May 14, 2004

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 May 13, 2004, Harold Feld, Associate Director, Media Access Project, and Mark Cooper, Consumer Federation of America, met with Martin K. Perry, Tracy Waldron, Jonathon Levy, Royce Sherlock, Barbara S. Esbin, Daniel Shiman, Marcia A. Glauberman, David Boling, and G. Patrick Webre in the above captioned matter.

Mr. Feld and Mr. Cooper reiterated the reasoning behind the more than 500+ pages CFA, *et al.* has submitted into this docket, observed the Commission's own research supports a conclusion that buyers of significant size have the power via "most favored nation" contract clauses to warp programmer incentives and unfairly deprive viewers of programming in violation of Section 613(f)(2)(A), that the GAO found (a) that the FCC's research methods inconsistent, confusing, and generally useless in identifying whether real competition existed in the MVPD marketplace, and (b) that the GAO's own studies found DBS did not significantly impact cable behavior, etc. etc. In response to the suggestion that dvds compete with cable, Mr. Feld and Mr. Cooper observed that Congress, the Department of Justice, and all FCC decisions to date have completely rejected this idea. Mr. Cooper observed that there was no basis for assuming any cross-elasticity of demand. Further, since dvds do not provide news or generally provide new entertainment products, it is difficult to understand why anyone (outside the cable industry) continues to advance this idea.

With regard to the relevant standard, Mr. Feld and Mr. Cooper repeatedly reminded the FCC staff that *TWE I* and *TWE II* agree that Section 613(f) demands the FCC take prophylactic action to ***prevent*** harm. It does not require a showing that harm already exists in the market place or that all programming decisions by cable operators flow from improper motives. It is sufficient under the statute and *TWE II* to demonstrate a genuine ***risk*** of harm (not ***actual*** harm). The *TWE II* court rejected the Commission's 1999 rule because the Commission based its rule on a false premise: the desire to create an environment in which diverse programming would have the most favorable environment. Instead, the *TWE II* court explained, the focus of the rule must rest on whether there is a real risk that any cable operator by virtue of size alone, or more than one cable operator operating jointly, can unfairly impede the flow of programming to viewers. The data clearly demonstrates the existence of such a risk at below 30%, based on the incentives and abilities of cable providers and the realities of the marketplace as documented extensively by CFA, *et al.*

Staff asked what, if anything, staff should focus on in updating the record. Mr. Feld replied (a) that there already exists sufficient data in the record to make a decision; (b) if the Commission wants to refresh the record, it should set an interim limit of 30%; (c) the likelihood that Comncast or Time Warner will seek to acquire all or parts of Adelphia makes it imperative that the Commission either act now to set a limit or, at the least, issue a statement that any acquisitions are made subject to the possibility of divestiture if they violate the rule; (d) the Commission should explicitly solicit and examine whether size has impacted the ability of municipalities or community based programmers to secure access to PEG channels or leased access channels; and (e) Staff should also look at deployment of video on demand, pvrs, set-top boxes, streaming media, and other areas of new technology that impact the ability of subscribers to view programming of their choice.

Mr. Feld also distributed the attached hand out.

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: Martin Perry
Jonathan Levy
Royce Sherlock
Barbara Esbin
David Boling
Marcia Glauberman
Daniel Shiman
Tracy Waldron
G. Patrick Webre

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.

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

  2. *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."

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

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

  5. *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.

1. 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)

2. 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.

3. 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.

4. 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%.