

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

In the Matter of:)
)
Broadcast Applications Seeking Share Time) DA 08-2612
Licenses Authorizing Urban Television LLC)
to Broadcast on Channels Licensed to)
Subsidiaries of ION Media Networks, Inc.)

COMMENTS OF CIVIL RIGHTS ORGANIZATIONS

Eleven of the nation’s foremost civil rights and minority entrepreneurship organizations (the “Civil Rights Organizations”), listed in the Annex, respectfully support the applications of Urban Television, LLC (“Urban”) to broadcast on channels currently licensed to subsidiaries of ION Media Networks, Inc. (“ION”) pursuant to Section 73.1715 of the Commission’s rules.¹ Urban is a new entrant controlled by African American cable pioneer Robert L. Johnson through his firm, the RLJ Companies (“RLJ”). Urban plans to offer a “creative content mall” through which independent producers and others – particularly but not exclusively African Americans - would place and own their programming.² Urban also “proposes to broadcast no less than seven hours per week of national or local public affairs programming directed at the communities” its stations will serve.³

¹ See Public Notice, TV Broadcast Applications Seeking Share Time Licenses Authorizing Urban Television LLC to Broadcast on Channels Licensed to Subsidiaries of ION Media Networks, Inc., DA 08-2621 (released November 26, 2008). These Comments reflect the institutional views of each of the Civil Rights Organizations as *amici curiae* and are not intended to reflect the individual views of each of their respective officers or directors.

² See n. 22 *infra*.

³ Urban Television Applications, Exhibit 4, Amendment (filed December 22, 2008) at 2.

We support the applications with the greatest enthusiasm. By granting them, the Commission will dramatically increase diversity in “the marketplace of ideas that is essential to our democracy,”⁴ “facilitate ownership diversity and new entry in the broadcasting industry”⁵ and solve the problem of public access to the nation’s airwaves by enabling citizens to “talk back to their television sets.”⁶

I. Approval Of The Urban Applications Will Be The Most Historic Moment For African Americans In Broadcast Television

Urban plans to offer “entertainment, informational and issue-oriented programming directed at and responsive to the needs, interests and concerns of the African American community and other historically underserved viewers.”⁷ When was the last time a television application arrived at the FCC promising anything remotely like this? Or proposing to triple the number of African American owned local television stations, all at once? And on top of that, to create the first African American over the air national network?

Never did we dream that in our lifetimes we might have an opportunity to witness this, the birth of the nation’s first over-the-air African American television network. But this year, so many things once thought impossible are taking place.

Consider the history leading up to this moment. The Federal Communications Commission was barely one year old when, seventy-three years ago, it awarded the first local television station license. Then, owing in great measure to segregation and discrimination in

⁴ See Promoting Diversification of Ownership in the Broadcasting Services, Second Report and Order and Third Further Notice of Proposed Rulemaking (“Broadcast Diversity Second Report and Third FNPRM”), 23 FCC Rcd 5922, 5924 ¶2 (2008) (discussing the desirability of “expanding opportunities for new entrants and small businesses, including minority- and women-owned businesses, to own broadcasting outlets.”)

⁵ Id. at 5925 ¶5.

⁶ After Nicholas Johnson, How to Talk Back to Your Television Set (1967).

⁷ Urban Television Applications, Exhibit 4, Amendment (filed December 22, 2008) at 2.

American society,⁸ thirty-eight more years elapsed until the Commission delivered a television license to African Americans.⁹ Over the next two decades, African American full power commercial television ownership grew slowly, peaking at 28 stations in 1999. That year, the bottom began to fall out. For the last ten years, consolidation and the repeal of the tax certificate policy have taken their toll.¹⁰ Today, only eight African American stations remain among the nation's over 1,700 full power commercial television stations.¹¹

⁸ The history of segregation and discrimination in broadcast licensing is well documented. See, e.g., Southland Television Co., 10 RR 699, recon. denied, 20 FCC 159 (1955) (holding that the owner of segregated movie theaters had the character necessary to be issued a television construction permit because state segregation laws were not inconsistent with the Communications Act); The Columbus Broadcasting Company, Inc., 40 FCC 641 (1965) (issuing only an admonishment in response to the FBI's well-documented allegation that a radio licensee helped incite the 1962 riot in which Whites tried to prevent James Meredith from integrating the University of Mississippi (two people were killed)); Lamar Life Broadcasting Co., 38 FCC 1143 (1965), reversed and remanded, Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) ("UCC I"), accepting remand, 3 FCC2d 784 (1966); renewing license again, 14 FCC2d 495 (ALJ 1967); aff'd, 14 FCC2d 431 (1968); reversed and vacated sub nom. Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) ("UCC II") (in which the Commission ultimately had to be instructed by the D.C. Circuit to deny the license renewal application of a notorious discriminator). The Commission also routinely approved the licensing applications of segregated state universities, deeply hindering the development of young African American broadcasting talent. The FCC didn't care that state laws and customs barred minorities from attending universities operating the only FCC-licensed educational stations. Rubber stamp licenses were yielded up to the University of North Carolina's WUNC-FM in 1952, to Arkansas State University's KASU-FM in 1957, to the University of Texas' KUT-FM in 1958, and to a host of other segregated schools. The average sign-on year for stations owned by the 28 state-operated Historically Black Colleges and Universities ("HBCUs") was 1980, while the average sign-on year for stations licensed to the 29 predominantly White state colleges in the same states was 1970. See documentation of this ten year head start in the Comments of the Civil Rights Organizations in MM Docket No. 99-25 (Low Power FM Radio), filed August 2, 1999, at 34-63, and legal analysis of the FCC's segregation-appeasing licensing scheme in Antoinette Cook Bush and Marc Martin, "The FCC's Minority Ownership Policies from Broadcasting to PCS," 48 Fed. Comm. Law J. 423, 424 (1996).

⁹ See WGPR, Inc., Detroit, Michigan, 42 FCC2d 836 (1973).

¹⁰ The Tax Certificate Policy permitted those selling broadcast stations or cable systems to minorities to defer capital gains taxes on the sale upon reinvestment in comparable property. The Policy was adopted in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979, 983 (1978) and repealed in Deduction for Health Insurance Costs of Self-

With Urban's applications, there's hope that change will come, and that one day the nation's African American citizens will celebrate a Communications Policy and Civil Rights Holiday. The calendar will mark the Holiday as the day the Commission grants these applications.

Urban certainly has proven the Commission correct when the agency observed that "the most potent sources of innovation often arise not from incumbents but from new entrants."¹² Consider not only the innovativeness, but the elegance and uniqueness of what Urban is proposing. Urban will use the multiplex capabilities available through DTV technology – the very attribute the Commission always hoped would justify its decision to give incumbents DTV spectrum – to create the 42 television stations that will form the backbone of Urban's new network.

By granting these applications, the Commission would deliver five immediate and much-needed benefits not only to African Americans but to the entire American television industry:¹³

- First, the Commission would promote ownership diversity by making it possible for new entrants, particularly minorities and women, to create new stations under a model regarded by financial institutions as ownership rather than leasing.¹⁴

Employment Individuals, Pub. L. No. 104-78, §2, 109 Stat. 93, 93-94 (1995). During its 17 years of operation, the Policy brought about a five-fold increase in the number of minority owned broadcast stations -- from 60 to over 300.

¹¹ See Free Press, "Out of the Picture: Minority and Female TV Station Ownership in the United States (October 2007), p. 2. Similarly, a generation ago there were about 20 African American owned cable systems. Now, again thanks to unbridled consolidation, only one SMATV system remains.

¹² Broadcast Diversity Second Report and Third FNPRM, 23 FCC Rcd at 5925 ¶5 (citing 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, 13632 ¶40 (2003) (fn. and subsequent history omitted)).

¹³ We recognize that it may prove necessary to establish ground rules for subsequently filed applications.

- Second, the Commission would afford DTV broadcasters an additional and entirely voluntary option to put digital spectrum to efficient use.¹⁵
- Third, the Commission would stabilize asset values and enhance competition by drawing new audiences and advertisers to broadcast television.¹⁶
- Fourth, the Commission would resolve the present crisis in African American television created by the near-abandonment of African American-targeted programming by the six largest English language television networks.¹⁷

¹⁴ The Civil Rights Organizations are not opposed to the leasing of DTV sub-channels. However, in today's marketplace, lenders will finance owners, not tenants. In a 2007 MMTC survey of thirteen firms in the business of providing broadcast financing, not one firm would consider financing a DTV subchannel lease. See Supplemental Ex Parte Comments of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking, MB Docket No. 06-121 (filed November 20, 2007), p. 28.

¹⁵ See FCC Advisory Committee on Diversity for Communications in the Digital Age, Recommendation on Leasing or Ownership of FM or DTV Subchannels Under the Share-Time Rule (September 27, 2007), p. 1 (unanimously approving a proposal to partition television licenses in the manner now proposed by Urban and ION, and observing that "since share-times would serve as an additional voluntary option available to the DTV or FM station licensee choosing to monetize its spectrum, the proposal would benefit broadcasters and the public by facilitating the growth of DTV and HD service.")

¹⁶ Urban Television Applications, Exhibit 4, Amendment at 2.

¹⁷ As the NAACP concluded just two weeks ago, "African-Americans and other races are underrepresented in almost every aspect of the television and film industry and have, for the most part, been denied access to any real positions of power in Hollywood." NAACP, "Out of Focus – Out of Sync, Take 4: A Report on the Television Industry" (December 2008), p. 38, available at http://www.naacp.org/news/press/2008-12-18/NAACP_OFOS_Take4.pdf (last visited December 24, 2008). The NAACP pointed out that "it is hard to draw any positive conclusions when, as stated in the June 20, 2008 issue of *Entertainment Weekly*, the only minority "lead" in a new show on a major network for the 2008-09 TV season is *Cleveland Brown*, an African-American animated character voiced by a White person. This is an insult not only to the African-American community but to the actors and actresses who have spent years developing their craft and building a fan base. It is hard to draw positive conclusions when such shows as *The Hills* and *Gossip Girls* are targeted towards the youth market, and continually lack diversity among their lead characters." Id. at 37. Finding that the number of minority actors and writers on primetime shows have dropped in recent years, the NAACP concluded that this diminishing talent base inhibits minority advancement into decision making positions as producers and owners of content and distribution platforms. Numerous award-winning artists had their careers launched on broadcast television because minorities in decision-making positions provided opportunities to write, direct, and perform. One need look no further than the 1990's variety show "In Living Color," produced by two African-Americans, Keenan Ivory Wayans and his brother Damon Wayans, that launched the careers of award-winning artists of a variety of ethnic backgrounds, including Jamie Foxx (Academy Award-winning actor and Golden Globe Recipient), Jim Carey (Golden Globe Recipient), Jennifer Lopez (Golden Globe Nominee and ALMA Award recipient), and Carrie Ann Inaba (Primetime Emmy Nominee). See

- And fifth – as discussed below – Urban’s unique programming plan will solve the three generations-old dilemma of how the public can participate in television broadcasting as producers rather than only as consumers.

II. The Urban/ION Sharing Agreement Marks An Historic Moment For Diversity of Voices

Apart from desegregation, the greatest dilemma in broadcast regulation has been how to give television viewers a genuine opportunity to be heard on the public airwaves.

The Commission’s inability thus far to harmonize broadcast regulation with the Associated Press¹⁸ principle is the Fermat’s Last Theorem of Communications Policy. Two unsuccessful proofs have been attempted. The former Fairness Doctrine, which was seldom enforced, was the first failure, and it isn’t coming back. And UCC I’s standing movement has been an “incomplete success,”¹⁹ having thus far failed to produce more than a handful of citizen-produced programming initiatives.

One theoretical paradigm has been offered to solve the problem of public access: the concept of a programming regulation exemption for stations that would voluntarily set aside public access time on a near-common-carrier model.²⁰ This “Access is Fairness” idea, propounded by Aspen Institute’s Charles Firestone, was ahead of its time, but now its time has come, for it is embedded in Urban CEO Robert L. Johnson’s concept of a “creative content mall”

In Living Color, Full Cast and Crew, Internet Movie Database, available at <http://www.imdb.com/title/tt0098830/fullcredits#cast> (last visited December 29, 2008) and follow links of the named artists.

¹⁸ Associated Press v. U.S., 326 U.S. 1, 20 (1945).

¹⁹ After Jimmy Carter (referring in 1980 to the unsuccessful raid to free hostages in Iran).

²⁰ See Charles Firestone, “Access is Fairness” (1976).

through which independent producers and others would place and own their programming.²¹

Built into the content mall would be “no less than seven hours per week of national or local public affairs programming directed at the communities the share-time stations will serve.”²²

Unlike Access is Fairness, Urban isn’t seeking a regulatory exemption, although should one be necessary Urban deserves one.

Johnson’s “content mall” idea is a true breakthrough. Instead of just railing about what they don’t want on television, citizens will be able to produce, broadcast, and own programs they do want, including an unprecedented amount of local and national public affairs programming.

Urban’s success with this pro-social business plan would be a First Amendment gift of major magnitude to the nation. Agree or disagree with Red Lion’s scarcity principle,²³ we can all agree that the replacement of top-down regulation with a free marketplace containing a commercially successful content mall channel is long overdue. The public access safety valve

²¹ See “The RLJ Companies Founder Robert L. Johnson Outlines Preliminary Business and Programming Model for Urban Television Venture with ION Media Networks” (PRNewswire, December 8, 2008):

Johnson’s plan is to develop a new and innovative broadcast model rather than provide programming under traditional broadcast models where programming, content, and advertising are solely controlled by the broadcast owner. His vision is to create a “content mall” where programming ideas would be solicited from the creative/talent community, as well as major advertisers. This model also includes an opportunity to align the broadcast programming content with an interactive Internet site which would provide for interactive programming, e-commerce, and more robust programming opportunity.

Mr. Johnson explained, “Think of this model as a creative television content mall where you find broad, mass-appeal content that serves as the anchor and niche programming that fills out the channel. Using this concept, our 24-hour continuous programming will be designed to attract creative entrepreneurs and to meet the interests and lifestyle of a variety of urban viewers.”

²² Urban Television Applications, Exhibit 4, Amendment at 2.

²³ After Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

proposed by Urban might substitute for many of the command-and-control regulations by which the Commission attempts to ensure that each individual broadcaster behaves like a public trustee.

Conclusion

What is the cause of death of really good ideas at the FCC? Old Age. How many groundbreaking ideas have sat, and sat, and sat on the 8th floor waiting for a vote?

Please, not this time. After the record closes, the Commission should schedule a vote immediately, address any fair questions raised in other comments, and grant the applications for assignment of license from ION to Urban.

Respectfully submitted,

David Honig

David Honig
Executive Director
Joycelyn James
John W. Jones Fellow
Joseph Miller
Earle K. Moore Fellow
Minority Media and Telecommunications Council
3636 16th Street N.W.
Suite B-366
Washington, D.C. 20010
(202) 332-7005
dhonig@crosslink.net

Counsel for the Civil Rights Organizations

Of Counsel:

Joycelyn Tate
Associate Media Broker
Minority Media and Telecommunications Council

December 29, 2008

ANNEX

Civil Rights Organizations

Black Entertainment and Sports Lawyers Association
International Black Broadcasters Association
Lawyers Committee for Civil Rights Under Law
Minority Media and Telecommunications Council
National Association for the Advancement of Colored People
National Association of Black Journalists
National Association of Black Owned Broadcasters
National Bar Association
National Urban League
Rainbow PUSH Coalition
Video Access Alliance