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May 3, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA COURIER

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte*: In the Matter of Carriage of Digital Television Broadcast Signals, CS Dkt. Nos. 98-120, 00-96

Dear Ms. Dortch:

On May 2, 2002, Lissa Nuestro-de Leon, Legal Administrator and Lyla Paniagua, Senior Manager for Cable and Syndication of ABS-CBN, The Filipino Channel; Dale Ardizzone, Vice President Business Affairs and General Counsel of The Inspiration Networks; Silvia Hildago, Regional Marketing Manager of International Channel Networks; Roger Williams, President and Chief Executive Officer of the Outdoor Life Network (all collectively referred to as "the Networks"); Maria Browne of Cole, Raywid & Braverman, L.L.P. and the undersigned met with the following Commission staff to discuss issues relating to the digital must-carry proceeding: Thomas Horan, Senior Legal Advisor; Mary Beth Murphy, Policy Division Chief; Eloise Gore, Policy Division Assistant Division Chief; and Ben Golant, Media Bureau.

The Networks' representatives and counsel urged the Commission to affirm its decision in the *Digital Must-Carry Order* (FCC 01-22) with respect to dual must-carry, primary video and multicast must-carry, and raised the points included in the attached materials. In addition, the Networks' presented the following information:

1. The Networks explained that a requirement that cable operators carry all of a broadcaster's multicasted video signals would sound the death knell for niche cable program networks such as theirs. Digital technology has increased the number of separate video streams of programming that can be delivered to cable subscribers in the same amount of spectrum. This advance promises to enable cable operators, who previously have been constrained by severe channel capacity limitations, to provide subscribers with many more channels of diverse programming. However, a multicast must-carry requirement would preferentially and discriminatorily reserve to broadcasters the benefit of such increased capacity and exclude cable programmers from access to that capacity. Such displacement would prevent programmers such as the Networks from gaining new carriage on many cable systems, when the

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expectation of such carriage (based on anticipated growth in cable operators' channel capacity) was a fundamental element in each network's business plan, and such expanded carriage is essential to the Networks' continued growth and survival.

2. Multicast must-carry would also penalize highly specialized programmers, such as The Inspiration Networks, The International Channel Networks, and others like them. These networks already are frequently denied cable carriage because local broadcasters, who are entitled to must-carry under existing FCC regulations, offer programming perceived by cable operators to be of the same or similar genres. For example, Inspiration offers religious and family programming. In many markets, two or three must-carry broadcast stations also distribute similar programming. While Inspiration would gladly compete for cable carriage against any of these stations on a level playing field, and puts stock in the superior quality of its highly diverse programming, cable operators are required to carry the religious broadcasters and understandably are reluctant to add a third or fourth (cable) programming service devoted to coverage of religious issues. Thus, the must-carry broadcast stations get carriage in place of Inspiration despite the fact that Inspiration's programming is superior. Similarly, International Channel Networks compete nationally with Telemundo and Univision in markets where these broadcast stations have must-carry rights. The International Channel repeatedly has been refused carriage of its Spanish language programming due to cable operators' preclusive obligations to must-carry broadcasters, notwithstanding a clear demand for International Channel's programming in markets where the Hispanic population is large and growing. Similarly, in Montgomery County, Maryland, International Channel cannot secure carriage of its Korean programming due to the fact that a Korean broadcaster has must-carry rights. The Filipino Channel also has been foreclosed from cable carriage, for example in San Francisco and Los Angeles, due to the presence in those cities of Asian-focused broadcast stations that have must-carry rights, notwithstanding the fact that those stations do not serve the needs and desires of Filipinos in those communities. If the Commission were to adopt a multicast must-carry requirement, whereunder foreign language, religious and similar specialized broadcasters received required carriage rights on cable systems for their multiple streams of programming of those genres, cable program networks such as Inspiration, International Channel and others would lose any chance of gaining carriage by such cable operators because the systems would already have a full complement of broadcast programming of such genres. Moreover, cable programmers like the Networks would even likely find themselves dropped by many cable systems on which they were previously carried because of the systems' new, additional multicast must-carry obligations.

3. The Networks also explained that obtaining capacity from educational or commercial broadcasters is not an option because the economic model simply does not work for cable programmers. Cable networks depend heavily upon subscription fees for their revenue base. OLN, for example, derives at least 60 percent of its revenue from subscription fees. Must-carry broadcast stations do not derive revenue from cable systems or subscribers. Thus, even if cable networks sought to be distributed on a multicast broadcast station whose signal was carried on cable, there would be no mechanism for the cable programmer to collect license fees for its programming.

Likewise, as stated by The Filipino Channel, cable program networks cannot afford to pay broadcasters to distribute their programming on multicast stations; cable programmers need to collect license fees for their programming. Nor can a cable programmer afford to pay broadcasters via a split of advertising revenues from the cable programmer's advertising inventory, as that would not leave enough revenue to sustain the programmer's operations. The Filipino Channel also explained that even where it has resorted to some very limited distribution on broadcast stations, these stations offer carriage for only one hour per day and during undesirable time slots, at excessive rates. Distribution of cable networks via non-commercial broadcast stations is even more infeasible because these stations are not permitted to carry commercial advertising and therefore cannot even generate advertising revenue. Inspiration also questioned the willingness of local religious broadcast stations to carry Inspiration's competing programming.

4. The Networks provided additional examples of cable systems that have had to drop the Networks' programming due to must-carry demands made by local broadcasters. Since 1999, Inspiration has lost more than 300,000 subscribers due to being bumped from systems in Santa Rosa, CA (50,000 subs); New Orleans, LA (111,000 subs); Rome, GA (25,000 subs); Los Alamitos, CA (23,000 subs); Sherman, TX (20,000 subs); Joplin, MO (17,000 subs); Mountain Brook, AL (20,000 subs); and Pearl, MO (23,000 subs). The International Channel gave additional examples of instances where broadcasters' must-carry demands resulted in the International Channel Networks being dropped. Similarly, OLN provided examples of cable systems on which OLN has been unable to gain carriage due to the systems' heavy must-carry obligations. The Networks emphasized that these circumstances would be exacerbated if the Commission were to adopt a multicast must-carry requirement.

5. Finally, OLN explained that broadcasters should not be entitled to a greater amount of bandwidth during parts of the day when they are not broadcasting in HDTV. When a broadcaster transmits its primary video in SDTV, any additional capacity should be available to cable programmers and not reserved to broadcasters for multicasted signals. DirecTV is a good example of an MVPD's ability to recapture bandwidth. DirecTV allocates more bits to program networks covering live sporting events, for example, during certain day parts, and more bits to other program networks during other day parts. Our niche networks oppose a regulatory regime that would not seek to reclaim bandwidth for the competitive use of all programmers, but would instead give preferential use to broadcasters when they are not transmitting in HDTV. Even if cable operators presently are not technically able to reclaim bandwidth through mapping, as is done on DirecTV, nonetheless when a broadcaster is not broadcasting in HDTV, excess bandwidth can be made available on a nondiscriminatory basis to cable programmers. Such bandwidth can be assigned at the head end in the same manner as the cable operator implements ad inserts, thereby giving cable programmers the opportunity for at least part-time carriage on such cable systems, and ensuring the fullest and best use of the cable operator's channel capacity.

Kindly direct any questions regarding this matter to my attention.

CERTIFICATE OF SERVICE

I, Debra Holland, do hereby certify that I caused one copy of the foregoing *Ex Parte* Letter of the network representatives for ABS-CBN, the Filipino Channel, The Inspiration Networks, International Channel Networks and the Outdoor Life Network to be served by hand delivery on the following parties this 3rd day of May, 2002.

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Ex Parte

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STATEMENT OF THE FILIPINO CHANNEL, THE GOLF CHANNEL, THE INSPIRATION NETWORKS, INTERNATIONAL CHANNEL NETWORKS AND OUTDOOR LIFE NETWORK—MAY 2, 2002:

THE COMMISSION SHOULD ADHERE TO ITS DECISIONS (1) NOT TO REQUIRE DUAL MUST-CARRY DURING THE DIGITAL TRANSITION AND (2) TO NARROWLY CONSTRUE THE TERM "PRIMARY VIDEO"

I. EXPANDING BROADCASTERS' DIGITAL MUST-CARRY RIGHTS WOULD REDUCE THE AVAILABILITY OF DIVERSE CABLE PROGRAMMING

A. Cable Networks Must Maintain And Increase Current Subscriber Levels To Become And Remain Economically Viable

- Distribution by multichannel video providers ("MVPDs") is critical to cable program networks. Unlike broadcasters, cable networks have no over-the-air access to viewers, and no guaranteed place on cable systems, with whom we must negotiate for carriage. We compete not only with more than 300 national and 60 regional networks, but also with a host of other new services, such as high-speed Internet access, interactive video, and cable telephony, for space on cable systems that have on average 65 channels. The number of channels on which cable networks can gain carriage is actually less once cable operators' mandatory carriage requirements (must-carry, leased access, PEG access) are satisfied.

- Thus, any governmental requirement that cable operators preferentially set aside additional channel capacity for broadcasters is of grave concern to program networks.

ABS-CBN The Filipino Channel
THE GOLF CHANNEL®
INSP The Inspiration Network
International Channel Networks®
ADVENTURE TV

B. Cable Networks Offer Diverse, High Quality Programming Desired By Consumers

- Our networks, The Filipino Channel, The Golf Channel, The Inspiration Networks, International Channel Networks, and Outdoor Life Network, provide diverse, high quality programming aimed at, and sought after by, underserved segments of the viewing audience.

- ***The Filipino Channel*** – ABS-CBN International launched The Filipino Channel on April 3, 1994. It is the only Tagalog-language programming service in North America. The channel originates live from Manila 24 hours a day, and produces wholesome entertainment and extensive public-service programs that cater to all aspects of Filipino life, including news, educational programming, movies, comedy and game shows, and talk shows. The channel is now seen in approximately 80 thousand households across North America and is carried on 46 cable systems throughout the United States and Puerto Rico. Approximately 95 percent of The Filipino Channel's distribution is digital.

- ***The Golf Channel*** – The Golf Channel was launched in January 1995, and currently distributes its programming to over 42 million subscribers within the United States. Of those subscribers, almost 90 percent are cable subscribers, with approximately 13 percent of those subscribers coming from digital cable subscriptions. The Golf Channel is the only 24-hour network devoted exclusively to golf programming, offering new and unique programming tailored to golf enthusiasts. Golf provides in depth coverage of more than 90 professional golf tournaments from around the world—more than all other broadcast networks combined. The channel also features other golf-related programming, including in depth looks at the players and new original programs broadcast from Golf's studios in Orlando, Florida. Golf's original programming includes instructional programs for all ages and abilities, hosted by top golf professionals, as well as "Golf Central," a CableAce award-winning nightly golf news show.

- ***The Inspiration Networks (INSP)*** – INSP, which launched in 1990, provides value-based, religious programming to approximately 15 million cable subscribers. INSP offers more than 845 different programs monthly, which programs are produced by INSP as well as by more than 80 different religious organizations. These organizations include 23 different minority organizations and represent more than 20 distinct religious denominations.

INSP has state-of the-art production facilities in Charlotte, North Carolina, where it produces its own original programming. INSP also offers high quality programming targeted to teens and children. In 1998, INSP launched a new network, Inspirational Life ("i-Lifetv"), which offers value-based lifestyle programming and a daily 8-hour block of Hispanic programming. i-Lifetv is distributed on cable system digital tiers to approximately 2 million cable television subscribers. INSP plans to launch additional new networks, including *La Familia Network*, a 24-hour family-oriented Hispanic channel, and plans to integrate interactive ("ITV") applications into its programming as ITV technology is more widely deployed at cable headends.

- ***International Channel Networks ("ICN")*** – International Channel Networks (official name International Cable Channels Partnership, Ltd.) owns and operates International Channel, which is a full-time foreign-language basic network comprised of programming in more than twenty foreign languages. International Channel, first launched in 1990, is the only national cable network dedicated to international in-language programming from multiple cultures, and provides educational and entertainment programming appealing to a wide variety of ethnic groups. The languages represented include Arabic, Cambodian, Cantonese, Farsi, French, German, Greek, Hindi, Hmong, Hungarian, Italian, Japanese, Korean, Mandarin, Polish, Portuguese, Punjabi, Romanian, Russian, Scandinavian (various), Spanish, Tagalog (Filipino), Thai and Vietnamese. International Channel is distributed throughout the United States by MVPDs, primarily cable systems, with a substantial percentage in digital, and is not carried on DBS.

  In addition, ICN represents and markets an additional eleven foreign-language premium networks (the International Premium Networks, or "IPNs") – ART Cable (Arabic/Islamic); CCTV-4 (Chinese); Power TV Zhong Tian Channel (Taiwanese); RAI (Italian); TFC (ABS-CBN) (Filipino); TV5 (French); TV Asia and Zee TV (Hindi, Gujarati, Urdu, Bengali, Punjabi); SBN (Vietnamese); TV Japan (Japanese); and RTN (Russian) – each offering full-time programming in a single foreign language (or the languages of a single region – e.g., South Asian), and the Canales ñ package of nine Spanish-language video programming services and eight Latino audio programming services.

- ***Outdoor Life Network*** – Outdoor Life, which launched in June 1995, serves approximately 41 million subscribers. The network, which is targeted at the previously underserved audience of outdoor enthusiasts, focuses on outdoor and environmental activities and interests, such as wildlife and wilderness conservation, fishing, mountaineering, hunting, camping, backpacking, mountain biking, white water sports and skiing, including its Emmy Award-winning series Adventure Quest. Outdoor Life provides live, in-depth coverage of events such as skiing, snowboarding, equestrian, and bicycle competitions, including the legendary Tour de France, and sailing competitions, such as the Louis Vuitton Challenger Series for the America's Cup.

- Our networks have invested hundreds of millions of dollars in the development and promotion of its network, to give TV viewers a wide variety of high quality programming. Each of our networks serves a segment of the viewing public that traditionally has been underserved by general entertainment cable and broadcast networks.

- In contrast, broadcasters do not have to compete for carriage and are offering little high definition programming (as they promised they would in return for free spectrum). Instead, broadcasters generally are offering a digital version of their analog programming. This gives the public nothing new and wastes channel capacity. Mandating carriage of these digital duplicates will do nothing to speed the digital transition.

C. Lack Of Channel Capacity Already Is A Major Impediment To Cable Networks' Growth

- Our networks know from experience that, even in upgraded cable systems, channel capacity is not unlimited.

- In 1996, ICN was dropped from carriage by Time Warner Cable in Manhattan, for a loss of 1.1 million subscribers, when the system was forced to add an additional analog must-carry broadcast signal. ICN had to resort to commercial leased access for part-time carriage in order to continue reaching this highly ethnic market. Other locations where ICN was dropped because of local must-carry issues: Bronx/Brooklyn, NY (Cablevision) 502,000 subscribers lost; Ventura, CA (AT&T) 60,000 subscribers lost; Stockton, CA (MediaOne) 66,000 subscribers lost; Elmhurst, IL (MediaOne) 125,000 subscribers lost. Cable operators also have had to forego promised launches of ICN due to must-carry in Fairfield County, CT (Cablevision) 110,000 subscribers lost; Mt. Vernon, NY (Paragon) 14,000 subscribers lost; and Revere, MA (MediaOne) 125,000 subscribers lost.

- In 2001, INSP was dropped by a cable system in the Bluefield, Tennessee market as a result of the current must-carry rules, after a broadcast station asserted its mandatory carriage rights.

- OLN has been unable to secure carriage in Las Vegas (Cox) due to system channel constraints and was migrated to digital from analog in Atlanta, GA (AT&T) and Oklahoma City, OK (Cox) due to channel constraints. Both Cox and AT&T were owners of OLN.

- Even where systems have been upgraded to 750MHz, new video and non-video services such as high speed Internet, interactive video, and cable telephony, compete with cable networks for access to that bandwidth. ICN, for example, has been unable to secure digital carriage in Orange County, CA, the New York City area, and in Tampa and Orlando, Florida, and has faced similar challenges gaining digital carriage for their ICNs and Canales ñ.

- Less than 1/3 of new digital capacity is being devoted to basic cable channels and niche premium services, such as our networks. Instead, mainstream premium services, pay-per-view services and other pay services are garnering anywhere from 70 to 80 percent of added capacity.

- Leased access and PEG channels also eat up capacity.

D. Dual Carriage Requirements Or Multicast Must-Carry Would Further Reduce Extant Channel Capacity To The Detriment Of Our Networks

During The Transition

- If dual carriage or multicast must-carry were imposed during the transition, cable operators would have to dedicate up to twice as much spectrum (12 MHz) to broadcasters' services as is currently needed for analog must-carry (6 MHz).

- For example, a broadcaster could insist that a cable operator carry both its analog signal (6 MHz) and down-convert its digital signal to analog (6MHZ); or, carry its multicast services on the digital tier (consuming up to an additional 6MHz). In major markets such as New York and San Francisco, where there are more than 20 local broadcast stations, this could me a reduction of more than 20 6 MHz channels.

- Faced with these additional channel capacity constraints, cable operators would be forced to drop existing cable networks. As evidenced by experience, niche networks such as ours are the most likely to be dropped first. Our networks most certainly would be hurt in their ability to obtain new carriage, retain existing carriage, or launch new networks on cable systems.

- The result would be to reduce program diversity and quality, and harm consumers. For example, carriage of a broadcaster's multicast signals could result in a cable operator being forced to carry a third party infomercial provider in lieu of one of our networks.

After The Transition

- Even after all broadcast stations convert to digital, multicast must-carry would still significantly and unconstitutionally harm non-broadcast programmers.

- The post-transition must-carry analysis must take into account the very different spectrum and carriage dynamics associated with digital, as opposed to analog, technology.

- In the digital realm, a cable network typically requires only 2.5 Mbps. In comparison, digital broadcasters asking for multicast must-carry rights are seeking carriage for the full 19.4 Mbps payload that comprises their digital signal. This would result in broadcasters getting carriage for approximately 7 times what a cable network obtains competitively.

E. Increased Must-Carry Rights For Broadcasters Would Not Withstand Judicial Scrutiny

- Dual carriage during the transition, or multicasting must-carry, would "render it more difficult to compete for carriage," in violation of the narrow tailoring requirement established in the *Turner* decisions. *Turner I*, 512 U.S. 622, 668 (1994); *Turner II*, 520 U.S. 180, 214 (1997). *Turner II* barely found analog must-carry constitutional when each broadcast station was displacing only a single competing non-broadcast programmer. In balancing the burden of the original must-carry mandate, the Supreme Court relied on the fact that "the burdens of must-carry will soon diminish as cable channel capacity increases." *Turner II*, 117 S.Ct. at 1198. As shown above, however, that prediction has not materialized, and if anything, the fight for carriage of new program networks has increased over the last several years, with channel capacity not keeping pace with the proliferation of new program networks and other cable services. Moreover, in contrast to arguments made by broadcasters, the Court focused on the actual impact of must-carry at the time of the cases, and not upon the impact that would be felt if 1/3 of a cable system were actually occupied.

- Granting broadcasters such preferential treatment in blatant disregard for subscribers' viewing preferences is also "impossible to reconcile with the Supreme Court's repeated admonition that the interests of viewers should be considered 'paramount' in the First Amendment calculus." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1453-54 (D.C. Cir. 1985) (striking down an earlier version of must-carry).

    - *See also Turner I*, 512 U.S. at 675 (O'Conner, J., dissenting) ("A cable programmer that might otherwise have been carried may well be denied access in favor of a broadcaster that is less appealing to the viewers but is favored by the must-carry rules. It is as if the Government ordered all movie theaters to reserve at least one-third of their screening for films made by American production companies, or required all bookstores to devote one-third of their shelf space to nonprofit publishers.").

    - *See also Turner II*,520 U.S. at 226 (Breyer, J., concurring) ("I do not deny that the compulsory carriage that creates the 'guarantee' extracts a serious First Amendment price. It interferes with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and *it will sometimes prevent some cable viewers from watching what, in its absence, would have been their preferred set of programs. This 'price' amounts to 'supression of speech.'*") (emphasis added).

- The statutory requirement that a cable operator carry a broadcaster's "primary video" signal requires carriage of only a single programming stream and other "program related" material. Broadcasters' argument that "video" should be construed in its plural form has no merit in the text or legislative history of the statute. This is the conclusion reached by the Commission in its *Report and Order* last year.

- No rational basis has been demonstrated for preferentially giving broadcasters a second (or, indeed, third, fourth, fifth or sixth slot on cable systems) in place of cable program networks such as ours.

- Any decision is likely to be challenged in the U.S. Court of Appeals for the District of Columbia Circuit, which has struck down several recent Commission rulings as unsubstantiated by the record.

II. EVEN PROPOSED COMPROMISE SOLUTIONS WOULD HARM OUR NETWORKS, WITHOUT BENEFITING THE TRANSITION

- Limiting the duration of a dual carriage requirement will not avoid the harm to our networks. Even a truncated dual carriage requirement would reduce extant channel capacity on channel locked cable systems, forcing cable systems to drop quality networks such as ours and foreclosing our ability to gain additional carriage during the transition period. Moreover, once digital broadcast signals secure carriage, it will be very difficult for cable operators to take duplicative broadcast signals off until the transition ends and all analog broadcasts cease. The injury caused to our networks by such foreclosure during the transition period would be irreparable.

- Nor is limiting a dual carriage requirement to upgraded (750MHz) systems the solution. These systems are devoting a substantial amount of spectrum over 550 MHz to non-video services, such as high speed internet, interactive applications and cable telephony. Thus, even these systems have limited capacity, as we have learned first hand in our attempts to gain carriage.

III. CREATION OF A LEVEL PLAYING FIELD FOR COMPETITION BETWEEN CABLE NETWORKS AND BROADCASTERS IS THE BEST METHOD FOR SPEEDING THE DIGITAL TRANSITION

- The broadcast industry will have a much greater incentive to produce diverse, high-quality programming if they have to compete for carriage, to the benefit of the viewing public.

- Broadcasters that are given more capacity than they can program themselves may try to sell capacity to nonbroadcast programmers, giving the broadcasters an undeserved windfall. This will not speed the digital transition.

- The real causes of delay in the digital transition are the lack of compelling content and the technical problems (such as tower siting and equipment production delays) that broadcasters have encountered, not cable carriage.

- The digital transition will be driven by the creation of compelling programming, not by mandated carriage of duplicative channels under either a "dual carriage" or multicast must-carry regime.