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

In the Matter of	)	
	)	
Paxson Communications License Company, *et al.*,	)	File Nos. BALCT-20081118AGX, *et al.*
Assignors,	)	DA 08-2621, DA 08-2772
	)	
and	)	
	)	
Urban Television LLC,	)	
Assignee,	)	
	)	
For Creation and Assignment of Full-Power Television Licenses	)	

REPLY OF NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION TO CONSOLIDATED OPPOSITION TO PETITIONS TO DENY

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REPLY OF NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION TO CONSOLIDATED OPPOSITION TO PETITIONS TO DENY

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby submits its Reply to the Consolidated Opposition to Petitions to Deny and Informal Objections filed by Urban Television LLC and ION Media Networks (hereinafter "ION Opposition" or "Opposition").

NCTA's Petition to Dismiss or, in the Alternative, to Deny detailed the significant procedural and substantive defects in ION's Applications. NCTA showed that ION's Applications fail to comply with numerous Commission filing requirements, and constitute a thinly disguised effort to create digital multicast carriage rights where the Commission has twice ruled there are none.

ION's Opposition hardly acknowledges, much less remedies, those fatal errors. While ION tries to downplay NCTA's arguments, characterizing them as "hyper-technical cavils," ION cannot hide that its Applications are fundamentally at odds with the FCC's rules. It proposes to

create a new "share-time station" although the share-time rules do not permit simultaneous full-time operation of television stations on the same 6 MHz channel. It seeks to subdivide its digital spectrum and assign it to its preferred assignee even though Congress and the FCC never authorized digital television licensees to disaggregate the digital spectrum. And most fundamentally, it tries to construct this unprecedented arrangement simply in an attempt to evade the Commission's unambiguous ruling that broadcasters have no multicast must-carry rights.

Under these circumstances, it is no wonder that the Applicants have failed to file a construction permit for a new station and have submitted only the most skeletal documentation in support of their assignment Applications – FCC rules and procedures do not contemplate or authorize this type of arrangement. Instead of waiving the rules and ignoring precedent, as ION requests, the FCC must dismiss or deny the ION Applications.

I. HOWEVER SALUTARY THE OBJECTIVE OF INCREASED MINORITY OWNERSHIP, THE APPLICATIONS ARE LEGALLY UNSOUND

At the outset, it is important to separate the real legal issues raised by the Applications from the diversity policy positions raised in the Opposition. Although the Opposition points to the purported benefits that the Applications could yield with respect to promoting diversity, as the pleadings filed by Entravision, The Africa Channel, Gospel Music Channel, and SíTV make clear, numerous other entities already provide similar benefits that the Applications could jeopardize. In fact, the cable industry itself has long been at the forefront of efforts to promote diversity in the communications field. In legislative efforts, regulatory initiatives, business practices and voluntary measures the cable industry strives to promote diversity of ownership, programming, employment, and other opportunities.

For example, NCTA and its member companies have supported efforts to revive the legislative proposals for a tax certificate program for transfers of media properties to minorities.[1] At the FCC, cable companies have participated in the Commission's Federal Advisory Committee on Diversity for Communications in the Digital Age and its subcommittees, which produced recommendations to the FCC regarding policies and practices that will further enhance the ability of minorities and women to participate in telecommunications.

Indeed, for more than 25 years, the cable industry has developed and funded an unmatched set of home-grown industry groups dedicated to racial and gender diversity through, among other things, leadership development, mentoring and executive training programs. Realizing that diversity is not only the right thing to do, but is also good for business, the cable industry has devoted tens of millions of dollars to funding the Walter Kaitz Foundation, which in turn provides financial and strategic support for the Emma L. Bowen Foundation, National Association for Multi-Ethnicity in Communications (NAMIC) and Women in Cable Telecommunications (WICT). In recent years, the industry has increased its commitment to expand the number of writers and producers with diverse backgrounds through its support of NAMIC's Writers Workshop and the National Association of Television and Production Executives (NATPE) Diversity Fellowship Program.

With respect to programming, NCTA-member companies, including the company founded by Urban Television's principal, have led the way in providing the viewing public with robust and diverse programming, meeting the needs and interests of an ethnically and culturally

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[1] *In the Matter of 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, et al*, MB Docket No. 06-121, MB Docket No. 02-277, MM Docket No. 01-235, MM Docket No. 01-317, MM Docket No. 00-244, MB Docket No. 228, Reply Comments of NCTA, filed November 1, 2007 (supporting measures to promote minority and female entrepreneurship across the communications industry, including a tax certificate program that would allow deferral of tax on gains from the sale of telecommunications businesses in certain circumstances and with appropriate safeguards as a means to promote diversity of ownership).

diverse audience and helping to launch many networks that were subsequently carried on competing platforms like DBS and telcos. Today dozens of programming networks serve diverse ethnic needs and a host of other networks provide programming targeting diverse audiences in their general program mix.[2]

These networks have to compete for carriage in the marketplace. To give preferential treatment to Urban's promise to offer a vague "creative content mall" simply because it is distributed under ION's broadcast license creates a disadvantage for the carriage prospects for new cable networks. It would lessen the incentive non-broadcast-connected diversity programmers have to develop competitive, high quality programming, if those with broadcaster connections can step to the front of the line. And as a policy matter, why would the Commission want to put Urban ahead of others with guaranteed carriage when established and emerging minority and ethnic-oriented programming services, such as the Black Television News Channel, which negotiated a carriage deal with Comcast last year, have had to demonstrate the compelling nature of their programming in a highly competitive market *before* obtaining carriage?[3]

The point is that the cable industry's record reflects a commitment to creating diverse media for a diverse viewing public. NCTA's objection to this proposed end-run on the rules against multicast must-carry is no way a criticism of efforts, like Urban's, to provide a new diverse voice to the media landscape. Indeed, the history of cable is a story of ever-increasing program choice and diversity. But, as described below, ION cannot create new must-carry rights for additional multicast streams through these legally defective Applications.

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[2] *See* Thirteenth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, MB Docket No. 06-189 (rel. Jan. 16, 2009) at App. C, Tables C1-C2.

[3] "Black Television News Channel Announces Carriage Agreement with Comcast", News Release, April 14, 2008. The channel will offer 24-hour original news programming with an African-American perspective and, under the agreement, will be added to Comcast systems in key African-American markets.

II. URBAN IS NOT ENTITLED TO MANDATORY CABLE CARRIAGE

NCTA's Petition showed why Urban's use of ION's multicast digital stream would not entitle it to mandatory cable carriage: the Commission has already determined that cable operators are not required to carry multicast digital streams in addition to ION's primary digital signal. NCTA also explained that even if Urban were to be deemed a "share-time station," that would not give it must-carry rights in addition to ION's rights. ION now argues that a station need not be the "exclusive user of a channel" nor use all 6 MHz in order to qualify for carriage.[4] But ION misses the point. Section 614 only requires operators to carry *one* primary digital stream per 6 MHz television channel.

It is beyond dispute that if ION itself programs one of its separate multicast streams, ION could not claim must-carry rights for that stream in addition to ION's primary digital stream.[5] The same conclusion obtains if ION leases that separate digital stream to a third party.[6] And if ION uses a portion of its 6 MHz digital spectrum to provide ancillary and supplementary services, none of those services have carriage rights, either.[7] ION's Opposition tries to distinguish its proposal for multicast carriage from others by calling Urban's multicast digital stream something else – a "share-time station."[8] Elsewhere, though, ION claims otherwise. If it

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4 ION Opp. at 8-9.

5 NCTA Petition at 24.

6 *See First Report and Order*, 16 FCC Rcd. 2598, 2622 (2001) (explaining that Congress did not intend operators to be required to carry all possible material transmitted in a broadcast signal, and citing to legislative history of the 1992 Act, which exempts from mandatory carriage uses such as "secondary uses of the broadcast transmission, including the lease or sale of time on subcarriers or the vertical blanking interval for the creation or distribution of material by persons or entities other than the broadcast licensee".) In fact, as the Community Broadcasters Association points out at 2 n. 2, "ION and RLJ could as well achieve their business objectives through a time brokerage agreement, requiring no Commission action at all," but for their effort to try to obtain forced cable carriage. *See also* Entravision Holdings Petition to Deny at 5.

7 47 U.S.C. § 336(b)(3).

8 ION Opp. at 7 ("Share-time stations authorized pursuant to Section 73.1715 of the Commission's rules are licensed 'stations' qualified for carriage pursuant to Section 614.").

were a separate station, then the "station" operated by Urban would be subject to comparative consideration under the Commission's licensing rules. Yet ION seeks to avoid *that* result on the ground that "ION already occupies the channels at issue."[9] This shows there is only one station providing capacity to a second entity – Urban – and that entity is not independently entitled to must carry.

It ultimately makes no difference whether a multicast stream is transmitted and programmed by ION, or a multicast stream is dubbed a "share-time station" transmitted by ION.[10] There is no statutory obligation for cable operators to carry another multicast stream transmitted by ION on top of ION's primary video stream.[11] Of course, nothing would prevent ION from designating the Urban programming stream transmitted by ION as its primary digital stream instead of the ION programming stream. What it cannot do is try to multiply must-carry rights for users of this same channel through the artifice of calling each individual ION spectrum user a separate "local commercial television station" licensee entitled to its own Section 614 must carry rights.[12]

Even if Section 614 were at all ambiguous on this score – which it is not – the Commission still would be barred from granting ION the multiple must-carry rights that it seeks.

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[9] *Id*. at 21.

[10] ION's Opposition describes that ION will "provide transmission and other technical facilities, operational and back office support and personnel for use at Urban's direction in connection with the operation of the Urban stations." *Id*. at 25.

[11] NCTA Petition at 24 (*citing Second Report and Order and First Order on Reconsideration*, 20 FCC Rcd 4516, 4532 (2005)); *See also* Entravision Petition to Deny at 2 (explaining it is filing "to respond to what it perceives as the Parties intended manipulation of the Commission's share-time provisions and must-carry rules, in a manner never intended by Congress, to provide thin cover for what, in the end, amounts to a substantive request for multicast must-carry rights").

[12] ION tries to argue that Congress must have known of share-time arrangements when it adopted the 1992 must carry provisions of the Act, and therefore somehow must be presumed to have required carriage of "share-time" stations. ION Opp. at 9-10. But that argument is especially far-fetched. As demonstrated in NCTA's Petition and *infra* at 10-13, the "share-time" rules have never applied to the simultaneous operation of two full-time programming streams.

While ION chooses simply to ignore the impact of its forced carriage scheme on the constitutional rights of cable operators, cable programmers and cable customers, the Commission cannot. The agency is bound to read Section 614 in a manner that avoids raising serious constitutional issues.[13]

ION's Opposition fails to acknowledge the real constitutional problems with its forced carriage plan. Instead, ION attempts to maximize claims of harm to Urban from lack of cable carriage and to minimize the impact on cable operators and programmers from such carriage. It is wrong on both accounts.

On the one hand, the Applicants have not pointed to a shred of evidence that they have even attempted to secure cable carriage through commercial negotiations. Instead, they merely speculate (based on stale, eighteen-year-old Senate Report statements) that cable operators would not voluntarily choose to carry Urban's programming,[14] despite their concession that "cable systems carry most broadcast stations out of economic self-interest."[15] Nor do they show that forced carriage of multiple digital broadcast streams is in any way necessary to the survival of the broadcasting industry.[16] They ignore any less restrictive means of achieving their goal of promoting diverse programming that would not require burdensome multicast carriage rules that impinge on operators' editorial control and non-broadcast programmers' ability to compete. And

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[13] *See, e.g.*, Ex Parte filing of NCTA, Docket No. 98-120 (Nov. 24, 2003) (attaching Memorandum from Professor Laurence H. Tribe, "Why the Federal Communications Commission Should Not Adopt a Broad View of the 'Primary Video' Carriage Obligation: A Reply to the Broadcast Organizations" at 6-7).

[14] ION Opp. at 7, n. 23 (citing 1991 Senate Report concerning likelihood of voluntary cable carriage).

[15] *Id.* at ii. *See also id.* at 11 (The "vast majority of television stations are carried in accordance with retransmission consent agreements, *i.e.*, they are carried because cable operators negotiate to carry them.").

[16] *See* Must Carry Reconsideration Order, 20 FCC Rcd 4516 at ¶ 38 (2005) ("Congress… has made no… findings regarding multicast must carry and broadcasters have not made a convincing argument that over-the-air broadcasting would be jeopardized in the absence of mandatory multicasting."). In *Turner II*, the Supreme Court narrowly upheld must carry based on Congress's finding that broadcasters would be threatened with financial ruin absent forced cable carriage. *Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 188 (1997) (citing *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 743-44).

they ignore the other ways available for programmers to gain distribution today other than cable carriage, including the Internet.

On the other hand, while ION tries to downplay the real-world intrusions into operators' editorial discretion that grant of these Applications would cause,[17] the burdens of a multicast must-carry requirement remain very real. Contrary to the Applicant's unsupported claim that cable operators' increased capacity will enable them to carry the new Urban programming without incurring any harm,[18] NCTA submitted declarations from various cable operators concerning their limited capacity to carry additional programming without displacing content needed to remain competitive and thus impinging on their editorial discretion.

ION threatens that "if Urban's proposal is turned away, ION will likely choose to use its remaining capacity for high-definition programming. This result would have a similar impact on the availability of cable capacity (without increasing diversity)."[19] But ION's capacity calculation is off the mark. Under the FCC's "viewability" order, during the three years after the transition to digital, cable operators must make each must-carry signal "viewable" – which means that the many systems that still provide an analog tier must devote 6 MHz of scarce analog space to each commercial must-carry station on top of the obligation to carry HD programming from each commercial must-carry station. If ION's multicast stream was deemed to be a separate must carry station entitled to its own full carriage rights, making that stream viewable in analog would consume an additional 6 MHz of cable bandwidth. And nothing about its proposal would preclude ION from providing an HD signal in any event; digital broadcasters commonly transmit an HD signal in addition to one or more standard definition digital signals,

[17] ION Opp. at 10-11.

[18] *Id.*

[19] *Id.* at 11.

on the 6 MHz digital broadcast spectrum. Therefore, under ION's "two for one" proposal, cable operator bandwidth could be demanded for ION or Urban to distribute an HD channel and an analog channel for each of them.

ION also simply ignores the unfair effects that their proposal would have on other programmers. The Africa Channel, Gospel Music Channel LLC, and SíTV, Inc. explained that grant of the Applications "would significantly disadvantage [their] opportunities for distribution, fairly arrived at, through the competitive process."[20] Their Informal Objection also highlights the adverse impact on other diverse programmers that grant of the Applications would cause: "Each of the Programmers here also is focused on creating and distributing programming that appeals to minority audiences. While Urban … has only hinted at what programming it might offer – and only if the FCC accedes to this unprecedented licensing arrangement and mandatory carriage – our programming services are already in existence. Yet the very programming slots claimed by the ION/Urban Television service could displace our (or other diverse) existing services."[21]

Finally, ION claims that must carry for share-time portions of full power broadcasters' digital spectrum will not open the floodgates to increased demands for cable carriage.[22] But other than asking for special rights for its 42 proposed applications based on vague promises of providing certain programming, ION articulates no real limiting principle.[23] If it intends to

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[20] Informal Objection to Proposed "Assignment" and Requested Declaratory Relief filed by The Africa Channel, Gospel Music Channel LLC, and SíTV, Inc. at 3 (filed Dec. 29, 2008).

[21] *Id.* at 4.

[22] ION Opp. at 11.

[23] *See also* Informal Objection at 4 (noting that "If ION is permitted to subdivide its license in the manner proposed, there is no logical way to limit other broadcasters from pursuing this same plan to circumvent the 'primary video signal' limitation on must-carry."); Informal Objection of Americans for Prosperity ("If ION … lacks must-carry status for its multicast channels, the existence of a time-sharing agreement with Urban … cannot result in the creation of a new must-carry station without opening an enormous backdoor that would lead

create a carriage test based on programming content, it would trigger strict scrutiny that will certainly fail under the First Amendment. And ION provides no reason to believe that this type of gambit will be used "infrequently"[24] if broadcasters can subdivide and profit from digital spectrum that the government has provided to them for free.[25]

III. THE COMMISSION'S RULES DO NOT ALLOW FOR THE DISAGGREGATION OF A DIGITAL TELEVISION STATION LICENSE

ION's Opposition attempts to defend its unprecedented scheme for partitioning the digital spectrum by asserting that it proposes nothing more than a share-time operation. While ION concedes that share-time arrangements are typically found in situations where the parties split the *hours of operation* (which is not what is proposed in the Applications), it submits that the language of the rule permits *simultaneous operation* of shared time licensees when "specifically authorized by the terms of the license."[26] In fact, a review of the history of shared-time operations shows no such thing. ION's proposal is not at all contemplated by or consistent with the fundamental purpose of the share-time provision, and, as explained below to the extent the FCC has looked at share-time arrangements generally, it has been viewed with disfavor.[27]

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to full multicast must-carry, since time-sharing agreements with sufficient legal entities could be arranged for every multicast stream.").

[24] ION Opp. at 12.

[25] ION is grasping at straws in trying to claim that the Commission has previously recognized that share-time licensing is an "important way to promote diversity in the broadcast service, but it is likely to be used 'infrequently'" because of the difficulties involved. *Id*. at 11-12. The Commission has made no such statement and in any event has historically been skeptical about using share-time operations to promote diversity. Its 1980 Policy Statement cited by ION did not endorse the concept, but simply summarized, without commentary, the *petitioner's* position in that proceeding. *Petition for Issuance of Policy Statement of Notice of Inquiry on Part-Time Programming*, 82 FCC 2d 107, ¶ 25 (1980) (noting "The NTIA petition which precipitated this inquiry noted that share-time licensing … is infrequently utilized because of the difficulties which arise in the actual licensing of two operators to the same frequency.").

[26] *Id*. at 14.

[27] *See also* Entravision Holdings Petition to Deny at 8 (showing that the "Parties proposed operation is … not a share-time arrangement at all, but rather a channel-sharing, multicast operation.").

The origins of the share time rules pre-date the Communications Act of 1934 and the Federal Communications Commission, and were initially created in the early days of radio to allow competing applicants to share the use of the same AM frequency. In the AM situation, there would have been times in which both AM stations authorized for a share-time arrangement could each operate simultaneously (*e.g.*, during the daytime hours where they were geographically separated and no interference would be caused), but only one station at a time could operate at night when skywave created interference potential at greater distances. Thus, the stations had to *share time* during at least some hours of their operation, lest both signals be drowned out.[28] The permissive language for the simultaneous operation of stations contemplated this situation, not the disaggregation of portions of a broadcaster's spectrum as proposed by ION, where there is no sharing of time at all.

In more recent Commission history, the share-time concept has become almost exclusively a creature of the non-commercial broadcasting, and its application continues to reflect that it is intended as a mechanism for resolving situations involving mutually exclusive applications.[29] The situation presented by ION does not involve the resolution of competing, mutually exclusive applications, nor a noncommercial station, and the existing share-time rules thus should not be read to apply even apart from the grave constitutional concerns posed by the request for the compulsory carriage of multiple stations. ION provides no precedent for the application of the share-time rules to its proposed multicasting arrangement, and indeed our

[28] *See e.g.*, *Main Auto Supply Co.*, 1 FCC 251 (1935) (operating simultaneously during the day and sharing time during the evening).

[29] *See, e.g.*, 47 C.F.R. § 73.872(c) ("if mutually exclusive [low power FM] applications have the same point total, any two or more of the tied applicants may propose to share use of the frequency by submitting … a time-share proposal."; *id*., § 73.7003(c)(3) (if a tie remains after application of the Commission's comparative point analysis, then "each of the remaining [noncommercial educational] applicants will be identified as a tentative selectee, with the time divided equally among them."); *id*., § 73.561 (allow competing applicants to seek to share time on the noncommercial educational radio station's channel in the evening that the primary licensee fails to operate for the minimum required hours.)

research found not a single instance where an existing station voluntarily entered into a share-time agreement absent the filing of a mutually exclusive application on a station's license renewal application.

Given this history, the rule cannot reasonably be expanded to cover ION's proposed operations. The Commission has previously sought to discourage the use of share-time agreements absent mutually exclusive applications, even characterizing them as disfavored more generally.[30] The Applicants proposal to alter fundamentally the purpose of share-time arrangements cannot be squared with their very limited and disfavored use.

NCTA's Petition explained that the Commission's open proceeding on permitting simultaneous share-time use of the digital FM radio spectrum provides further support for the notion that it is not otherwise permitted for the digital television spectrum.[31] Logically, the Commission would not seek comment on such a proposal if such a disaggregation of digital broadcast spectrum was already permitted under the current share-time rules.[32] ION's claim that the FM service was treated differently because the Commission was in the process of

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[30] *See, e.g., Voices of Brooklyn, Inc., et al.*, 8 FCC 230, 250 (1940) (approving the continuation of a share time arrangement but noting the Commission's opinion that a single station operating full time and under one management is preferable to a time sharing arrangement); *Metropolitan Broadcasting Corporation, et al.*, 8 FCC 557, 577 (1941)(permitting two stations to continue with a share-time arrangement, but noting that "the Commission is not to be construed as departing from its position that time-sharing stations do not represent a healthy situation and are not to be encouraged."); and *WHEC, Inc., et al.*, 24 FCC 147, 173-174 (1958) ("Although the Commission's rules … provide for share-time operations, the Commission has in the past, in considering such requests for share-time operation of standard broadcast stations, asserted that share-time operations do not represent a healthy situation and are not to be encouraged.").

[31] NCTA Petition to Dismiss or, in the Alternative, to Deny at 16 (discussing the division of FM digital channels suggested in *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rule Making, 23 FCC Rcd 5922 (2008)).

[32] ION's attempt to distinguish that proposal from what it has proposed in the Applications is unavailing, and, in fact, ignores the first (and most relevant) portion of the proposal. In its recent rule making proceeding regarding ways to promote the diversification of ownership the Commission sought comment on a proposal "that the Commission afford FM licensees that broadcast in HD using IBOC technology the voluntary option of assigning the right to operate an HD radio stream to a [socially and economically disadvantaged business]." This is precisely what ION claims it already has the right to do under the Commission's current rules.

establishing service rules for multicasting for digital radio[33] is off the mark: digital radio service rules were set a year *before* the Commission issued the rule making seeking comment on disaggregation of radio spectrum. If ION's proposal was contemplated under the current rule, then so too would the proposal for permitting separate licensees of FM radio channels, yet the Commission correctly concluded that a rulemaking was necessary for such authorizations, just as it should conclude here.

In any event, ION's Opposition makes clear that it does not propose to *share time* at all. What it really proposes is to sub-divide and assign a portion of the station's spectrum – something that is not contemplated by the share-time rule or any other provision of Part 73.[34] ION's proposal would seek to create new broadcast stations from a portion of the 6 MHz of spectrum assigned to it for a full-power broadcast television station in an attempt then to assign a partial station to Urban with all of the attendant rights and obligations associated with a full power station. While disaggregation may be contemplated in other services regulated by the Commission,[35] the rules do not permit for the disaggregation of a broadcast television station license and the Commission has never considered the public interest implications of such an arrangement.[36]

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[33] *See* ION Opp. at 15 n. 56.

[34] *See, e.g.*, ION Opp. at 9 ("These Applications propose that a *new and separate broadcaster*, Urban, would broadcast its own programming on its own portion of what is currently ION stations' spectrum.") (emphasis in original); *id*. at 11 ("The Urban proposal would create 42 new stations…").

[35] *See, e.g.*, 47 C.F.R. §1.948 (partitioning and disaggregation of wireless radio service licenses); *id*., § 95.823 (parties seeking "Commission approval of geographic partitioning or spectrum disaggregation of 218-219 MHz Service system licenses shall request an authorization for partial assignment of license pursuant to § 1.948 of this chapter," and that "[s]pectrum maybe disaggregated in any amount.").

[36] *See In re Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets,* Policy Statement, 15 FCC Rcd. 24178 ¶ 10 n. 18 (2000) (encouraging licensees to make efficient use of their spectrum but specifically noting that "unique and substantial public interest considerations … must be weighed carefully" in the broadcast license context and highlighting that the Commission has "not attempted to strike that balance" for broadcasters). Commissioner Copps has expressed concern with similar proposals in the past. *See In re Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of*

ION can point to no provision in the statute, rules, or the long history of the digital television proceeding where Congress or the FCC ever authorized a licensee to disaggregate the 6 MHz of spectrum authorized for a single DTV station and assign a portion of that spectrum to a third party in order to create an entirely new station. Neither the history of the share-time rules nor the Commission's recent actions authorizing multicasting provide any precedent for granting the pending Applications. The Commission therefore must deny the Applicants' request to reverse well-settled precedent denying multicast must-carry rights through the guise of "interpreting" or "clarifying" (or waiving) its share-time rules.

IV. THE APPLICANTS HAVE FAILED TO ADEQUATELY ADDRESS THE PROCEDURAL AND SUBSTANTIVE FLAWS IN THEIR APPLICATIONS

Most of the procedural and substantive failings of the Applications detailed in NCTA's Petition to Deny have been given cursory and inconsistent treatment in the ION Opposition. What is perhaps most glaring is the seeming chameleon-like way that the Applicants describe their Applications. At one point, the filing is for a new station when it suits their purpose. At other points, it transforms into an application for an assignment of license when that description more benefits their cause.

To illustrate, the Applicants claim that the share-time rules allow them to create new stations. Yet they insist that no competing applications can be filed for those new stations,

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Secondary Markets, Report & Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 20604, 20798 (2003) (Dissenting Statement of Commissioner Copps) ("Beginning the process of allowing television and radio broadcasters to sell to non-broadcasters access to spectrum rights that Congress and the FCC gave them for free would have been a terrible mistake. It would have meant that broadcasters could sell control of part of all of their spectrum rights to others, potentially without Commission review. Broadcasters were given these spectrum rights for free because they are engaged in work that is critically important to our country – the provision of free over-the-air TV and radio. To allow them to sell these spectrum rights for other uses would have been deeply troubling."). Moreover, because the Applications do not include the full agreement between the parties, there is no way for the Commission to know what obligations Urban will undertake. If the Applications were granted, it does not appear that Urban would end up with its own identified subset of ION's 6 MHz of broadcast spectrum. Rather it appears that Urban would have a bitstream that is mixed in with ION's streams. It is unclear in what sense Urban would be a "licensee," with the related benefits and obligations of such status.

because this is really an assignment application, and the Commission cannot consider preferable buyers for the new stations at auction, as would be done for new stations. But then, switching back to the new station guise, for must-carry purposes, the Applicants claim the stations are entitled to be treated like any other new full-power commercial television station. The result is that the Applicants have failed to file complete Applications and are attempting to hide behind these varying different characterizations to justify their inadequacy under the rules.

Another example is that the Applicants never really address why, if these are Applications for new stations, they have not yet filed a single FCC Form 301. The Applicants claim that the process that they have followed, submitting FCC Form 314 assignment applications with draft Form 301 applications as exhibits, is sufficient, and claim that the petitions against the assignment applications are sufficient to meet the statutory obligation that applications for new stations be subject to a 30-day public comment period in which petitions to deny can be filed.[37] Relying on the Public Notice issued on November 26, 2008, however, simply does not meet the requirement. That Notice does not list the Form 301 applications for the simple reason that they have not, as of yet, been filed with the FCC. Accordingly, the comment period required by the statute can not yet have been opened. How can one petition against a non-filed application?

NCTA also showed that the Applications are deficient because they fail to include a final agreement setting out all terms of the arrangement between ION and Urban governing the proposed transactions. The Applicants attempt to distinguish the case cited by NCTA, holding that all agreements relating to the arrangements surrounding the sale of a station must be submitted to the Commission for review in connection with a sale, by stating that the Share-Time

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[37] ION Opp. at 12-13.

Agreement addresses the "central material issue before the Commission in shared-time situations: how the Applicants will operate on their shared channels."[38] But this statement demonstrates the Applicants' misperception of the application of the share-time rule, and the nature of the current Application. The usual share-time situation, as described in the previous section, would have involved independent applicants competing for a new channel, who would have had their entire legal qualifications set forth in their Form 301 applications (or Form 340 applications for noncommercial stations) pending review by the FCC. There would have been no assignment of license involved, and the only agreement between the parties would have been the agreement as to how much time each party gets to operate on the channel. Each party's full, legal qualifications would be independently reviewed in connection with their pending construction permit application before the share-time arrangement would be approved.

No application for a construction permit is pending; the assignment application is the only avenue the Applicants have offered to the public by which their qualifications can be assessed. By not presenting the full details of their relationship, and the details of the proposed transaction, these matters cannot be assessed properly.

Contrary to the claims of the Applicants that the Share-Time Agreement provides all of the necessary information for Commission review, a cursory reading of the Agreement reveals its deficiencies. These are matters that the Applicants seemingly want to wait to detail until after the Applications are granted, when such decisions can be made outside of the scrutiny of the Commission and the public. For example, the Agreement leaves for later decision the following:

- The details of the parties' financial arrangements;[39]

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[38] *Id*. at 17.

[39] The Applicants' response as to Urban's financial qualifications is equally evasive. The Applications themselves acknowledge that the parties have not yet come to final terms regarding the venture and how it will be funded. The Opposition submits that the Form 314 only requires that applicants certify their financial qualifications, and

- The identity and nature of the interests of the additional investors that the parties will attempt to include in the new company (*see* paragraph 1 of the Agreement);
- The "customary investor protections" that ION will hold as the minority shareholder in the new entity (paragraph 2 of the Agreement);
- The further details of each party's investment in the transaction (as set out in paragraph 6 of the Agreement);
- Any details about the use of the physical facilities of ION's stations, such as who maintains the technical plant, whether there are any cost-sharing agreements as to that technical plant, and whether ION will have any liability should the broadcast stream that will constitute Urban's "station" not be broadcast;[40] and
- The details of the right of first refusal.[41]

With all of these missing terms and critical details, the Applicants cannot truly support their contention that the Commission has all the information it needs to approve the Applications. This is but a skeletal submission, leaving out many important, legally-required disclosures of the post-assignment relationship.

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that no inquiry is warranted where that certification has been made. If the Applications had been so clear, simply certifying that it was financially qualified, then perhaps no issue would be warranted. But here, the Assignee did not simply so certify, but instead it attached an exhibit stating that the commitment of the RLJ Companies to provide financing was "subject to the Commission's approval of this transaction and based on terms mutually agreed on by the parties." Applications, Ex. 20. The seeming implication of this statement is that the terms of the financing have not yet been agreed to or the "commitments" that have been made as to financing are so vague as to not satisfy the specificity required by the Commission.

[40] *See also* Common Cause Comments in Support at 4 (detailing incomplete submissions, including with respect to compensation, reversionary interests, rights of first refusal or other mechanisms that may constitute undue control or influence).

[41] The missing details of the right of first refusal are critical, as the existence of such a right would violate the Commission's rule against reversionary interests retained by a seller of a station. The Opposition states that "the Applicants confirm that ION will not have any rights with respect to the new licenses," yet the Agreement states just the opposite – specifically identifying the right of first refusal as a right that ION will have. That right has not been amended out of the agreement, and it certainly gives ION a right of approval over any disposition of the "station" by the party to which it is purportedly selling this license. As shown in NCTA's Petition, this right is contrary to precedent.

CONCLUSION

The Applications are procedurally and substantively lacking in multiple fundamental respects. The Commission simply cannot single these Applications out for special treatment by ignoring these glaring deficiencies. Thus, the Applications must be dismissed or denied based on these procedural and substantive defects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, certify that on this 27th day of January, 2009, I caused a true and correct copy of the foregoing Reply of National Cable & Telecommunications Association to Consolidated Opposition to Petitions to Deny to be served by first-class mail, postage prepaid, upon:

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