

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

In the Matter of

Black Television News Channel

Request for Limited, Temporary Waiver of  
the Commission's Advertising Ban on  
Noncommercial National Educational  
Programming Suppliers

Docket No. \_\_\_\_\_

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FCC Office of the Secretary

To: The Commission

**BLACK TELEVISION NEWS CHANNEL  
REQUEST FOR LIMITED, TEMPORARY WAIVER**

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## EXECUTIVE SUMMARY

Congress and the Federal Communications Commission have long recognized that a diversity of viewpoints, particularly with respect to news, informational, and educational programming, is critical to a robust democracy. The Commission has also recognized that minorities – and specifically African Americans – are woefully underrepresented in the media. The availability of news, informational, and educational programming that meets the needs of diverse segments of society is directly tied to diversity in media ownership. Tragically, however, there is a shameful and declining amount of African-American-owned broadcast media in the United States today. And despite the significant African-American population and its disproportionately heavy reliance on subscription television for information, there is not a single news or educational channel focused on the informational needs of this community.

Black Television News Channel (“BTNC”), in collaboration with a Historically Black College and University (“HBCU”) – the Florida A&M University (“FAMU”) School of Journalism & Graphic Communication – seeks to correct this imbalance by launching the nation’s first news and educational channel dedicated to the African-American community. BTNC seeks to launch, for a temporary market-entry period, on the channels that Congress, to promote media diversity, specifically set aside for “noncommercial educational programmers” on Direct Broadcast Satellite (“DBS”) systems. In order to avail itself of this opportunity, however, BTNC requires a temporary, three-year waiver of the Commission’s ruling that noncommercial educational programming cannot include any advertisements.

In exchange, and as part of this waiver request, BTNC is willing to enter into enforceable conditions requiring that, for the duration of the waiver, BTNC will concretely and meaningfully address the lack of diverse news, informational, and educational programming identified by the Commission, in a manner that will be sustainable for generations to come. As set forth within this waiver request, these conditions include:

- Producing and showing 14 hours per day of news, informational, and educational programming;
- Operating as a non-profit during the period of the waiver, with revenue going directly back into supporting the development of news, informational, and educational programming, and the infrastructure to support that programming;
- Creating at least 80 new jobs in categories including news anchors, journalists, writers, producers, production staff, engineers, broadcast sales, marketing, graphic design, virtual reality production, and others;
- Creating at least 40 internship and mentorship programs related to news and media;
- Providing hands-on training for investigative reporting and local, community reporting;
- Including two minutes per hour of promotional air time dedicated to the promotion of HBCUs and National Association of Black Journalists training services, activities, and events; and
- Building out an HBCU media training center on the campus of FAMU.

The Commission has the legal authority to waive its rules, and there is abundant good cause to do so. The ban on advertising is not statutory; instead, it reflects the Commission's own gloss on the statute, and the Commission may waive or modify its prior interpretations. This relief will help correct the shameful level of minority media ownership that exists today and further the diversity and competition goals of the Communications Act as well as other public interest goals.

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Attachment: Declaration of J.C. Watts

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**BLACK TELEVISION NEWS CHANNEL  
REQUEST FOR LIMITED, TEMPORARY WAIVER**

Pursuant to Section 1.3 of the rules of the Federal Communications Commission, Black Television News Channel (“BTNC”) hereby requests a limited, temporary three-year waiver of the Commission’s ruling banning advertising on the channels set aside for noncommercial educational programmers on Direct Broadcast Satellite (“DBS”) systems. There is abundant good cause to grant this waiver. The waiver will enable BTNC to launch the nation’s first news and educational channel serving the informational needs of the underserved and underrepresented African-American community. In exchange, and as part of this waiver request, BTNC is willing to enter into enforceable conditions requiring that, for the duration of the waiver, BTNC will concretely and meaningfully address the Commission-recognized lack of diverse sources of news, informational, and educational programming in a manner that will be sustainable for generations to come – well beyond the period of the waiver.

## I. INTRODUCTION AND SUMMARY

BTNC was formed in 2004 to fulfill a critical mission: “To produce intelligent programming that is informative, educational, inspiring, and empowering for distribution to the network’s African American audience.” Although African Americans are one of the country’s largest minority groups – and the largest viewers of subscription television by a wide margin – there is not a single news channel dedicated to this community. This is not due to a lack of consumer interest for such a channel – to the contrary, African Americans widely prefer programming that is targeted to their community. Rather, as BTNC’s own experience over the past decade demonstrates, it is practically impossible for a minority-focused educational news channel such as BTNC to acquire funding and win one of the limited slots for carriage over channels with a broader and more commercial focus.

***BTNC Will Further Congressional Goals:*** Recognizing precisely this dilemma, Congress has taken various steps to promote carriage of the type of public interest programming that BTNC seeks to provide. With respect to DBS providers, Congress created “set-aside” provisions that require such providers to devote a certain percentage of their channel capacity “exclusively for noncommercial programming of an educational or informational nature.”<sup>1</sup> In addition, Congress instructed the Commission to take steps “to promote the policies and purposes of this [Act] favoring diversity of media voices.”<sup>2</sup> Thus, Congress recognized that certain types of programming – noncommercial educational and informational programming directed at minority voices – should be singled out to ensure that it is available to the public.

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<sup>1</sup> 47 U.S.C. § 335 (b)(1).

<sup>2</sup> *Id.* § 257(b).

*The Commission May Waive or Modify the Advertising Ban:* Congress did not define the term “noncommercial programming of an educational or informational nature” in section 335. In Section 397, of the Act, however, Congress defined “noncommercial educational broadcast station” and “noncommercial telecommunications entity.”<sup>3</sup> In both cases, Congress indicated that the touchstone of whether an entity is “noncommercial” is whether it is “nonprofit,” which the statute further defines as an entity for which “no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.”<sup>4</sup> When the Commission implemented section 335 of the Act in 1998, it likewise held that a “noncommercial” programmer must operate on a non-profit basis. But the Commission also went on to state that noncommercial programming “cannot include advertisements,”<sup>5</sup> though no explanation was given for this holding. This advertising ban is therefore not statutory, but instead is a Commission interpretation that may be waived or modified in the Commission’s discretion, subject to Administrative Procedure Act (“APA”) requirements.

*BTNC Requires a Waiver of the Advertising Ban:* BTNC seeks to show limited advertising on its channel, restricted to half the amount of daytime advertising as a typical commercial programmer, together with long-form advertising in the overnight time slot when BTNC will be off-air. In order to do this, BTNC requires a temporary waiver of the Commission’s interpretive rule banning advertising. Without a sustainable and significant source of revenue, no entity can produce original news, informational, and

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<sup>3</sup> 47 U.S.C. § 397(6)-(7).

<sup>4</sup> *Id.* § 397(8).

<sup>5</sup> Report and Order, *Implementation of Section 25 of the Cable Television and Consumer Protection Act of 1992, Direct Broadcast Satellite Public Interest Obligations*, 13 FCC Rcd 23254, ¶ 95 (1998) (“*DBS PI Order*”).

educational programming on a daily basis. The funding challenge is even greater for entities that seek to serve underrepresented and diverse viewpoints. BTNC is no exception – without the ability to show a limited amount of advertising, BTNC has no viable way to generate the revenues necessary to sustain its operations and produce 14 hours every day of original news, informational, and educational public interest programming. Advertising is necessary to support this ambitious and resource-intensive operation.

*There Is Abundant Good Cause To Support the Requested Waiver:* The

Commission has recognized that a confluence of factors has led to a decline in diverse media voices and a decline in local news and investigative reporting – “with potentially serious consequences for communities.”<sup>6</sup> The Commission’s advertising ban is therefore unintentionally subverting the very goals that Congress in enacting section 335 sought to promote: encouraging the inclusion of diverse voices in the media that would serve the informational needs of diverse and underrepresented audiences. Granting BTNC the requested waiver will help correct this state of affairs, which is harming both the African-American community and the public at large.

BTNC meets all of the other requirements of a noncommercial educational programmer and is in fact precisely the type of programming that Congress has sought to promote, both in letter and in spirit. BTNC’s mission has been educational from the outset, and this focus has recently been enhanced through a major partnership with FAMU, one of the nation’s premier journalism schools and an elite HBCU. Among other

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<sup>6</sup> Steven Waldman & Working Group on Information Needs of Communities, FCC, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, at 10 (July 2011) (“*FCC 2011 Information Needs Report*”), [http://transition.fcc.gov/osp/inc-report/The\\_Information\\_Needs\\_of\\_Communities.pdf](http://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf).

things, this partnership will enable BTNC to house its network operations center on the campus of FAMU's journalism school and draw on a diverse and rich pool of HBCU faculty, alumni, and students to serve as on-air contributing analysts. Aspiring African-American journalists will benefit from a new state-of-the-art media training center, internships, mentoring programs, scholarships, and job-placement services. Students will receive hands-on training in a fully automated, active newsroom and HDTV television production environment. FAMU will benefit through significant capital improvements to its existing broadcast training facility, the creation of numerous jobs, and an enhanced curriculum that will allow for intensive training in in-depth and investigative reporting, as well as training in the coverage of local community issues, and a steady outlet for news serving an underserved audience, among other important curriculum enhancements.

In addition, BTNC has structured its operations to ensure that it will operate as a non-profit for the duration of the waiver. BTNC will make an enforceable commitment that, for the duration of the waiver, any revenues will be used to cover only expenses and to further invest in the development of educational programming and the infrastructure to support that programming. All revenues that exceed expenses will be plowed back into BTNC – no profit will be distributed to any of BTNC's investors.

***BTNC Will Make Binding Commitments That Further Congress's and the***

***Commission's Goals of Expanding Media Diversity:*** BTNC is willing to enter into additional enforceable commitments that will bind BTNC to concrete and measurable outputs – each of which serves the public interest. BTNC will also submit whatever reporting and documentation related to these conditions the Commission feels is appropriate. As explained below, these enforceable conditions include:

- showing 14 hours of daily news, informational, and educational programming from Gam-midnight (minus limited commercial advertising consistent with the waiver grant);
  - operating as a non-profit during the period of the waiver, with no revenue going to shareholders, and all monies going directly back into supporting the development of news, informational, and educational programming, and the infrastructure to support that programming;
  - contributing financially to the FAMU School of Journalism & Graphic Communication, to support courses and programs for the training of journalists;
  - contributing much needed capital improvements to the FAMU broadcast training facility for HBCU students and National Association of Black Journalists trainees;
  - creating at least 80 new jobs in categories including news anchors, journalists, writers, producers, production staff, engineers, broadcast sales people, marketing executives, graphic designers, virtual reality production specialists, and others;
  - creating at least 40 internship and mentorship programs related to news and media;
  - providing hands-on training for in-depth investigative reporting, hands-on training for local, community reporting, and hands-on training in a newsroom including both broadcast journalism and television production; and
  - including two minutes per hour of promotional air time dedicated to the promotion of HBCUs and National Association of Black Journalists training services, activities, and events.
- \* \* \*
- For all the foregoing reasons, the Commission should promptly grant BTNC a limited, temporary waiver of its advertising ban on noncommercial educational programming to allow an underserved audience access to a diverse and significant source of news, informational, and educational programming; to provide HBCUs with access to training, development, and employment opportunities; and to give the public at large a source of additional debate and discourse.

## II. BACKGROUND

### A. BTNC's Mission and Organization

BTNC was formed in 2004 with the goal of becoming the first-ever news channel dedicated to serving the informational needs of the underserved and underrepresented African-American community. BTNC's founding mission, which continues to guide it today, is "[t]o produce intelligent programming that is informative, educational, inspiring, and empowering for distribution to the network's African American audience." BTNC's founders recognized that creating a channel dedicated to such programming would accomplish numerous critical social objectives, including:

- Giving voice to an underserved minority;
- Facilitating a national conversation about the many challenges facing urban communities;
- Engaging Black viewers in the nation's social, economic, and political debates;
- Reporting on issues and events important to the African-American community but perhaps not a focus of mainstream or other news outlets;
- Creating a platform for Black newsmakers to reach their constituents;
- Showcasing African-American achievers creating positive role models for Black youth.

The Commission has recognized the important role of universities and journalism schools in advancing public interest objectives, particularly with respect to providing news and information.<sup>7</sup> The Commission has also recognized that "[m]inority journalists have lost ground in terms of employment in recent years, and industry experts doubt that the trend will reverse any time soon."<sup>8</sup>

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<sup>7</sup> See *FCC 2011 Information Needs Report* at 150.

<sup>8</sup> *Id.* at 253.

Granting the BTNC waiver request can address this decline and can do so in a novel way that leverages the partnership with FAMU's School of Journalism & Graphic Communication. BTNC's central news operation will be located at the university, which will receive much-needed upgrades to its facilities and equipment. These upgrades will include the installation and integration of a state-of-the-art digital production facility, featuring HDTV broadcast equipment; a fully automated newsroom; virtual reality graphic design and production studios; and advanced Sony ENG newsgathering infrastructure. BTNC will be able to draw on the university's vast academic resources – and the resources of other HBCUs – to develop programming. BTNC will make an enforceable commitment to provide minimum numbers of mentorship programs and employment opportunities to university students, which will help train the next generation of African-American journalists. FAMU's journalism school even plans to restructure its curriculum around BTNC and will emphasize both long-form in-depth investigative reporting and coverage of a broad range of local community issues.

**B. The Launch of BTNC Will Address the Recognized Need for Diverse Sources of News, Educational, and Informational Programming**

The Commission has long recognized that a diversity of viewpoints, and, particularly, diverse sources of independent news, informational, and educational programming, is critical to a robust democracy. The availability of diverse informational and educational programming that meets the needs of underserved segments of society is directly tied to diversity in media ownership. Tragically, however, there is a shameful and declining amount of African-American-owned broadcast media in the United States today. And despite the significant African-American population and its disproportionately

heavy reliance on subscription television for information, there is not a single news or educational channel focused on the informational needs of this community.

There is no question that minority audiences, and specifically the African-American community, are woefully underrepresented in today's television media.<sup>9</sup> This is occurring despite the strong demand among African Americans for Black-owned-and-operated programming. Marketplace factors have failed to deliver programming, and particularly news and informational programming, to satisfy this demand because of various factors: fierce competition for the limited number of channel slots on Multi-Channel Video Programming Distribution ("MVPD") systems, which favors programming with the greatest widespread commercial appeal; the risk associated with launching any new channel; the high costs associated with producing news programming; and the challenges associated with raising funding for minority enterprises. Yet having a national news channel dedicated to the African-American viewpoint will have obvious and large benefits for this community, which will redound to the nation as a whole.

A 2013 Nielsen Report on African-American consumers found that no group watches more television than African Americans, who lean heavily toward programming that includes diverse characters and casts.<sup>10</sup> In 2013, African Americans watched 37

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<sup>9</sup> See, e.g., Report and Order and Third Further Notice of Proposed Rulemaking, *Promoting Diversification of Ownership in the Broadcasting Services*, 23 FCC Rcd 5922, ¶ 1 (2008) ("*Diversity Order*") (noting that "minority- and women-owned businesses" historically have not been "well-represented in the broadcasting industry"); Notice of Proposed Rule Making, *Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, 10 FCC Rcd 2788, ¶ 5 (1995) ("[D]espite the Commission's efforts to increase minority ownership of broadcast and cable facilities, minorities today remain significantly underrepresented among mass media owners.").

<sup>10</sup> See Nielsen, *Resilient, Receptive and Relevant: The African-American Consumer, 2013 Report* (2013), <http://nmpa.org/wp-content/uploads/2013/06/African-American-Consumer-Report-2013.pdf>.

percent more TV than any other segment of the U.S. population.<sup>11</sup> Nielsen also found that the vast majority of television programs and other media that African Americans favor include African-American cast members and viewpoints.<sup>12</sup>

African Americans – more than any other segment – also depend on subscription television to stay informed and prefer when such programming is focused on their community. A 2012 Nielsen study found that 91 percent of African Americans “believe that Black media is more relevant to them”; that 77 percent “believe that Black media has a better understanding of the needs and issues that affect them”; and that 73 percent “believe that Black media keeps them in touch with their heritage.”<sup>13</sup>

Despite these figures, Black-oriented news programs are rare. And despite being subscription television’s most loyal customers, African Americans are currently vastly underserved and underrepresented by today’s MVPD programming (and television programming generally). There are only two widespread cable networks with an African-American focus – Black Entertainment Television (owned by Viacom) and TVOne (partially owned by Comcast). Both focus overwhelmingly on entertainment programming. BET originally had some regular news programming, but that has

<sup>11</sup> *See id.* at 15 (“Blacks are voracious media users and leaders when it comes to setting pop culture trends. Nowhere is this more prevalent than in Blacks’ television viewing habits where Blacks watch 37% more television than any other group, spending seven hours and 17 minutes per day viewing TV, compared to five hours and 18 minutes of total viewing for Total Market.”).

<sup>12</sup> *See id.* at 16 (“Previous *State of the African-American Consumer Reports* noted that Black viewers tend to mostly watch programs that provide diversity in casts or characters who are reflective of the Black lifestyle and culture . . . . So it should not come as a surprise that eight of the top 10 television shows delivering Black viewers ages 18-49 originated on cable where diversity tends to be more consistently prevalent.”).

<sup>13</sup> Nielsen, *African-American Consumers: Still Vital, Still Growing, 2012 Report*, at 12 (2012),

<http://www.nielsen.com/content/dam/corporate/us/en/microsites/publicaffairs/StateOfTheAfricanAmericanConsumer2012.pdf>.

disappeared from its schedule in recent years, which now contains no regular news or other educational or informational programming.<sup>14</sup> African Americans have also been losing their voice in the broadcast space. As Free Press reported in December 2013: “We just experienced a shameful milestone in the history of the U.S. media – and barely anyone noticed. There are now *zero* Black-owned and operated full-power TV stations in our country,” the first time this has occurred since the nation’s civil rights movement.<sup>15</sup>

### C. **BTNC’s Struggle To Obtain Commercial Carriage**

BTNC has struggled for years to obtain standard commercial carriage from MVPDs. Given the relatively limited number of available channels on MVPD systems, it is extremely difficult for an unlaunched channel with a minority focus to win carriage over channels with broader majority commercial appeal. That is even more the case with respect to news and educational programming, which generally commands much fewer slots than entertainment, sports, and other types of programming.

BTNC’s target audience is African-American homes. Yet market entry to cable TV households in each of the top 10, 19 of the top 20, and 43 of the top 50 African-American markets is controlled by Comcast and Time Warner Cable, which are now seeking to merge.<sup>16</sup> As a practical matter, therefore, unless BTNC can obtain a carriage

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<sup>14</sup> See Black Entertainment Television, BET Original Shows, <http://www.bet.com/shows.html>; Black Entertainment Television, Schedule, <http://www.bet.com/schedule.show2014-05-04.html>.

<sup>15</sup> Joseph Torres & S. Derek Turner, Free Press, *A Sorry Moment in the History of American Media* (Dec. 20, 2013) (noting that the number of Black-owned-and-operated TV stations has shrunk from 18 in 2006 (representing 1.3 percent of all such stations) to 5 in 2012, and to zero in 2013 as a result of the deal by Roberts Broadcasting to sell its three remaining full-power TV stations to ION Media Networks), <http://www.freepress.net/blog/2013/12/20/sorry-moment-history-american-media>.

<sup>16</sup> See Comcast Inc., *Comcast and Time Warner Cable Merger Presentation*, at 6 (Feb. 13, 2014),

commitment from Comcast, it cannot reach its target audience through cable, the dominant source of subscription television.

BTNC finds itself in a Catch-22: it cannot receive funding until it has a carriage commitment from Comcast or one of the two satellite distributors; Comcast will not commit to carriage today; and, absent a Commission waiver, BTNC cannot launch on DBS as there is little commercial justification for a DBS provider to carry an unlaunched African-American news channel on a commercial slot.

Even though Dish and DirecTV have national footprints, they serve only a small percentage of African-American homes.<sup>17</sup> This is likely due at least in part to the fact that the African-American community is more urban than the population as a whole, and DBS is not as widely available to urban residents due to difficulties of placing receivers and obtaining a clean line of sight in such environments.<sup>18</sup> Also, urban consumers are often denied access to satellite service due to multi-dwelling-unit deed restrictions and bulk service agreements with incumbent cable operators. As a consequence, it is difficult for a DBS provider to justify allocating one of its limited carriage slots for commercial channels to an unlaunched minority network like BTNC. Nonetheless, both DBS

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<http://files.shareholder.com/downloads/CMCSA/3139213871x0x725713/781d73e7-0635-47b4-b25e-34e5c7ea4ft9/Comcast%20Investor%20Presentation.pdf>; Nielsen, *Local Television Market Universe Estimates: Black or African American TV Homes*, at 1-2 (Sept. 28, 2013), [http://www.tvb.org/media/file/TVB\\_Market\\_Profiles\\_Nielsen\\_AA\\_DMA\\_Ranks\\_2013-2014.pdf](http://www.tvb.org/media/file/TVB_Market_Profiles_Nielsen_AA_DMA_Ranks_2013-2014.pdf).

<sup>17</sup> See Nielsen, *An Era of Growth: The Cross-Platform Report*, at 17, 19 (Mar. 2014) (24 percent of African-American households subscribe to satellite television), <http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2014%20Reports/nielsen-cross-platform-report-march-2014.pdf>.

<sup>18</sup> See U.S. Government Accountability Office, *Direct Broadcast Satellite Subscriberhip Has Grown Rapidly, but Varies across Different Types of Markets*, Rep. No. GAO-05-257 (Apr. 2005), <http://www.gao.gov/assets/250/245959.pdf>.

providers have supported the carriage of BTNC on the public interest channels they are required to set aside for noncommercial educational programmers pursuant to Section 335. In fact, DISH Network has already provided BTNC a three-year Public Interest Carriage Agreement should the Commission grant BTNC's waiver request.

BTNC has also faced the struggles that many independent programmers must endure in terms of raising funds. BTNC's founders have been working on this project for 10 years and have already spent more than \$4 million to poll audience demand, conduct 18 months of on-air program trials, build valuable content partnerships, test new technologies, and develop operational models. BTNC has recently assembled new financing and investors that are committed to help BTNC accomplish its mission. This has not been an easy task, given the inherently expensive nature of producing original news and educational programming, and the risk associated with launching any channel, much less a minority news channel. Under the terms of this current financing arrangement, BTNC will obtain the capital it needs to launch and operate as soon as BTNC has a carriage agreement with either Comcast or one of the two DBS providers. Thus, if the Commission grants BTNC the requested waiver, it will be able to launch, which BTNC expects to do within approximately 14 months from the time it receives such waiver. But BTNC needs this waiver promptly: unless BTNC can secure carriage with Comcast or a DBS provider by this summer, its current sources of funding will no longer be available.

### III. LEGAL ARGUMENT

The Commission's rules "may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter."<sup>19</sup> The Commission may waive its rules "on its own motion or on petition if good cause therefor is shown."<sup>20</sup> As the D.C. Circuit has held, a waiver is permissible "where particular facts would make strict compliance inconsistent with the public interest."<sup>21</sup> The Commission must also "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."<sup>22</sup> As set forth below, the conditions for granting a waiver are met here.

#### A. **The Commission Has the Authority To Waive the Advertising Ban on Noncommercial Educational Broadcasters**

As an initial matter, the Commission has the legal authority to waive the advertising ban on noncommercial educational programming suppliers. This ban is not a statutory requirement. Neither section 335 nor any other section of the Communications Act defines "noncommercial programming," much less specifies that such programming cannot include advertisements.<sup>23</sup> Rather, the ban reflects the Commission's interpretation

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<sup>19</sup> 47 C.F.R. § 1.3.

<sup>20</sup> *Id.*

<sup>21</sup> *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *see AT&T Corp. v. FCC*, 448 F.3d 426, 433 (D.C. Cir. 2006).

<sup>22</sup> *Northeast Cellular*, 897 F.2d at 1166.

<sup>23</sup> *See* Notice of Proposed Rule Making, *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 1589, ¶ 44 (1993) (acknowledging that section 335 does not define "noncommercial" programming).

of the statute, and it is well settled that the Commission may waive or modify its own statutory interpretations.<sup>24</sup>

Four years ago – and on a different set of facts – the Media Bureau concluded that the advertising ban was “statutory,” describing it as “an integral component of the noncommercial designation mandated by Congress.”<sup>25</sup> For the reasons set forth in detail in this waiver petition, BTNC respectfully believes that the Media Bureau erred in reaching the conclusion that the advertising ban is statutory.

When the Commission adopted the advertising ban for DBS public interest channels, it “relied on Section 399B of the Act, which pertains to advertisements on public television stations.”<sup>26</sup> At that time, while the Commission cited section 399 in adopting the ban, it did so only for the limited purpose of noting the statutory definition of “advertisement.” The Commission did not offer any further explanation for the ban, including the justifications for it or why it was permissible or appropriate to take an advertising ban that Congress established for *public* broadcasters and impose that ban on *private* noncommercial educational programmers that do not have the same access to public spectrum or the same ability to tap into government sources of funding.

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<sup>24</sup> 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 that there are good reasons for the new policy” and “that the new policy is permissible under the statute”).

<sup>25</sup> Order and Declaratory Ruling, *BTNC, Inc. Request for Temporary Waiver*, 25 FCC Rcd 3565, ¶ 5 (2010).

<sup>26</sup> *Id.* ¶ 6 (citing Report and Order, *Implementation of Section 25 of the Cable Television and Consumer Protection Act of 1992, Direct Broadcast Satellite Public Interest Obligations*, 13 FCC Rcd 23254, 23294 (1998) (“*DBS PI Order*”).

The Commission adopted the advertising ban in a 1998 order implementing section 335 for the first time. The Commission held that the term “national educational programming supplier” in section 335(b)(5)(B) includes only noncommercial entities with an educational mission and that “[t]he term should not be interpreted as including ‘commercial’ entities organized for profit-making purposes.”<sup>27</sup> The Commission stated that “[w]e believe that Congress intended to reserve channels for noncommercial programmers to ensure that DBS capacity would be available to programmers that are not driven by commercial incentives.”<sup>28</sup> In concluding that “only noncommercial entities with an educational mission will qualify to use the reserved channels,” the Commission further held that “the tax code definition of non-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.”<sup>29</sup>

In addressing the question of what type of programming might qualify as noncommercial educational programming, the Commission concluded that the statute failed to provide a definition and that it would not adopt any rigid eligibility criteria.<sup>30</sup> The Commission then stated, without any explanation, that, “in order to qualify as noncommercial programming, the programmer cannot include advertisements.”<sup>31</sup> The Commission cited section 399b for the definition of “advertisement,” but did not offer

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<sup>27</sup> *DBS PI Order* ¶ 86.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* ¶ 87.

<sup>30</sup> *Id.* ¶¶ 90, 94.

<sup>31</sup> *Id.* ¶ 95.

any analysis for the basis of this restriction as either a legal or a policy matter.<sup>32</sup> The order does not even cite to a single commenter who raised or discussed this issue.

The advertising ban is not a statutory requirement, but instead reflects the Commission’s own determination of what restrictions a noncommercial programmer should face. Congress nowhere indicated that “noncommercial programming” must exclude advertising. Nor does the term “noncommercial” necessarily suggest or imply such a restriction. To the contrary, as the Commission’s order implementing section 335 recognizes, the touchstone of whether an entity is “noncommercial” is whether it operates in a non-profit manner. Thus, the Commission can waive the advertising ban for BTNC, without running afoul of the statute, by clarifying that this ban is not a statutory requirement, but instead reflects a Commission interpretation that can be waived for good cause shown. The Commission could further conclude that BTNC otherwise meets the statutory definition of noncommercial, so long as BTNC operates in a non-profit manner.

Other sections of the Communications Act – which the Media Bureau’s decision on BTNC’s prior waiver never confronted – confirm that Congress intended to equate “noncommercial” with “nonprofit” and that any requirement beyond that is purely the Commission’s own gloss. Section 397 of the Act defines the terms “noncommercial educational broadcast station” and “noncommercial telecommunications entity.”<sup>33</sup> In

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<sup>32</sup> *Id.* ¶ 95 & n.206.

<sup>33</sup> *See* 47 U.S.C. § 397(6)-(7).

Section 397(6) defines “noncommercial educational broadcast station” and “public broadcast station” as “a television or radio broadcast station which—(A) under the rules and regulations of the Commission in effect on November 2, 1978, is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or (B) is owned and operated by a municipality and which transmits only noncommercial programs for education purposes.”

both cases, the touchstone of whether an entity is “noncommercial” is whether it is “*nonprofit*,” which the statute further defines as an entity for which “no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.”<sup>34</sup> Congress did not in either case restrict the manner in which these noncommercial entities may earn revenues; it instead required only that such revenues not produce earnings that are distributed to private shareholders or investors. There is no mention of advertising in either definition.

Section 335 also recognizes that noncommercial educational programmers may earn revenues, without placing any restrictions on how such revenues may be generated. Section 335(b)(3) authorizes DBS providers to charge “reasonable prices” to national educational programming suppliers,<sup>35</sup> thereby acknowledging that such programmers will need to have *some* source of revenues. The statute also authorizes the Commission to ensure that such prices are reasonable, and in doing so instructs the Commission to “take into account the nonprofit character of the programming provider and any Federal funds used to support such programming.”<sup>36</sup> Thus, this section of the Act likewise permits noncommercial educational programmers to raise revenues (and indeed anticipates they must do so); makes no attempt to restrict the way in which the revenues may be earned;

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Section 397(7) defines “noncommercial telecommunications entity” as “any enterprise which—(A) is owned and operated by a State, a political or special purpose subdivision of a State, a public agency, or a nonprofit private foundation, corporation, or association; and (B) has been organized primarily for the purpose of disseminating audio or video noncommercial educational and cultural programs to the public by means other than a primary television or radio broadcast station, including, but not limited to, coaxial cable, optical fiber, broadcast translators, cassettes, discs, microwave, or laser transmission through the atmosphere.”

<sup>34</sup> *Id.* § 397(8).

<sup>35</sup> *Id.* § 335(b)(3).

<sup>36</sup> *Id.* § 335(b)(4)(A).

and expressly instructs the Commission to consider the “nonprofit” character of the programming supplier, thereby again analogizing this term to “noncommercial.”

Section 399b – the only statutory provision that the Media Bureau cited in adopting the advertising ban in 1998 – also does not provide a statutory or other basis for the ban. That section specifically, and only, bans “public broadcast station[s]” from showing advertisements.<sup>37</sup> But the steps that Congress took to address concerns with respect to the commercialization of public broadcasting stations<sup>38</sup> do not and should not automatically apply to 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. 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, which may then require payment for carriage. Thus, non-broadcast educational programmers potentially need greater revenues to provide even the same level of programming that a broadcaster may provide. There is accordingly a sound basis to treat noncommercial educational programmers that operate pursuant to section 335 differently from public television stations that operate pursuant to section 399b.

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<sup>37</sup> *Id.* § 399b(b)(2).

<sup>38</sup> See *Minority Television Project, Inc. v. FCC*, 736 F.3d 1192, 1194 (9th Cir. 2013) (en banc) (“The hallmark of public broadcasting has been a longstanding restriction on paid advertising to minimize commercialization. In a classic case of ‘follow the money,’ Congress recognized that advertising would change the character of public broadcast programming and undermine the intended distinction between commercial and noncommercial broadcasting.”), *petition for cert. pending*, No. 13-1124 (U.S. filed Mar. 17, 2014).

Finally, because the advertising ban is non-statutory, the Commission may waive it without notice and comment rulemaking under the APA.<sup>39</sup> As the Commission has recognized, where it makes “revisions” that are “interpretive in nature,” they can “be adopted without notice and comment pursuant to the ‘interpretive rule’ exception to the APA.”<sup>40</sup>

**B. There Is Abundant Good Cause To Grant BTNC the Requested Waiver**

The Commission may waive its rules on a showing of good cause.<sup>41</sup> The D.C. Circuit has held that granting a waiver is appropriate where the particular facts make strict compliance inconsistent with the public interest.<sup>42</sup> In determining whether a waiver is in the public interest, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>43</sup> Applying these standards, there is abundant good cause for the Commission to grant BTNC the requested waiver.

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<sup>39</sup> See 5 U.S.C. § 553(b)(3)(A).

<sup>40</sup> Report and Order, *Comprehensive Review of Licensing and Operating Rules for Satellite Services*, 28 FCC Rcd 12403, ¶ 15 n.30 (2013); see Notice of Inquiry, *Framework for Broadband Internet Service*, 25 FCC Rcd 7866, ¶ 29 (2010) (holding that, where classification of service “involve[s] an interpretation of the Communications Act, the notice and comment procedures we follow here are not required under the Administrative Procedure Act”) (citing *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (change in interpretation of statute does not require notice and comment procedures)).

<sup>41</sup> See 47 C.F.R. 1.3.

<sup>42</sup> See *Northeast Cellular*, 897 F.2d at 1166; see also *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir. 2008) (waiver of FCC rules is appropriate if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest).

<sup>43</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

### ***1. BTNC's Waiver Strongly Furthers the Public Interest***

The Commission, the courts, and Congress have all long recognized that promoting programming that focuses on minorities and that is owned and/or operated by minorities are all important public interest goals. Granting a waiver of the advertising ban that enables BTNC to launch the nation's first African-American news, informational, and educational channel will simultaneously fulfill all of these objectives and is therefore strongly in the public interest.

First, Congress, in enacting section 257(b) as part of the Telecommunications Act of 1996, made it a national policy for the Commission to take steps "to promote the policies and purposes of this [Act] favoring diversity of media voices."<sup>44</sup> The Commission has "long recognized" the continuing difficulties that minorities face in obtaining a voice in media, and has repeatedly affirmed the ongoing importance of remedying this situation.<sup>45</sup> Further, as the Commission has noted, "it is well established under *NAACP v. FPC, Metro Broadcasting* and Supreme Court decisions that preceded them, that fostering diversity of viewpoints is a goal encompassed by the Commission's public interest mandate."<sup>46</sup> As the Supreme Court has stated, "it has long

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<sup>44</sup> 47 U.S.C. § 257(b).

<sup>45</sup> See, e.g., Further Notice of Proposed Rulemaking and Report and Order, *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket Nos. 14-50 et al., FCC 14-28, 2014 WL 1466887, ¶ 13 (rel. Apr. 15, 2014); *Diversity Order* ¶ 1 (noting that "minority- and women-owned businesses" historically have not been "well-represented in the broadcasting industry").

<sup>46</sup> Report and Order, *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, 15 FCC Rcd 2329, ¶ 53 (2000) ("*EEO Streamlining Order*"), vacated on other grounds, *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13 (D.C. Cir. 2001); see *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 795-800 (1978); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969). See also *Community Television of Southern*

been a basic tenet of national communications policy” that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”<sup>47</sup> The Court has further noted that “[t]he benefits of . . . diversity are not limited to” minorities but, rather, “redound to all members of the viewing and listening audience.”<sup>48</sup>

Second, there is widespread recognition that it is important to promote media and programming that is owned and/or operated by minorities. As the Commission has noted, the Supreme Court has affirmed the Commission’s “judgment that there is a nexus between rules fostering minority ownership of broadcast stations and the statutory goal of fostering diversity of viewpoints.”<sup>49</sup> Congress has recognized this nexus as well. For example, the legislative history of the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”) indicates that Congress believed “now, as it

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*California v. Gottfried*, 459 U.S. 498, 508 (1983) (acknowledging that the Commission’s public interest mandate permits and perhaps requires it to determine whether its licensees are providing diverse programming to all sectors of its community).

<sup>47</sup> *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 192 (1997) (internal quotation marks omitted).

<sup>48</sup> *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 568 (1990), *overruled on other grounds by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). *See id.* at 567 (“Safeguarding the public’s right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC’s mission. We have observed that ‘the “public interest” standard necessarily invites reference to First Amendment principles.’”) (quoting *National Citizens Comm.*, 436 U.S. at 795, and *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 122 (1973)).

<sup>49</sup> *EEO Streamlining Order* ¶ 54 (citing *Metro Broad.*, 497 U.S. at 578-79; and noting that *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978), recognized “the Commission’s authority to enforce both employment ‘affirmative action’ and anti-discrimination rules in the license renewal context to advance its public interest mandate to foster diverse programming”). *See also National Citizens Comm.*, 436 U.S. at 793-802 (recognizing nexus between diversity of ownership generally and diversity of viewpoints and upholding FCC’s broad authority to foster diversity of ownership).

did in 1984, that increased equal employment opportunities (EEO) for women and minorities, particularly in decision-making and managerial positions, ‘ . . . is a crucial means of assuring that program service will be responsive to a public consisting of a diverse array of population groups.’”<sup>50</sup> The House Report for the 1992 Act further states that “[t]he Courts and the Commission have consistently recognized the increasing amount of programming designed to address the needs and interests of minorities and women is fundamentally related to the number of minority and women employees in the upper level positions within media companies.”<sup>51</sup> Moreover, the Commission has stated that it believes that

program content is not determined solely by the individuals at the station with authority to select programming, but may also be influenced by interaction between these individuals and other station employees, which exposes the former to views and perspectives of the latter. We also noted that low-level positions provide a way for individuals with little or no communications experience, including minorities and women, to enter the broadcast and cable industries. This, in turn, could lead to higher-level positions of greater responsibility that could affect programming and/or provide the experience desired by financial institutions to finance ownership in the broadcast and cable industries.<sup>52</sup>

If the Commission were to grant BTNC a temporary waiver of the advertising ban and thereby enable BTNC to launch the nation’s first African-American news channel, it would unquestionably fulfill these benefits that the Commission, the courts, and Congress have all identified as strongly in the public interest. BTNC will produce 14 hours of original programming per day that focuses on the African-American community and viewpoint. Its principal shareholders include prominent African Americans, including former U.S. Congressman J.C. Watts. BTNC will partner with FAMU, one of the

<sup>50</sup> H.R. Rep. No. 102-628, at 111 (1992) (quoting H.R. Rep. No. 98-934, at 85 (1984)) (alteration in original).

<sup>51</sup> *Id.* at 114.

<sup>52</sup> *EEO Streamlining Order* ¶ 55.

nation’s preeminent historical Black colleges, to produce programming, utilizing the staff, students, and other resources of that university. BTNC will create numerous employment opportunities for African Americans and will foster the next generation of Black journalists.

**2. BTNC’s Proposed Enforceable Conditions Will Help Guarantee That These Public Interest Benefits Are Realized**

On prior occasions when the Commission has sought to ensure the delivery of benefits to the public in exchange for some form of regulatory relief, it has entered into a “Social Contract” with the affected entities.<sup>53</sup> In adopting these contracts, the Commission relied on its authority under Sections 4(i) and (j) of the Communications Act, which authorize the Commission to “perform any and all acts . . . not inconsistent with this [Act], as may be necessary in the execution of its functions,” and to “conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”<sup>54</sup>

Under the circumstances here, BTNC hereby proposes entering into enforceable conditions akin to the Commission’s previous social contracts. The enforceable conditions will guarantee that the grant of the requested waiver will deliver the public interest benefits outlined above. First, BTNC will be bound to concrete and measurable outputs that will each serve the public interest, and related reporting requirements,

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<sup>53</sup> See Order, *Social Contract for Comcast Cable Communications, Inc.*, 13 FCC Rcd 3612, 3646-47 (1997); Order, *Continental Cablevision, Inc., Amended Social Contract*, 11 FCC Rcd 11118, 11156-57 (1996); Memorandum Opinion and Order, *Social Contract for Time Warner*, 11 FCC Rcd 2788, 2862-63 (1995), *appeal dismissed per stipulation*, *Intercommunity Cable Regulatory Comm’n v. FCC*, No. 96-1027 (D.C. Cir. Mar. 25, 1999); Memorandum Opinion and Order, *Social Contract for Continental Cablevision*, 11 FCC Rcd 299, 361-62 (1995).

<sup>54</sup> 47 U.S.C. § 154(i), (j).

thereby ensuring that the public will receive the benefits set forth above. These

conditions – which if not met could result in BTNC losing its waiver authority – include:

- showing 14 hours of daily news and informational programming from 6am-midnight (minus limited commercial advertising consistent with the waiver grant) “culturally specific” for its African-American audience;
- operating as a non-profit during the period of the waiver;
- contributing 2.5 percent of company-wide EBITDA, up to \$500,000 each year in capital improvements to the FAMU broadcast training facility for HBCU students and National Association of Black Journalists trainees;
- creating at least 80 new jobs in categories including news anchors, journalists, writers, producers, production staff, engineers, broadcast sales people, marketing executives, graphic designers, virtual reality production specialists, and others;
- creating at least 40 internship and mentorship programs related to news and media;
- hands-on training for investigative reporting and local, community reporting; and
- including two minutes per hour of promotional air time dedicated to the promotion of HBCUs and National Association of Black Journalists training services, activities, and events.

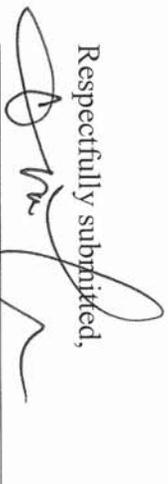
Second, these conditions – together with the unique nature of BTNC’s mission

and programming – help ensure that granting the requested waiver will not have far-reaching consequences that could otherwise dilute the quality of noncommercial programming on the airwaves or MVPD systems. Thus, if the Commission were to find that granting BTNC’s waiver was in the public interest in light of BTNC’s unique mission and the proposed enforceable conditions, the Commission would ensure that any subsequent waiver applicants similarly have to ensure that the public will be served and that the goals of the Commission and Congress would be furthered not impeded.

#### IV. CONCLUSION

For all the foregoing reasons, the Commission should promptly grant BTNC a temporary (three-year) waiver of its advertising ban on noncommercial educational programming to allow an underserved audience access to important news and educational programming; HBCUs access to media training, development, and employment opportunities; and the public at large to benefit from additional debate and discourse.

Respectfully submitted,



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May 6, 2014

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

In the Matter of

Black Television News Channel

Request for Limited, Temporary Waiver of  
the Commission's Advertising Ban on  
Noncommercial National Educational  
Programming Suppliers

To: The Commission

**DECLARATION OF J.C. WATTS**

1. My name is J.C. Watts. I am one of the founders and President of the Black Television News Channel. By virtue of my position, I am familiar with the facts set forth in the foregoing Request for Limited, Temporary Waiver ("Request").
2. I have read the foregoing Request and I am familiar with the contents thereof.
3. I declare under penalty of perjury that the facts contained herein and within the foregoing Request are true and correct.



J.C. Watts  
President  
Black Television News Channel