From: Braverman, Burt
Sent: Friday, September 07, 2007 3:39 PM
To: rick.chessen@fcc.gov
Subject: Joint comments -- dual must-carry

Rick:

Attached is a copy of our joint comments. Please see pp. 13-20 for our discussion of the impact of a dual must-carry requirement, to which we referred in our meeting.

In response to your question regarding whether the FNPRM contemplates a triple must-carry requirement: In the FNPRM, after referring to the dual carriage requirement (analog and digital), the Commission said: "This requirement would be in addition to the requirement that the cable operator pass through the HD signal to the cable subscribers of an HD package, as discussed above." Thus, even where a cable operator is carrying a broadcaster's HD signal, it must still carry the SD signal for subscribers who do not subscribe to an HD package -- i.e., triple must-carry.

Thank you for taking the time to meet with us today.

Burt

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Carriage of Digital Television Broadcast Signals; Amendments to Part 76 Of the Commission's Rules	CS Docket No. 98-120

REPLY COMMENTS OF:

THE AFRICA CHANNEL
ALTITUDE SPORTS & ENTERTAINMENT
AZN TELEVISION
COMCAST SPORTS NETWORKS
E! ENTERTAINMENT TELEVISION
THE FILIPINO CHANNEL
G4 NETWORK
THE GOLF CHANNEL
i-LifeTV
THE INSPIRATION NETWORK
LA FAMILIA COSMOVISION
OUTDOOR CHANNEL
PBS KIDS SPROUT
Sí TV
STYLE NETWORK
TV ONE
VERSUS

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August 16, 2007

Their Attorneys

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The Africa Channel, Altitude Sports & Entertainment, AZN Television, Comcast Sports Networks, E! Entertainment Television, G4 Network, The Filipino Channel, The Golf Channel, i-LifeTV, The Inspiration Network, La Familia Cosmovision, Outdoor Channel, PBS Kids Sprout, Sí TV, Style Network, TV One, and Versus (the "Networks"),[1] submit these reply comments pursuant to the Commission's *Second Further Notice of Proposed Rulemaking*,[2] and in response to arguments asserted by the National Association of Broadcasters ("NAB") and several other parties that filed comments in this proceeding.

I. INTRODUCTION AND SUMMARY

Purporting to carry out congressional intent, the Commission proposes that, after February 17, 2009, every cable television system be required to ensure that cable subscribers with analog television sets are able to continue to view all must-carry stations, either (1) by carrying all such broadcast signals in both analog and digital format until the cable system goes all-digital, or (2) on all-digital systems, by carrying the signal only in digital format, provided that all subscribers with analog sets have the necessary equipment to view the broadcast content. *NPRM* at ¶¶ 4, 17. Cable systems would be required, moreover, to pass through the High Definition ("HD") signals of must-carry broadcasters, potentially requiring cable systems to carry *three identical streams* of each local broadcaster's signal. *NPRM* at ¶¶ 3, 17. The proposed imposition of these requirements is made even more onerous by the Commission's companion proposal to prohibit efficient bandwidth preservation techniques that cable systems use to compress signals, supposedly for the sake of preventing material degradation of broadcast signals carried on cable systems. *NPRM* at ¶¶ 3, 12-15. Because few cable systems will be all-

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[1] Please see Appendix 1 for a description of each of the Networks.

[2] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Second Further Notice of Proposed Rulemaking, CS Docket 98-120, FCC 07-71 (rel. May 4, 2007) ("*NPRM*").

digital by February 2009 or the foreseeable future thereafter, the obvious net effect of these proposals is that, after February 17, 2009, the overwhelming majority of the nation's cable television systems will be subject to a dubious dual, and in many cases triple, must-carry regime that will occupy substantial portions of such systems' bandwidth capacity with duplicative streams of broadcast television programming and will displace and endanger many multichannel networks.[3]

NAB and several other parties supporting these proposals claim that they are necessary to ensure that broadcast signals continue to remain viewable by all cable subscribers. NAB argues that "old constitutional arguments" against dual must-carry no longer apply, as limitations on cable capacity are now a "thing of the past."[4] Other parties supporting the Commission's proposals even go so far as to claim that expanded must-carry obligations will foster a diversity of choices and viewpoints in the television marketplace.[5]

However, these remarkable assertions are out of touch with the current reality of the cable television marketplace. Despite cable operators' significant plant upgrades, multichannel networks must fight more vigorously than ever for carriage on cable systems, vying not only with one another for scarce "shelf space", but also with cable operators' need to provide ever-increasing Internet access speeds, their aggressive roll-out of capacity-consuming products such as voice over Internet protocol telephone ("VoIP"), video-on-demand ("VOD") and other advanced and interactive services, as well as their mandated accommodation of a host of regulatory-imposed capacity demands, including PEG access, commercial leased access, must-

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[3] We use the term "multichannel network" to refer to a national or regional satellite or terrestrial program vendor that distributes its programming to the public through cable television, DBS and/or other multichannel video program distributors ("MVPDs").

[4] Comments of National Association of Broadcasters, in Docket 98-120, filed July 16, 2007, at 13.

[5] *See, e.g.,* Comments of Religious Voices in Broadcasting, in Docket 98-120, filed July 16, 2007, at 5.

carry and the various carriage obligations arising out of retransmission consent negotiations. Thus, the capacity limitations confronting multichannel networks are daunting.

Promoting diversity of programming sources is, as the Supreme Court has concluded, a government purpose of the highest order, and multichannel networks offer some of the most original, innovative and diverse programming available on television, including a depth and breadth of coverage not found on broadcast television. Any additional consumption of cable systems' bandwidth in the form of a dual, or triple, must-carry requirement would squander a scarce and valuable resource, threaten many multichannel networks' continued viability by artificially restricting their distribution, and thereby jeopardize the diversity of the television marketplace to which those networks have made so important a contribution.

Each of the Networks has invested anywhere from tens of millions of dollars, to 1.5 billion dollars, in original programming, production and studio facilities, delivery technologies and auxiliary services, and marketing and promotion, all at its own risk and without the benefit of governmentally mandated carriage guarantees or other subsidies.[6] They and other multichannel networks like them have had to compete fiercely for carriage on the scarce extant channels of cable and other MVPD systems to gain subscriber distribution, the lifeblood of all program networks. As a result of such efforts, the competitive marketplace for multichannel television has thrived, and the number, diversity and quality of multichannel program networks has continued to grow.

The Commission's dual carriage proposal places that growth in jeopardy, and could endanger the vibrant rainbow of multichannel networks that the past fifteen years has produced. Any dual carriage requirement would further reduce available cable system channel capacity and

[6] *See* Appendix I, *infra.*

force cable operators to drop multichannel networks, shift them to lower-penetrated tiers or delay planned launches, and deny carriage to new and emerging networks. Faced with limited growth potential, and either stagnation or decrease in license fees and ad revenues, networks would be forced to spend less on the acquisition and production of original programming and the development of new products, to broaden the scope (yet dilute the unique, niche focus) of their networks in order to attract larger viewing audiences, and to forego plans to launch new networks. As a result, many program networks would fail; others would be forced to slash programming budgets and possibly forego the creation of innovative, original programming and the introduction of new interactive services; and many new and proposed networks would never see the light of day because the absence of channel capacity would reduce the incentive for launch of new networks. Programming diversity, and competition in the television marketplace, long sought by Congress and the Commission, would suffer, and consumers would be deprived of diverse, quality programming that they want to receive. While the Commission's *NPRM* expresses concern about the burden of the DTV transition on cable subscribers who own analog television sets,[7] it voices not one word about the impact that its proposals most certainly would have on multichannel networks and reflects no sensitivity to how consumers would be harmed even more by the loss of such diverse multichannel network services and their replacement with redundant broadcast signals.

In bringing about this result, television consumers would not be served and Congress' goals for the digital transition would not be substantially advanced. A dual carriage requirement, while intended to guarantee that no cable subscriber is unable to receive broadcast channels after the transition, does little to actually accomplish that goal that could not be achieved in a way that

[7] *See NPRM* at ¶¶ 4, 5.

does not discriminate against, and stifle the voices of, independent multichannel networks. Yet the *NPRM* does not even consider, or request comment upon, any such alternative.

Dual must-carry is not necessary – and certainly is not a reasonably tailored plan – to preserve viewability of broadcast programming by cable subscribers after the digital transition, and instead would unjustly discriminate against multichannel networks' speech in favor of broadcasters' speech. Thus, the delicate balance that salvaged the must-carry rules in *Turner* would no longer prevail, and consequently the dual carriage requirement under consideration could not survive constitutional challenge.

II. PROMOTION OF PROGRAM SOURCE DIVERSITY IS A GOVERNMENT PURPOSE OF THE HIGHEST ORDER

Congress and the Commission have long sought to promote diversity in sources of television programming, which the Supreme Court has recognized as a government purpose of the "highest order."[8] One of the primary objectives in enacting Title VI of the Communications Act was to "assure that cable communications provide and are encouraged to provide the widest possible *diversity of information sources and services* to the public."[9] In adopting the Cable Television Consumer Protection and Competition Act of 1992, Congress reiterated its policy objective to ". . . promote the availability to the public of a *diversity* of views and information through cable television and other video distribution media."[10] In addition, Congress directed the Commission to adopt regulations in order to promote "the public interest . . . by increasing competition and *diversity* in the multichannel video programming market and the continuing

[8] *Turner Broad. Sys., Inc. v. United States*, 520 U.S. 180, 190 (1997) ("*Turner II*").

[9] 47 U.S.C. § 521(4) (emphasis added).

[10] 1992 Cable Act, Section 2(b)(1), 106 Stat. at 1463 (emphasis added).

development of communications technology."[11] Courts too have recognized the long-standing Commission policy of promoting program source diversity.[12]

Congress and the Commission also have expressly acknowledged, and sought to guard against, the potential chilling effect of regulation on the development of new programming services. For example, in adopting the horizontal ownership limitations in Section 633, Congress directed the Commission not to impose "limitations that will impair the development of diverse and high quality programming."[13] Similarly, the Commission has exempted program networks from certain of the Commission's regulations when program diversity was threatened,[14] and modified its Dual Network Rule to eliminate the major network/emerging network merger prohibition after finding that relaxation of the rule would promote diversity in the video marketplace.[15] The Commission recently has continued to trumpet the goal of promoting diversity in programming sources.[16]

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[11] 47 U.S.C. § 548(c)(1) (emphasis added); *see also* § 548(c)(4)(D). In 1996, Congress sought to promote program diversity in enacting rules governing Open Video Systems. *Implementation of Section 302 of the Telecommunications Act of 1996 (Open Video Systems*), 11 FCC Rcd 20227 (1996), ¶ 224 (citing Conference Report at 172, 177-78). The Commission itself has recognized that the 1992 Cable Act program access-exclusivity restrictions were intended to "promote diversity by providing incentives for cable operators to promote and carry a new and untested programming service." *Cablevision Industries Corp. and Sci-Fi Channel*, 10 FCC Rcd 9786 (1995), ¶¶ 27-29.

[12] *See, e.g., Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) ("Over the past seventy years, the Commission has actively adjusted its license ownership rules on an ongoing basis to foster the growth of new media outlets while maintaining a *focus on programming diversity*.") (emphasis added).

[13] 47 U.S.C. § 533(f)(2). Although the U.S. Court of Appeals for the District of Columbia Circuit held that the FCC's horizontal cable ownership rules were overreaching, the court expressly recognized the validity of Congress' actions in requiring the rules. *Time Warner Entm't Co v. United States*, 211 F.3d 1313 (D.C. Cir. 2000). *See also Time Warner Entm't Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

[14] *See Waiver Of The Commission's Rules Regulating Rates For Cable Services*, 11 FCC Rcd 1179 (1995) ("the Commission is guided by the goal of reducing unnecessary burdens on cable operators and providing the cable operators incentives to innovate and promote program diversity in response to competition"); *Sixth Order On Reconsideration (Rate Regulation)*, 10 FCC Rcd 1226 (1994), ¶ 22 (modifying the going-forward rules to ease the burden on establishing new networks). *See also Closed Captioning and Video Description of Video Programming -- Implementation of Section 305 of the Telecommunications Act of 1996 -- Video Programming Accessibility*, Order On Reconsideration, FCC 98-236, MM Docket No. 95-176 (rel. Oct. 2, 1998), ¶ 54 (expanding exemption "to include numerous nascent networks that are continuing to experience growing difficulties").

[15] *In the Matter of Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule*, Report and Order, FCC 01-133, MM Docket No. 00-108 (rel. May 15, 2001) ("*Dual Network Order"*), ¶44.

[16] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503 (2006) ("*Twelfth Report*"), at ¶ 169 (noting that the Commission's rules concerning competitive access to cable programming "seek to promote competition and diversity in the multichannel video programming market . . . ."); *id.* at ¶ 31 (noting the Commission's authority to "promulgate any

Given this clearly articulated and consistently applied policy to promote "diversity in ideas and speech,"[17] the Commission should refrain from taking its proposed actions in the current rulemaking, actions that unquestionably would decrease the diversity of programming sources and choices for the American viewing public.

III. MULTICHANNEL NETWORKS SERVE THE PUBLIC INTEREST BY AFFORDING VIEWERS A LEVEL OF SOURCE AND PROGRAM DIVERSITY THAT FAR EXCEEDS BROADCAST TELEVISION

Congress' objective of promoting diversity in the sources of television programming has been substantially fulfilled by multichannel program networks, the total number of which has grown steadily over the years. There are today 531 national multichannel networks[18] compared to 281 in 2000[19] and 172 in 1998.[20] In addition, there are 96 regional sports and news networks in operation, as well as another 79 national multichannel networks that have announced plans to launch.[21] Not only are there now more diverse multichannel networks than in 1998, fewer networks today are vertically integrated with cable television MSOs. As reported by the Commission, 39 percent of cable networks were vertically integrated in 1998,[22] whereas only 21 percent were vertically integrated in 2006.[23]

The robust and diverse nature of multichannel network programming offers viewers an array and depth of content options that simply is not found on broadcast television, which tends

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additional rules necessary to promote diversity of information sources."); *id.* at ¶ 156 (noting Congress' purpose to foster competition and diversity.).

[17] *Time Warner Entm't Co. v. FCC,* 240 F.3d at 1130.

[18] *See Twelfth Report* at ¶ 21.

[19] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Seventh Annual Report, 16 FCC Rcd 6005 (2001) at ¶ 173.

[20] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd 1034 (1998) at ¶ 158.

[21] *Twelfth Report* at ¶¶ 22, 167.

[22] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd 24284 (1998).

[23] *Twelfth Report* at ¶ 21.

to cater to the broadest common denominator and holds viewers prisoner to day-part schedules that were created to maximize broadcast networks' revenues, not consumer convenience or choice. These multichannel networks provide full-time coverage of a broad spectrum of niche genres that address nearly every imaginable viewing interest and need of the American public, including art, theater, cinema, entertainment, literature, music, business, news, sports, nature, history, foreign affairs, minority and ethnic groups, foreign languages, cooking, home and garden, crafts, travel, health, children, family, women, men, gay and lesbian lifestyle, science, space, environment, geography, religion, animals, humor, cartoons, animation, local and regional interest, shopping, weather, and countless others, with whole networks being devoted to full-time coverage of each of these subject areas. The Networks who have joined together to submit these reply comments are a microcosm of this incredible diversity, and are representative of the competitive force that multichannel networks have brought to the television marketplace in fulfillment of Congress' vision.

By way of example, multichannel networks such as La Familia Cosmovision and The Filipino Channel offer entire channels of foreign language programming in a host of languages and dialects, programming that cannot be found on broadcast television. These networks are highly valued by, and uniquely important to the lives of, their viewers, whose needs and interests are largely unserved by the broadcast television industry. Likewise, networks such as TV One, The Africa Channel, AZN Television and Sí TV serve the unique viewing needs of African American, Asian and Hispanic television viewers, respectively. No less important to their committed viewers are the acclaimed programs that Inspiration Network and i-LifeTV provide to viewers of religious and spiritual programming, that PBS Kids Sprout provides to children, that The Golf Channel, Outdoor Channel, Altitude Sports & Entertainment, Versus and Comcast Sports

Nets provide to passionate sports and outdoor enthusiasts, that E! Entertainment and Style provide to women, and that G4 provides to video game enthusiasts.[24]

Thus, instead of Bruce Springsteen's 1992 lament of the dearth of programming options on cable – "57 channels and nothing on" – the reality today is that multichannel networks provide a cornucopia of interesting, differentiated, innovative programming on a 24 x 7 basis – an accomplishment that broadcast television cannot begin to match. The unparalleled quality, originality and value to television viewers of these diverse multichannel networks is reflected in the year-over-year increase in Nielson ratings of basic cable networks and the corresponding decline of broadcast networks.[25] Multichannel networks continue this trend, outperforming broadcasters in ratings this Summer and garnering more Emmy nominations and awards than ever before.[26]

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[24] *See* descriptions of the Networks at Appendix I, *infra*.

[25] *See, e.g., Cable's Clean Sweep: As season opens, broadcast share slips behind ad-supported networks*, BROADCASTING & CABLE, Oct. 18, 2004 ("For the first time, ad-supported cable networks beat broadcast in the initial week of a new season and are holding on to that advantage, according to analyses of Nielsen Media Research data by Turner Broadcasting and NBC."), *available at* http://www.broadcastingcable.com/article/CA472600.html (last visited Aug. 12, 2007); *Cable makes history, beating broadcast in 2002*, MEDIA LIFE MAGAZINE, Dec. 18, 2002 ("For the first time ever, cable will outperform broadcast during a calendar year in terms of total audience share. Cable's share of 48 percent was three points higher than broadcast's with a few more weeks to calculate."), *available at* http://www.medialifemagazine.com/news2002/dec02/dec16/3_wed/news7wednesday.html (last visited Aug. 12, 2007).

[26] *See, e.g., Shine and Swoon: While the broadcast nets have seen audiences wilt this summer, cable is beefing up ratings*, MEDIAWEEK, Aug. 6, 2007 ("The Big Four broadcast networks are once again treading water this summer, with cumulative live-plus-same-day DVR viewership down 2.3 million per night or 9 percent lower than last summer, according to Nielsen Media Research data . . . . Cable has bulked up in the weight room and stormed back to spend a leisurely summer kicking sand in broadcast's face. Summer to date (through August 2), no fewer than nine original cable series are averaging a 2 household rating, which is generally considered the Mendoza Line as far as potential renewals are concerned."), *available at* http://www.mediaweek.com/mw/current/article_display.jsp?vnu_content_id=1003621468 (last visited Aug. 12, 2007). *Basic cable shows make Emmy strides*, THE HOLLYWOOD REPORTER, Aug. 6, 2007 (". . . basic cable networks continue to make strides at the Emmys…. with a fraction of the budgets and the viewership of the broadcast networks and HBO, basic cable has been dominating the reality series field and slowly but surely has taken over two other prestigious categories – best variety, music or comedy series and best reality competition."), *available at* http://www.hollywoodreporter.com/hr/content_display/features/columns/tv_reporter/e3ic160a8816c130e5c518385bbcfaca351 (last visited Aug. 12, 2007); *Cable TV Is Having Breakout Summer*, N.Y. TIMES, Aug. 9, 2007 ("A host of cable channels have generated significant successes with original shows this summer, mainly hourlong dramas like "The Closer" and "Saving Grace" on TNT; "Army Wives" on Lifetime; "Burn Notice" on USA; "Damages" on

These accomplishments have come without the aid of government carriage requirements, preferences or subsidies that broadcasters receive – indeed, some would say, in spite of governmentally imposed disadvantages – and reflect multichannel networks' investment of billions of dollars in the development and promotion of original program fare[27] that gives TV viewers the wide variety of innovative, high quality programming and services that they crave. It simply cannot be good policy to jeopardize the distribution of diverse networks such as these in order to gain cable operators' carriage of two, or even three, *duplicative* streams of the same programming to cable homes with analog television sets when there are more tailored, less disruptive ways of continuing to ensure that broadcasters' digital signals can be viewed in such homes after the DTV transition.

IV. DESPITE CABLE UPGRADES, SCARCITY OF CHANNEL CAPACITY HAS MADE IT INCREASINGLY DIFFICULT FOR MULTICHANNEL NETWORKS TO OBTAIN CABLE DISTRIBUTION

Today's diverse multichannel program networks still must compete vigorously for carriage, notwithstanding significant cable upgrades over the past decade.[28] While overall bandwidth capacity on cable systems has increased, much of the new "space" created by upgrades has been allocated to services other than traditional linear network programming or committed to launches of services linked to retransmission consent deals. Moreover, as previously recognized by the Commission in this proceeding, other government imposed access

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FX; and "Mad Men" on the most unlikely channel, AMC."), *available at* http://www.nytimes.com/2007/08/09/arts/television/09cabl.html (last visited Aug. 12, 2007).

27 *Summer on basic cable outlets is a time to win audiences with original shows*, L.A. TIMES, Aug. 5, 2007 ("Research firm SNL Kagan estimates that basic-cable networks (not including HBO and Showtime) spent a total of $15.5 billion on programming costs in 2006, up 16% compared with the previous year."), *available at* http://www.latimes.com/entertainment/news/tv/la-et-channel6aug06,1,5546791.story?coll=la-entnews-tv (last visited Aug. 12, 2007).

28 *See TV Channels Move to Web*, MULTICHANNEL NEWS, Aug. 10, 2007 ("Despite some inroads -- it eventually reached 16 million homes -- the Atlanta-based company had struggled to get cable providers to offer the channel in enough homes to attract advertisers. 'Today, if you want to start a cable network, it might be easier to schedule a ride to the moon,' says Rick Newberger, chief executive of the Black Family Channel.").

obligations have further significantly reduced the amount of channel space available to multichannel program networks.[29] Thus, the more than 625 national and regional multichannel networks must compete not only among themselves for access to this limited cable capacity, but also with local broadcasters, a host of other new non-video services, and government regulations that allocate cable operators' bandwidth to other purposes.

A. Cable Upgrades Have Been Allocated To Other Services That Compete With Multichannel Program Networks For Shelf Space

Many cable operators are utilizing their newly acquired bandwidth to offer services such as high-speed Internet service, VOD, HD packages, VoIP, and a host of interactive and other enhanced services – services that require substantial amounts of system bandwidth that previously would have been allocated to carriage of linear networks.[30] For example, more than 32 million homes and small businesses throughout the country now connect to the Internet through cable 's broadband high speed Internet service, and more than 10 million obtain VoIP or circuit-switched phone service via cable, with robust features like voice mail, caller ID, and call forwarding.[31] In addition, many cable operators are aggressively rolling out VOD services,[32]

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[29] *See Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, ¶ 86 (rel. Jan. 23, 2001) (discussing PEG obligations of cable systems) ("*First R&O*").

[30] *See, e.g.*, Motorola Inc. at Citigroup 17th Annual Entertainment, Media and Telecommunications Conference - Final FD (FAIR DISCLOSURE) WIRE, Jan. 11, 2007 ("Cable is certainly in a lot better shape than I think the traditional wireline telcos are in terms of what they can deliver because they have a big pipe. But is that big pipe getting full? Yes, that big pipe is getting full… Partly because cable operators are getting pushed and pushed for more data [services to customers]. Kind of the mantra today is 100 Mb to the home. That's what fiber to the home [ILEC competitors to cable] talk about . . .); *Cable's Looming Bandwidth Crisis?*, LIGHT READING, Sept. 21, 2006 (". . . it is true that most of cable's bandwidth is eaten up by analog broadcast channels, to the tune of 70 or more on many cable systems. And then there's broadcast digital, digital simulcast, and VOD, not to mention DOCSIS channels for IP services."), *available at* http://www.lightreading.com/document.asp?doc_id=109594&print=true (last visited Aug. 12, 2007); *see also Twelfth Annual Report* at ¶ 28 ("deployment of video-on-demand . . . increased during 2004 and the first half of 2005. Deployment of nonvideo advanced services, such as high-speed Internet access service and telephone service, also increased during this period.").

[31] NCTA Statistics, *available at* http://www.ncta.com/ContentView.aspx?contentId=54 (last visited Aug. 12, 2007).

[32] *Twelfth Annual Report* at ¶ 56 ("At year-end 2004, VOD service was available to 73 percent of homes passed by cable systems."); *see also* Simon Applebaum, *Top 7 Issues to Watch In '07: The Insiders*, CABLE WORLD, Vol. 19, No. 1, Jan. 8, 2007 (citing Danial Faizullabhoy, CEO of Broadlogic Network Technologies, on his belief that

which, for example, now attract more than 250 million subscriber views per month on Comcast's systems alone.[33] Cable operators also are introducing a variety of other server-based, bandwidth intensive advanced and interactive services such as those that will be supported by OpenCable Application Platform ("OCAP).[34] In cable systems that have been upgraded to 750-860 MHz of capacity, much of the capacity above 550 MHz has been dedicated to services other than carriage of linear multichannel networks.[35]

At the same time, multichannel networks are being driven by the marketplace to introduce their own interactive services, which, while highly desirable, will consume significant bandwidth.[36] In the face of cable operators' competing priorities for use of their capacity, it will be extraordinarily difficult for multichannel networks to obtain capacity on cable platforms for these new services.[37]

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bandwidth is the top issue to watch in 2007 because the simultaneous growth of HD, VOD, VoIP and broadband data requires greater bandwidth).

[33] *Coming Back for More; VOD Isn't Hugely Profitable for Cable Operators, But It Drives Viewer Retention*, TELEVISIONWEEK, June 25, 2007.

[34] *New Report Assesses the Implications of the Seemingly Inevitable Evolution of OPAC iTV*, BUSINESSWIRE, July 26, 2007 ("OCAP is designed to support applications that run on consumer devices that are connected to a digital cable service. Applications can include electronic programming guides, video on demand, digital video recording, telescoping advertisements, shopping, games, gambling, information retrieval, sport statistics, virtual channels, caller ID, e-mail, and customer support, to name a few – all done on your television screen."), *available at* http://home.businesswire.com/portal/site/google/index.jsp?ndmViewId=news_view&newsId=20070726005479&newsLang=en (last visited Aug. 12, 2007).

[35] *Bare Bones Basics: HDTV and Bandwidth 101*, MULTICHANNEL NEWS, Apr. 26 2004 (**"**In general, most cable providers reserve 200 MHz of bandwidth, located spectrally between 550-750 MHz, for their digital products. That's about 33 channels in traditional width - 6 MHz.").

[36] *See, e.g.,* Comments of The Weather Channel, Inc., in Docket No. 98-120, filed August 16, 2007.

[37] *See* Shirley Brady & Janet Stilson, *Cable's Content Gatekeepers, Part II*, CABLE WORLD, Vol. 19, No. 11, June 18, 2007 (referring to the position of Peter Stern, EVP of Product Management at Time Warner Cable, that "there are limited opportunities at Time Warner Cable for linear channel additions . . ."; and quoting Patty McCaskill, SVP of Programming for Suddenlink Communications, on her observation that fewer linear networks are seeking launch because "New entrants have come to the realization that launches of new linear networks are going to be few and far between"); Shirley Brady, *Independent Programmers with Nonlinear Savvy are Hot With Cable Operators*, CABLE WORLD, Vol. 18, No. 13, June 12, 2006 (noting that "operators' contractual agreements and bandwidth hogging services such as HD channels have limited their capacity to add linear networks"); Shirley Brady & Janet Stilson, *Cable's Content Gatekeepers, Part II*, CABLE WORLD, Vol. 19, No. 11, June 18, 2007.

Digital channel space, once considered the answer to capacity problems, is also scarce. The Networks have found that less than one-third of the new digital video capacity is being devoted to networks such as theirs. Instead, premium services, pay-per-view services and other pay services are garnering anywhere from 70 to 80 percent of any added capacity.[38] For example, HBO, which in 1992 when must-carry was adopted by Congress had only 4 channels of programming,[39] now offers seventeen channels of pay programming, including nine channels under the Cinemax brand.[40]

B. Existing Regulatory Requirements Already Severely Limit The Amount Of Cable System Channel Capacity Available To Multichannel Networks

All cable systems, whether upgraded or not, must set aside a significant percentage of their channel capacity for government-imposed access requirements, including must-carry, commercial leased access, and public, educational and government access.[41] In addition, broadcasters have used their retransmission consent leverage to secure cable operators' carriage of additional content, including multicast channels and affiliated cable networks. The Commission previously has recognized the toll that these regulatory requirements take on available cable channel capacity.[42]

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[38] For example, more than three quarters of Time Warner's Eastern Carolina channel capacity is devoted to pay and premium services (see channel lineup at http://www.timewarnercable.com/CustomerService/CLU/TWCCLUs.ashx?CLUID=473&Zip=&Image1.x=48&Image1.y=6) and more than two thirds of Bright House Networks' capacity in Tampa is devoted to such services (http://tampabay.mybrighthouse.com/products_and_pricing/digital_cable/programming/channels/default.aspx).

[39] *TCI: $200 million for channel explosion*, BROADCASTING, Dec. 7, 1992 ("Maintaining its four analog feeds of HBO and Cinemax (East and West), HBO will begin with 4-to-1 satellite compression of the additional signals 'to maintain state-of-the-art quality' at the headend, said Zitter.").

[40] HBO Schedule, *available at* http://www.hbo.com/apps/schedule/ScheduleServlet?ACTION_TODAY=TODAY (last visited Aug. 12, 2007).

[41] *Broadcast Signal Carriage Issues*, Report and Order, FCC 93-1448, FCC Rcd 2965 (1993); *Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, FCC 94-211, 9 FCC Rcd 6723 (1994); *Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access*, Second Report and Order and Second Order on Reconsideration of the First Report and Order, FCC 97-27, 12 FCC Rcd 5267 (1997); 47 U.S.C. §§ 531, 532, 534, 535.

[42] *First R&O* at ¶ 123 (inquiring about the average number of channels dedicated to such requirements).

According to recent statistics, cable systems nationwide offer an average of 70.5 channels on their expanded basic tiers.[43] Assuming that 30 channels on average are used by local commercial broadcasters, non-commercial educational broadcasters, leased access programmers, and PEG access,[44] only 40 cable channels are left for the 625 national and regional non-broadcast multichannel networks, including new, foreign language, minority and other niche and micro-niche programming services. Thus, even without the burden of the Commission's proposed new dual must-carry rules, only a very select few multichannel networks conceivably can be distributed on the widest tier of the average cable system.

Even in today's upgraded cable systems, the amount of analog channel space available to multichannel networks is extremely limited. For example, a 750 MHz system has approximately 700 MHz available for downstream content, with approximately 50 MHz typically being reserved for upstream use,[45] leaving approximately 116 channels of 6 MHz each.[46] Local commercial broadcasters are allowed to co-opt up to one-third of this available channel capacity, or

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[43] *See In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 21 FCC Rcd 15087 (2006) ("*2006 Report on Cable Prices*") at ¶ 23, Table 4 (70.5 channels, as of Jan. 1, 2005).

[44] The growing pressure to provide more government mandated services such as leased access, *see Leased Commercial Access*, Notice of Proposed Rulemaking, FCC 07-18, MB Docket No. 07-42, ¶¶ 3-6 (June 15, 2007), and PEG, *see Twelfth Annual Report* at ¶ 187, has further limited the capacity that otherwise would be available to multichannel networks. Indeed, local demands for PEG channels have increased in recent years, and state video franchise legislation passed in a number of states reflects that PEG obligations are one of the more hotly contested aspects of video franchising. *See, e.g.*, *Verizon files application to offer FiOS TV to further 77,000 homes in Tampa, Florida under revised state cable franchise regulations*, OPTICAL NETWORKS DAILY, July 6, 2007 ("As a new entrant, Verizon will be required to match the number of PEG channels required by the existing incumbent franchise agreements").

[45] *See, e.g.*, "Technical Evaluation of the Millennium Cable System Serving Seattle Washington," July 24, 2006, at 7 ("The upper system bandwidth is 750 MHz providing 700 MHz downstream transmission capacity. The remaining 50 MHz is used for upstream capacity and as a guard band between the downstream and upstream.") http://www.seattle.gov/cable/MDMrenewal/Report%20and%20Attachments/Seattle%20%20Evaluation%20FINAL%20report_072406.pdf (last visited Aug. 12, 2007).

[46] *Cable's Looming Bandwidth Crisis?*, LIGHT READING, Sept. 21, 2006 ("With 700 MHz downstream, MSOs have 110 channels to play with…"), *available at* http://www.lightreading.com/document.asp?doc_id=109594&print=true (last visited Aug. 12, 2007).

approximately 233 MHz, for required carriage of their signals.[47] Because each broadcast channel utilizes 6 MHz, approximately 39 channels must be made available to satisfy commercial must-carry obligations. On top of that, 15 percent of all activated downstream channels (i.e., 17 channels) must be made available for commercial leased access use;[48] and typically about 3 channels (and in a growing number of cases, more) are required for PEG access programs.[49] Finally, all local qualified Noncommercial Educational ("NCE") broadcast stations are entitled to mandatory carriage on request, which often requires carriage of an additional three stations at least, and potentially more.[50] Since typically 33 channels are reserved for the non-linear downstream transmissions such as VOD, pay-per-view, high speed Internet, and VoIP that today's cable customers demand, the end result yields more than 625 multichannel networks vying for carriage on a cable system with only 21 analog channels available.

Taking a real world example, in New York City, the largest cable market in the country, Time Warner Cable offers 76 channels of programming on its most widely distributed tier.[51] Of these 76 channels, 15 have been assigned to mandatory carriage of broadcast networks[52] and 10 to

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[47] 47 C.F.R. § 76.56(b)(2) ("A cable system with more than 12 usable activated channels, as defined in § 76.5(oo), shall carry local commercial television stations up to one-third of the aggregate number of usable activated channels of such system.").

[48] 47 U.S.C. § 532(b)(1)(C) ("An operator of any cable system with more than 100 activated channels shall designate 15 percent of all such channels.").

[49] PEG obligations are not being decreased by new state-wide franchising laws. *See Ohio -- Governor signs cable franchise law*, TR's STATE NEWSWIRE, June 27, 2007 ("Competitive video service providers will have to offer three public access channels on the basic tier in townships that had three or more PEG channels programmed as of Jan. 1, 2007"); *Kansas Joins State Franchising Rolls*, MULTICHANNEL NEWS, Apr. 10, 2006 ("A locality may demand no more PEG channels than are activated by the incumbent.").

[50] 47 C.F.R. § 76.56(a)(1)(iii) ("Systems with more than 36 usable activated channels shall be required to carry the signals of all qualified local NCE television stations requesting carriage, but in any event at least three such signals"). New York and San Francisco markets have four NCEs each. 2007 TELEVISION AND CABLE FACTBOOK, at D-1062 (New York, NY), D-175 and A-2696 (San Francisco, CA).

[51] *See* Time Warner Channel Line-up for Manhattan, NY, *at* http://www.timewarnercable.com/CustomerService/CLU/TWCCLUs.ashx (last visited Aug. 12, 2007).

[52] 2007 TELEVISION AND CABLE FACTBOOK, Cable Vol. 2, at D-1062 (New York, NY).

PEG usage.[53] The system also is required to make up to 17 channels available for leased access,[54] leaving only 35 channels reliably available for multichannel networks. Similarly, Comcast Cable in San Francisco includes 80 channels in its most widely distributed tier.[55] Of these 80 channels, 20 are analog commercial and NCE must-carry broadcast signals,[56] and at least 20 must be available for leased access and PEG.[57] This leaves 40 channels reliably available for all other video programming.

Thus, under the Commission's current regulations, there are only 35 channels that currently are freely available on the widest tier in New York, and only 40 in San Francisco.[58] If cable operators were to be subjected to a dual must-carry requirement after the transition, capacity allocated to broadcast stations would increase by 50 percent (i.e., 6 MHz for analog, plus 3 MHz for digital streams of the same programming). Consequently, channels reliably available to multichannel operators in New York would decrease by 7 to a net of 28, and would decrease by 10 in San Francisco to a net of 30. Assuming that, with digital compression technology, approximately six cable networks could be carried within the bandwidth of each 6MHz channel, the Commission's dual carriage proposal could foreclose analog carriage of **7** and **10** multichannel networks in New

[53] *See Petition of Time Warner Cable of New York City for a Waiver of the Requirements of 9 NYCRR 595.4(c)(11) of the Public Service Commission's Rules and Regulations*, Order Granting Waiver, Case No. 04-V-0089 (NYPSC June 10, 2004). *See* Time Warner Channel Lineup – Local Channels, *available at* http://www.timewarnercable.com/nynj/programming/localprogramming/default.html?menu=Programming (last visited Aug. 12, 2007).

[54] Fifteen percent of 76 channels, *i.e.*, 11.4 channels that statutorily must be designated for leased access.

[55] *See* Comcast Channel Line-up for San Francisco, CA, *at* http://www.comcast.com/Customers/Clu/ChannelLineup.ashx (last visited Aug. 8, 2007).

[56] 2007 TELEVISION AND CABLE FACTBOOK, at D-175 (San Francisco, CA).

[57] The leased access and PEG channels include Access Television Network/ComcastSF-City Station (Channel 11); SFGTV (Government Access) (26); City College/SFSU/Public Schools (Educational Access) (27); Public Access Channels (29 and 75), Access SF2 (76); Access SF Channel (77); SFGTV2 – San Francisco Government Channel (78); and Leased/Adult Access (79).

[58] Although unused leased access channels may temporarily be put to other use by a cable system, they are subject to reclamation for leased access usage at any time demand for such channels arises, and the Commission currently is considering measures to enhance the demand for, and use of, cable systems' leased access channels. *See Leased Commercial Access*, Notice of Proposed Rulemaking, FCC 07-18, MB Docket No. 07-42 (June 15, 2007).

York and San Francisco, respectively, and digital carriage of **42** and **60** multichannel networks in New York and San Francisco, respectively.

The situation would grow even worse if cable operators were subjected to a triple must-carry requirement, being required to also carry broadcasters' HD signals in addition to their SD and analog signals. After the transition, they could expect to see cable operators' mandatory broadcast carriage requirements increase by 100% (6 MHz for analog, plus 3 MHz for SD digital and 3 MHz for HD digital streams of the same programming). Available channels would decrease to 20 in New York for a total decline of 15 channels, and to 20 in San Francisco, for a total decline there of 20 channels. Assuming that, with digital compression technology, approximately six cable networks could be carried within the bandwidth of each 6 MHz channel, the Commission's proposed triple must-carry proposal could foreclose analog carriage of **15** and **20** multichannel networks in New York and San Francisco, respectively, and digital carriage of **90** and **120** multichannel networks in New York and San Francisco, respectively.

Layered on top of these substantial regulatory channel set-asides are cable operators' obligations to carry numerous channels of broadcasters' multicast programming and cable networks affiliated with the major broadcast networks, commitments extracted by broadcasters through use of their retransmission consent leverage, further reducing the channel capacity available to multichannel networks. For example, early in the digital transition, broadcasters applied retransmission negotiations to gain cable systems' carriage of duplicative digital broadcast signals in addition to cable operators' required carriage of analog broadcast signals.[59] Later in

[59] *See, e.g.,* Steve Donohue, *Digital Works in Raleigh*, MULTICHANNEL NEWS, SPECIAL SUPPLEMENT, Apr. 23, 2001, at 6A (noting Time Warner's agreement with WRAL-TV Raleigh, the local CBS affiliate, as well as Time Warner's agreement with PBS); Jon LaFayette, *Fox gets cable deal; Time Warner, ABC still negotiating for retransmission*, ELECTRONIC MEDIA, Jan. 3, 2000, at 1; *What Gatekeeper: Time Warner Cable Reaches Retrans Deal with NBC*, CABLEFAX, Vol. 11, No. 98, May 18, 2000; Linda Moss, *Time Warner, Belo Will Make News*, MULTICHANNEL NEWS, PROGRAMMING, Oct. 2, 2000, at 32 (all noting Time Warner's entry into agreements with Fox and NBC, in addition to several broadcast stations in Texas).

the transition, broadcasters used their leverage to obtain cable operators' delivery of their digital signals to subscribers with both analog and digital television sets.[60]

Broadcasters also have used retransmission consent leverage to gain cable carriage of their digital multiplexed signals. For example, through retransmission consent negotiations, NBC secured cable operators' widespread carriage of its NBC Weather Plus multicast service, displacing many multichannel networks that otherwise might have occupied that capacity.[61] Deals such as these have resulted in cable operators carrying broadcast stations' signals in excess of that which the stations could demand under must-carry, with such additional carriage coming directly at the expense of multichannel networks.

Occupying still more of cable systems' capacity, the major broadcast networks have used retransmission consent negotiations by their owned and operated stations to secure cable operators' carriage of cable networks owned by the broadcasters.[62] For example, Fox employed

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[60] Both Comcast and Time Warner have reached agreement for digital carriage with multiple broadcast stations and groups. *See* note 59, supra and Comcast Ex Parte in CS Docket No. 98-120, filed Feb. 3, 2005*; see also* Press Release, Time Warner Cable Announces Digital Retransmission, Jan. 30, 2004 (agreement with LinTV and Granite Broadcasting Group) available at http://www.timewarnercable.com/InvestorRelations/PressReleases/TWCPressReleaseDetail.ashx?PRID=327&MarketID=54 (last visited August 13, 2007). Cable industry trade associations also have reached industry-wide agreements with the Association of Public Television Stations and PBS for digital carriage of NCE stations. *See* Press Release, Boards of APTS, NCTA and PBS Approve Public Television Digital Cable Carriage Agreement, Feb. 4, 2005, *available at* http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=reltyp1&contentId=359 (last visited Aug. 13, 2007).

[61] *See, e.g., When Multicast Means Cash*, BROADCASTING & CABLE, July 10, 2006, at 22 ("Although [multicast] channels like NBC Weather Plus and The Tube can be received using digital rooftop antennas, few homes are likely to be outfitted with the devices, industry executives believe. That leaves cable and the Internet as the primary delivery systems for the channels, which typically get cable carriage through retransmission-consent negotiations"); *Five Reasons Why TV Stations are a Good Buy,* BIA FN, Aug. 3, 2007 ("Many stations are airing a second network (*e.g.*, CW or My Network TV) or other programming (*e.g.*, NBC Weather Plus) on one of their digital multicast signals. Through their retransmission consent negotiations, these stations are obtaining local cable carriage. Multicasting allows television operators to benefit from having more than one TV station in mid-size and smaller television markets without running afoul of the local television ownership regulations. Like the retrans take, the multicasting revenues help compensate for the decrease, or complete elimination of, network compensation revenues."), *available at* http://www.bia.com/data_perspective_tv_stations_good_deal.asp (last visited Aug. 13, 2007).

[62] *See, e.g.*, *NCTA: Big Four's Retransmission-Consent Study Flawed*, MULTICHANNEL NEWS, Aug. 1, 2007 ("[T]he Big Four's study neglected to take into account that retransmission consent involves more than just the payment of fees to carry local TV signals -- it also includes the carriage of Big Four-affiliated cable networks for which MSOs need to pay license fees."), *available at* http://www.multichannel.com/article/CA6464758.html (last visited Aug. 12,

its retransmission consent leverage to require cable operators to launch affiliated cable network programming channels like FX.[63] This strategy has forced independent multichannel networks, unaffiliated with broadcasters, to look elsewhere for carriage,[64] has led to major broadcast networks becoming major owners of cable networks,[65] and has resulted in their further occupation of scarce cable system capacity.[66]

Appropriating additional cable system capacity for mandatory carriage of duplicative streams of broadcasters' signals, over and above the sizeable amount already made unavailable to independent multichannel networks as a result of existing federal regulations and retransmission consent agreements, would severely reduce the already limited shelf space available for multichannel networks. Indeed, for every broadcast channel entitled to triple must carry under the Commission's proposed rules, as many as 12 compressed digital multichannel

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2007); *Chop Schlocky TV*, FORBES, Dec. 13, 2004 ("Retransmission consent . . . was benignly designed as a way to ensure that broadcast stations would be compensated for the retransmission of their programs on cable. But retransmission consent has since morphed into the bludgeon used by media conglomerates to ensure their ancillary cable networks get favorable distribution in exchange for allowing cable companies the right to use their network affiliates broadcast signals.").

[63] *See A TV News Marriage that Might Have Been*, N.Y. TIMES, July 26, 1996 (". . . Fox created the cable channel FX, and NBC started the channel America's Talking, which it has since changed to the all-news MSNBC"), *available at* http://query.nytimes.com/gst/fullpage.html?res=9C00E5DC1739F935A15754C0A960958260 (last visited Aug. 12, 2007).

[64] Independent networks such as Discovery Channel, Hallmark Channel and Court TV all have previously noted the effects of retransmission consent leveraging on their ability to secure carriage. *See* Supplemental Submission of Joint Cable Operators, *Inquiry on Rules Affecting Competition in the Television Marketplace*, MB Docket No 05-28, at 10-11 (filed May 32, 2005).

[65] *See, e.g.*, *Fox Rallies Troops*, VARIETY, Jan. 13, 1997 (Rupert Murdoch informs Fox affiliates that they will benefit from acquiring cable networks and "integration of those media operations to the benefit of our core business broadcasting."); *Peacock Enhances Cable Stable*, VARIETY, Sept. 8-14, 2003 ("NBC could withhold [retransmission consent] unless, say, the cable system agreed to pay a healthy increase in license fees to USA").

[66] *See, e.g.*, Testimony of James O. Robbins, CEO, Cox Communications, before the U.S. Senate Committee on Science, Commerce, and Transportation, Mar. 25, 2004, *available at* http://commerce.senate.gov/hearings/testimony.cfm?id=1127&wit_id=2835 (last visited Aug. 12, 2007) ("Since retransmission consent was legislated in 1992, numerous channels have been added to Cox Cable customers' channel lineups, at additional cost, primarily due to retransmission consent negotiations – not by consumer need, choice or demand. In addition, license fees for existing cable channels affiliated with broadcast networks have increased significantly, due to the leverage created by the ability of these broadcast networks to withhold distribution of their local stations.").

network slots would be eliminated.[67] No matter what numbers are used or which market is considered, the Commission's proposed rules unquestionably would result in cable operators dropping numerous multichannel networks, and thereby would reduce the diversity of programming sources and choices available to cable subscribers across America.

C. An Increased Number Of Video Programming Services Are Vying For Extant Channel Capacity

Against the backdrop of cable operators' competing needs for their capacity, regulatory demands on that capacity, and broadcasters' retransmission leverage, the number of multichannel program networks has increased more than five-fold since Congress enacted the must-carry requirements in October 1992.[68] The Commission has recognized that this increase in networks, whose growth and diversity the Congress and Commission have sought to foster, has outstripped the growth of cable capacity.[69] This perfect storm -- of increasing demands on cable capacity, regulatory allocation of that capacity to everyone but multichannel networks, and the increase in multichannel networks vying for carriage on cable systems -- has led to countless instances of networks being either dropped, downgraded or not launched by cable operators, and numerous networks being forced to shut down their operations. For example:

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[67] *See, e.g.*, *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516, 4526 ¶ 19 (2005) (citing comments of Discovery Communications Corp. that additional capacity asked for by broadcasters could instead be used "to provide as many as a dozen diverse non-broadcast programming services offered on a compressed digital basis") ("*Second R&O*"); Comments of Comcast Corporation, in CS Docket No. 98-120, at 29-30 (July 16, 2007).

[68] *See* notes 18 and 21, *supra; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442, ¶ 21 (1994) (there were fewer than 100 cable networks in 1993).

[69] *See General Motors Corporation and Hughes Electronics Corporation, Transferors And The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 110 (2004) (Commission notes NewsCorp's reference to "prior Commission findings that the programming supply market is extremely competitive, with the growth rate of new programmers outpacing the growth of new channels on MVPD systems"), citing *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*, Third Report and Order ("*Horizontal Ownership Order*"), 14 FCC Rcd 19098 at 19104 (1999).

- In 2002, Action Sports Cable Network, a regional sports network started by Charter Communications' Paul Allen, closed its doors due to its failure to achieve sufficient distribution.[70]
- CNN/SI shut down in May of 2002 due to an inability to get sufficient carriage, despite the name brand recognition of CNN and Sports Illustrated and affiliation with Time Warner Cable.[71]
- Q Television Network was unable to sustain its operations, reaching only 3 million subscribers before going off the air.[72]
- In a February 2005 submission to the Commission, the C-SPAN Networks noted that their carriage levels still had not completely recovered from the loss of distribution they experienced when cable operators were first required to give every local broadcast station licensee must-carry status on their analog systems.[73]
- The Black Family Channel ("BFC"), despite strong strategic and financial backing, an uncluttered genre (African American family programming), and substantial financial support, closed its doors earlier this year.[74]

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70 *ASCN Hangs it Up*, CABLE WORLD, Nov. 11, 2002 ("Paul Allen's Portland, Ore.-based Action Sports Cable Network has ceased operations. 'Unfortunately, ASCN was never able to achieve sufficient distribution of its product to allow it to remain in business.'").

71 *Ops In No Rush to Replace CNN/SI*, MULTICHANNEL NEWS, Apr. 15, 2002 ("CNN/SI**,** which launched in 1996, was expected to combine the sports coverage of Cable News Network with the brand of Time Warner Inc.-owned Sports Illustrated magazine to create a viable competitor to ESPN's ESPNews. But the service struggled to gain distribution.").

72 *Here, Logo Grow as Their Ranks Shrink*, MULTICHANNEL NEWS, July 10, 2006 ("'The financial challenges that [QTN] faced proved too difficult, and I was simply unable to turn around the network,' said QTN CEO Lloyd Fan, in a prepared statement.").

73 *Ex Parte* Letter to Marlene Dortch from Bruce Collins, on behalf of The C-Span Networks re: Multi-Cast Must Carry; CS Docket No. 98-120 (dated Feb. 3, 2005).

74 *See* THE MORNING BRIDGE, Aug. 1, 2007 ("'If you are a cable network that is not owned by one of the major players, the environment is very tough,' said SNL Kagan senior analyst Derek Baine. 'For example, The Black Family Channel, which was on the air for eight years, recently announced that it is unable to make it on its own and is merging with Gospel Music Channel, while Outdoor Channel recently announced a reduction in its license fee.'").

- According to former Congressman J.C. Watts, no fewer than *six* minority networks have failed in the past decade (not including BFC's recent demise).[75]
- Just last week The Media Group, owner of independent cable networks Men's Channel, Healthy Living, and iShop, declared bankruptcy.[76]

Newer networks, including digital networks, are particularly vulnerable to the intense competition for access to available channel capacity. But even large, well-established networks, and networks under common ownership with some of the largest MSOs, are not immune to the channel capacity challenge.[77] Recently, some of the Networks submitting these reply comments have suffered from the decrease in available channel space and the competing uses to which operators are allocating any available bandwidth. For example:

- The Filipino Channel has been unable to secure carriage in major Filipino-American markets such as New York, Florida and Texas, being told by cable operators that their systems cannot accommodate the network channel because of the need to use bandwidth for HD, VOD or broadband Internet.

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[75] J.C. Watts, *Why Marriage Needs Protection*, LAS VEGAS REVIEW-JOURNAL, June 14, 2006 ("Minorities have been shut out of the Telecommunications Act of 1996, which called for diversity in programming on cable networks (in the last 10 years, six minority networks have failed because they couldn't get carriage) . . .").

[76] *TMG Blames EchoStar for Chapter 11 Filing*, MULTICHANNEL NEWS, Aug 7, 2007, available at http://multichannel.com/article/CA6466148.html (visited August 13, 2007).

[77] *See Staff Discussion Draft on the Transition to Digital Television: Hearing before the Subcomm. on Telecomm. & the Internet*, 107th Cong. 78 (2002) (prepared statement of Michael S. Willner, Vice Chairman and CEO of Insight Communications) ("Under a dual carriage scheme, many operators would be forced to drop popular cable networks in order to make room for duplicative digital broadcast signals. Even where cable systems have capacity, a 'broadcaster first' policy would deprive consumers of opportunities to enjoy numerous new cable networks that have to compete for carriage"); *see also id.* at 82 (statement of Lana Corbi, President and CEO of Crown Media United States) ("The reality is that as much as many cable operators would like to add Hallmark Channel to their line-ups, they are unable to do so because of channel capacity limitations. Simply put, even as systems upgrade to add capacity, the demands on that capacity, including demands for broadband and other advanced services, are growing even faster. A 'dual carriage' requirement, that would essentially double the number of channels dedicated to broadcast signal carriage, would place carriage opportunities on many systems out of our reach for the foreseeable future, particularly in larger markets that are critical to the success of a national program service. Such a requirement could even threaten our existing level of carriage").

- TV One has been informed by EchoStar that channel capacity could be a potential obstacle to launch on the DBS operator's system.
- Style has been denied carriage on the majority of systems of a top-four cable operator, being told that the operator is saving capacity for HD programming, and both Style and G4 have been bumped to the third tier of EchoStar's national programming packages, substantially reducing their subscriber penetration.
- Cable operators have told The Africa Channel that they would launch the network faster and more widely but for bandwidth constraints coming from must-carry, potential dual must-carry, and the need to accommodate other services such as broadband Internet and HD, even though the operators enthusiastically praise the network's programming.
- A top-five cable operator threatened to move Versus from an analog tier to a less widely distributed digital tier in order to free-up bandwidth for new VOD.
- Citing a lack of bandwidth, some cable operators have denied carriage to PBS Kids Sprout even though they agree that Sprout presents excellent, high quality programming for families and Sprout is offering its programming at favorable rates, with extended free periods, marketing support and license fee discounts.
- Both the Golf Channel and Versus recently were bumped by a top-five cable operator from an analog tier to a digital tier in a large Texas market, with the operator explaining that it needed to reclaim bandwidth for the addition of HD services.
- Several large MSOs have declined to carry Altitude Sports & Entertainment on some or all of their cable systems within Altitude's territory, claiming that channel capacity is an issue.

- Outdoor Channel has been placed on a digital or sports tier on some systems where it previously enjoyed wider distribution, due the systems' need to conserve capacity for other uses.
- A top-five cable operator declined to launch Style – even on digital – expressly due to bandwidth constraints of the system.
- Nearly all of the Networks are seeing their distribution on analog tiers shrink as cable operators relocate them to less widely distributed digital tiers and reclaim analog slots for new HD and non-video services.

Losses in distribution translate directly into reduced license fees and advertising revenues. Diminished revenues dramatically affect a network's ability to continue to fund the production of innovative and high quality original programming, which both weakens the network's standing in the marketplace and its ability to serve its viewers. A dual, or triple, must-carry requirement would make the current difficult situation in which most multichannel networks find themselves immeasurably worse.

V. A DUAL MUST-CARRY REQUIREMENT WOULD SUBSTANTIALLY WEAKEN MULTICHANNEL NETWORKS AND REDUCE PROGRAM DIVERSITY IN THE VIDEO MARKETPLACE

Even under a single channel must-carry regime, the combination of channel scarcity, existing regulatory requirements, marketplace conditions and technological developments already challenges the ability of independent multichannel networks – even the largest – to obtain sufficient cable distribution to sustain their existing operations, let alone to fuel the growth necessary to develop new services. As demonstrated above, adoption of the proposed dual must-carry requirement indisputably would exacerbate these conditions by requiring cable operators to devote an even greater amount of bandwidth to carriage of broadcast signals and, thereby, reducing even further the amount of cable capacity available for carriage of multichannel networks. Necessarily, many systems would be forced to jettison some multichannel networks or to shift them from coveted analog slots to less penetrated digital tiers.[78]

If even a few channels on cable systems serving major markets were required to be devoted to delivery of duplicative broadcast signals, rather than to their current carriage of multichannel program networks, the resulting loss in distribution would be enough to push some networks below the point of viability, permanently depriving subscribers in those systems and across the country of those additional voices.[79]

While other networks might survive, any reduction in distribution would force them to slash programming budgets, lay off staff, and possibly forego the acquisition and/or production of original, high quality programming. The costs of launching, and sustaining the operation of, a profitable, quality program network are enormous, and continue to rise.[80] Indeed, the costs of

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[78] A shift of a multichannel network from highly-coveted analog slots to digital tiers can have dire consequences. The average penetration for digital tiers is substantially less than analog tiers – digital tier penetration is currently at 34 million subscribers, or 52 percent of basic subscribers, nationwide – and thus, hardly enough to sustain the profitable operation of most basic cable program networks. *See* NCTA Statistics at http://www.ncta.com/ContentView.aspx?contentId=54 (last visited Aug. 12, 2007). The Commission has recognized that "the more limited exposure [program networks] receive by virtue of their placement on digital or other tiers to which subscribership is restricted and the associated difficulties of attracting an audience base to support advertising sales" diminish the benefits of increased channel capacity. *Horizontal Ownership Order*, 14 FCC Rcd 19098 at ¶ 14. Thus, digital tier distribution will make it considerably more difficult for a network to reach the 30 million subscriber benchmark for break even and long-term sustainability.

Moreover, it is not a foregone conclusion that multichannel networks would even be moved to digital tiers, as opposed to dropped, as many cable operators are using digital channels primarily for premium services, pay-per-view, VOD and sports programming, with only a limited number of slots being set aside for linear niche programming services. *See Niche channels face challenges*, LOS ANGELES BUSINESS JOURNAL, Oct. 23, 2006 ("The [network launch] strategy also requires that the channels have a spot on expanded basic cable tiers, not premium packages. However, the explosion of cable channels has made it harder for new entries to get on these tiers, which are limited by bandwidth. That in turn makes it harder for the channels to reach that key 20 million figure."), *available at* http://findarticles.com/p/articles/mi_m5072/is_43_28/ai_n16865889 (last visited Aug. 12, 2007).

[79] The Commission itself previously recognized this possibility in only a slightly different context, stating that "there is a risk that if [dual] carriage were mandated, cable subscribers would lose existing cable programming services that would be replaced on the channel line-up by digital [broadcast] television signals with less programming." *First R&O* at ¶ 120.

[80] *Subscriber Rates and Competition in the Cable Television Industry*, INTERNET BUSINESS NEWSLETTER, July 1, 2004 ("During the past 3 years, the cost of [cable] programming has increased considerably (at least 34 percent), driven by the high cost of original programming, among other things."); *Time Warner to Raise Customer Bills*, POST

producing and acquiring original, quality programming alone are substantial.[81] Recent years have seen program networks increase their reliance on original programming in order to differentiate themselves from other networks, or simply because niche nets often cannot find programming that fits their niche.[82] But whatever the reason, program networks pay top dollar for programming, whether acquiring syndicated or newly created material.[83]

In order to cover these costs, basic cable networks depend primarily on two revenue sources: affiliation fees and advertising revenues, both of which are linked directly to subscriber distribution. Pay services, whose revenue streams are comprised of advertising and a percentage of the subscription fee, also are dependent on eyeballs. In other words, the viability of any programming network is directly dependent upon the extent of its carriage.

The Commission previously recognized that a new basic cable network generally will not be viable without a minimum of at least 15 million subscribers, that it generally will not break even until its distribution reaches at least 20 million subscribers, and that some networks may need even more subscribers to be successful.[84] Indeed, a multichannel network today cannot get

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STANDARD, Mar. 3, 2007 ("'The cost for us to acquire this programming increases year after year as the networks put more money into the shows they're providing,' he said. 'As the cost to the networks to provide the programming goes up, this ultimately is passed on to the consumer.'").

81 *The Branding of Broadcast; Technology & Trends*, TELEVISION BROADCAST, Dec. 1, 2005 ("In addition to more competition, television programming expenses were up 11.4% in 2004, according to ECONOMICS OF TV PROGRAMMING & SYNDICATION 2005, which further states, 'Three factors are responsible for the profound shifts in the economics of TV programming and syndication: (1) the rising cost of original programming, (2) technology driving fragmentation of viewer demographics, and (3) advertising reallocations in pursuit of shifts in viewer choices.'").

82 *See, e.g.*, *Launch Pad*, CABLEFAX DAILY, Sept. 29, 2004 (The Better Life Network "lined up other revenue streams (publishing, DVDs) to offset the cost of original programming for the net.").

83 *See* THE HOLLYWOOD REPORTER, Kathleen Anderson, June 16, 2005 ("[Independent network Hallmark Channel owner] Crown Media's total cost of services jumped 24% from $36.2 million a year ago to $45 million. Programming expenses, which rose 47% from $19 million a year ago to $28 million, were because of buying such costly shows as 'M*A*S*H,' 'Judging Amy' and the cost of original programming, which totals 32 programs for the year.").

84 *Horizontal Ownership Order*, 14 FCC Rcd at 19115.

reliably rated by Nielsen[85] – without which it cannot even begin to sell national advertising– until it has hit or exceeded the 20 million subscriber benchmark. In 2007, the current wisdom among most networks – including Style and PBS Kids Sprout, for example – is that distribution to at least 30 million households is necessary just to break even on a year-to-year cash flow basis, covering programming, marketing and administration expenses with license fee and advertising revenues.[86] This is also borne out by the experience of Outdoor Channel, which at its current subscribership of just under 30 million has just reached cash flow break-even. Thirty million subscribers, however, does not give a network like Style the opportunity to pay down initial investment, so it remains a far cry from profitability. E! estimates that recovery of the substantial investments in programming and launch fees necessary to get a network off the ground requires at least 50 million subscribers. A dual must-carry requirement would make it impossible for many multichannel networks to hit these marks.[87] For newer networks like The Africa Channel, whose investors and shareholders took on business risk to bring a unique network to American viewers, and now need substantial increased carriage beyond its existing two million subscribers in order to raise capital and produce revenues sufficient to produce and

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[85] *Niche channels face challenges*, LOS ANGELES BUSINESS JOURNAL, Oct. 23, 2006 ("Historically, the launch strategy for a cable channel goes something like this: Raise $100 million to fund startup costs and the first several years of existence, over which time the channel pushes itself into 20 million homes. That's a key benchmark needed to qualify for statistically accurate Nielsen ratings that enables channels to sell advertising to big national companies."), *available at* http://findarticles.com/p/articles/mi_m5072/is_43_28/ai_n16865889 (last visited Aug. 12, 2007).

[86] *News Corp., Time Warner Settle Rift As Fox News Is Promised New Outlets*, WALL ST. J., July 24, 1997 ("In the cable network business, 30 million subscribers is considered the bare minimum needed to break even. Fox News, however, because of its heavy start-up costs, needs about 40 million subscribers to start reaping meaningful profits."); *Covering a War, CNN Still Fights Familiar Demons*, WALL ST. J., Nov. 16, 2001 ("One top cable executive estimates that CNN faces 'a minimum' of $200 million in payments to cable operators to bring CNN-SI to the critical 40 million subscriber mark – up from its current level of 15 million – that Madison Avenue demands in exchange for big ad dollars.").

[87] It might be argued that the prejudice that multichannel networks would suffer from dual must-carry would gradually abate as consumers further embraced digital television equipment and more cable systems became fully digital. However, that process will play out over at least several years. In the meantime, numerous multichannel networks would fall victim to the dual carriage regime, either going out of business, having to degrade their original programming on account of decreased revenues, or having to delay or cancel planned network launches.

obtain new programming for coming seasons, a dual must-carry requirement could present an insurmountable barrier.

Not only would some networks fail and others be forced to cut back on programming if a dual carriage requirement were imposed and cable channel capacity further limited, but plans to launch new networks would be put on hold, if not cancelled altogether. In fact, already far fewer new networks are launching today than have in past years. The Commission previously has recognized that sparse analog channel capacity might have accounted for the slowdown in the launch of new programming networks.[88] Any additional reduction in channel capacity would further stunt the development of new networks.

Multichannel network failures are anything but apocryphal, with more and more networks succumbing.[89] Indeed, if the Black Family Channel could be forced to shut its doors, the same thing could happen to TV One, in which case, the entire African American population of viewers would be left again with only one multichannel network that addresses their needs – BET – and only in part, as BET focuses on a very young, edgy demographic, whereas TV One, as did BFC, focuses on a more mainstream, adult demographic. If BFC could not get sufficient distribution to sustain its operations under the existing single-channel must-carry regime, it does not take much imagination to envision how difficult (if not impossible) it would have been for BFC – and would be for TV One – to flourish in a world where cable operators' channel capacity is wastefully consumed by the requirement that they carry two, or even three, duplicative streams of each broadcaster's programming.

Any additional regulations that force cable operators to set aside additional channel capacity for broadcast networks surely would have a direct and negative impact on the level of

[88] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd 1244, ¶ 160 (2002).

[89] See notes 70-76, *supra*, and accompanying text.

diversity in the video programming market and, as the Commission has recognized in the multicast context,[90] deprive viewers of independent sources of programming. The effects of the Commission's proposed rules would be particularly harsh on newer, less established or micro-niche networks such as i-LifeTV and Filipino Channel, which might be among the first to be dropped. Indeed, in the changed cable marketplace, not even the Discovery brand is enough to sustain a new or more targeted network, as in the case of Discovery en Español, which is having difficulty gaining carriage and could be shut down if dual must-carry is imposed.[91]

Nowhere is the blow to diversity that dual must-carry would strike more apparent than in the case of multichannel networks that focus on the needs of America's ethnic, minority and foreign speaking populations. The foreign-born population in the United States is expected to grow to more than 45 million by the year 2020.[92] The Census Bureau's 2000 survey showed that more than 47 million members of the U.S. population currently speak a language other than English at home,[93] many of them second generation children of immigrants.[94] These individuals

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[90] As the Commission recognized, more onerous must-carry rules serve only to reduce diversity in programming by delaying, and in some cases excluding, new voices in the cable industry:

> Based on the current record, there is little to suggest that requiring cable operators to carry more than one programming stream of a digital television station would contribute to promoting 'the widespread dissemination of information from a multiplicity of sources.' Under a single-channel must-carry requirement, broadcasters will have a presence on cable systems. Adding 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.*[90]

Second R&O at 4535, ¶ 39 (emphasis added).

[91] Comments of Discovery Communications Corp., in Docket 98-120, filed July 16, 2007, at 29 ("Discovery's efforts to secure carriage deals for its Spanish-language networks also are already hindered because of capacity constraints on cable systems.").

[92] New Bostonians Demographic Report, *available at* http://www.cityofboston.gov/newbostonians/pdfs/dem_report.pdf (last visited Aug. 12, 2007).

[93] "Making Sense of Census 2000," James Crawford, Language Policy Research Unit, *available at* http://www.language-policy.org/content/features/article5.htm (last visited Aug. 12, 2007).

[94] Preface to "Supporting English Language Acquisition," Anne E. Casey Foundation, *available at* http://www.pcf.org/raising_reader/pdfs/Language_Acquisition_Paper.pdf (last visited Aug. 12, 2007).

are served by foreign-language channels such as The Filipino Channel (Tagalog), La Familia Cosmovision (Spanish), and many other multichannel networks whose programming is entirely or substantially in foreign language (e.g., TV5 (French), RAI (Italian), ART (Arabic), and TV Asia (Hindi, Gujarati)). Cable operators are finding that their customers demand foreign language channels in greater numbers and that the channels are needed to stay competitive.[95]

Numerous other ethnic-focused networks, such as Sí TV (Hispanic) and AZN Television (Asian), present programming in English that is targeted to the social, cultural, political and economic needs of the ethnic populations they serve. Likewise, TV One, which focuses on the adult African American population, serves the cultural, intellectual and entertainment needs of a population group of 36 million Americans that can find little more targeted to them on broadcast television than sitcoms, supporting actors, a few day-time talk show hosts, and an occasional documentary. Viewers of networks like TV One, La Familia Cosmovision, AZN and The Filipino Channel generally are not well served by mainstream broadcast television, and cannot hope to find there the news, information, cultural, arts and entertainment programming that they now can obtain from multichannel networks. Moreover, these channels also serve as an expansive "window on the world" for all Americans – providing a glimpse of other cultures, lifestyles, languages and viewpoints – in a way that broadcast network programming can never provide. By giving preferred status to the duplicative signals of digital broadcasters, who focus on mainstream, undifferentiated, general entertainment programming, the FCC's proposed rules

[95] *Cable In Translation: Immigrants Tuning In to Foreign Language Channels*, SAN FRANCISCO CHRONICLE, Apr. 15, 2005 ("Comcast, the Bay Area's dominant cable TV provider, has nearly quadrupled the number of foreign-language networks it offers in the region during the past three years. It now offers 35 channels."), *available at* http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/04/15/BUGQ3C43IE55.DTL&type=business (last visited August 15, 2007); *TV offers new Alaskans a portal to life left behind*, ANCHORAGE DAILY NEWS, Dec. 28, 2006 ("Describing the popularity of Filipino Channel programming, cable operator "estimates about 25 percent to 30 percent of [the cable system's] customers subscribe to foreign-language television. That was unheard of five years ago. The product sells itself…."").

threaten to continue the discrimination against ethnic and minority viewing groups that has been so prominent a characteristic of broadcast television for decades and that the FCC's minority action and affirmative action regulations have been largely ineffective in addressing.

Apart from these obvious effects, the Commission's proposals threaten several particularly insidious consequences. First, while many independent multichannel networks would suffer considerable injury from dual must-carry, cable networks affiliated with the major broadcast networks would be largely insulated, by virtue of their ability to use the retransmission consent leverage of their affiliated broadcast stations to ensure continued carriage of the affiliated cable networks and even the launch of new services. This would thus shift the burden of the proposed rules largely to independent multichannel networks, and would transfer even more marketplace power to the broadcast entities whose broadcast streams will be carried in duplicate, or even in triplicate, on the nation's cable television systems. It also makes the discriminatory aspect of the proposed dual or triple must-carry regulations more invidious – as it will not only give a preference to broadcast television "speakers" over independent cable networks, but also will preference cable networks that are affiliated with broadcasters over those that are not.

Second, in a dual must-carry world, where independent networks are squeezed down to lower tier carriage and are forced to take drastic steps to avoid being bumped from cable systems, they will have no choice but to dilute their niche focus and broaden their network concepts in the hopes of reaching larger audiences, and the greater license fee and advertising revenues that those audiences would generate. The twisted ending of such a tale would be the homogenization of the multichannel television landscape, where only undifferentiated mainstream programming (and those niche programming networks owned by a major broadcast network) would have the revenues to survive.

Finally, the loss of diverse programming that dual must-carry would bring about would be particularly tragic, given that the broadcast services by which multichannel networks would be replaced would be *totally duplicative*,[96] thus reducing the viewing options available to cable subscribers and striking a blow against the diversity in programming sources that Congress and the Commission have long sought to foster.

VI. THERE ARE ALTERNATIVE MEANS TO ACCOMPLISH THE COMMISSION'S GOAL OF "VIEWABILITY" THAT WOULD IMPOSE LESS BURDEN ON MULTICHANNEL NETWORKS' SPEECH

Even if the Commission's "viewability" objective were an adequate justification for its proposed rules – which it is not – there are other ways to achieve that goal that would impose less of a burden on multichannel networks' speech. Moreover, the Commission's proposed dual must-carry rule is in fact totally unnecessary to accomplish its goal, as cable subscribers *will* be able to continue to receive broadcast signals on analog sets after the digital transition without a dual carriage rule.

As the Commission's own website informs the public, cable operators can provide set-top boxes, as they always have, to subscribers that wish to view broadcasters' signals over analog sets, so that their customers can continue to view signals and will not lose channels as a result of the digital transition.[97] Yet, the *NPRM* is remarkable for its total failure to ask for comment on,

[96] *See First R&O* at ¶ 9 ("Toward the end of the transition period, there would be an increasing redundancy of basic content between the analog and digital signals as the Commission's simulcasting requirements are phased in. We recognized that, to the extent that the Commission imposes a dual carriage requirement, cable operators could be required to carry double the amount of television signals, that will eventually carry identical content, while having to drop various and varied cable programming services where channel capacity is limited.").

[97] *Digital Television Basics: Digital Television Facts at a Glance*, *available at* http://www.dtv.gov/whatisdtv.html (last visited Aug. 12, 2007) ("If you are a cable or satellite customer, you may need a set-top box to receive DTV signals and convert them into the format of your current analog television, even after the DTV transition is complete. A DTV set-top box also may receive multicast channels and high definition programming and display

or consider, whether cable industry relief from the requirement to use set-top boxes with separated security function would facilitate the continued viewability of digital broadcast signals after the transition. Many cable operators have pointed out that the expense of set-top boxes with separated security diverts funds that could be directed to making the jump to all-digital,[98] and the Media Bureau has recognized this important digital transition goal in granting limited relief from the separated security requirement.[99] If the costs of set-top box deployment were lowered, cable operators would be able to deploy equipment more easily to subscribers on their analog systems after the digital transition, ensuring that the goal of viewability of broadcast signals would be protected without resorting to a dual or triple signal carriage requirement that would burden cable systems and cable networks more than necessary, forcing many of the latter off the air.

In the *NPRM* and Chairman Martin's accompanying statement, concern is expressed about consumers' inconvenience and the "hassle" of getting set-top boxes, relying on that as a reason to impose a burdensome dual carriage regime.[100] However, neither the *NPRM* nor the Chairman explains why independent multichannel networks should be forced off the air just to avoid consumer "hassle," particularly when doing so will foreclose viewers from receiving the diverse, quality multichannel network programming that every consumer would prefer, if given the option, to the choice of having two or even three duplicative streams of the same must-carry stations. Moreover, although the Commission worries about cable subscribers with analog sets

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them in analog picture quality. Check with your cable or satellite provider to determine if and when you will need a set-top box.").

[98] *See, e.g.*, Comcast Corporation's Request for Waiver of 47 C.F.R. § 76.1204(a)(1), CSR-7012-Z, CS Docket No. 97-80 at 17-19 (filed Apr. 19, 2006) (asserting that the increased costs associated with the integration ban will slow Comcast's transition to all-digital platforms).

[99] *Bend Cable Communications, LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, CSR-7057-Z, Memorandum Opinion and Order, DA 07-47, ¶ 24 (rel. Jan. 10, 2007).

[100] *NPRM*, Statement of Chairman Kevin J. Martin.

being "left behind", no regard is paid to the certain impact that the Commission's proposal will have on multichannel networks and their loyal viewers, many of whom most assuredly will be left behind. Would it really be better for African American viewers to get three duplicative streams of the local broadcast stations but to lose TV One or The Africa Channel, just as they lost Black Family Channel? Or for faith-based viewers to lose the Inspiration Network? Or for Hispanic viewers to lose Sí TV or INSP's La Familia Cosmovision? These are digital transition issues as important as a consideration of what constitutes "viewability" or "material degradation" for broadcasters – who are the least likely television market participants to be left behind with or without burdensome new must-carry rules.

Furthermore, numerous other factors demonstrate that dual and triple carriage requirements are unnecessary, and that there are reasonable alternative means to achieve the Commission's viewability goal that would impose less of a burden on multichannel networks' and cable operators' First Amendment rights. For example:

- Cable operators can be relied upon to enable their subscribers with analog sets to receive digital broadcast signals, as the operators will want to ensure that *all* viewers – including those with analog sets – are receiving their local broadcast signals as well as their HD programming, particularly as cable operators compete with DBS operators and ILECs that are carrying full HD packages.
- By 2009, the overwhelming majority of households will have one or more digital sets or the ability to view digital signals with a converter, and a combination of the marketplace and federal subsidies will provide antennas or converters capable of receiving digital signals and making them viewable on analog sets.

- If necessary, the digital transition subsidy could be increased using a small portion of the very substantial funds to be raised from the upcoming 700 MHz auction.[101]
- The Commission could propose rules requiring broadcasters to provide antennas and A/B switches in local markets.
- HDTV signals can be received with antennas off the air, providing yet another way for the Commission to ensure viewability without burdening cable network capacity.[102]
- The Commission could direct government funds to the deployment of"rabbit ear" set-top boxes, which allow users to receive over-the-air signals without burdening cable system capacity or impacting multichannel networks.[103]
- Finally, the Commission could grant pending applications for review requesting a waiver of the integration ban in order to facilitate the deployment of low-cost set-top boxes to all cable subscribers, ensuring that signals remain viewable post-transition.[104]

All of these alternatives, *none* of which is raised in the *NPRM*, should be considered now, as they belie the lack of justification for the proposal to put the digital transition burden on the backs of some First Amendment speakers – cable networks and operators – but not on a preferred class – broadcasters. Yet, only Commissioner Adelstein even touches upon these considerations, in noting that the Commission, before embracing a new proposal that will lead it to a "previously-rejected dual carriage regime," should "first seek comment on a set of objective questions that considers all options and does not pre-judge the outcome or weigh heavily against

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[101] The auction of the 700 MHz spectrum is expected to yield "about $12 billion by Congressional Budget Office estimates, as much as $15 billion - $20 billion by others . . . ." BROADCASTING & CABLE, Aug. 6, 2007, at 8.

[102] *Digital Television: FAQ, Consumers Corner, available at* http://www.dtv.gov/consumercorner.html (last visited Aug. 12, 2007) ("Receiving the DTV and HDTV signals over-the-air requires an antenna and a new DTV receiver that can decode the digital signals. In general, an antenna that provides quality reception of over-the-air analog TV signals will work for DTV reception.").

[103] *Trying to Beat Broadcast Over the Ears*, MULTICHANNEL NEWS, Mar. 12, 2007.

[104] *See, e.g.*, Comcast Corporation's Application for Review, Request for Waiver of 47 C.F.R. § 76.1204(a)(1), CSR-7012-Z, CS Docket No. 97-80 (filed Jan. 30, 2007).

viable alternatives."[105] Commissioner Adelstein also notes that the Commission's proposals here should be viewed in context of the FCC's denial of cable operators' pleas to be allowed to deploy less expensive boxes, which is an alternative that might have helped avoid the foreclosure effect of cable operators being required to carry multiple streams of the same programming; by encouraging cable operators to supply subscribers with more affordable boxes, the need for condemnation of an additional six or twelve megahertz of network capacity could have been obviated. Commissioner Adelstein further notes that the "either/or" nature of the *NPRM* ignores "the possibility of other workable, negotiated solutions" that still need to be explored.

Yet, the Commission neither considers nor proposes such alternatives to dual carriage in the *NPRM* and does not request comment on any alternatives. Given the near certain harms that would befall multichannel networks, any action on these proposals before a full record can be developed and considered with appropriate notice would be premature and illegal.[106]

VII. THE PROPOSALS ARE CONSTITUTIONALLY INDEFENSIBLE

The Commission's new twist on dual (and now triple) must-carry has, in addition to the foregoing flaws, all of the same constitutional infirmities that plagued prior dual carriage proposals, which properly were rejected as unsustainable under the First Amendment.[107] A single-channel, analog must-carry mandate survived constitutional scrutiny by only the narrowest of margins in the Supreme Court's *Turner* decisions,[108] which relied heavily on

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105 *NPRM*, Statement of Commissioner Jonathan S. Adelstein.

106 For all the reasons that the dual carriage rule is overly burdensome, so too is the imposition of a material degradation standard for broadcasters that gives more bandwidth to broadcast than cable, as that requirement would have the same preclusive effect, forcing cable networks off the air. This proposed rule should be rejected because, as with dual must-carry, it will diminish diversity without contributing to the advancement of the digital transition and will burden multichannel networks' and cable operators' speech more heavily than necessary.

107 *Second R&O*, 20 FCC Rcd at 4523-29; *First R&O*, 16 FCC Rcd at 2603-09, 2649-52.

108 *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

specific statutory objectives and extensive congressional findings to sustain the regulation.[109] Prior orders in this proceeding correctly established and re-affirmed that, given the analyses and evidence in the record, as well as the constitutional considerations articulated by the Supreme Court, cable operators cannot be forced to carry more than a single "primary" program stream for each broadcaster.[110] These conclusions rested primarily on findings that conferring additional carriage rights would not advance the Supreme Court-sanctioned government interests underlying the Act's must-carry requirements – *i.e.*, preserving free over-the-air television, fostering widespread dissemination of information from a multiplicity of sources, and promoting fair competition in the market for programming – nor would additional carriage rights aid the digital transition, a newly-minted governmental interest not considered in the *Turner* decisions.[111] The Commission also found such requirements would burden more cable speech than necessary to serve any legitimate government interest.[112]

Nothing has changed to alter these conclusions now that the Commission, industry and consumers face a "hard" February 17, 2009, cut-over date for ending analog broadcast service, rather than what has been a transitional period of concurrent analog and dual broadcasting. As NCTA explains in its comments, "for households in which all their television sets are served by cable, February 17, 2009, can and should be a non-event," because "operators already provide digital programming, including digital broadcast signals, to cable households and already have the means to ensure continuing service to analog television sets with *no government intervention*

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[109] Compare *Turner II*, 520 U.S. at 190-193, 195-211, 219-222, with *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) (both striking down must carry rules in the absence of congressional findings).

[110] *First R&O*, 16 FCC Rcd at 2622; *Second R&O*, 20 FCC Rcd at 4533.

[111] *Second R&O*, 20 FCC Rcd at 4523-27, 4534-35. *See also Turner II*, 520 U.S. at 189; *Turner I*, 512 U.S. at 662.

[112] *First R&O*, 16 FCC Rcd at 2600; *Second R&O*, 20 FCC Rcd at 4524.

or subsidy required."[113] The *NPRM* does not suggest that its dual (and triple) carriage proposals are needed to advance any of the *Turner* or other objectives analyzed in the *First* and *Second R&O*s – in fact, it does not discuss those objectives or the constitutional implications of the proposals at all. Indeed, the *NPRM* simply proposes a new form of dual must-carry without even acknowledging the Commission's unambiguous prior holding – by unanimous vote – that "mandatory dual carriage would essentially double the carriage rights and substantially increase the burdens on free speech" beyond what *Turner* authorized.[114] Nothing in the *NPRM* even hints at why this would be permissible.

Such silence is understandable since the current proposals plainly would violate the First Amendment. Moreover, as threshold matters, the proposals face serious hurdles even before reaching the substantive constitutional analysis. First, the Commission has twice rejected dual carriage in this docket on First Amendment grounds. The Commission accordingly would be hard pressed to justify reversing itself on that score, as is required when an agency attempts a 180-degree change in its thinking.[115] While the *NPRM* comes at dual carriage slightly differently than in the past, there is nothing so inherently unique about the current approach as to itself justify departing from precedent. Indeed, many of the Networks commenting here demonstrated previously, and the Commission agreed, that it could not mandate dual carriage because doing so would burden cable operators' First Amendment rights substantially more than necessary to further the government's interests.[116] Nothing about the current proposal, nor any change in

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[113] NCTA Comments in Docket 98-129, filed July 16, 2007, at 2 (emphasis added).

[114] NCTA Comments at 14 (quoting *Second R&O*, 20 FCC Rcd at 4524).

[115] *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 456-57 (2d Cir. 2007); *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (agency "failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making") (internal quotes omitted).

[116] *Second R&O*, 20 FCC Rcd at 4524; *First R&O*, 16 FCC Rcd at 2603-09, 2649-52. *See* 2001 Filipino Channel Comments at 35-36. In this regard, it is erroneous to suggest that the "constitutional arguments previously raised by

facts, reduces the burden. If anything, the possibility of triple must-carry under the current proposals raises the specter of burdening multichannel networks and cable operators even more than anything previously considered.

Changing position also would be difficult for another reason that erects a second substantial pre-constitutional hurdle for the present proposals. Specifically, nowhere in the *NPRM* (or the appended statements) is there any mention – let alone consideration – of the effect the proposals will have on cable operators' or multichannel networks' First Amendment rights. The Commission bears the burden of justifying any must-carry or other speech regulation,[117] yet has not so much as teed up the constitutional issue for analysis. Just as the complete absence of a legislative record on the need for dual carriage to assist the digital broadcasting cut-over dooms this supposed governmental interest as a First Amendment matter,[118] a complete absence of FCC inquiry into current proposals' constitutionality is a fatal APA deficiency.[119] This deficiency also impedes the Commission from building the kind of record necessary for the contemplated reversal of position regarding the constitutional burden of dual carriage that adopting the present proposals would require.

In any event, the above preliminary hurdles aside, the Commission cannot meet its First Amendment burden of justifying the current dual carriage proposals. To meet this burden, the Commission must show how the current proposals advance a substantial government interest,[120]

cable operators about a requirement to carry both digital and analog signals are not applicable" here. NAB Comments at 12.

[117] *Turner I*, 512 U.S. at 665.

[118] S*ee infra* at note 124 and accompanying text.

[119] *Fox v. FCC*, 489 F.3d at 455 (quoting *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

[120] *Turner I*, 512 U.S. at 663-64

and that they would not burden more cable speech than necessary.[121] It is incumbent on the Commission to affirmatively demonstrate the need for any must-carry rule – it may not simply rely on previous congressional findings regarding analog must-carry.[122] With respect to must-carry rules specifically, as held by the Supreme Court's *Turner* decisions, the Commission must show how the proposals would help preserve free over-the-air television, promote widespread dissemination of information from a multiplicity of sources, or aid fair competition in the market for programming.[123] Because the carriage models proposed in the *NPRM* cannot meet this standard, they fail constitutional scrutiny.

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[121] *Second R&O*, 20 FCC Rcd at 4523-24 (citing, *inter alia*, *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). Significantly, intermediate scrutiny is no easy hurdle to clear. *See N. Olmsted Chamber of Commerce v. City of N. Olmstead*, 86 F. Supp. 2d 755, 770 (N.D. Ohio 2000) ("the Supreme Court's recent cases have given extra bite to … intermediate scrutiny"). The test is essentially identical to the commercial speech test. *See, e.g.*, *Capobianco v. Summers*, 377 F.3d 559, 565 (6th Cir. 2004) ("commercial speech is subject to intermediate scrutiny in a First Amendment challenge"). In either case, the government must "prove [a] regulation directly advances [its] interest and is not more extensive than necessary to" do so. *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 374 (2002) (internal quote and citation omitted). It must "carefully calculat[e] the costs and benefits [of] the burden on speech," *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 528 (2001), and if it can "achieve its interests in a manner that … restricts less speech, [it] must do so." *W. States Med. Ctr.*, 535 U.S. at 371.

[122] *See, e.g.*, *Time Warner v. FCC*, 240 F.3d at 1130 (holding it is insufficient for FCC simply to rely on prior congressional findings when regulating cable speech, and vacating as unconstitutional rules implementing horizontal and vertical cable ownership limits in Section 613 of the Act even though court previously had denied facial constitutional challenge) (discussing *Time Warner Entm't Co. v. United States*, 211 F.3d 1313 (D.C. Cir. 2000)). Accordingly, any time the Commission implements a provision of the Act that affects speech, it must ensure its actions comport with the First Amendment, even if similar efforts have survived previous constitutional scrutiny, as analog single-channel must-carry narrowly did in *Turner*.

[123] *Turner II*, 520 U.S. at 189; *Turner I*, 512 U.S. at 662. At a minimum, intermediate scrutiny applies to any must-carry proposal. However, must-carry rules would be required to satisfy strict scrutiny if the Commission agreed with certain commenters to justify must-carry based on a desire to preserve "public affairs programming," "local news," "children's programming," "local sports and niche programming," or programs that are "wholesome," "family-friendly," or "community-oriented," or that otherwise claim to depart from that which allegedly is "often violent, profane, and indecent." Religious Voices in Broadcasting Comments at 1. *Cf. Commission Seeks to Update the Record for a Petition for Reconsideration Regarding Home Shopping Stations*, Public Notice, DA 07-2005 (rel. May 4, 2007) (seeking to update record on petition by Center for Study of Commercialism concerning qualifications for must carry status of stations used predominantly to transmit sales or program length commercials such as home shopping stations). Such must-carry rules would be subject to strict scrutiny as content-based regulation, *see Turner I*, 512 U.S. at 658, which generally faces near-certain invalidation under the First Amendment. *See Regan v. Time, Inc.*, 468 U.S. 641, 648-49.

A. The Current Proposals for Mandatory Carriage of Multiple Broadcast Streams Fail To Advance New Governmental Interests Not Considered in *Turner*

The Commission cannot justify multiple must-carry obligations by proffering new governmental interests not advanced by Congress, considered in any legislative findings or addressed in the *Turner* decisions, including supposed interests in advancing the digital transition or, as the *NPRM* articulated the interest, guaranteeing that all subscribers can constantly view broadcast signals in analog, digital, and high definition.[124] In *Turner II*, the Court explicitly rejected the parties' attempt to invent "new interpretations" or "alternative formulations" of the government interests at issue and instead required them to hew to "Congress' *stated* interests in enacting must-carry."[125] *Turner II* thus applies the principle that the government cannot invent *post hoc* rationalizations to defend speech restrictions, and prevents the Commission from asserting a newly-minted governmental interest in guaranteeing all viewers analog, digital, and high definition broadcasts.[126] To the extent the Commission's previous orders in this proceeding considered an interest in addition to those enumerated in *Turner*, they explored whether dual carriage and multicast must-carry would help advance the digital transition. While the mere consideration of this *post hoc* rationalization itself contravened the *Turner* decisions, the Commission still rejected this additional ground for expanding carriage rights on the merits.[127] In the *Second R&O*, the Commission considered comments asserting that "dual carriage is

[124] *See NPRM* at ¶ 5.

[125] 520 U.S. at 190-91 (emphasis added) s*ee also id.* at 187, 199 (Congress considered "years of testimony" and "volumes of documentary evidence and studies offered by both sides"); *Turner I*, 512 U.S. at 632, 646, 649, 662 (repeatedly attesting to the "extensive record" compiled by Congress in support of analog must-carry).

[126] *See*, *e.g.*, *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1069 (10th Cir. 2001) (holding that it is impermissible to "supplant the precise interests put forward by the State" in First Amendment analyses) (quoting *Edenfield v. Fane*, 507 U.S. 761, 768 (1993)).

[127] *Second R&O*, 20 FCC Rcd at 4527-29, 4536. In this regard, the Commission's error in considering advancement of the digital transition as a possible government interest in the *Second R&O* is harmless since it did not lead to imposition of expanded carriage rights. However, any other outcome – either there, or here – would be extremely susceptible to First Amendment challenge.

necessary to achieve a swift and successful DTV transition," including arguments that dual carriage was "necessary for public acceptance of digital television technology" and would stimulate the purchase of DTV receivers.[128] The Commission rejected these arguments and instead found "voluntary carriage," combined with carriage of HD programming from non-broadcasters, "*more likely* to spur the sale of digital television equipment (thereby, facilitating the transition) than forced dual carriage of all television stations."[129] The Commission noted that "more and more cable households are receiving HDTV programming" and that 92 million out of 108 million U.S. TV households "are now passed by a cable system that offers a package of HDTV programming."[130]

Even if the Commission could entertain new government interests not considered by Congress and revisit its own prior decisions, the *NPRM* does not explain the interest it seeks to advance. The Commission generally characterizes the new interest as "ensur[ing] that all cable subscribers – including those with analog sets – continue to be able to view all commercial and non-commercial broadcast stations," but does not explain how the current proposals will advance that interest in a way that would not be served by the existing "primary" signal must-carry requirement, and does not explain how the current interest differs from that analyzed in the *First* and *Second R&O*s wherein the Commission found dual carriage not justifiable.[131]

In fact, the record here further confirms that the current proposals are unnecessary to advance the digital transition, and that the Commission correctly concluded in 2005 that voluntary carriage rather than government intervention will promote a successful transition.[132]

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[128] *Id.* at 4528.

[129] *Id.* at 4529 (emphasis added).

[130] *Id.* at 4528-29.

[131] *NPRM* at ¶ 16.

[132] *Second R&O*, 20 FCC Rcd at 4529.

As NCTA observes, cable operators currently provide both digital programming generally and digital broadcast signals specifically and can continue service to analog television sets, such that the DTV transition will be a "non-event."[133] Not only would the Commission's current proposal not facilitate the transition, but it would directly impede the transition by creating a disincentive for consumers to purchase digital tuners. After all, the more programming that is available in analog format, the less reason analog subscribers will have to purchase digital tuners.[134]

B. The Current Dual Carriage Proposals Do Not Advance the Interests Recognized in *Turner*

The Commission also already has found that giving broadcasters must-carry rights beyond a single "primary" video stream is not necessary to advance the three interests the Supreme Court *did* countenance in the *Turner* cases, namely (1) helping preserve free over-the-air television, (2) promoting widespread dissemination of information from a multiplicity of sources, and (3) aiding fair competition in the market for programming.[135] In the *Second R&O*, the Commission found dual carriage unnecessary to preserving free broadcast television, which the Supreme Court, as recognized by the Commission, defined more specifically as "provid[ing] over-the-air viewers who *lack* cable with a rich mix of over-the-air programming."[136] Because broadcasters are already required to broadcast digitally, the Commission found that dual carriage would not increase over-the-air viewers' access to programming, and indeed the absence of such carriage might "encourage broadcasters to produce" innovative programming "to convince cable operators to voluntarily carry their digital

[133] NCTA Comments at 2. *See also* Comcast Comments at 32.

[134] Time Warner Comments at 13.

[135] *Turner I*, 512 U.S. at 662; *Turner II*, 520 U.S. at 189. As the Commission noted, only four Justices endorsed fair competition as an important governmental interest in *Turner II*. *Second R&O*, 20 FCC Rcd at 4525. *See also* *Turner II*, 520 U.S. at 226 (Breyer, J., concurring).

[136] *Second R&O*, 20 FCC Rcd at 4525 (quoting *Turner II*, 520 U.S. at 222).

signal."[137] As for the second interest in promoting dissemination of information from a multiplicity of sources, the Commission found dual carriage unnecessary because it does "not result in additional *sources* of programming" and instead multiplies redundant sources, since "digital programming largely simulcasts analog programming."[138] Finally, with regard to the third interest in promoting fair competition, the Commission found no connection to dual carriage, stating that, in light of the onerous obligations dual carriage would impose, dual carriage proponents bore the burden of proving "competitive necessity" but presented nothing more than "speculative allegations."[139]

The current dual carriage proposal suffers from the same defects as the dual carriage proposals the Commission rejected in the *First R&O* and *Second R&O* and fails to advance the relevant governmental interests. First, as for the interest in preserving free over-the-air television, the governmental interest as defined by *Turner II* is "not to guarantee the financial health of all broadcasters, but to ensure a base number of broadcasters survive to provide service to *non-cable households*."[140] As the Commission has already recognized, the interest in preserving free over-the-air television to non-cable subscribers is more than adequately served by mandatory carriage of a single "primary" video signal from each must-carry broadcaster.[141] Departing from the interest in providing broadcast service to *non-cable* households, the current proposal seeks to ensure the signals are available on every TV set in every *cable* home.[142]

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[137] *Id*. at 4525-26.

[138] *Second R&O*, 20 FCC Rcd at 4526 (emphasis added).

[139] *Id.* at 4527.

[140] 520 U.S. at 222 (emphasis added). *See also Second R&O*, 20 FCC Rcd at 4525 ("[T]he focus of the government interest in *Turner* is not the economic health of broadcasting per se . . .").

[141] *See Second R&O*, 20 FCC Rcd at 4524-25, 4526-27, 4534-35.

[142] *NPRM at* ¶ 5 (stating that cable operators are required to "make must-carry stations viewable by all cable subscribers").

Guaranteeing signals to every cable TV subscriber simply is not an interest recognized by the *Turner* cases and therefore cannot justify dual must-carry.

Even if ensuring that all cable subscribers receive signals qualifies as a legitimate governmental interest, cable operators already have ample incentive to ensure that their subscribers receive HD and other broadcast signals. *See* NCTA Comments at 2 ("Cable operators already provide digital programming, including digital broadcast signals, to cable households"); Comcast Comments at 32 ("Cable operators are committed to serving all of their customers, including analog-only customers, while working to facilitate the transition to digital"). Moreover, those consumers who wish to receive broadcast signals will be able to do so easily by obtaining equipment (such as set-top boxes) for each TV.

The current proposals also will not promote the remaining interests identified by the *Turner* cases, widespread dissemination of information from a multiplicity of sources and fair competition in the market for programming. On the contrary, the regulatory preference of must-carry undermines fair competition by giving broadcasters other advantages unrelated to "shelf space" that place multichannel program networks at a profound disadvantage. Guaranteeing broadcasters' carriage means they can avoid investments that other programmers must make. This goes beyond just being freed from the imperative to produce compelling programming (including research, development, and other costs) while other programmers have to "earn" their way onto cable systems. It also removes the prospect of having to furnish market-based consideration in negotiating for carriage. Such consideration can include direct payment to the cable operator, marketing support for joint cable operator-programmer promotion, furnishing commercial availabilities for the cable operator's use in the cable network's programs (and the programmer's attendant loss of ability to generate revenue by selling that time), and other forms of consideration. Broadcasters assured of carriage through must-carry may also spend less marketing their offerings since such offerings cannot be dropped.

Multichannel networks also are burdened by the fact that broadcasters can demand carriage of programming that can enter head-to-head competition with a cable programmer's offering. If a cable network's offering and the broadcast programming occupy the same market niche, and the cable operator determines that the services are duplicative, the broadcaster with must-carry rights cannot be dropped whereas the cable network may be expendable. For instance, the programming of both the Inspiration Network and i-LifeTV provide viewers with high quality religious and spiritual programming, a niche also targeted by religious broadcasters who now support dual carriage rules to protect their veiwership.[143] Any proposal to expand must-carry rights accordingly does not protect a multiplicity of sources but instead eliminates some sources (*i.e.*, multichannel networks squeezed off the system to accommodate additional must-carry broadcast signals) while giving already-represented sources (*i.e.*, broadcasters who get extra must-carry rights) duplicative opportunities.

C. The Current Proposals for Mandatory Carriage of Multiple Broadcast Streams Will Burden More Cable Speech Than Necessary

In evaluating the elastic approach to *Turner* that the broadcasters advocate, it is important to keep in mind that must-carry is inherently unfair because "[b]roadcasters, which transmit over the airwaves, are favored, while cable programmers, which do not, are disfavored."[144] As Justice O'Connor put it, this "controversial judgment [is] the heart" of must-carry.[145] Each guarantee of carriage for a broadcast video stream means that one or more other programmers lose the opportunity to gain carriage, *i.e.*, an opportunity to speak to the public. Furthermore, it is equally

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[143] Religious Voices in Broadcasting Comments at 1.

[144] *Turner I*, 512 U.S. at 645.

[145] *Id.* at 679 (O'Connor, J., concurring in part and dissenting in part).

true that must-carry's regulatory preference for broadcasters has an impact far beyond the one-to-one (or greater) swap of program streams it may necessitate. Guaranteeing carriage to must-carry broadcasters relieves them from the pressure of competing for carriage in the market, while non-broadcast programmers must compete for access. Increasing must-carry rights only exacerbates the burden of this competitive imbalance.

The Commission already has found that giving broadcasters must-carry rights beyond a single "primary" video stream would unduly burden cable operators' First Amendment rights. As recognized in the *Second R&O*, "[m]andatory dual carriage would essentially double the carriage rights and substantially increase the burdens on free speech beyond those upheld in *Turner,*" and this excessive burden would fail narrow tailoring analysis and violate the First Amendment *even if* such burdens served an important governmental interest.[146] In examining the burden imposed on cable operators, the Commission also noted that if Congress intended to impose such drastic new burdens, "it would have done so much more plainly and explicitly."[147] The Commission's conclusions in the *Second R&O* reaffirmed its tentative conclusion in the *First R&O* that dual must carry would impose a constitutionally impermissible burden on cable operators' free speech rights.[148] The Commission's burden analysis in the *First* and *Second R&Os* was properly focused and correctly decided, because it did not depend upon a quantitative analysis of cable system capacity and instead acknowledged the "unfairness to cable program networks" that must-carry represents.[149] Indeed, as the Commission recognized, limited capacity is not the only burden at issue. Specifically, the Commission stated that "the majority of cable subscribers are connected to systems with at least 750 MHz capacity, and . . . operators continue

[146] *Second R&O*, 20 FCC Rcd at 4524.
[147] *Id.* at 4522.
[148] *See First R&O*, 16 FCC Rcd at 2600.
[149] *Second R&O*, 20 FCC Rcd at 4532.

to build out their facilities,"[150] but despite this evidence of substantial capacity, the Commission went on to reject mandatory dual carriage.[151] Properly understood, the burden imposed by dual carriage is too harsh to permit adoption of the current proposals under *Turner*, and as demonstrated, *supra* pp. 13-17, dual carriage would drive many multichannel networks off the air and out of business and would cripple many others that might survive.[152] Thus, expanded capacity is beside the point from a constitutional perspective, because even were capacity unlimited – which it is not – giving broadcasters additional guaranteed entrée to cable systems while multichannel programmers must compete in the marketplace for carriage puts the multichannel programmers at a disadvantage vis-à-vis broadcast programming.

Yet, even if the burden on cable operators and networks could be measured, as NAB suggests, in terms of how much bandwidth on cable systems broadcasters occupy – which it cannot – the continued growth of capacity does not reduce the burden of dual carriage. *See* NAB Comments at 13-14. As we have demonstrated and NCTA has observed, "[c]ompetition remains fierce for access" notwithstanding increased capacity.[153] Our comments and those of NCTA and others make clear that technology has not yet developed to the point where we have reached NAB's fanciful state of "no practical limitations" on cable capacity.[154] If anything, the comments reflect that technological advancements have created *more* – not less – demand for use of cable systems as pipelines of communication. Cable systems are "used for a wide range" of

[150] *Id.* at 4521 n.35.

[151] *Id.* at 4530.

[152] *See supra* at pp. 13-17; Discovery Comments at 8 (dual must-carry would hinder new programming because "[i]nvesting in digital programming is a very risky proposition in any event, and even more so if the programming channel does not have guaranteed carriage rights from cable operators."); see also Comcast Comments at 33-35.

[153] *See supra* at pp. 11-13, 18-24; NCTA Comments at 20 ("Programmers … are preparing to launch new channels of HD programming to remain competitive with those already in HD. Today, 30 networks are provided in HD; by year end, cable networks have announced plans to offer an additional 50 networks in HD.").

[154] *See supra* at pp. 10-18; *see, e.g.*, NCTA Comments at 19; Discovery Comments at 5-8; Time Warner Comments at 5-6; Comcast Comments at 33-34.

services, including "not only linear channels of standard definition and high definition digital programming, but also video-on-demand and high speed data" and Internet service, and cable operators accordingly "are increasingly looking [for] technical solutions to free up space." NCTA Comments at 19-20. It is inaccurate to claim therefore, as does NAB, that cable system capacity has evolved to the point that mandating use of some capacity for one purpose, such as duplicative broadcast content, does not mean precluding its use for others, such as cable programming of the type provided by the Networks. *See* NAB Comments at 13-14.

Finally, even assuming the Commission's newly-articulated interest in ensuring carriage of must-carry broadcast stations to all television sets could qualify as a governmental interest under the *Turner* decisions, dual must-carry fails intermediate scrutiny because it is "more extensive than necessary," to advance this interest.[155] The Commission can "achieve its interests in a manner that … restricts less speech" than requiring dual carriage – specifically, by allowing interested subscribers to obtain the equipment necessary to view broadcast content – and accordingly the Commission "must" adopt the less speech-restrictive alternative.[156] The *NPRM* contemplates the use of such equipment for analog sets connected to all-digital systems,[157] and there is no reason not to allow this less speech-restrictive alternative for systems that are not all digital, but that will provide the single "primary video" must-carry stream of each broadcaster in digital form. The same approach is also contemplated for receipt of over-the-air digital broadcast signals by analog sets – *i.e.*, having consumers that wish to do so acquire equipment to convert the signals. There is no reason to saddle multichannel networks and cable operators with

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[155] *Thompson v. Western States Med. Ctr.*, 535 U.S. at 374.
[156] *Id*. at 371.
[157] *NPRM* at ¶ 17.

the more speech-restrictive approach of dual carriage when it is open to the Commission to restrict less speech by using an equipment-based, or other less restrictive, approach.

CONCLUSION

The proposed dual must-carry requirements are fundamentally unfair and discriminatory to, and would have a devastating effect upon, multichannel program networks. Moreover, they would do grave harm to the competitive television marketplace that multichannel networks have helped to create and to cable subscribers' ability to continue to obtain diverse programming, information and viewpoints uniquely provided by multichannel networks. Because the Commission has failed to adequately justify adoption of the proposed rules, and because the rules would burden multichannel networks' speech more than necessary to achieve the Commission's purported objective, the proposed dual must-carry requirements simply cannot pass statutory or constitutional muster and would not serve the public interest.

Respectfully submitted,

s / Burt Braverman

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i-LifeTV
THE INSPIRATION NETWORK
LA FAMILIA COSMOVISION
OUTDOOR CHANNEL
PBS KIDS SPROUT
Sí TV
STYLE NETWORK
TV ONE
VERSUS

APPENDIX I: THE NETWORKS

THE AFRICA CHANNEL

The Africa Channel is a showcase for the African continent's most outstanding English language television series, specials, documentaries, feature films, music, event specials, biographies, business analysis, and cultural and historical programming. The network has opened an unprecedented daily window for African American families, and indeed all Americans, into the richness and promise of modern Africa and into the lives of its people, showing viewers a world filled with rich cultures, adventures, human dramas, and the countless musical cultures found on the African Continent. Likewise, Africans now have a media voice with which to tell their stories directly to Western viewers, policy makers, travelers, investors and business people. The power of this new media bridge between Africa and the rest of the world is enormous and will create previously unimaginable business, political, economic and social opportunities. The Africa Channel has strong appeal to both general audiences and African Americans, as its programming and its coverage of the heritage, history, and portraits of the emerging modern Africa are not available anywhere else on U.S. television. The Africa Channel also has a strong appeal to the five to ten million African U.S. immigrants, with its focus on their countries of origin. The Africa Channel is currently distributed to just under two million U.S. homes, with plans for further expansion in the works.

ALTITUDE SPORTS & ENTERTAINMENT

Altitude Sports & Entertainment hit the airwaves on September 4, 2004, and is the most watched regional sports network in the Rockies. Altitude is the official television network of the Denver Nuggets, Colorado Avalanche, Colorado Mammoth and Colorado Rapids. In addition, through its partnership with ESPN Syndication and it's own broadcast agreements with select conferences, Altitude will air Big 12, Big East, Big Sky, RMAC and WAC basketball, and Big Sky, Big East, WAC, RMAC and football games. Altitude has been nominated for and received multiple awards ranging from Emmys to Tellys. In addition, Altitude has received recognition for televising multiple series on the men and women of the United States Military that focus on the personal, not the political. A prime example of this dedication can be found in the documentary series "Those Who Served," in which our veterans from WWII and today's wars are highlighted with the support of The Greatest Generations Foundation. Altitude televises approximately 150 Nuggets and Avalanche games (combined) each year, the vast majority of which are aired only on Altitude within Altitude's home territory. Altitude currently has in excess of 2.8 million cable and satellite subscribers. There are approximately 400,000 cable subscribers within Altitude's home territory that do not receive Altitude.

AZN TELEVISION

AZN Television is the network for Asian America. The channel's programming targets the fast-growing, affluent and multi-generational Asian American community, as well as a broader American audience interested in the Asian experience. Genres include the most popular Asian films, dramas, documentaries, anime and news, as well as original programming. Most programming on AZN Television is either in English or subtitled in English. Signature series include Cinema AZN, which in an upcoming episode will explore the phenomenon of Korean programming in recent years, featuring insight from actors, directors and producers of all the popular TV series and hit films, and Dae Jo-Young, an epic historical drama depicting King Dae Jo Young and other heroes of the Balhae Kingdom, dating back some 1300 years ago.

Comcast SportsNet

COMCAST SPORTS NETWORKS

Comcast Sports Networks provide primarily regional, and some national, athletic events to an aggregate of over 35 million viewers across the nation via cable and other forms of multi-video programming distribution. The eleven sports channels falling under the Comcast Sports Networks umbrella serve diehard sports fans in their respective markets. These networks combine live game coverage with original local programming about sports of interest to each market and particular audience, including news, analysis, talk, features and specials. Because the Comcast Sports Networks' channels are devoted almost exclusively to sports programming, they offer viewers deeper, more comprehensive content than broadcast outlets. Comcast SportsNet Philadelphia launched in 1997 and shows Phillies, 76ers, and Flyers games. Comcast SportsNet Mid-Atlantic, formerly known as Home Team Sports, which serves the Washington, DC-Baltimore area, shows Washington Wizards, Washington Capitals DC United games. Comcast SportsNet Chicago, shows games of the Chicago Cubs, Chicago White Sox, Chicago Blackhawks, Chicago Bulls and Chicago Fire MLS. Comcast SportsNet West, based in Northern California, shows the Sacramento Kings; and Comcast SportsNet Northwest, based in Portland, Oregon, will launch in the Fall of 2007, and will bring Oregon and Washington residents Portland Trail Blazers games. All of the above networks' professional home games are broadcast in HD, and the number of away games televised in HD will increase each year. Other members of the Comcast Sports Networks family include FSN New England, FSN Bay Area, SportsNet New York, mtn. Mountain West Sports Network, Comcast/Charter Sports Southeast, and Comcast Local Detroit.

E! ENTERTAINMENT TELEVISION

E! Entertainment Television provides unique programming focused exclusively on Hollywood news and events, programming that will not be seen on broadcast television. E! is focused entirely on creating original programming, not acquiring programming from third parties, and its ability to produce high quality, original entertainment depends on its wide distribution and carriage on multiple cable and DBS systems. Since its inception in 1989, E! has invested almost 1.5 billion dollars in programming, marketing, and capital expenses. Today E! is one of the most recognizable channels on cable with some of the biggest and most talked about hit shows in all of television, including the Simple Life starring Paris Hilton and Nicole Richie, the inimitable Talk Soup, now known simply as The Soup, and the E! True Hollywood Story.

THE FILIPINO CHANNEL

The Filipino Channel was launched by ABS-CBN International, Inc. on April 3, 1994. The Filipino Channel's mission is to reach and serve Filipinos wherever they may be and to address their needs by bringing to them a vast array of tailor-made products and services. The Filipino Channel has over 250,000 US Filipino subscribers viewing the Tagalog-language programming service in North America. With content coming both from Manila and the U.S., The Filipino Channel helps second and third generation Filipino-Americans feel closer to their culture. In addition, ABS-CBN packages three other 24-hour video channels, ANC, Cinema One, and Kapmilya Channel. Some of the original programming available on The Filipino Channel includes Balitang America, the first and only daily Filipino-American news program and TV Patrol World, Speak Out, a discussion and opinion program, and Citizen Pinoy, which has a unique place on American television in its focus on providing assistance and helpful information on immigration issues to the Filipino community. The Filipino Channel has invested approximately 50 million dollars to date, including expenses for programming, marketing and promotions, to maintain its quality programming and content.

G4 TV

G4 TV produces 500 hours of original programming each year. G4 is TV that's plugged in, delivering unique programming to today's tech-savvy, Web-obsessed young male. Now available in more than 63 million households, the network surrounds itself in technology and gadgets, viral web culture and videogames, irreverent programming of all kinds, and distinctive live events, all to create an authentic multi-media destination for 18 to 34 year old guys. G4's signature series ' include "Attack of the Show!," a daily live trip through the latest-breaking pop culture news and need-to-know info about the Internet, videogames, gadgets, movies, TV, women, music and more, providing in-depth, on-the-scene reporting from the places and events that guys care about the most, including E3, Comic-Con, and the Consumer Electronic Show -- unique coverage that is highly valued by G4's subscribers and is not duplicated elsewhere on cable or broadcast. Other signature series include "X-Play," the longest-running and most-watched videogame series on television, offering smart, funny and brutally honest reviews of the hottest videogames on the market, and "Cheat!," which provides videogame exclusives, hidden secrets and tricks, and, as a last resort, cheat codes. G4's total investment since 2000 is over 230 million dollars.

THE GOLF CHANNEL

The Golf Channel was launched in January 1995, and currently distributes its programming to over 32 million subscribers within the United States. Of those subscribers, almost 90 percent are cable subscribers, with approximately 17 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 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.

ILIFE TV

iLifeTV launched in 1998, and offers value-based, lifestyle programming. i-Lifetv is the first and only inspirational lifestyles network, delivering practical programs for everyday life that appeal to the whole family. Some of i-Lifetv's unique original programs include "Back to the Bible " with Dr. Woodrow Kroll, one of the world's leading Bible scholars, who brings an in-depth and revealing Bible teaching that is practical and applicable to our lives; "Cross Talk," a head-scratching touch-of-humor program by Dr. Randy Weiss, bridging the relationship between Judaism and Christianity; "Raising an Amazing Generation," in which educator, counselor and author C.K. Ardizzone equips parents with real-world skills and resources to help their children fulfill their potential; and children's programming, "Taylor's Attic," a network exclusive hosted by Taylor Mason, which uses puppets, props, storytelling and comedy to bring history to life.

THE INSPIRATION NETWORK

The Inspiration Network ("INSP"), which launched in 1990, provides religious and value-based programming to millions of viewers. INSP offers more than 845 different programs monthly, which programs are produced by INSP as well as more than 80 religious organizations, including 23 minority organizations, that represent more than 20 different religious denominations. Operating from its state-of the-art production facilities in Charlotte, North Carolina, where it produces its own original programming, INSP provides its inspirational programming 24 hours a day, 7 days a week, in contrast to the occasional Sunday morning spiritual programming found on broadcast television. INSP also offers high quality programming targeted to teens and children. INSP currently serves more than 2,000 cable systems across the country with a growing subscriber base of more than 22 million households. The network targets the millions of Americans who embrace inspirational values. INSP features original and exclusive music, children's programs and a wide variety of different ministry programming.

LA FAMILIA COSMOVISION

La Familia Cosmovision is a contemporary network that honors the traditional values of the Hispanic family. This network reflects the diversity of the Hispanic culture with programming for men, women, kids and teens. Produced by Hispanic families for Hispanic families, programming includes movies and novellas, news and information, cooking, talk shows and more. Providing programming in an all Spanish-language format, La Familia Cosmovision provides unique programming targeted at Hispanic Americans, including "The Zone," which speaks to young Latinos, bringing the latest in fashion, cinema, technology, sports, and the latest musical videos; and "Good Life" in which host Maria Adelaida helps viewers to discover beauty, day-to-day exploration, and discovery about how to heal oneself and take care of one's mental and physical health.

OUTDOOR CHANNEL

Outdoor Channel is a national cable television network devoted to traditional outdoor activities such as hunting, fishing and shooting sports, as well as off-road motor sports and other outdoor-related lifestyle programming. Outdoor Channel's target audience is comprised of sportsmen and outdoor enthusiasts throughout the U.S., of which there are more than 82 million according to a 2001 survey by the U.S. Fish and Wildlife Service. As of December 2006, Outdoor Channel had relationships or agreements with the ten largest cable and satellite companies in the U.S. Through those arrangements, Outdoor Channel is carried by approximately 6,200 individual cable and satellite service providers, making it available to over 81.1 million U.S. households, with a subscriber penetration rate of 29.7 million households as of December 2006. Since its inception in 1993, Outdoor Channel has been committed to providing excellent programming, for which it was recognized with a Programmer of the Year Honor by the National Cable Television Cooperative in 2003. Outdoor Channel provides viewers with a unique destination for authentic, informative and entertaining outdoor programming, and invests about 10 million dollars per year in original programming.

PBS KIDS SPROUT

PBS Kids Sprout is a multiplatform service that fulfills family and preschooler viewing needs that no other broadcast or cable network can fill with its 24-hour linear channel, video on demand service and website. Sprout's digital cable channel provides an all preschool environment scheduled to reflect the lives of young children ages 2-5 and their families, while its video on demand offering is the #1 Kids VOD service with approximately 14 million views per month and over 250 million views to date. Available in 34 million unique homes (linear and VOD combined), Sprout features curriculum-driven programs in an environment that encourages everyday learning and celebrates the moments and milestones of early childhood. While a portion of Sprout's programming exists on PBS and other cable stations, its original programming and new series are unique to the network and cannot be seen anywhere else. Typically, other networks that air preschool programming confine it to the morning and early afternoon hours, whereas Sprout is the only place where preschoolers and their families can find trusted programs like *Sesame Street*, *Barney & Friends*, *Teletubbies*, *Bob The Builder* and *Thomas & Friends* available all day, every day. There are approximately 10 million U.S. homes with children ages 2-5 and over 30% of those homes are Hispanic, a demographic that is particularly underserved when it comes to preschool programming. Sprout On Demand en Espanol and *The Good Night Show* with host Nina (played by Hispanic actress Michele Lepe, who teaches children Spanish words, sign language, crafts and more) directly impact and serve this demographic group. Sprout's investment in infrastructure, original programming, marketing and promotion to date is approximately $40 million.

SI TV

Si TV is a fresh irreverent, English-language Latino cable network that connects with young viewers through vibrant and relevant programming made just for them. Our 24-hour network delivers a mix of original and acquired programming, including the latest in entertainment, lifestyle, talk, standup comedy, classic series and feature films, as well as irreverent reality programming that pushes the boundaries of the genre. Si-TV goes beyond tradition by catering to today's English-speaking Latinos who consume English media, but still want shows that speak to their Latino roots. Si TV was established in 1997 as a production company to develop, produce and distribute original English-language, Latino entertainment. The company's slate of shows over the years has included the talk show Cafe Ole with Giselle Fernandez, and Nickelodeon's highly rated and critically acclaimed family comedy, The Brother's Garcia, which made television history as the first English-language sitcom with an all-Latino cast and creative team of writers, directors and producers. Launched on February 25, 2004, Si TV is now a cutting edge television network that is putting America's melting-pot onto the screen and further positioning Latino culture into the mainstream. Si TV celebrates the broad appeal of Latino culture and is embraced by its Latino and multicultural audiences. Si TV's mission is to deliver authentic and original programming in English while portraying Latinos in non-stereotypical roles. Si TV delivers entertaining programming on subjects that are important to young Latino and multicultural audiences whose culture is an integral part of their identity.

style network

STYLE NETWORK

Style Network is the destination for women 18-49 with a passion for the best in relatable and inspiring lifestyle programming. The Style Network currently counts 57 million cable and satellite subscribers. Style creates 300 hours per year of original niche woman's programming that does not exist on broadcast television. Style has invested over 270 million dollars building its network since 1998. Style creates inspirational and story driven programming in its signature series "How Do I Look," which gives friends and professional stylists turns at dressing individuals the way they've always wanted to see them, and "Whose Wedding is it Anyway," which follows wedding planners as they brave their way through the drama of planning the perfect wedding, as well as relatable and informational series like "Clean House," winner of a 2007 Silver Angel Award, which helps families by giving them professional help to overcome clutter and the mess that goes with it. Before launching, Style's business plan called for 150 million dollars of investment and a projected goal of 30 million subscribers just to break even on *annual cash flow*, not even including paying down the accumulated investment.

TV ONE

TV One is the only network with programming devoted primarily to African American adults. TV One offers a broad range of lifestyle and entertainment-oriented programming that respects their values and reflects their intellectual and cultural diversity. TV One's goal is to be distributed on the most widely available cable and satellite service level in markets where African Americans represent a significant segment of the population. With an engaging mix of original and acquired programming from key entertainment genres, TV One's programming provides a sophisticated alternative for adult African American viewers, as well as providing positive images that can be watched by both parents and children together. TV One provides viewers with shows like "TV One Access," presented as monthly, one-hour specials and daily minute-long entertainment updates, which takes viewers behind the velvet rope for an inside look at who's who in Black Hollywood, and the "Gospel of Music" in which accomplished gospel harpist Jeff Majors speaks knowingly to musical guests from all wings of the gospel music universe who are brought together for inspirational discussion and song. Since launching in 2004, TV One has achieved a subscribership of 39 million.

VERSUS

Versus (formerly known as Outdoor Life Network or "OLN") offers a diverse array of live must-see sporting events that are available year-round to a variety of audiences in more than 72 million homes in the United States. In addition to live events, Versus also partners with the best producers and talent to present viewers with the finest field sports programming on television. Versus events include: approximately 57 regular season NHL games, all produced and available in HD, approximately 54 Stanley Cup playoff games which includes exclusive LIVE coverage of the Eastern and Western Conference final round and first two games of the Stanley Cup Final, collegiate sports from top conferences such as the Pac-10, Big 12 and Mountain West, Cycling's top events including the Tour de France and the Giro d'Italia, World Extreme Cagefighting (WEC), Coverage of PBR events almost every weekend and the PBR World Finals, The America's Cup, Top Rank boxing, World Cup of Rugby, and International Association of Athletic Federations (IAAF) World Championships. The network was first launched on June 30, 1995, and as of July 2007 is carried on approximately 5,150 cable systems reaching a total of 71,918,000 (70.9% of total) households, of which at 50,989,862 (29.1% of total) are cable. Versus' investment in infrastructure, original programming, marketing and promotion to date are approximately 1.3 billion dollars.