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Via ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Black Television News Channel Request for Limited, Temporary Waiver of the Commission's Advertising Ban on Noncommercial National Educational Programming Suppliers, MB Docket No. 14-77

Dear Ms. Dortch:

The record in this proceeding overwhelmingly supports Black Television News Channel's ("BTNC") request for relief from the Commission's advertising ban on DBS set-aside channels. This relief would enable BTNC to launch the nation's first news and educational channel dedicated to the underserved African-American community. A wide range of parties support the requested relief, emphasizing that it will concretely advance the Commission's stated goals of increasing diversity in media voices, and increasing diverse sources of original and independent news programming.[1] By contrast, not a single party opposes the requested relief.

As set forth below, the Commission has a clear path forward to grant the requested waiver.

[1] Supporters of the waiver request include a member of Congress, Historical Black College and University ("HBCU") educators and students, Mayor John Marks, who currently serves as the Vice Chairman of the United States Conference of Mayors' Communications Committee, a faith-based organization, media representatives, and others.

1. The Commission Can Waive or Modify the Advertising Ban on Noncommercial Programming

As BTNC has demonstrated at length, the current advertising ban on noncommercial programming is not a statutory requirement. As the Commission has recognized, "the term 'noncommercial programming of an educational or informational nature' is not defined in the statute."[2] Moreover, the term "noncommercial programming" does not unambiguously mean programming without advertising. To the contrary, and as set forth more fully below, there are multiple other reasonable ways to interpret what "noncommercial" means in this context, such as whether the programming is commercially viable, whether it is geared toward mass entertainment as opposed to a small audience, or whether it is produced by a purely commercial entity or instead by a non-profit entity or institution. As the Commission has stated, "Congress intended to reserve channels for noncommercial programmers to ensure that DBS capacity would be available to programmers not driven by commercial incentives."[3]

Because the term "noncommercial programming" does not unambiguously require a ban on advertising, the Commission's statement in the *DBS PI Order* that, "to qualify as noncommercial programming, the programmer cannot include advertisements,"[4] is properly considered an interpretive rule. An "interpretative rule" is a rule that "reflects an agency's construction of a statute that has been entrusted to the agency to administer," which is exactly the situation here.[5] Indeed, the Commission's statement adopting the advertising ban was not codified as a rule in the CFR or included in the summary of the *DBS PI Order* that was published in the Federal Register,[6] both of which are further indicia that the ban is an interpretive rule.[7] And because the ban is an interpretive rule, rather than a statutory requirement or legislative rule, the Commission

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[2] *Implementation of Section 25 of the Cable Television and Consumer Protection Act of 1992; Direct Broadcast Satellite Public Interest Obligations*, Report and Order, 13 FCC Rcd 23254, ¶ 93 (1998) ("*DBS PI Order*").

[3] *Id.* ¶ 86.

[4] *Id.* ¶ 95.

[5] *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997).

[6] *See* 64 Fed. Reg. 5951, 5954, ¶ 25 (Feb. 8, 1999), *available at* http://www.gpo.gov /fdsys/pkg/FR-1999-02-08/pdf/FR-1999-02-08.pdf.

[7] *See, e.g.*, *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.3d 1106, 1109 (D.C. Cir. 1993) ("an agency presumably intends a rule to be legislative if it has the rule published in the Code of Federal Regulations."); 5 U.S.C. § 553(b)(3)(A) (exempting "interpretative rules" from publication in the Federal Register).

indisputably may waive it under 47 C.F.R. § 1.3 or modify it without engaging in notice-and-comment rulemaking.[8]

Even if the ban were considered a legislative rule, however, the Commission may still waive it. In this circumstance, the Commission "'must explain why deviation better serves the public interest, and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.'"[9] Here, there can be no question that granting the waiver will serve the public interest, as it will create for the first time a news channel devoted exclusively to the underserved African-American community. Moreover, there are numerous "special circumstances" here, including the numerous enforceable conditions to which BTNC has agreed to adhere, the unique nature of BTNC's mission and programming, and the fact that, in this context, the advertising ban is having precisely the opposite effect that Congress intended when it sought to promote educational and information programming to minority communities.

Alternatively, the Commission could modify its interpretive rule, and need not conduct notice and comment rulemaking in order to do so. It is well-settled that the APA does not require notice-and-comment rulemaking to adopt or amend interpretive rules.[10] The Commission itself has recognized this fundamental administrative law principle, finding that where classifying an action "involve[s] an interpretation of the Communications Act, the notice and comment procedures we follow here are not required under the Administrative Procedure Act."[11] Although the D.C. Circuit has

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[8] There is no doubt that the Commission can change its interpretation of a statute. *See, e.g.*, *King Broad. Co. v. FCC*, 860 F.2d 465, 470 (D.C. Cir. 1988) (FCC may permissibly change its approach to interpreting a statute so long as it provides a reasonable explanation); *see also NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (agency is free to re-examine initial interpretation of statute in light of changed circumstances); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (an agency may change its position if it "show[s] that there are good reasons for the new policy" and "that the new policy is permissible under the statute").

[9] *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008) (quoting *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)).

[10] *See* 5 U.S.C. § 553(b)(3)(A); *Shalala*, 127 F.3d at 94 ("without notice and comment" an agency may issue an interpretation that "changes a prior statutory interpretation"); *Firearms Imp./Exp. Roundtable Trade Grp. v. Jones*, 854 F. Supp. 2d 1, 12 (D.D.C. 2012) ("Without notice and comment an agency may issue an interpretation that changes a prior statutory interpretation.") (internal quotation marks omitted), *aff'd*, 498 Fed. App'x 50 (D.C. Cir. 2013).

[11] *Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866, ¶ 29 (2010).

reached a different conclusion, holding that notice-and-comment rulemaking is required to revise an interpretive rule, the Supreme Court is currently reviewing that D.C. Circuit rule and the United States is urging the Court to reverse it.[12] The Solicitor General argues that this "judge-made procedural requirement is inconsistent with the text of the APA, the policies embodied in that act, and this Court's precedents."[13]

2. Once the Advertising Ban Is Waived or Modified, BTNC Satisfies the "Noncommercial Programming" Requirement

Once the Commission waives or modifies its current advertising ban, it will still need to address the question of whether BTNC's programming qualifies as "noncommercial programming of an educational or informational nature." The Commission has held that, because the statute failed to define what type of programming might qualify as noncommercial educational programming, it would not adopt any rigid eligibility criteria.[14] Presumably, therefore, the Commission will consider this question on a case-by-case basis, considering the totality of the circumstances. Under that approach, the facts here demonstrate that BTNC's programming qualifies as "noncommercial programming of an educational or information nature."

First, BTNC's programming fosters key goals of the act to increase diversity in media, which Congress recognized would require Commission action precisely because the "commercial" marketplace has failed to do so.[15] Because BTNC's programming is targeted to an underserved and geographically dispersed minority, there is currently no viable "commercial" case for carriage of the programming that BTNC seeks to offer. BTNC's programming is "noncommercial" in at least that dimension.

Second, as the nation's first-ever news network – and only current news programing – dedicated to the African-American community, BTNC's programming will not only be educational and informational in nature, but will provide this information to an underserved community. The commercial marketplace has not responded to this gap, despite indisputable demand for it, and despite the fact that African-American consumers

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[12] *See Perez v. Mortgage Bankers Ass'n*, Nos. 13-1041 & 13-1052 (U.S. filed Feb. 28, 2014).

[13] Brief for Federal Petitioners at 10, *Perez v. Mortgage Bankers Ass'n*, Nos. 13-1041 & 13-1052 (U.S. filed Aug. 2014), *available at* http://www.justice.gov/sites/default/files /osg/briefs/2014/01/01/2013-1041.mer.aa.pdf.

[14] *DBS PI Order* ¶¶ 90, 94.

[15] *See* 47 U.S.C. § 257(b).

are large consumers of other types of television programming. These facts also speak to the noncommercial nature of the programming.

Third, BTNC's partner in creating the programming at issue is Florida A&M University ("FAMU"), one of the nation's premier HBCUs. Indeed, BTNC's programming will be produced and broadcast from the FAMU campus and will be created with the assistance of FAMU staff and students. Thus, BTNC's programming will not be created by traditional "commercial" forces, but in partnership with a university, which is a paradigmatic noncommercial entity. In addition, BTNC will dedicate two minutes of promotional air time each hour to promoting the training, services, activities, and events of HBCUs and the National Association of Black Journalists. This, too, speaks to the noncommercial aspect of the programming, as such promotion would not typically be found on commercial programming.

Weighed against these significant "noncommercial" aspects of BTNC's programming, the presence of a limited amount of advertising on BTNC's programming should not be dispositive. Thus, if the Commission waives or modifies the current advertising ban, it should readily find that BTNC's programming qualifies as "noncommercial programming of an educational or informational nature."

3. BTNC Also Satisfies the Requirement of a "National Educational Programming Supplier"

BTNC also qualifies as a "national educational programming supplier," and is therefore eligible to obtain carriage of its programming under 47 U.S.C. § 335.

Section 335(b)(5)(B) states that a "national educational programming supplier" "includes any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions." The Commission has held that the term "national educational programming supplier" in Section 335(b)(5)(B) includes only noncommercial entities with an educational mission, and that "the term should not be interpreted as including 'commercial' entities organized for profit-making purposes."[16] The Commission has stated, moreover, that "the eligibility of a programming supplier under the statute should depend on its noncommercial character, not merely whether its programming contains commercials,"[17] suggesting that the presence or absence of advertising is not dispositive. Rather, in determining whether "noncommercial entities with an educational mission will qualify to use the reserved channels," the Commission held that "the tax code definition of non-

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[16] *DBS PI Order* ¶ 86.

[17] *Id.*

profit will apply to qualify an entity as an eligible national educational programming supplier," and that "[a]n entity that is not organized as a nonprofit corporation may also qualify if it shows to the Commission's satisfaction that it is organized for a noncommercial purpose and has an educational mission."[18]

BTNC will be organized for a noncommercial purpose, and has demonstrated its willingness to take those steps the Commission deems necessary to fulfill this commitment. For example, BTNC has committed that no revenue will go to shareholders, and all monies would instead go directly back into supporting the development of news, informational, and educational programming, and the infrastructure to support that programming.[19] Although some commercial entities also pursue business models in which they earn significant revenues but do not report profit because they continually reinvest in the business, there is an important difference here. BTNC is committing not to distribute any profits to shareholders, while commercial entities can make no such promise, and could choose at any time to stop reinvesting in their business and to distribute profits to shareholders. Moreover, BTNC is willing to organize as a non-profit under the tax code if the Commission requires this step necessary as a condition of the requested relief.

4. Standards for Determining "Noncommercial" in the Public Broadcasting Context Are Not Applicable Here

At the time the Commission adopted the advertising ban in the *DBS PI Order*, it cited to Section 399b of the act, which imposes that ban on "public broadcast station[s]."[20] In *Minority Television Project, Inc. v. FCC*,[21] an *en banc* panel of the Ninth Circuit upheld Section 399b. The existence of the advertising ban in the public television context has no bearing on whether the Commission should interpret the statute to impose such a ban in the context of DBS set-aside channels.

As an initial matter, the steps that Congress took to address concerns with respect to the commercialization of public broadcasting stations do not and should not apply to

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[18] *Id.* ¶ 87.

[19] BTNC stated that it would operate on this basis for three years from the time the Commission grants BTNC a waiver of the advertising ban. If the Commission decides to modify rather than waive the ban, BTNC would plan to make the same commitment, and the Commission could find that BTNC's noncommercial status depends on operating in this manner.

[20] *See DBS PI Order* ¶ 95 & n.206.

[21] 736 F.3d 1192 (D.C. Cir. 2013).

programmers that do not use the public airwaves. Public broadcasters receive from the government, at no charge, the scarce and highly valuable spectrum they need to reach the public. The Commission itself recognized this in its brief before the Supreme Court, in which it successfully opposed a petition for certiorari challenging the Ninth Circuit's decision in *Minority Television Project*. In that brief, the Commission explained that "[b]roadcast licensees have . . . received important government assistance, *i.e.*, the license itself, and the availability of government enforcement mechanisms to prevent others from making unauthorized use of the . . . licensees' use of the spectrum," and that "[t]he licencee's acceptance of those benefits has historically carried with it an enforceable obligation to operate the franchise in a manner that serves the public interest."[22] Non-broadcast educational programmers, by contrast, do not receive any guaranteed means of accessing the public, but instead must compete and negotiate for such access with MVPDs. Indeed, Section 335(b)(3) authorizes DBS providers to charge "reasonable prices" to national educational programming suppliers, thereby acknowledging that such programming will need to earn revenues just to be able to secure carriage. Non-broadcast educational programmers therefore do not, by extension, have the same public interest obligations as public broadcasters.

In any event, there is no question that deeming BTNC's programming non-commercial would not undermine – but would instead be fully consistent with – the goals underlying the advertising ban in the public broadcasting context. As the Ninth Circuit explained, "[t]he primary harm § 399b sought to prevent was the loss of the distinctive content of public broadcast programming," and that "[o]ne of the major themes in the evidence before Congress was that advertising distorts programming decisions because advertisers have something to sell—be it a product, message, or candidate—and they want to sell it to the largest audience possible."[23] The Court also found that "[e]vidence before the district court reinforces the congressional view that if advertising were allowed, programming would 'follow the money,' changing the nature of public broadcast programming."[24] The Court cited evidence by economist Roger Noll that "commercial broadcasting suffers from a 'market failure' in that a "competitive, advertiser-supported television system leads to an emphasis on mass entertainment programming with insufficient attention to programs that serve a small audience, even if that audience has an intense desire to watch programs that differ from standard mass entertainment programs."[25]

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[22] Brief for the Federal Respondents in Opposition at 16, *Minority Television Project, Inc. v. FCC*, No. 13-1124 (U.S. filed May 22, 2014).

[23] *Minority Television Project*, 736 F.3d at 1202.

[24] *Id.* at 1203.

[25] *Id.* (internal quotation marks omitted).

Here, there is no basis for concern that allowing BTNC to include a limited amount of advertising in its programming will threaten the "distinctive content" of that programming" in a way that emphasizes "mass entertainment" over a "small audience." To the contrary, BTNC's programming is and will necessarily remain designed to serve the woefully underserved African American community. Moreover, BTNC's programming will not be "mass entertainment," but news, educational, and informational programming. Indeed, it is BTNC's founding mission to be the nation's first news channel dedicated to the African American community, and BTNC's unique partnership with FAMU will further ensure this mission is fulfilled.

The Commission can ensure that BTNC will achieve this goal by taking the steps outlined above, and granting the requested relief.

Sincerely,

Evan T. Leo