that the merger would harm competition and diversity within a distinct Spanish-language TV-radio market, consistent with its general assumption “that radio and television stations do not compete in the same product market.”⁴⁷ It also rejected the possibility of harm to a distinct Spanish-language radio market “because Univision owns no radio stations.”⁴⁸ Although the Commission in *HBC* expressed doubt about the existence of separate and independent Spanish-language markets, nothing prevents us from taking into account the public interest benefits of an additional Spanish-language station for purposes of a waiver.

22. The Commission also concluded in *HBC* that, even if it treated the Spanish-language radio market as independent, the showing of alleged harms was unpersuasive given evidence of significant market competition, relative ease of entry, and diverse programming available to local and national Hispanic audiences, including both Spanish- and English-language alternatives. Again, however, the Commission was concerned, in that case, with a different issue: whether anticompetitive effects justified denying or conditioning the proposed merger. The Commission’s conclusions there do not preclude us from determining here that grant of the Joint Petition would have substantial competitive and diversity benefits under the circumstances presented here.

23. Univision argues that Telemundo failed to consider other options for serving additional Spanish-language viewers such as a power increase for KPHZ-DT, Holbrook.⁴⁹ However, as Telemundo notes, the station was not assigned a paired DTV channel and would be required to “flash-cut” to digital on the channel authorized for its existing analog operations (*i.e.*, cease analog transmissions and begin operation of new digital transmitting equipment on the same date). We find that, instead of improving the station’s service, such a flash-cut prior to the DTV transition, could deprive viewers of the station’s signal.⁵⁰ Univision also argues that fostering Spanish-language program competition is unnecessary in the Phoenix market because there are abundant broadcast and non-broadcast options available.⁵¹ While there may be other sources of Spanish-language programming in the Phoenix market, many of those cited by Univision are not full-service stations or were pay services and we do not recognize the availability of

⁴⁴ See 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, 18 FCC Rcd 13620, 13799-13800 (2003).

⁴⁵ See *Fostering Expanded Use of UHF Television Channels*, 41 FCC 1069 (1964).

⁴⁶ See *HBC*, 18 FCC Rcd at 18872-18873 (dissenting statements of Commissioners Adelstein and Copps).

⁴⁷ *HBC*, 18 FCC Rcd at 18893.

⁴⁸ *Id.*

⁴⁹ Univision Comments at 18-19.

⁵⁰ See Joint Reply Comments at 9-10.

⁵¹ Univision Comments at 23-24; Univision Reply Comments at 22-24.

pay services as an adequate substitute for free, over-the-air broadcasting of the kind that we find would be fostered by approval of the Joint Petition.⁵²

24. Granting the Joint Petition will also give KPHZ(TV) (as a Phoenix station) increased credibility with advertisers in the Phoenix DMA, as demonstrated by the numerous statements submitted by local advertisers.⁵³ Telemundo has pledged that this increased credibility will, in turn, support an expanded local programming effort including increased local news directed to the Hispanic audience.⁵⁴ Univision argues that such a pledge is “illusory” because Telemundo’s existing Class A station already airs an hour of local news programming Monday through Friday.⁵⁵ Although Telemundo may be providing some local programming in its existing Class A station, we conclude that its local programming efforts will be improved by its ability to operate a full power television station in the Phoenix market. Although we agree that the Commission is not in the business of dictating programming to broadcast stations, we frequently have accepted programming-related commitments from licensees seeking waivers and other actions.⁵⁶ We are also satisfied that Telemundo is committed to maintaining a Hispanic-oriented format on Channel 39 if we approve the Joint Petition.⁵⁷ Telemundo claims a strong tradition of meeting the needs and interests of its predominantly Spanish-speaking audience by producing and airing local news and other programs on its owned and operated stations.⁵⁸ From the earliest days of broadcasting, the Commission has pursued policies aimed at encouraging localism.⁵⁹ While we leave to the discretion of our licensees the best means of fulfilling their obligation to present news and public affairs programming, locally produced news, public affairs and other local programs are a preferred means of responding to local needs and interests.

25. Grant of the proposal will also preserve two full-power television stations, while we find that the record evidence demonstrates that denial of the proposal likely will result in the discontinuance of operation by KPHZ(TV) in Holbrook.⁶⁰ We attach significance to Telemundo’s view because it is the most familiar with the challenges of operating the station. We agree that allowing KPHZ(TV) to operate as a noncommercial station could improve the station’s operations because it may be able to draw on sources of funding independent of advertising revenues such as direct financial contributions.⁶¹ Although Univision does not believe that noncommercial educational service in Holbrook is feasible, we note that CTE has experience successfully operating noncommercial stations.⁶² CTE owns and operates other noncommercial television stations that are supported by a variety of support mechanisms including cash donations, pledges, bequests, gifts of property, charitable gift annuities, trusts and more. Although

⁵² See Joint Reply Comments at 21.

⁵³ See Joint Comments at Exhibit 3.

⁵⁴ See Joint Petition at 25 and 34-35.

⁵⁵ See Univision Reply Comments at n.52.

⁵⁶ See, e.g., *WNWO Associates*, 11 FCC Rcd 18595 (1996); *WHTM-TV, Inc.*, 11 FCC Rcd 5829 (1996); *Stockholders of CBS, Inc.*, 11 FCC Rcd 3733 (1995).

⁵⁷ Accordingly, we disagree with Univision that the proposal should be denied because Telemundo could change program formats.

⁵⁸ See Joint Petition at 2-4 and Exhibit 1.

⁵⁹ Council Tree maintains that grant of the Joint Petition will actually increase ownership concentration and harm localism. See Council Tree Comments at 2-3. The fact that the channel exchange will not increase ownership diversity is outweighed by its public interest benefits including expanded local programming.

⁶⁰ See Joint Petition at 8 and 20-21; Joint Comments at 8-9 and 25-27.

⁶¹ See Joint Petition at 21-22.

⁶² See Univision Comments at 13-16; Joint Reply Comments at 24-25.

Univision has offered to operate the Holbrook station, it offers no evidence or information to support its view that a commercial station may be profitably operated in Holbrook despite Telemundo's experience to the contrary.⁶³ Grant of the proposal would also bring the first noncommercial educational station to Holbrook, thereby furthering one of our allotment priorities.⁶⁴

26. We also conclude that reserving Holbrook's sole commercial channel is consistent with our long-standing allotment policies. Although in a majority of communities, the Commission has ensured that the community would first receive a commercial allotment before a reserved channel was allotted, we find that preserving Holbrook's sole television transmission service outweighs this policy under the circumstances here. Similarly, we conclude that dereserving one of the two reserved channels in Phoenix will not unduly deprive the market of noncommercial educational service. Univision argues that a grant of the Joint Petition would put Phoenix at odds with the noncommercial allotments of similarly sized markets.⁶⁵ Notwithstanding that Phoenix will be left with only one noncommercial station we believe that public interest would be served by a waiver for the reasons outlined herein. In addition, Phoenix will continue to be served by reserved channel 8* and CTE has pledged to continue to operate KDRX-CA as a noncommercial station.⁶⁶ Univision also argues that changing the reserved allotment from Phoenix to Holbrook will result in a net loss of noncommercial educational service.⁶⁷ We find that this detriment is outweighed by the benefit of preserving Holbrook's sole local television transmission service, the opportunity to foster local and national Spanish-language network competition, and to expand and improve local programming in Phoenix.⁶⁸

27. On balance, we find that these public interest factors weigh in favor of granting the proposed de-reservation of channel 39* in Phoenix and reservation of channel 11 in Holbrook, Arizona and waiving the Commission's policy disfavoring dereservation of reserved noncommercial educational channels and the uncodified rule requiring opening of dereserved channels for competing applications. Based on Telemundo's commitments, we also find that a grant of the proposal will result in expanded and improved local news and other local programming. Finally, and more importantly, grant of the proposal will create the first full-power competition to Univision in the Phoenix market, thereby giving Spanish-speaking viewers an additional meaningful choice by enhancing diversity of programming, a long-standing Commission objective.⁶⁹

28. We note that licensees operating on channels reserved for noncommercial educational operation, who are not schools, colleges or universities, are required to have officers, directors, and

⁶³ See Univision Reply Comments at 28.

⁶⁴ We clarify that our decision does not reply on Telemundo's conclusion that KPHZ is not viable for its specific business objective of serving Phoenix's Hispanic population. See Joint Petition at 9.

⁶⁵ See Univision Comments at 12.

⁶⁶ See Joint Petition at 37-38; and Joint Comments at 13 and 30.

⁶⁷ See Univision Comments at 3 and 11-12.

⁶⁸ See *Amendment of Section 73.606(b), Boca Raton and Lake Worth, Florida*, 10 FCC Rcd 9254 (channel exchange permitted despite the new reduction in noncommercial service).

⁶⁹ Council Tree argues that a decision on the Joint Petition should be deferred until the Commission lifts its freeze on changes to existing DTV and analog TV service areas and channels. See Council Tree Comments at 2-3. Because the Joint Petition does not involve changes in the technical parameters of any station but only involves a change in the reservation status of channels, there will be no impact on other analog or DTV stations, allotments or applications and deferral is not necessary. We also are unpersuaded by Council Tree's argument that the proposal should be denied because it would increase ownership concentration and harm localism. See *supra*, ¶14. For the reasons discussed above, we find that grant of the proposal serves our goal of localism, and the fact that Telemundo's proposal will not increase ownership diversity does not outweigh its public interest benefits.

governing board members who are broadly representative of the educational, cultural, and civic groups in the community of license.⁷⁰ Although CTE is qualified to operate on a reserved channel in Phoenix, it has not established its qualifications to operate on the proposed newly reserved channel 11 in Holbrook. CTE has committed to ensure that, upon approval of the Joint Petition, its board of directors will be broadly representative of the Holbrook community.⁷¹ Thus, our approval of the proposed channel exchange will be conditioned on CTE establishing its qualifications to operate on a noncommercial channel in Holbrook and receiving the approval of the Media Bureau's staff before the joint petitioners may consummate these transactions.

V. CONCLUSION

29. Based upon our review of the record before us, we conclude that the public interest would be served by removing the noncommercial reservation from Channel *39 in Phoenix, and instead reserving Channel 11 in Holbrook. Accordingly, IT IS ORDERED, That, the Joint Petition to Amend the Television Table of Allotments filed by NBC Telemundo Phoenix, Inc. and Community Television Educators, Inc. IS GRANTED.

30. IT IS FURTHER ORDERED, That, effective November 28, 2005, Section 73.606 of the rules is amended as follows:

Community	Channel No.
Phoenix, Arizona	3+, 5-, 8*+, 10-, 15-, 21, 33, 39, 45, 61
Holbrook, Arizona	11*+, 18*+

31. IT IS FURTHER ORDERED, That the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send by Certified Mail, Return Receipt Requested, a copy of this Report and Order to the following:

F. William LeBeau, Esq.
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Washington, DC 20006
Counsel for Community Television Educators, Inc.

⁷⁰ See *WQED Pittsburgh, supra*.

⁷¹ See Joint Comments at 27-28.

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Koerner & Olender, PC
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Bethesda, MD 20852
Counsel for Community Television Educators, Inc.

32. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the authorization of Telemundo for KPHZ(TV), Holbrook, Arizona, IS MODIFIED to specify Phoenix, Arizona as the station's community of license and operation on channel 39 in lieu of channel 11.

33. IT IS FURTHER ORDERED, That within 45 days of the effective date of this Order, Telemundo shall submit to the Commission a minor change application for a construction permit (FCC Form 301) specifying channel 39 in lieu of channel 11 for station KPHZ(TV) and Phoenix, Arizona as the station's community of license.

34. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the authorization of CTE for KDTP(TV), Phoenix, Arizona IS MODIFIED to specify Holbrook, Arizona as the station's community of license and operation on channel 11* in lieu of channel 39*, conditioned on submission and approval of a showing that CTE is qualified to operate on a reserved channel in Holbrook, Arizona.

35. IT IS FURTHER ORDERED, That within 45 days of the approval of its qualifications pursuant to paragraph 26 above, CTE shall submit to the Commission a minor change application for a construction permit (FCC Form 340) specifying Channel 11* in lieu of Channel 39* for station KDTP(TV) and Holbrook, Arizona as the station's community of license.

36. IT IS FURTHER ORDERED, That the Commission will send a copy of this Order in a report to be sent to Congress and the Government Accountability Office (GAO) pursuant to the Congressional Review Act.⁷²

37. IT IS FURTHER ORDERED, That this proceeding is terminated.

38. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606.⁷³

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁷² See 47 U.S.C. § 801(a)(1)(A).

⁷³ See *Certifications that Section 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making To Amend Sections 72.202(b), 73.504, and 73.606(b) of the Commission's Rules*, 46 FR 11549 (February 9, 1981).

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

*Re: Amendment of the Television Table of 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*

Dereserving a noncommercial station in a community should only be permitted in those rare circumstances where there is an extraordinary public interest showing that it would serve the local community. Based on the unique circumstances of this case, I concur in finding that the petitioners have met this high standard. Over the past few years, we have seen consolidation in Spanish-language media taken to new and threatening heights. Today's decision should promote at least somewhat greater diversity and competition for those who receive their news and entertainment in Spanish in one of the largest Hispanic markets in the country.