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Joint Comments of Howard University, the National Association of Black-Owned Broadcasters, the National Bar Association and the National Conference of Black Lawyers Communications Task Force

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

In the Matter of

Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems	))))	MM Docket No. 85-349

114

JOINT COMMENTS
OF
HOWARD UNIVERSITY, THE NATIONAL
ASSOCIATION OF BLACK-OWNED BROADCASTERS,
THE NATIONAL BAR ASSOCIATION AND THE NATIONAL
CONFERENCE OF BLACK LAWYERS COMMUNICATIONS TASK FORCE

Howard University ("Howard"), which was created by an Act of Congress in 1867, is a Federal Communications Commission ("FCC" or "Commission") licensee of Station WHMM-TV. WHMM-TV is a noncommercial educational station broadcasting on UHF Channel 32 in Washington, D.C. As the nation's only television station licensed to a predominantly Black university, WHMM-TV provides a substantial amount of programming geared to the special needs and interests of minority audiences. The station presents a unique set of viewpoints to its multi-ethnic and diverse audience -- viewpoints that otherwise may be given little exposure by broadcasters or programmers generally. See Payton, WHMM-TV celebrates 5th anniversary, The Washington Afro-American, December 28, 1985, at 6, col. 1.

The National Association of Black-Owned Broadcasters (NABOB) is a trade association which was formed in 1976 to represent the interest and concerns of Black broadcasters throughout the United States. It represents the interests of the licensees of more

than 150 radio and television facilities across the country. Its membership is extremely diverse with respect to the size of the markets represented and the number of companies and individuals involved in media related activities, such as station brokerage, equipment sales, program and management consulting, and advertising.

The purposes of the Association include fostering the development of broadcast ownership by Black entrepreneurs, promoting practices which will strengthen and maintain the operation of the broadcast facilities by Blacks, serving as a resource for the dissemination of information about electronic media matters, participating before the FCC and other regulatory bodies on issues of concern to Black broadcasters, and promoting the regulation and operation of broadcast stations in the public interest.

The National Bar Association (NBA), founded in 1925, is a group of predominantly Black lawyers with 18,000 members. Since the early days of radio NBA has been concerned about the regulatory impact of governmental decisions on the public at large, on questions of programming, and in recent years, the impact of regulatory decisions on minority ownership.

The National Conference of Black Lawyers Communications Task Force (NCBL) was founded in 1974. Its purpose includes the study of the effects of government policy and marketplace decisions on minority ownership, programming, and equal employment opportunity. In addition, it sponsors legal education programs to expose minority lawyers to communications law.

I.

Must-Carry Rules of Some Sort Are Critical Stones for the Pioneer Minority Owned Television Broadcaster

On November 18, 1985 the Federal Communications Commission issued a Notice of Inquiry and Notice of Proposed Rulemaking seeking comments on various cable television rule proposals in light of Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985). As the Notice points out, on July 19, 1985, the United States Court of Appeals for the District of Columbia questioned the Commission's cable television rules requiring that cable systems carry certain local television broadcast signals. The rules, often referred to as must-carry rules, were said to violate cable operators' rights under the First Amendment to the United States Constitution. The Quincy decision was decided on July 19, 1985.

Thereafter, the Association of Independent Television Stations, Inc. (INTV) filed a request for rulemaking with the Commission apparently influenced by the Court's indirect suggestion that "the Commission ... recraft the rules in a manner more sensitive to the First Amendment concerns." Quincy v. FCC, supra, at 1463.

In its request for rulemaking INTV proposes the adoption of a recrafted must-carry rule based on Section 111 of the Copyright Act, as follows:

> Cable television carriage of television broadcast signals is permissable, for purposes of Section 111(c) of Title 17 of the United States Code, if the cable system carries, as part of the basic tier of cable

> service regularly provided to all subscribers at the minimum charge, the entire signals of all local television broadcast stations without discrimination or charge. (emphasis added). A television broadcast station is "local" as to a cable system if the cable system lies within the "local service area" of the television station, as defined in 17 USC §111(f).

The purpose of this comment is to raise some special and unique concerns with the Commission in the hope that whatever rule is ultimately adopted will take into account the effect that the elimination of the must-carry rule will have on minority owned broadcasters and/or broadcasters with minority-oriented formats, a matter which has received little or no attention by the Commission and the Courts.

When the Commission first became concerned about the effects that community antenna television would have on broadcasting, there were no Black-owned television stations in the nation. Hence, the deliberative processes of the Commission has never taken into account the effect of the must-carry rules to enhance the pioneer Black-owned broadcaster.

The assumption upon which the existing cable broadcast rules are based -- that cable television if left unregulated would have a deleterious effect on the broadcast industry -- is assuredly well founded and is factually relevant to pioneer minority-owned television stations. Unless the Commission gives special consideration to the must-carry rules as they relate to minority owned television stations, there may be a displacement of these

stations which would undermine the FCC's mandate to allocate the broadcast spectrum in a "fair, efficient and equitable" manner. 47 U.S.C. § 307(b)(1982).

Because minority-owned television is new to America, and particularly Black-owned television, the FCC has little experience with marketplace influences on the racial integration of the spectrum. As a matter of fact, "ethnic TV is a completely unknown quantity." T.C. Grame, Ethnic Broadcasting In the United States; at i (January, 1977). However, the picture cannot be painted rosy for the Black-owned commercial television station based on an assumption that profitability from advertising revenues is an automatic phenomenon of spectrum use.

The Black-owned broadcaster is new to regulatory and judicial concerns because they are new to the marketplace for the dissemination of our ideas, utilization by advertisers and face-to-face competition. Their viability to the community and to their service area may depend on judgments which may be influenced by the past effects of social, political and economic exclusion from the mainstream of usual marketplace forces. The elimination of the must-carry rules, and the economic consequence which will surely follow could "discourage [minorities] from seeking a broadcast license and, in the [not so] extreme case, might even result in financial failure of some existing stations." Quincy v. FCC, supra, at 1441. It is submitted that unless the must-carry rules are maintained or some equivalent, the risk of audience fragmentation and the concomitant threat to free, local television will not be forestalled. Hence, we

continue to view "the must-carry rules as critical stones in the regulatory bulwark erected to guard against destruction of free, community-oriented television." Ibid.

II.

Minority Broadcast Stability Is Not A Fair Assumption For Eliminating The Must-Carry Rules Given Historical Race Factors In the Marketplace

The Commission's general objective in promulgating the must-carry rules was to assure that the advent of cable technology did not undermine the financial viability of free, community-oriented television. Quincy, at 1440. At the time of the establishment of the must-carry rules, the Commission acknowledged that it had insufficient data to predict with exactitude the extent of the risk posed by cable. Id., at 1440. However, the Commission appropriately concluded that it would be inconsistent with its responsibilities to withhold action until indisputable proof of irreparable damage to the public interest in television broadcasting has been complied with, i.e., by waiting until the bodies piled up. Id. at 1442.1/

1/ That bodies might pile up was not a conclusion devoid of fact. We remind the Commission (a point overlooked by the Quincy court) that when the First Report and Order, 38 FCC 683 (1965) (Docket Nos. 14895, 15233) was adopted, it was supported by the Fisher Report, which is relevant to issues concerning minority ownership today. Id. at 691. The Fisher Report has been described: "In an effort to demonstrate the economic adverse impact on local stations the broadcasters submitted a report by Dr. Franklin M. Fisher, Associate Professor of Economics at M.I.T. The Fisher Report concluded that there was a direct correlation to size in audience and station revenues; that small stations were less profitable then large stations. Using his study and a variety of measures, Dr. Fisher concluded that if his

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However, saying as the Quincy court seems to imply that the assumptions relied upon by the Commission may have been speculative and since proved nonexistent with regard to broadcasters in general does not end the inquiry. The economic assumptions and factual predicate the Commission relied upon in fashioning its must-carry rules are still evident when examining minority-owned broadcasting stations or those stations with minority-oriented formats. The circumstances surrounding the following two stations are reflective of the type of injury and gravity of the injury that the abolishment of the must-carry rules work on minority broadcasters.

Case 1. WHMM-TV. There is not a single cable TV system currently carrying WHMM-TV (Channel 32) which was not required to do so under the must-carry rules. See Brief of Howard University As Amicus Curiae In Support of Joint Petition For Writ of Certiorari (Quincy, No. 85-502), at 4 (Brief). Moreover, a good number of these systems commenced carriage only after WHMM-TV had specifically invoked its must-carry rights. Ibid. The impact that the rules have on minority broadcasters stems in part from the fact that most minority broadcast stations are broadcasting on the UHF band. For instance, WHMM-TV in most cases is satisfactorily available over-the-air only to households which have installed an outdoor UHF antenna aimed at the direction of

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audience through additional program choices upon the profits of a large number of stations could be serious--and in the case of stations already marginal, disastrous." J.C. Smith, Primer on the Regulatory Development of CATV (1950-72), 18 Howard L.J. 729, 737 (1975).

WHMM-TV's transmitter. Moreover, cable subscribers are most unlikely to incur the additional expense of installing and maintaining a UHF antenna simply to receive WHMM-TV.

Case 2. Another case in point is WHCT-TV (Channel 18), Hartford, Connecticut. WHCT was acquired on January 23, 1985 by Astroline Communications Company ("Astroline") pursuant to the Commission's distress sale policy. This policy was designed specifically to assist minorities in gaining a foothold in broadcast station ownership. Nearly fifty percent (50%) of the Hartford/New Haven market subscribes to cable. In May 1985, Astroline had commitments for cable carriage in more than 600,000 homes in the Hartford market. By September 30, 1985, a little over a month after the Quincy case was decided, Astroline had been able to retain less than half of this cable carriage in its home market. This has resulted in an immediate loss of potential viewers and, thus, an immediate loss of advertising revenues. Astroline estimates that it will lose over $2 million in advertising revenues in 1986 if WHCT is not carried on all local cable systems. See Hart, note 7, infra.

Another factor to consider is that minority-oriented programming is not always the most profitable because of market influences that shun broadcasts that factor minority issues in its news, public affairs and general format. As such, abandonment of any and all type of must-carry requirements will result in cable subscribers being exposed to only non-minority, or non-minority oriented programming, an absolute restriction of

speech of the minority-owned broadcaster and broadcasters who provide minority-oriented formats. Such conduct is hardly consistent with the First Amendment.

Another corollary effect of the elimination of must-carry is that the minority station will not be able to increase its audience while other local stations carried on cable would. Such a consequence both discourages minority broadcasters from seeking a broadcast license, and might even result in financial failure of some existing minority stations.

Moreover, the type of alternative video services that the Quincy Court said the Commission now recognizes implicitly is illustrated by stations like those owned by minorities or with minority oriented formats. For example, WHMM-TV provides a substantial amount of programming geared to the special needs and interests of minority audiences. Brief at 2. The station presents a unique set of viewpoints to its multi-ethnic and diverse audience; viewpoints that otherwise may be given little exposure by broadcasters or programmers generally, Id. at 3.

As Quincy states, it is true that "the Commission has repeatedly repromulgated and fine-tuned the must-carry rules." Id. at 1442. However, it is not true that the Commission's consideration of the must-carry rule as related to minority broadcasters is based on speculative premises. It is for this reason that we urge the Commission to consider perhaps for the first time since the First Report and Order was adopted in 1965, the minority ownership factor in connection with the resolution of the instant proceeding.

III.

The Must-Carry Rule Is But An Incidental Burden of Speech And Furthers A Substantial And Declared Governmental Interest In Furtherance Of The Established Minority Ownership Policy

The must-carry rules impose a mere incidental burden and evinces a substantial governmental interest in furtherance of minority ownership. Stated differently, as related to minority ownership, and the diversity of views sought to be achieved under such a policy, must-carry regulations can be viewed as enhancing as opposed to any curtailment of expression.

In Qunicy v. FCC, supra , the court determined that the existing must-carry rules did not satisfy the First Amendment requirements announced in United States v. O'Brien, 391 U.S. 367, 377 (1968) because the regulation could not "fairly be understood as a merely incidental restriction on expression..." or in furtherance of "a governmental interest unrelated to the suppression ... [of] speech ..." Quincy at 1450-1451 (quoting O'Brien and Home Box Office, Inc. v. FCC, 567 F.2d 9, 47-48 (D.C. Cir.), (per curiam), cert. denied, 434 U.S. 829 (1977)).

However, the court held that if a regulation can be shown to be merely an incidental burden of speech, "it will be sustained 'if it furthers an important or substantial governmental interest ... and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest'." Id. at 1451.

In determining whether the proposed rules by INTV and others favoring minority broadcasters comport with the First Amendment, the proper test is that set out in United States v. O'Brien, 391 U.S. 367, 377 (1968). Analysis of the stated reasons for proposing the said version of must-carry indicates that the rules are intended to [1] remove a conflict between those with and those without access to cable television and [2] to integrate the spectrum by allowing the public interest mandate of integrating the spectrum to include the diversity of viewpoint exemplified by the minority broadcasters. This purpose is unrelated to the suppression of free expression under O'Brien. It is also within the Commission's authority to promulgate rules to regulate cable television in furtherance of the Communications Act of 1934, 47 U.S.C. § 151 et seq. See also, Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359, cert. den., 375 U.S. 951 (1963); Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220 (1967). This view has been adopted by several Courts of Appeals, see, e.g., American Civil Liberties Union v. FCC, 523 F.2d. 1344, 1351, (9th Cir. 1975), and confirmed by the Supreme Court in United States v. Midwest Video Corp. and Southwestern Cable Co., 392 U.S. 157 (1968), where the court held that the Commission may exercise authority over cable television to the extent "reasonably ancillary" to the Commission's jurisdiction over broadcast television. United States v. Southwestern Cable Co., supra, 392 U.S. at 178; United States v. Midwest Video Corp., 406 U.S. 649, 670, 667-668 (1972).

The integration of the spectrum through promoting the role of minorities in broadcasting is indisputable. That there is a dearth of minority ownership is not arguable. See W. E. Kennard, "Minorities In Broadcast Ownership: Status Report 1984," Before the FCC and National Telecommunications and Information Administration, June 28, 1984. This position has recently been restated by Edward Hayes, Jr., and Keith Townsend in a paper entitled, "The State of Minority Ownership of Telecommunications Facilities," presented during a symposium in financing for the minority entrepreneur, sponsored by the FCC, on October 7-8, 1985. The following paragraphs from the paper state the case that there is a substantial government interest in furtherance of minority ownership through rules such as the must-carry:

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> Minority ownership of telecommunications property as a national concern has a brief history spanning less than two decades. A starting point for an analysis of the significance of media ownership in American Society and of the lack of minority ownership therein is the Report of the National Advisory Committee on Civil Disorders, also known as the Kerner Commission Report, released in 1968. [See also, Role of the Mass Media In the Racial Crisis (Industrial Relations Center, Iowa State University, 1969) (Edited by L.M. Thompson, Jr.)] The Kerner Commission Report stated that a contributing factor to racial unrest in American cities in the mid-sixties was the feeling of minorities that they were excluded from quality broadcast service, particularly with regard to news coverage, and that the electronic media was an extension of the power structure that responded only to non-minority interests. Further, the Report stated that mass media had the power to shape both what individuals think of themselves and others, and that it was a social mistake for minority views to be absent from this process.
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> As an initial response to the Kerner Report, the Commission in Nondiscrimination in Employment Practices of

Broadcast Licensees, 13 F.C.C.2d 240 (1969), forbade employment discrimination by broadcast licensees on the basis of race, color, religion, or national origin.[2/] In addition, it affirmatively required broadcast licensees to offer all qualified persons equal opportunity in employment.

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While the Commission was examining methods to increase minority involvement in the broadcast media, the courts were also making pronouncements in this area. The United States Court of Appeals for the District of Columbia observed in Citizens Communications Center v. F.C.C., 447 F.2d 1201 (D.C. Cir. 1971):

> "Since one very significant aspect of the 'public interest, convenience and necessity' is the need for diverse and antagonistic sources of information, the Commission simply cannot make a valid public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it.
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> * * * * *
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> ". . .As new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in the chance to broadcast on our garbled radio and television frequencies."
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> 447 F.2d at 1213 n. 36.

The court again treated the issue of minority ownership in TV 9, Inc. v. F.C.C., 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 418 U.S. 986 (1974).[3/] In reversing a decision wherein the Commission had refused to award merit to an applicant in a comparative proceeding based upon minority ownership and participation, the court emphasized:

> "It is consistent with the primary object of maximum diversification of ownership of mass communication media for the Commission in a comparative license proceeding to afford favorable consideration to an

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2/ In 1970, "sex" was added as an impermissible basis for discrimination. Nondiscrimination Employment Practices of Broadcast Licensees, 23, F.C.C.2d (1970).

3/ See also West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (1984), cert. denied, 105 S. Ct. 1392 (1985).

> applicant who, not as a mere token but in good faith, as broadening community representation, gives a local minority group media enterpreneurship . . .
>
> "We hold only that where minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded."
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> 495 F.2d at 937-38.

Despite the Court's pronouncements and the actions taken by the Commission, there continues to be an extreme disparity between the representation of minorities in the population and in the broadcasting industry. The Commission held a seminar on April 26th and 27th, 1977, to examine the underrepresentation of minorities in broadcasting and to focus on ways to increase the number of minority owners.

As a result of the conference, the Commission subsequently issued a Minority Ownership Taskforce Report.4/ The Taskforce concluded that there was acute underrepresentation of minorities in the broadcasting industry and that serious steps had to be taken to encourage entry.

The Commission responded to the Taskforce Report with its Policy Statement on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 (1978) ("Policy Statement"). In the "Policy Statement" the Commission noted the "dearth of minority ownership in the broadcast industry," and recognized that increased minority participation in ownership and management of broadcast facilities would result in a more diverse selection of programming and enhance the diversity of control of the spectrum, a limited resource to which access is highly regulated. The Commission declared:

> "We believe that diversification in the areas of programming and ownership--legitimate public interest objectives of the Commission--can be more fully developed through our encouragement of minority ownership of broadcast properties."
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> 68 F.C.C.2d at 981.

In order to implement its minority ownership policy, the Commission initiated procedures which it indicated would be "the first of several steps we expect to consider in fostering the growth of minority ownership." Id. at 982. These steps made possible (i) the granting of tax certificates to assignors or transferors where the assignment or transfer would advance the policy of increasing minority ownership; and (ii) the assignment

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4/ "Minority Ownership in Broadcasting" May 17, 1978) ("Taskforce Report").

or transfer to qualified minority applicants at "distress sale" prices those licenses designated for revocation or renewal hearing.5/

Concerned by continuing complaints about the dearth of minority ownership, the FCC re-examined its Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications ("Advisory Committee"). The Advisory Committee, composed of government and private sector experts in telecommunications policy and finance, proposed a number of new solutions to the problem of underrepresentation. Some of these recommendations were codified into the Policy Statement Regarding the Advancement of Minority Ownership in Broadcasting, 52 R.R.2d 1301 (1982), and into the Policy Statement on Ownership of Cable Television Facilities, 52 R.R.2d 1469 (1982). . . .

In addition to these actions, Congress has also sought to provide opportunities for increasing minority ownership of media facilities. In amending the Communications Act of 1934 to allow the Commission to implement random or lottery selection among compacting applicants, Congress directed the Commission to accord preferences to applications owned on controlled by minorities.6/

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The breakdown of minority ownership of commercial broadcast stations, according to statistics complied by the office of Minority and Special services of the National Association of Broadcasters, is as follows:

Black Ownership

In 1984, blacks owned 131 of the 9,512 radio stations in operation, and 11 of the 1,181 television stations. This total of 142 black owned properties represents a decline from 1983 when were 145 black owned stations.

Hispanic Ownership

Hispanics in 1984 owned 4 televisions stations and 36 radio stations for a total of 40. This number is a decline from the high of 45 Hispanic owned properties in 1983.

5/ According to 1985 FCC statistics, the FCC since 1978 has awarded 82 tax certificates, while approving 32 distress sales of broadcast stations.

6/ Omnibus Budget Reconciliation Act of 1981, Pub. Law. No.97-35,95 State, 736 (1981); Random Selection Lotteries 93 F.C.C. 2d 952 (1983); Third Report And Order, General Docket No. 81-768, FCC 85-453, August 16, 1985.

Native American Ownership

Native Americans have owned 5 radio stations during the past two years with no television ownership.

Asian American Ownership

Asian Americans have owned 2 radio stations for the past two years with no television ownership.

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The First Amendment to the U.S. Constitution provides for freedom of expression. The purpose of the provision was to make certain that persons with differing views would be heard. Freedom of expression, however, is only meaningful if one also has access to the means of being heard.

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Blacks and Hispanics own a total of fifteen (15) television stations out of a total of 1,181. The Commission nor the courts can put their blinders on when considering the must-carry rules given the recognition and the findings made by the Congress, the FCC and the judiciary regarding the special and unique role that minority ownership plays in furtherance of the First Amendment. See generally, Blacks and the Media (1984) (Edited by N. Bowie); A. Hammond, Now You See It, Now You Don't: Minority Ownership In An "Unregulated" Video Marketplace, 32 Catholic L. Rev. 633, 651-656 (1983).

Hence, it is the position of the commentors that the existing rules and the one proposed by INTV square with the O'Brien test and therefore, as to minority broadcasters does not violate the First Amendment because the incidental restriction on First Amendment protection is no greater than is essential to the furtherance of that interest.

A substantial proportion of our citizenry will remain underserved and the larger, non-minority audience will be deprived of the views of minorities without the device of the must-carry rules. Use of the existing or proposed must-carry rules illustrates what the Commission meant when it said that "answers to all the problems [of increasing minority ownership] will be found by hard and imaginative development of solutions by the potential minority broadcaster and the private and governmental institutions confronting the issues." FCC Report on Minority Ownership in Broadcasting Facilities 1978 (Preface). The Commission has set aside any doubts some may have as to the need for structural rules to increase diversity of viewpoint by allowing the spectrum to include the minority viewpoint.

IV.

Standards For Petitions For Special Relief Should Be Adopted If The FCC Abandons The Must-Carry Rule

The commentors believe that we have firmly established that the must-carry rules are incidental to the First Amendment. However, as a bear minimum, we proposed that the Commission establish standards for waivers should it decide to rescind the must-carry rule. In this regard, the commentor proffer the following factors to be considered in deciding whether minority-owned broadcast stations or stations with minority-oriented formats should be carried by cable operators: (1) whether the station is operated by a minority broadcaster (2) UHF handicap[7/]

7/ The recent increase in the number of UHF stations owned by (footnote continued)

(3) economic impact on the station absent must-carry, and (4) the public interest benefits derived by granting must-carry.

In support of granting a waiver [a Petition for Special Relief] for must-carry of the minority broadcasters, this comment balances the First Amendment rights of cable operators against the Commissions' public interest mandate embodied in its minority ownership policy. However, any incidental intrusion into First Amendment protections of cable operators resulting from mandated carriage of minority stations is permissible where, as here, minority stations demonstrate under the proper standard that such a rule furthers an important governmental interest and is no greater than is essential to the furtherance of that interest.

Espousal of any argument, however, suggesting that such an approach requiring must-carry of minority stations leads inevitably to a quota system are baseless. See Regents of University of California v. Bakke, 438 U.S. 265, 325 (1977) (plurality opinion) ("Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at

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minorities has been encouraging. The continued success, however, of UHF service depends largely on sound, simple entrepreneurial principles. Minority-owned UHF stations cannot effectively compete with other commercial stations if they are not carried on local cable systems. Cable systems enhance UHF signal quality and give UHF stations broader signal coverage. Thus, the economic hardship which the elimination of the must-carry rule places upon minority-owned stations is enormous. Without cable carriage, UHF stations are a second-class television service, and, thus cannot compete successfully for advertising revenues. See Remarks of T.A. Hart, "The Need For a "Must Carry" Rule For Minority-Owned Television Stations," Before the National Black Media Coalition, 12 Annual Convention, Oct. 10-13, 1985.

least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.") Assume however, that mandating must-carry of minority stations amounts to a preference; the Courts, Congress and the Commission have all previously expressed preferences for integrating the spectrum by allowing for diversity of viewpoint through structural means, such as minority ownership. Ibid.

Also, the factual premise and economic assumptions upon which the must-carry rules were based are today directly applicable to minority stations.

In addition, the Commission must continually consider whether its proposed policies encourage or preclude minority entrants in structuring entry and establishing licensing procedures for developing technologies. Smith, Toward Minority Visibility In Telecommunications Ownership, 12 Nat'l B.J. vii (1983).

In sum, to ensure that cable advances but not at the expense of the minority stations, we focus on issues pertinent to the survival and growth of the minority broadcaster.

The rule proposed by INTV is not overly intrusive and is narrowly drawn to meet the Commission's public interest mandate, or stated differently, to allow minority broadcasters to be able to compete in a marketplace era. Under the waiver proposal that we offer, the responsibility would be on the minority broadcaster to show how in the absence of must-carry this would impact on the

station economically, and/or defeat the Commission's mandate to integrate the spectrum in order to allow for diversity of viewpoints.

It is submitted that requiring cable operators to carry minority stations enables the minority broadcaster to compete--theoretically -- on equal footing in any marketplace environment. See J.C. Smith, "The Dearth of Minority Voices In the Information Mix," before the National Black Media Coalition, Eight Annual Media Conference, October 8, 1981 (citing to page 3 of FCC Release No. 003550) at 2. Also, the purpose for granting the waiver proposed here is similar to those allowed in other instances to integrate the spectrum. See e.g., Garrett v. FCC, 513 F.2d 929 (D.C. Cir. 1975).

The incidental restriction of must-carry on cable operators' First Amendment freedoms is no greater than is essential to the furtherance of the stated above government objectives.

In sum, the proposed must-carry requirement is a sensible accomodation of the editorial freedom of cable operators, the rights of viewers to receive information and minority broadcasters right to have the spectrum integrated so all communities may hear the emerging silent minority.

Therefore, the O'Brien test squares with the existing and the proposed version of the must-carry rules, and justifies our proposal that standards for petitioners for special relief be adopted as set forth herein. See Regents of University of

California v. Bakke, 438 U.S. 265, 325 (1977), and Fullilove v. Klutznick, 448 U.S. 448 (1980). See also, Stereo Broadcasting, Inc. v. FCC, 652 F.2d 1026 (D.C. Cir. 1981).

V.

Whither The First Amendment When The Non-Selection Or De-Selection Of A Broadcast Signal Is Based On The Race Of The Owner Or The Racial Orientation Of The Format?

Some comment ought be made about the non-selection or deselection of a minority owned broadcast signal on the basis of race. An important objective of the First Amendment is to protect the values of all the people in America. Does the First Amendment protect a cable system that denies carriage of a minority owned and/or format on that basis alone? Is to favor majority owned stations over minority owned stations on the basis of race an acceptable exercise of editorial discretion? May a cable system, in disregard of minority subscribers' viewing preferences, refuse to carry or de-select a minority owned or programmed station on the basis of race? The Commission must now address these issues in the light of its marketplace policy[8/] if its policy on minority ownership in broadcasting has substance. See Remarks of FCC Chairman Mark S. Fowler "Minorities and the

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8/ It is also noted that "The Regulatory regime placed by Congress and the Courts over CATV was not designed to make entrepreneurs rich but to serve the public interest by 'mak[ing] available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service' 48 Stat. 1064, as amended, 47 U.S.C. Section 151" National Cable Television Ass'n Inc. v. United States, 415 U.S. 336, 343 (1974).

Communications marketplace," before the National Conference of Black Lawyers Communications Task Force, March 20, 1985, at 7 ("The drive to include new players in the mass media is of special concern to the black community . . . I do not doubt [that in cases] race prejudice exist by those instrumental in the financing, construction or operation of a facility." De-selection or non-selection of a signal of a minority owner due to race could become another "historic cause of noninvolvement in broadcasting . . .". See Quincy v. FCC, supra at 1455. As deregulatory efforts by the FCC were never intended to erode the principle of localism, these same deregulatory efforts cannot be allowed to increase the risk of the elimination of the minority broadcaster, or the public interest served by them. Quincy v. FCC, supra at 1455, n.45

Conclusion

The Commission has recognized that racial integration of the spectrum, which is being defeated in a majority of the country through total abandonment of must-carry rules, is a compelling national interest. Effects of total abandonment of must-carry is the return of segregation of the spectrum, which the Commission has fought to integrate. In its policy Statement on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 (1978), the Commission recognized that increased minority participation would result in a more diverse selection of programming and enhance the diversity of control of the spectrum. Therefore, the Commission's actions in the area of minority ownership and management of broadcast facilities illustrates the compelling

interest of integrating the spectrum and allowing minorities to take part in expressing its views, an interest also recognized by Congress, and the Courts.

Some might argue that what the debate is all about is whether the government should sit in the stands as a spectator and let the natural marketplace forces determine the extent of diversity in the communications industry; or whether the government should stand in the shoes of an architect and try to sketch its own marketplace model in order to safeguard and promote the interest of minorities. Arguably, the latter raises First Amendment questions which can be answered affirmatively in favor of minority broadcasters. Even assuming the former, however, minority broadcasters should at least be allowed to be on equal footing (have access to the potential viewers that other operators will have by being carried on cable) to compete in the marketplace.

Respectfully submitted,

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