October 24, 2002

Marlene H. Dortch
Secretary
Federal Communications Commission
TW-A325
445 Twelfth St., SW
Washington, DC 20554

Re: *Notice of Ex parte* presentation in: CS Docket No. 98-82

Dear Ms. Dortch:

On March 5, 2003, Harold Feld, Associate Director, Media Access Project (for CFA, *et al.*) met with Commissioner Martin and his media advisor Catherine Bohigan.

Mr. Feld's presentation followed the discussion points attached to this *Notice*. A copy of the discussion points was left with the Commissioner and Ms. Bohigan. Mr. Feld also left a copy of the written *ex parte* filed in this docket on October 11, 2002.

In accordance with Section 1.1206(b), 47 C.F.R. § 1.1206, this letter is being filed electronically with your office today.

Respectfully submitted

Harold Feld
Associate Director
Media Access Project

cc: Catherine Bohigan
Commissioner Martin

1625 K St., NW Suite 1118 Washington, DC 20006 phone: (202) 232-4300 facsimile: (202) 466-7656

CABLE HORIZONTAL OWNERSHIP POINTS

- **Petitions for Reconsideration** – Media Access Project filed two *Petitions for Reconsideration* of the original order. These *Petitions* were dismissed as moot by the current *NPRM*. Neither the Court in *TWE* nor the Commission has ever considered the validity of these arguments and the Commission should review them *de novo*. These arguments are:

  1. The Commission erred as a matter of law and policy by using total MVPD subscribers rather than just cable subscribers or cable homes passed.

  2. Permitting cable operators to use the "any generally accepted industry publication." See October 11, 2002 *ex parte*.

  3. Use of "insulation criteria" to circumvent the attribution criteria.

- **The FCC Must Set A Limit**– The statutory language is non-discretionary. The legislative history unequivocally states: "The FCC is given discretion in establishing the reasonable limits ... however, the legislation is clear that the FCC must adopt some limitations." Senate Report at 80. The attempt by the MSOs to leverage the word "necessary" so as to make a limit discretionary rather than mandatory should be rejected.

- **Understanding *TWE***. In discussing *Time Warner Entertainment, L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) at the staff level, it has become clear that staff have a fundamentally different, and far more restrictive interpretation of the *TWE* decision than is warranted.

  4. *TWE* explicitly leaves open the prospect that the 30% cap may be justified on remand.

  5. *TWE* does not preclude consideration of other markets than the programming market or other public interest harms than "unfairly imped[ing] the flow of programming."

  6. *TWE* does not preclude consideration of diversity.

  7. *TWE* does not preclude or diminish the Commission's ability to rely on its predictive judgment to prevent harms from occurring.

  8. *TWE* does not mandate any particular form of evidence.

TWE does require that the rule "enhance competition." Accordingly, the Commission cannot rely exclusively on the diversity rationale. In addition, *TWE* does require the Commission to support its predictive judgment with evidence.

· **Support for 30%**. Congress intended, and the D.C. Cir. found in *TWE I*, that Congress intended the statute as a prophylaxis to address potential harms. CFA, *et al.* have made the following case for the 30% rule.

9. Legal considerations – under antitrust law, a presumption of market power is established at 30%. While in antitrust, the government must further prove a violation of law, ***Congress intended the FCC to enact rules preventing concentration "well below the level of traditional antitrust concern***." (*Turner II,* House Report)

10. The factual case – CFA, *et al.* comments contain extensive market analysis and economic modeling. CFA also includes case studies of harms already extant in the market place.

11. Competition issues – *TWE* requires the FCC to consider potential competition from DBS and other sources. The recent report by GAO in the context of the DirecTV/Echostar merger demonstrated clearly that DBS competition ***does not influence or discipline cable***. This contrasts with those markets in which there is genuine competition from overbuilders.

12. Finally, the FCC independent research demonstrates the fallacy in the cable case. OPP has published papers showing (a) that the cable industry argument that economic self-interest limits the ability of cable MSOs to favor their own content is not valid; and, (b) that cable MSOs can exert market power over programmers at levels well below 50%.