

May 19, 2003



Marlene H. Dortch
Secretary
Federal Communications Commission
TW-A325
445 12th Street, SW
Washington, DC 20554

Re: Notice of *Ex parte* Presentation
MB Docket No. 02-277
MB Docket No. 01-235
MB Docket No. 01-317
MB Docket No. 00-244

Dear Ms. Dortch:

On May 16, 2003, Andrew Jay Schwartzman of the Media Access Project met with Commissioner Kevin Martin and his legal assistant Catherine Bohigian to discuss, *inter alia*, the Commission's biennial review of its media ownership rules.

There was brief discussion of reports that the Commission might initiate a separate proceeding to address arguments which have been made about the need for protecting diversity in video program production. Mr. Schwartzman characterized such a move as impermissible under the APA and hypocritical as a matter of administrative policy.

Mr. Schwartzman stated that there is no valid justification for maintaining the 50% "UHF discount" in calculating a broadcaster's audience reach under the so-called "national ownership cap" and that the Commission must in any event provide an empirical basis for retaining any UHF discount of any size.

According to Mr. Schwartzman, it has been reported that some members of the Commission and/or its staff have expressed the view that the Commission lacks authority to modify the UHF discount because Section 202(h) of the 1996 Telecommunications Act limits the Commission to actions which are "deregulatory" in nature. He argued that this is an impermissible reading, since the statute expressly authorizes the Commission "to modify" its rules. Moreover, such a reading could actually frustrate deregulation by precluding modest regulatory adjustments to which might be necessary in the public interest to remediate negative impacts of very substantial deregulatory changes. He also observed that such a reading would be incompatible with other actions the Commission may soon take, such as the possible adjustment of the definition of radio markets.

As to the merits of retaining the UHF discount, Mr. Schwartzman pointed out that it is inherently inconsistent for the Commission to treat UHF stations as having one half the impact of VHF stations for purposes of the national ownership rules while treating them as equivalent to VHF stations in establishing limits on local station ownership and cross-ownership.

Mr. Schwartzman noted that, at the time the Commission established the UHF discount in

1985, cable penetration was at approximately 35% and there was no statutorily mandated must-carry privilege and there were only three national networks. As of today, MVPD penetration is about 85% and, pursuant to the 1992 Cable Act there is not only must-carry, but also statutorily mandated channel positioning protection. There are now four major networks and several “baby” networks, including WB, UPN and PAX, as well as two Spanish language networks. These national programming services have greatly improved the relative status of UHF stations. In addition, he said, DBS operators provide local-into-local service into most major markets. Moreover, the number of homes with second and third MVPD connections or wireless networking has increased. These changes are reflected in the market valuation of UHF stations which, according to most accounts, is perhaps 10-15% less than VHF stations with comparable affiliation.

Mr. Schwartzman pointed to powerful empirical evidence that, even as of 1995, UHF stations had achieved profitability comparable to VHF stations, citing two studies submitted to the Commission by Economists, Incorporated in Docket 94-135.

Finally, Mr. Schwartzman noted that the Commission has itself found that it will be necessary, at the least, to provide for phase-out of the UHF discount as the digital transition proceeds. In light of this, it would be arbitrary and capricious for the Commission not to address whether and to what extent the UHF discount should be reduced at this time.

Sincerely,

Andrew Jay Schwartzman
President and CEO

cc. Commissioner Martin
Catherine Bohigian