

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

In the matter of )  
 )  
BTNC, INC. )  
 ) MB Docket No. 07-213  
Request for Temporary Waiver )  
 )

ORDER AND DECLARATORY RULING

Adopted: April 6, 2010

Released: April 6, 2010

By the Chief, Media Bureau:

I. INTRODUCTION

1. Black Television News Channel, Inc. (“BTNC”) requests a temporary waiver of the requirement that programming carried on the direct broadcast satellite (“DBS”) noncommercial reserved channels contain no commercials.<sup>1</sup> In this Order, we deny BTNC’s request.

II. BACKGROUND

2. The requirements at issue here were adopted pursuant to the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”),<sup>2</sup> which directed the Commission to impose certain public interest obligations on DBS providers, including a requirement to reserve a percentage of channel capacity for noncommercial educational or informational programming.<sup>3</sup> A provider can meet this requirement by making the capacity available to “national educational programming suppliers” at reduced rates.<sup>4</sup> The statute defines national educational programming suppliers as including “any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions.”<sup>5</sup>

3. In implementing Section 335, the Commission adopted a four percent reservation requirement and elaborated on the definition of entities qualified to be carried on the reserved channels.<sup>6</sup>

<sup>1</sup> Request for Temporary Waiver of Black Television News Channel (“BTNC”), Inc., filed Mar. 16, 2007. See 47 C.F.R. § 25.701.

<sup>2</sup> See Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”), Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 335).

<sup>3</sup> See 47 U.S.C. § 335(b)(1).

<sup>4</sup> 47 U.S.C. § 335(b)(3).

<sup>5</sup> 47 U.S.C. § 335(b)(5)(B).

<sup>6</sup> See 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 23,254, 23,286-92 (1998) (“DBS PI Order”). See also 47 C.F.R. § 25.701(f)(2)(v).

It concluded that in order to qualify for carriage, entities must be “noncommercial entities with an educational mission.”<sup>7</sup> The Commission also determined that to qualify for the set-aside, the programming cannot contain advertisements.<sup>8</sup>

4. BTNC filed a Request for Temporary Waiver asking for a three-year waiver of the requirement that programming carried on the DBS set-aside channels be advertisement-free.<sup>9</sup> LeSEA Broadcasting Corporation (“LeSEA”), Free Press, and Association of Public Television Stations (“APTS”) filed Comments.<sup>10</sup> BTNC argues that the funding limitations imposed upon it by the Commission’s ban on commercial advertisements render it unable to finance news programming oriented to African Americans.<sup>11</sup> APTS opposes a waiver because it asserts that absence of commercial advertisements is an “essential quality” of noncommercial educational programming.<sup>12</sup> Free Press opposes a waiver because it would undermine the intended purpose of the rule and because BTNC’s case does not warrant a waiver.<sup>13</sup> LeSEA proposes that the Commission issue a general waiver for *de minimus* advertising.

### III. DISCUSSION

5. We find that because Section 335 of the Communications Act<sup>14</sup> requires that the DBS set-aside capacity be used for noncommercial educational or informational programming, the Commission cannot waive the requirement that such programming be commercial free. We disagree with BTNC that the ban on advertising is merely a “non-statutory condition added by the Commission.”<sup>15</sup> Rather, the ban is an integral component of the noncommercial designation mandated by Congress. Section 335 requires both that (1) the set-aside capacity be used “exclusively for noncommercial programming of an educational or information nature,” and (2) that it be made available to “national educational programming suppliers” for that purpose.<sup>16</sup> In interpreting the statutory requirement, the Commission specifically concluded that “in order to qualify as noncommercial programming, the programmer cannot include advertisements.”<sup>17</sup> Since the requirement that the programming be “noncommercial” is statutory,

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<sup>7</sup> *Id.* at 23,290, ¶ 86.

<sup>8</sup> *Id.* at 23294, ¶ 95 (citing 47 U.S.C. § 339(B) which pertains to advertisements on public broadcast stations).

<sup>9</sup> See Request for Temporary Waiver of Black Television News Channel (“BTNC”), Inc., filed Mar. 16, 2007. See also *Ex Parte* Comments of BTNC (filed Feb. 7, 2008).

<sup>10</sup> See Comments of the Association of Public Television Stations, filed Oct. 26, 2007, Free Press, filed Oct. 26, 2007, and LeSEA, filed Oct. 26, 2007. BTNC and Free Press filed Reply Comments on Nov. 13, 2007. The Reply Comments of Free Press argue that a waiver would undermine the purpose of the rule. Free Press argues that if the Commission grants BTNC’s request, it would be hard pressed to delineate a standard specific enough to deter similar waiver requests in the future. Free Press Reply Comments at 1-2. On February 7, 2008, BTNC filed an *ex parte* letter rebutting Free Press’s allegation that it sought carriage on DBS systems under false pretenses and stating that its revenues are below the revenue thresholds for cable and other satellite subscription services to qualify as a small business. *Ex Parte* Letter of BTNC (filed Feb. 7, 2008).

<sup>11</sup> See Request for Temporary Waiver of BTNC at 5.

<sup>12</sup> APTS Comments at 2.

<sup>13</sup> See Free Press Comments at 1 and 6.

<sup>14</sup> 47 U.S.C. §335.

<sup>15</sup> Request for Temporary Waiver of BTNC at 3.

<sup>16</sup> See 47 U.S.C. §335.

<sup>17</sup> 13 FCC Rcd at 23294.

the Commission does not have authority to waive the ban on advertisements.<sup>18</sup>

6. In addition, we note that in upholding the Section 335 set-aside in the face of a First Amendment challenge, the D.C. Circuit Court of Appeals stated that the statutory provision “represents nothing more than a new application of a well-settled government policy of ensuring public access to noncommercial programming.”<sup>19</sup> It is well established law that advertisements are not permitted on “noncommercial” programming.<sup>20</sup> In adopting an advertising ban for DBS public interest channels, the Commission relied on Section 399B of the Act, which pertains to advertisements on public television stations.<sup>21</sup> This statute defines advertisement as “any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended to promote any service, facility, or product for for-profit entities...”<sup>22</sup> The Commission has interpreted the statute to mean that educational broadcasting stations may acknowledge supporters only for identification purposes; such stations may not broadcast information which promotes, compares, qualitatively describes, gives pricing information about, or calls individuals to act, buy, sell, rent or lease.<sup>23</sup> This prohibition applies to programming utilizing the DBS set aside capacity by virtue of the fact that it must be noncommercial.

#### IV. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED that the request by Black Television News Channel IS DENIED.

8. This action is taken by the Chief, Media Bureau, pursuant to authority delegated by Section 0.283, 47 C.F.R. §0.283, of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake  
Chief, Media Bureau

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<sup>18</sup> See *Federal-State Joint Board on Universal Service*, 15 FCC Rcd 7170, 7178 (1999).

<sup>19</sup> *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 976 (D.C. Cir. 1996).

<sup>20</sup> See 47 U.S.C. § 399B.

<sup>21</sup> 13 FCC Rcd at 23294.

<sup>22</sup> 47 U.S.C. § 399B.

<sup>23</sup> See *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, Public Notice (1986), republished, 7 FCC Rcd 827 (1992).