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June 6, 2006

**VIA ELECTRONIC SUBMISSION**

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Rm. TW-A325
Washington, D.C. 20554

**Re: GN Docket No. 98-120**
**In the Matter of Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules**

Dear Ms. Dortch:

Today, TV One, The Inspiration Network ("INSP"), Inspirational Life Television ("iLifetv"), La Familia Network ("La Familia"), Altitude Sports & Entertainment ("Altitude"), and The Filipino Channel ("Filipino Channel") (collectively, "the Networks")[1] submitted the attached *Ex Parte* Written Presentation to Commissioner Michael Copps and Jessica Rosenworcel, Commissioner Copps' Senior Legal Advisor. The Networks also provided Commissioner Copps and Ms. Rosenworcel with copies of Joint Comments filed in this proceeding by several of the Networks (and several other multichannel networks) on June 11, 2001, as well as copies of the Joint Opposition To Petitions For Reconsideration filed by several of the Networks (and several other multichannel networks) on May 26, 2005. Those previous filings are publicly available on the Commission's web site.

In addition, Karen Wishart (representing TV One), Burt Braverman of Cole Raywid & Braverman, LLP and I met yesterday with Ms. Rosenworcel to discuss the detrimental impact that a multicast must-carry requirement would have on TV One.

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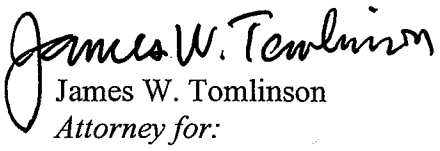
[1] The corporate entities of the Networks include: TV One, LLC; The Inspirational Network, Inc. d/b/a The Inspiration Networks (INSP, iLifetv and La Familia); KSE Media Ventures, LLC, d/b/a Altitude Sports & Entertainment; and ABS-CBN International, d/b/a The Filipino Channel.

Pursuant to 47 C.F.R. § 1.1206, this notice is being filed electronically with the Commission. Please contact the undersigned with any questions you may have.

Very truly yours,



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**KSE MEDIA VENTURES, LLC**

cc: Commissioner Copps
Ms. Rosenworcel

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JUNE 6, 2006

Commissioner Michael Copps
Ms. Jessica Rosenworcel, Senior Legal Advisor
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: Multicast Must-Carry (CC Docket No. 98-120)**

Dear Commissioner Copps and Ms. Rosenworcel:

We understand that the Commission, at its June 15 meeting, may again consider the adoption of "multicast must-carry" rules that would require cable operators, and perhaps other multichannel video program distributors ("MVPDs"), to carry additional programming streams or services that a broadcast station delivers through its over-the-air digital channel in addition to the broadcaster's "primary video" signal. **TV One**, The Inspiration Network ("**INSP**"), Inspirational Life Television ("**iLifetv**"), La Familia Network ("**La Familia**"), Altitude Sports & Entertainment ("**Altitude**"), and The Filipino Channel ("**Filipino Channel**") (collectively, **"the Networks"**)[1] are a diverse group of multichannel video program networks that would be profoundly injured by such a decision and, therefore, have joined together to express their strong opposition to any form of a multicast must-carry requirement.

Broad distribution by MVPDs is essential to multichannel program networks' ability to become and remain commercially viable. The reduction in, and discriminatory allocation to broadcasters of, MVPD channel capacity available for distribution of multichannel networks that would result from a multicast must-carry requirement would prevent multichannel networks from gaining new carriage on many cable systems, and in many cases would result in networks being dropped by existing distributors. A multicast must-carry requirement would be unjustifiably and unnecessarily unfair to multichannel networks, would sound the death knell for

[1] The corporate entities of the Networks include: TV One, LLC; The Inspirational Network, Inc. d/b/a The Inspiration Networks (INSP, iLifetv and La Familia); KSE Media Ventures, LLC, d/b/a Altitude Sports & Entertainment; and ABS-CBN International, d/b/a The Filipino Channel.

many niche multichannel programmers, and would subvert the development of diversity in the television programming marketplace.

***Twice before – most recently in February 2005 – the Commission has refused to adopt a multicast must-carry rule***, concluding that (1) no evidence had been presented that governmentally mandated carriage of multiple streams of a broadcaster's programming is necessary to achieve the statutory goals of preserving free over-the-air local broadcast television for viewers, and promoting the widespread dissemination of information from a multiplicity of sources; and (2) there had been no meaningful showing that a multicast carriage requirement would facilitate the digital transition. As discussed below, the Commission was correct its analysis and determination, and ***nothing in the television marketplace has changed*** in the past 15 months that would warrant an abrupt 180 degree shift in Commission policy or a diametrically contrary interpretation of the substantial record developed in 2004-05 and, before that, in 2001 when the Commission issued its First Report and Order. Indeed, the evolving marketplace conditions and the robust health of the television broadcast industry have made a multicast must-carry requirement ***even more unnecessary, counter-productive, unjustifiable and legally indefensible*** today than when the Commission previously rejected such requirements.

Several petitions for reconsideration are pending before the Commission in this docket. These petitions should be rejected because they merely rehash arguments that were fully considered by the Commission in its Second Report and Order, raise no new material facts or legal arguments not already in the record and considered by the Commission, fail to demonstrate any material error of law, and otherwise fail to establish any ground for reconsideration. In addition, they should be denied because, as the Commission previously concluded, broadcasters have not established that multicast must-carry would promote the goals underlying Section 614, which currently are being advanced without such requirements. Several of the Networks were part of a consortium of multichannel networks that submitted a Joint Opposition To Petitions For Reconsideration; copies of that Opposition and those networks' comments in this proceeding are attached hereto for your convenience.

## I. BACKGROUND

The Commission has recognized the significant contributions made by multichannel program networks such as the TV One, Filipino Channel, INSP, iLifetv, La Familia and Altitude, to the high quality and broad diversity of television programming available today. Since 1992, hundreds of new multichannel program networks have launched, each focusing on a subject area or genre that previously was only modestly, if at all, covered by the general entertainment networks of the television broadcast industry. This multiplicity of multichannel networks has met the long unserved needs of the viewing public by providing television viewers with an abundance of choices, including networks that each focus on a different area of viewer interest, such as ethnic programming, local and regional affairs, foreign language programming, religious

and inspirational programming, sports, arts and music, history, nature, cooking, home and garden, health and numerous other areas of specialized viewer interest. Multichannel networks truly have met the national goal of promoting diversity and the widespread dissemination of information from a multiplicity of sources, and have changed the face of television in America. Congress and the Commission can be credited with providing the regulatory framework that made this possible.

These program networks have each invested tens of millions of dollars, and collectively billions of dollars, in the creation and acquisition of original and high quality programming, delivery technology and auxiliary services, all at their own risk and without the benefit of governmentally mandated carriage guarantees. They have had to compete vigorously for carriage on the scarce, extant channels of MVPDs to gain subscriber distribution, the lifeblood of all television programming networks.

As a result of such efforts, the competitive marketplace for multichannel television has thrived, and the number and diversity of multichannel program networks has continued to grow. However, multicast must-carry would place that growth in jeopardy, and could endanger the rich and diverse rainbow of multichannel programming that the past fifteen years has produced. Although multichannel video programming distributors have substantially increased their channel capacity since 1992, channel capacity on cable systems remains extremely limited as cable operators, in recent years, have devoted most of their increased capacity to pay-per-view and premium programming, and to advanced services such as high speed internet access, VOIP, video-on-demand, and interactive services, but generally not to initiating carriage of additional multichannel networks. The imposition of multicast must-carry obligations on cable operators or other MVPDs would substantially reduce the amount of channel capacity available for distribution of multichannel networks, making it virtually impossible for most multichannel networks to gain additional MVPD carriage, and in many instances causing MVPDs to drop networks in order to make room for fulfillment of their expanded multicast must-carry obligations. This is precisely why now, when the Commission may be reconsidering its prior rejection of multicast must-carry, the Networks are again calling to the Commission's attention the grave impact that such a requirement would have on multichannel networks and the tens of millions of viewers that they serve. The Networks simply cannot afford, and should not be required, to give up carriage to additional government-subsidized digital broadcast streams.

## II. THE NETWORKS

The Networks are diverse multichannel video program services that have been active in the Commission's digital must-carry proceedings in the past. Each of the Networks has invested many millions of dollars in the development and promotion of its network, in order to be able to provide specialized, high quality programming to a segment of the viewing public that traditionally has been underserved by general entertainment broadcast networks.

TV One launched in January 2004 and features a broad range of lifestyle and entertainment offerings designed to entertain, inform and inspire a diverse audience of African-Americans, including programming that tackles a wide range of cultural, political and economic issues. INSP, iLifetv and La Familia are sister networks that focus on viewers who care about religion and inspirational values. INSP blends ministry programs with family-oriented movies, dramas, music, children's shows and specials, while iLifetv distributes life-enriching educational entertainment programming. La Familia is a Spanish-language family network that offers wholesome programming that includes concerts, sitcoms, talk shows and programming for children and teens. Filipino Channel is the only Tagalog-language programming service in North America and presently provides service to more than 80,000 Filipino-American households in the United States. The network produces wholesome entertainment and extensive public-service programs that cater to all aspects of Filipino life. Altitude is a Denver-based regional sports and entertainment network that features programming from professional and collegiate teams from the Rocky Mountain region, other local and regional sports and entertainment programming, as well as public affairs programming.

Although the Networks are themselves quite different, they each face the same primary challenge in executing their business models -- obtaining and maintaining distribution to the largest audience possible over MVPD systems. Thus, a multicast must-carry requirement, which would strike a devastating blow to multichannel networks' distribution, is an issue of utmost importance to each of the Networks, as it is to all of the nation's multichannel networks.

## III. THE SECOND REPORT AND ORDER

In its Second Report and Order in Docket No. 98-120, which was issued only 15 months ago in February 2005, the Commission (by a 4-1 vote) flatly ***rejected*** calls by the broadcast industry to adopt a multicast must-carry requirement. In so holding, the Commission found ***no clear Congressional intent*** from the legislative history that would require mandatory carriage of multicasts, and ***no evidence*** that carriage of multiple streams of programming was necessary to achieve the underlying statutory goals of (1) preserving the benefits of free over-the-air local broadcast television for viewers, and (2) promoting the widespread dissemination of information from a multiplicity of sources. The Commission also concluded that there had been ***no meaningful showing*** that a multicast carriage requirement would facilitate the digital transition. Accordingly, the Commission concluded that the term "primary video" means "a single programming stream" and that, if a digital broadcaster elects to divide its digital spectrum into several separate programming streams, only one stream will be considered "primary" and entitled to mandatory carriage.

In considering whether mandatory multicast carriage would be necessary to preserve the benefits of free over-the-air broadcast television, the Commission noted an agreement between the National Cable & Telecommunications Association and the Association of Public Television Stations, which provided for carriage of multiple streams of at least one public broadcast station

in each local market during the digital transition and for carriage of multiple streams of programming aired by every public broadcast station in each market after the transition, subject to non-duplication limitations. This voluntary agreement demonstrated that the interests of over-the-air television viewers would remain protected without a governmentally-imposed requirement of carriage of commercial broadcasters' multicast programming.

## IV. MULTICAST MUST-CARRY WOULD HAVE DISASTROUS CONSEQUENCES FOR MULTICHANNEL NETWORKS AND THE TELEVISION VIEWING PUBLIC

The record in the digital must-carry proceeding, which dates back to 1998, is replete with evidence that diverse multichannel networks, such as the Networks, which rely predominantly on cable carriage for their dual revenue streams of advertising and subscription revenues, would be significantly harmed by imposition of a multicast must-carry requirement.

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

- Broad distribution by MVPDs is critical to multichannel program networks. Multichannel networks depend primarily on two revenue sources – affiliation fees and advertising revenues – both of which are directly linked to subscriber distribution. In other words, the viability of any program network is directly dependent on the extent of its carriage

- Unlike broadcasters, multichannel networks have no over-the-air access to viewers, and no guaranteed place on the cable systems with which networks must negotiate for carriage. The Networks compete not only with more than 400 national and 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 and other MVPDs. The number of channels on which multichannel networks can gain carriage is further limited by cable operators' mandatory carriage requirements (primary video must-carry, leased access, PEG access), and by similar requirements to the extent they are applicable to other MVPDs such as DBS operators. Thus, any governmental requirement that cable operators preferentially set aside additional channel capacity for broadcasters is of grave concern to multichannel program networks.

- Multicast must-carry would also penalize highly specialized programmers, such as the 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 and other MVPDs to be of the same or similar genres. For

example, INSP offers religious and inspirational programming. In many markets, two or three must-carry broadcast stations also distribute similar religious programming. While Inspiration will gladly compete for cable carriage against any of these broadcast 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 programming service, like INSP, devoted to religious content. Thus, broadcast stations that offer inferior quality religious content but that are entitled to must-carry already often get carriage in place of INSP despite the fact that INSP's programming is of superior quality and more attractive to viewers. If the Commission were to adopt a multicast must-carry requirement, whereunder religious, ethnic and similar specialized broadcasters received required carriage rights on cable systems for their multiple streams of programming of those genres, multichannel program networks such as INSP, iLifetv, La Familia, Filipino 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. The same fate would befall TV One, if local broadcasters used one of their digital streams to create an African-American-oriented channel, and to Altitude, if local broadcasters used one of their digital streams to create a local or regional sports and entertainment channel. Indeed, most multichannel program networks would find themselves at risk of being dropped by cable systems on which they previously were carried because of the systems' new, additional multicast must-carry obligations.

**B. Lack Of Channel Capacity Already Is A Major Impediment To Multichannel Networks' Growth**

- Notwithstanding recent upgrades by cable systems, channel capacity is still scarce. Even where systems have been upgraded to 650, 750 or 850 MHz, premium and pay-per-view services, and new video and non-video services such as high speed Internet, video-on-demand, interactive video, cable telephony and other enhanced services, have consumed most of the added capacity, leaving virtually none of it for expanded linear carriage of multichannel program networks. Leased access and PEG channels also consume channel capacity on cable systems.

- The Networks know from experience that, even in upgraded cable systems, channel capacity is not unlimited. For example, INSP was dropped by a cable system in the Bluefield, Tennessee market as a result of the current single-channel must-carry rules, after a broadcast station asserted its mandatory carriage rights. Industry trade press have carried other recent reports of cable

and DBS operators that have, in spite of recent upgrades, dropped multichannel networks to make additional room for these enhanced services.

- 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. However, a multicast must-carry requirement would preferentially and discriminatorily reserve to broadcasters the benefit of such increased capacity and exclude multichannel program networks from access to that additional capacity. Such displacement would prevent the Networks, and other multichannel networks, from gaining new carriage on many cable systems, when the 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.

- Without sustained or increased carriage on cable systems, multichannel networks will not be able to continue to invest in high quality, niche programming that meets the needs of previously underserved segments of the viewing public.

**C. Multicast Must-Carry Would Further Reduce Extant Channel Capacity To The Detriment Of The Networks, And Would Reduce Programming Diversity**

- If multicast must-carry were imposed during the transition from analog to digital broadcast service, 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 its multicast services on the digital tier (consuming up to an additional 6 MHz), while at the same time being required to continue to carry its analog signal. In major markets such as New York and San Francisco, where there are more than 20 local broadcast stations, this could mean a reduction of ***more than 20*** 6 MHz channels that were available for carriage of multichannel program networks.

- Faced with these additional channel capacity constraints, cable operators would be forced to drop existing multichannel networks. Experience demonstrates that niche program services such as the Networks are the most likely to be dropped first. In addition to losing existing carriage, the Networks would be thwarted in their ability to obtain new carriage or to launch new networks on cable systems.

- The consequence for the viewing public would be a dramatic reduction in program diversity and quality. For example, carriage of a broadcaster's multicast signals could result in a cable operator being forced to carry third-party infomercial "programming" in lieu of one or more of the Networks. Indeed, in the Second Report and Order (at ¶ 39), the Commission found that "[a]dding additional channels of the same broadcaster would not enhance source diversity. Furthermore, programming shifted from a broadcaster's main channel to the same broadcaster's multicast channel would not promote diversity of information sources. Indeed, ***mandatory multicast carriage would arguably diminish the ability of other, independent voices to be carried on the cable system.***" (Emphasis added).

- Even after all broadcast stations convert to digital, multicast must-carry still would significantly and unconstitutionally harm non-broadcast, multichannel program networks. 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 multichannel 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 multichannel network obtains competitively.

**D. Multicast Must-Carry Would Not Withstand Judicial Scrutiny**

- Multicast must-carry would "render it more difficult to compete for carriage," in violation of the narrow tailoring requirement established in the *Turner* decisions. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 668 (1994) *(Turner I)*; *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 214 (1997) *(Turner II)*. *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 enhanced 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* one-third of a cable system were actually occupied by broadcast signals.

- 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).

    - As Justice O'Connor noted in *Turner I*, 512 U.S. at 675 "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." (O'Conner, J., dissenting)

    - Similarly, Justice Breyer observed in *Turner II*, 520 U.S. at 226, 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 'suppression of speech.'* (Breyer, J., concurring) (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 twice before, most recently only 15 months ago.

- No rational basis has been demonstrated for preferentially giving broadcasters a second, third, fourth, fifth or even sixth slot on cable systems in lieu of multichannel program services such as the Networks.

- Any decision imposing multicast must-carry is likely to be challenged in the U.S. Court of Appeals for the District of Columbia Circuit, which has not hesitated in the past to strike down Commission rulings as unsubstantiated by the record. An abrupt 180 degree shift in the Commission's assessment of the

record compiled in Docket 98-120, and the policy decisions based thereon, ***when there has been no legal or factual change since the Commission issued the Second Report and Order, and the standard for granting reconsideration has not been met,*** would do violence to principles of rational decision-making, and undoubtedly would be viewed by the D.C. Circuit as arbitrary and capricious, and an abuse of discretion, and would be struck down on that basis alone, if not also on the ground that multicast must-carry is an unconstitutional abridgement of speech.

## V. MULTICAST MUST-CARRY IS NOT NECESSARY TO PRESERVE "FREE OVER-THE-AIR TELEVISION" OR FACILITATE THE TRANSITION TO DIGITAL TELEVISION

- In the Second Report and Order (at ¶ 29), the Commission found that broadcasters "have not made the case on the current record that ... additional programming streams are essential to preserve the benefits of a free, over-the-air television system for viewers. Broadcasters will continue to be afforded must carry for their main video programming stream ... [and] Broadcasters can rely on the marketplace working to without mandatory carriage in order to persuade cable systems to carry additional streams of programming. ... Under these circumstances, the interests of over-the-air television viewers appear to remain protected."

- As the Commission found in the Second Report and Order, the digital transition will be driven by the creation of compelling programming, not by mandated carriage of sometimes duplicative channels under a multicast must-carry regime. 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. Indeed, cable operators already are carrying broadcasters' multicast digital signals in some cases, where marketplace realities commend such carriage. In the Commission's words: "no persuasive case has been made on the current record that a multicasting carriage requirement will facilitate the digital transition. High quality programming in a digital format is a major factor that will drive this transition. ... [A] guaranteed carriage requirement [might] diminish incentives for broadcast stations to produce high quality programming, which would 'reduce incentive for consumers to switch to digital TV.'" (Second Report and Order at ¶ 40).

- Broadcasters that are given more capacity than they can program themselves may try to sell capacity to nonbroadcast programmers, giving broadcast stations an undeserved and unnecessary windfall.

- The broadcast industry is a mature, established industry that is hardly in need of regulatory protection doled out by the Commission at the expense of multichannel networks. Indeed, broadcasters already have significant advantages over multichannel networks in the competition for advertising revenue because they are entitled to mandatory carriage of their primary video signals, can often demand carriage of multiple streams using leverage from retransmission consent negotiations, and obtain viewers from their over-the-air distribution.

- Moreover, in recent months, broadcasters have begun to enjoy entirely new revenue streams, which further enhance the already solid financial footing of the broadcast industry. Many broadcasters – including those that serve smaller markets, such as Nexstar Broadcasting – now are receiving *significant cash payments* from MVPDs in exchange for the right to retransmit the broadcast stations' signals. In addition, many broadcasters are developing additional revenue streams by licensing their content for cross-platform distribution and through the sale of advertising in connection with their distribution of content on other platforms. In light of these new revenue streams, and the overall vibrant health of the broadcast industry, broadcasters' claims that multicast must-carry is "essential" for their survival rings hollow.

* * * *

The Commission has, twice before, thoroughly examined and rejected proposals for multicast must-carry. Since the issuance of the Second Report and Order, nothing has changed that would warrant the Commission departing from those prior conclusions. Moreover, the pending petitions for reconsideration fail to present reasons sufficient to justify a grant of reconsideration. Finally, as the Commission has before concluded, multicast must-carry would do nothing to advance the digital transition or to preserve the availability of "free" over-the-air broadcast television service, and would in fact significantly diminish the diversity of television service available to the American viewing public. Therefore, the Networks urge the Commission to again reject the proposal for multicast must-carry.

Respectfully submitted,

**TV ONE, LLC**
**THE INSPIRATIONAL NETWORKS, INC.**
**ABS-CBN INTERNATIONAL, INC.**
**KSE MEDIA VENTURES, LLC**

By their attorneys:
**COLE, RAYWID & BRAVERMAN**

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