

December 13, 2002

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554



RE: Notice of Oral *Ex Parte* Presentation
CS 98-82

Dear Ms. Dortch:

On December 11, 2002, Andrew Jay Schwartzman, President, Media Access Project, and Harold Feld, Associate Director, Media Access Project, met with W. Kenneth Ferree, William Johnson, Robert Ratcliffe, Royce Sherlock, Andrew Wise, Daniel Hodes, William Cox and Adam Candeub to discuss the Commission's cable ownership proceeding.

MAP representatives presented the following points:

Consumer Federation of America, *et al.* ("CFA") filed *Petitions for Reconsideration* in prior dockets that have been superceded by the current proceeding. The issues raised were not addressed or resolved by the Court of Appeals in the *TWE v. FCC* matter. Accordingly, they remain live.

That the *TWE* Court affirmed the Commission's attribution rules as against challenges from cable MSOs did not bear on the attribution issues which CFA has presented. Specifically, CFA has argued that 1999 *Third Report and Order* made changes in the attribution rules which violated the statute and were arbitrary and capricious. CFA has also challenged the use of all MVPD homes in formulating ownership rules

MAP representatives reiterated arguments raised in its October 16, 2002 written *ex parte* presentation with respect to recent revelations that smaller MVPDs have inflated their subscriber counts. This underscores the inherent unreliability of using unaudited, unsworn proprietary sources for enforcing regulatory policy. Furthermore, by permitting merging cable MSOs to select "any generally accepted industry data," the FCC invites MSOs to game the system. If the FCC insists on using private reporting data, a decision to which CFA, *et al.* strongly object, the Commission should at least pick a single definitive source to minimize uncertainty and deliberate gaming of the system.

Experiential evidence continues to provide additional confirmation of the validity of the economic model CFA has presented in its comments in this proceeding. The October, 2002 GAO report (a copy of which is attached to this letter) reaches the similar conclusions with respect to the absence of pricing constraints on cable attributable to competition from DBS. Nor is there evidence that DBS otherwise constrains cable. Head to head competition between DBS and cable is largely limited to high-end customers desiring increased channel capacity and premium services. Furthermore, evidence submitted in the Comcast/AT&T proceeding demonstrates that even at current levels, cable MSOs can engage in predatory pricing and other anticompetitive behavior. The Commission therefore has more than e-

nough evidence that levels above the current level constitute a non-conjectural risk of harm. Mr. Schwartzman and Mr. Feld reminded staff that the *TWE* court recognized that the Commission continued to exercise predictive judgment and that Section 613(f) is prophylactic in nature. Mr. Schwartzman took particular issue with the suggestion that to support a rule, the Commission must show evidence of actual harm in the market place now. Rather, what is required is a non-conjectural *risk* of harm.

In response to a question from Mr. Johnson, MAP representatives observed that the *TWE* court could not have limited consideration of harm to the programming market exclusively, because the plain language of the statute includes several other specific factors and an express requirement that the Commission consider “other public interest factors.” Rather, the *TWE* Court focused on programming because the Commission’s 1999 *Third Report and Order* relied on programming as the sole justification for the rule. CFA’s position throughout this proceeding has been that this focus on programming and foreclosure was unduly narrow.

MAP representatives also objected to the “safe harbor” approach suggested in the *FNPRM*. The Commission has stated that it must have rules of general applicability so that parties can proceed with certainty. In the ATT/Comcast merger proceeding, the Commission explicitly refused to consider allegations of predatory pricing and other negative behaviors because they are not “merger specific” and need to be considered in the context of the ownership proceeding. In the ownership proceeding, the Commission has now signalled that it will refuse to set a rule, choosing instead to propose a safe harbor and careful scrutiny of mergers on a case-by-case basis. The refusal to consider such evidence in a merger context and the subsequent adoption of a rule which purports to leave the matter to case-by-case is little more than a “shell game,” in which there is never a proper proceeding to raise complaints of anticompetitive behavior that result from allowing cable companies to grow beyond a reasonable limit.

Sincerely,

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cc. W. Kenneth Ferree
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