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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Carriage of the Transmissions of Digital Television Broadcast Stations	)	CS Docket No. 98-120
	)	
Amendments to Part 76 of the Commission's Rules	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999:	)	
	)	
Local Broadcast Signal Carriage Issues	)	CS Docket No. 00-96
	)	
Application of Network Non-Duplication, Sinydicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals	)	CS Docket No. 00-2

To: The Commission

PETITION FOR RECONSIDERATION OF
TELEMUNDO COMMUNICATIONS GROUP, INC.

Telemundo Communications Group, Inc. ("Telemundo"), pursuant to Section 1.429 of the Commission's rules,[1] hereby submits this Petition for Reconsideration of the First Report and Order in the above-captioned proceeding (the "Petition").[2] In the *Report and Order*, the Commission concluded, *inter alia*, that mandatory carriage of digital television signals would be limited to a single programming stream and other program-related content.[3] This conclusion conflicts with the text and policy of the 1992 Cable Act, the intent of Congress and rulings of the United States Supreme Court. Moreover, the Commission's decision will deprive viewers of a

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[1] 47 C.F.R. § 1.429 (2000).

[2] *Carriage of Digital Television Broadcast Signals Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120, CS Docket No. 00-96, CS Docket No. 00-2, *First Report and Order and Further Notice of Proposed Rule Making*, FCC 01-22 (rel. Jan 23, 2001) ("*Report and Order*").

[3] *Report and Order* at ¶ 57.

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wealth of new program choices and stifle the development of new and innovative programming services. Telemundo therefore urges the Commission to reconsider its decision and, in compliance with the 1992 Cable Act, order immediate cable carriage of all of the free, over the air programming broadcast by qualified local broadcasters, regardless of whether such programming is analog or digital.

I. MULTICASTING IS VITAL TO SERVING THE NEEDS OF SPANISH-SPEAKING AMERICANS

Over the past ten years, the number of Hispanic Americans grew by nearly fifty-eight percent. Recently, the U.S. Census announced a Hispanic population of more than 35 million, exceeding the Census' highest published estimates by approximately 2.5 million, making the United States' Hispanic population the fifth largest Hispanic population in the world. Applying historical average growth rates, by 2005 the Hispanic population in the U.S. will be the second largest in the world. Soon, Hispanics are expected to surpass African-Americans (currently numbering 36.4 million) as the largest minority in the United States. Between 1990 and 2000, Hispanics accounted for forty percent of the growth in the U.S. population, more than any other ethnic group.

Over the same period, the amount of programming available to the American public grew even more dramatically. According to the National Cable Television Association ("NCTA"), the number of cable networks have grown from seventy-nine networks in 1990 to *two hundred twenty-four networks* in 2000 – *a one hundred eighty four percent increase* over ten years.[4] In addition, the number of broadcast networks has nearly doubled over the past several years with the emergence of three new broadcast networks – UPN, the WB, and PaxTV (all of which, incidentally, owe their existence to the protections of the must carry statute). *Despite this*

extraordinary growth, however, just two broadcast networks currently serve the programming needs of Spanish-speaking Americans.

Telemundo, the fastest growing Spanish-language television network in the United States, reaches eighty-seven percent of Hispanic viewers. For foreign language broadcasters such as Telemundo, digital multicasting represents an extraordinary opportunity to expand and improve service to our communities. With the ability to broadcast as many as six channels of digital programming, Telemundo (along with other broadcasters) will be able to greatly expand the amount of Spanish language and bilingual news, public affairs and children's programming currently offered to the public. Due to the Commission's actions in the *Report and Order*, however, these new and sorely needed programming services may not be possible.

II. THE CABLE ACT REQUIRES CARRIAGE OF MULTICAST SIGNALS

A. The Text of Cable Act Requires Immediate Multicast Must Carry.

Section 614 of the Cable Act of 1992 (the "Cable Act"), provides that "each cable operator shall carry on the cable system of that operator, the signals of local commercial television stations."[5] The Cable Act does not distinguish between analog and digital signals. Thus, the digital signals of a local commercial television station are entitled to mandatory carriage on the same basis as the analog signals of a local commercial television station. Section 614 further states:

> The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be

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[4] NCTA, CABLE TELEVISION INDUSTRY OVERVIEW 2000 at 2 (2000), <http://www.ncta.com/pdf/yearendreview2000.pdf>.

[5] 47 U.S.C. § 534(a).

> substituted, under [the Commission's nonduplication protection/ syndicated exclusivity and sports broadcasting rules].[6]

An analog broadcaster must carry the entirety of its programming schedule on a single programming stream – it has no choice. A digital broadcaster, on the other hand, is able to carry different parts of its programming schedule on multiple programming streams. The Cable Act does not limit the requirement to carry the entirety of a broadcasters programming schedule simply because that schedule is spread across more than one programming stream. In fact, the Cable Act states that the only reason a cable operator may carry less than the entirety of the a broadcaster's programming schedule is to ensure compliance with the Commission's rules regarding nonduplication protection, syndicated exclusivity and sports broadcasting.[7] The Commission may not create additional exceptions.[8] Thus, the plain language of the Cable Act requires cable carriage of the entire programming schedule of qualified broadcasters, regardless of whether the programming is carried on a single video stream or several, multicast video streams.

B. The Commission's Definition of "Primary Video" Is Flawed.

At the heart of the Commission's incorrect conclusion regarding multicasting is a mistaken interpretation of Section 614(b)(3)(A) of the Cable Act. Section 614(b)(3)(A) states that cable operators "shall carry, in its entirety ... the primary video, accompanying audio ... and, to the extent technically feasible, programming-related material carried in the vertical blanking interval or on subcarriers."[9] The Commission concluded that "'primary video' means a

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[6] 47 U.S.C. § 534(b)(3)(B).

[7] 47 U.S.C. § 534(b)(3)(B).

[8] *See United States v. Smith*, 499 U.S. 160, 166-67 (1991).

[9] 47 U.S.C. § 534(b)(3)(A).

single programming stream and other program-related content."[10] This conclusion, however, cannot be correct. As noted above, Section 614(b)(3)(B) of the Cable Act requires carriage of the "entirety of the programming schedule" of stations carried pursuant to the must carry statute.[11] If a cable operator restricts its carriage of a multicast broadcast signal to a single programming stream, it cannot meet its obligation to carry the entirety of the broadcaster's programming schedule. Section 614(b)(3)(A) cannot be read in such a way that obviates the requirements of Section 614(b)(3)(B).

The Commission's reading of Section 614 (b)(3)(A) of the Cable Act mistakes the meaning of the term "primary video." As demonstrated above, the term cannot have been intended to limit carriage to a single programming stream. As "primary video" is entitled to mandatory carriage, it can be defined, in part, by contrasting it to those services not entitled to mandatory carriage – namely, ancillary and secondary services. After all, services can only be "ancillary" or "secondary" insofar as they are ancillary or supplementary to other, *primary*, services. "Primary video" therefore includes those programming services that are not ancillary or supplementary services. The Commission's *DTV Fifth Report and Order* states that ancillary and supplementary services include "any service provided on the digital channel other than free *over-the-air services*."[12] Hence, "primary video," in the context of Section 614 must be defined as including free over-the-air services. This definition, unlike the one put forward in the *Report and Order*, is consistent with cable operators' obligation to carry the entirety of the programming schedule, as well as the must carry statute's Congressionally mandated goal of preserving free over-the-air broadcasting services. Thus, so long as the multicast programming of a qualified

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[10] *Report and Order* at ¶57.

[11] 47 U.S.C. § 534(b)(4)(B).

local television station is provided as a free over-the-air service, it qualifies as primary video entitled to mandatory cable carriage under Section 614.

III. THE UNITED STATES SUPREME COURT'S DECISIONS SUPPORT MANDATORY CARRIAGE OF MULTICAST SIGNALS.

Mandatory cable carriage of multicast signals is in accordance the holdings of the United States Supreme Court, as well as the text and intent of the Cable Act. The Court twice rejected claims that must carry imposed an unconstitutional burden on the rights of cable operators. In *Turner II*, the Court held that must carry requirements advance three important government interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.[13] These same important governmental interest apply with equal, if not greater, force to digital multicast signals. At the same time, the burdens on cable operators will only decrease as cable system capacity grows.

A. The Governmental Interests in Must Carry Apply to Multicast Programming

Among the Congressional findings noted by the Court was the concern that "increasing market penetration by cable services, as well as the expanding horizontal concentration and vertical integration of cable operators, combine to give cable systems the incentive and ability to delete, reposition, or decline carriage to local broadcasters in an attempt to favor affiliated cable programmers."[14] The Court noted that the percentage of cable subscribers served by cable systems controlled by the ten largest multiple system operators ("MSOs") increased from just

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[12] *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fifth Report and Order, DTV* 12 FCC Rcd. 12809, 12821 (1997) (emphasis added) ("DTV Fifth Report and Order").

[13] *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 212-213 (1997) ("Turner II").

[14] *Turner II*, 520 U.S. at 191 (*citing* the Cable Act at §§ 2a(2)(15), (15)).

under forty-two percent of all cable subscribers in 1985 to nearly fifty four percent by 1989.[15] As of 2000, the top ten MSOs controlled cable system systems serving over eighty-three percent of all cable subscribers.[16] In addition, horizontal and vertical concentration seems likely to increase as a result of the recent United States Court of Appeals for the District of Columbia Circuit decision striking down the vertical and horizontal cable ownership caps.[17] Thus, cable operators' ability and incentive to discriminate against broadcasters have *increased* since the United States Supreme Court's consideration of the matter.

As the statutorily mandated conversion of broadcasters to digital operations has proven increasingly difficult and expensive, the risk of economic failure for local broadcast stations also has increased. To make matters worse, stations in the most constrained financial situations – foreign language broadcasters, noncommercial stations, affiliates of emerging networks and true independents – also are more likely to require the protection of the must carry to ensure carriage of their multicast signals. Unlike major network affiliates, these stations lack the leverage to demand carriage of multicast programming steams in exchange for retransmission consent.

Multicasting clearly furthers the important governmental interests advanced by the must carry statute. Telemundo, like many station owners, firmly believes that digital multicasting will be essential to the survival of local broadcast stations as they struggle to compete against the hundreds of channels offered by cable network programmers. Almost by definition, multicasting increases the widespread dissemination of information from a multiplicity of sources. In Telemundo's case, Spanish-speaking Americans will gain several more programming options as Telemundo becomes able to transmit up to six channels of Spanish-language and bilingual news,

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[15] *Turner II*, 520 U.S. at 197.

[16] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report*, CS Docket No. 00-132, FCC 01-1 at ¶¶ 137, 171, 175 (rel. Jan. 8, 2001).

public affairs, children's and general entertainment programming. Markets served by both of the current Spanish-language networks may see the choice of Spanish-language programming increase from two channels to as many as twelve channels. It also is self-evident that the ability to multicast will increase the competitiveness of local broadcast operations *vis-à-vis* cable operators and cable networks which have long been able to target niche audiences through multi-channel programming.

Without full digital must carry, however, multicasting by broadcasters such as Telemundo is unlikely to begin, let alone survive. Stations cannot be expected to devote the resources necessary to implement digital multicasting if cable operators have the power to deny access to the seventy percent of television homes that subscribe to cable service. Indeed, many stations may not even be able to find funding for such programming without the guarantee of access provided by must carry. Thus, all of the benefits inherent in multicasting may never be realized without the protections of the must carry statute.

B. Burdens Imposed on Cable Operators Will Not Increase.

In *Turner II* the Court found that the burdens imposed on cable operators were no greater than necessary to further the important governmental interests addressed by the must carry statute. The Court found that "Congress took steps to confine the breadth and burden" of must carry.[18] Congress limited must carry obligations to one-third of each cable system's capacity, restricted carriage to those stations capable of delivering a good quality signal to the cable system's headend, allowed cable operators discretion in choosing between competing and qualified signals and permitted carriage of public stations on unused public, educational and

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[17] *See Time Warner Entertainment Co. v. FCC*, 2450 F.3d 1126 (2001).

[18] *Turner II*, 520 U.S. at 216.

governmental channels in some circumstances.[19] The protections of the Cable Act, as well as its burdens, do not distinguish between analog and digital signals. Cable operators' carriage obligations are limited to one-third of the capacity of their cable systems, regardless of whether that one-third is occupied by digital or analog broadcast signals. As such, the burdens of full digital must carry certainly will not exceed the burdens of analog must carry.

If anything, the burdens on cable operators will decrease as cable systems continue to upgrade to expanded facilities. It simply stands to reason that as the capacity of a cable system increases, the capacity occupied by must carry channels decreases as a proportion of the overall capacity. In 1992, average cable channel capacity was approximately thirty eight channels.[20] According to the NCTA's own estimates, eighty-one percent of all cable homes now are passed by systems with capacities of 750 MHz or higher.[21] Even assuming that full digital carriage of a station requires the same 6 MHz per channel required by analog broadcast channels (although it is reasonable to assume that compression technologies will reduce this number), a 750 MHz system could carry *forty-one* stations before reaching the statutory-one third cap. Carriage of every full power station in a given market would not even begin to approach this number.

IV. THE COMMISSION'S RELIANCE ON "PRIMARY VIDEO" AND "PROGRAM RELATED CONTENT" CREATES CONFUSION AND UNCERTAINTY.

In the *Report and Order*, the Commission concluded that, in addition to primary video, "program-related content" also is entitled to mandatory carriage. The Commission, however, left defining "program-related content" to a future Order, requesting comments on "the proper scope of program-related in the digital context."[22] This leaves all broadcasters in a state of enormous

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[19] 47 U.S.C. §§ 534-535.

[20] National Association of Broadcasters, *Reply Comments* in CS Docket No. 98-120, *Cable Growth Chart.*

[21] NCTA, CABLE TELEVISION INDUSTRY OVERVIEW 2000 at 1.

[22] *Report and Order* at ¶ 122.

uncertainty as to their rights under the must carry statute. As noted above, broadcasters cannot be expected to proceed with the development of multicast programming while cable carriage of such programming remains in doubt. There is no doubt, however, that reliance on carriage criteria as vague and complex as "program-related content" will subject the DTV must carry rules to years of rulemakings, inquiries and court challenges. In the meantime, the public will be deprived of the new and innovative programming services made possible by digital multicasting.

CONCLUSION

Telemundo believes that multicasting presents the best hope of expanding and improving Spanish language broadcast programming. There are hundreds of options for English language news, public affairs, children's and entertainment programming. The thirty-five million Spanish-speaking Americans, however, have just two networks serving their programming needs. Without full and immediate digital must carry, the potential of multicasting to expand Spanish-language programming options may never be realized. Telemundo respectfully requests that the Commission reconsider its conclusion that mandatory carriage of digital television signals are limited to a single programming stream and other program-related content and urges the Commission, upon reconsideration, to affirm that multicast signals are entitled to full and immediate mandatory cable carriage.

Respectfully Submitted,

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