



December 23, 2004

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
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RE: Notice of Oral *Ex Parte* Communication
MB Docket 02-277
MB Docket 01-317
MB Docket 01-235
MB Docket 96-197
MB Docket 00-244

Board of Directors

Peggy Charren
Founder,
Action for Children's Television

Henry Geller
Former Director,
National Telecommunications
and Information Administration

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CUNY School of Law

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Roanne Robinson Shaddox
Privacy Council

Jorge Schement
Co-director,
Institute for
Information Policy
Pennsylvania State University

Andrew Jay Schwartzman
President and CEO,
Media Access Project

Jonah Seiger

Dear Ms. Dortch:

In compliance with 47 CFR §1.1206(b), this letter gives notice of the undersigned's oral *ex parte* presentation on December 22, 2004 to Commissioner Adelstein and his Legal Assistant, Johanna Mikes Shelton

With respect to whether the Commission should seek *certiorari* of the U.S. Court of Appeal's *Prometheus* decision, I observed that in asking the Supreme Court to hear that case, the Commission greatly increased the likelihood that the Court would also hear other *certiorari* petitions. This would put at risk a number of important statutes, including 18 U.S.C. §1464, the Children's Television Act, digital TV provisions of the 1996 Act and the DBS set aside provisions of the 1992 Cable Act. The Commission also jeopardizes the many important aspects of the *Prometheus* case as to which the Commission had prevailed. I pointed out that the Third Circuit had harmonized its reading of Section 202(h) of the 1996 Act with that of the D.C. Circuit in a manner which essentially adopted the position the Commission had originally taken in the D.C. Circuit's *Fox* case.

I also discussed the considerable delay which result from seeking *certiorari*. Even if the Supreme Court did agree to hear the case, there remains a substantial likelihood of a remand whether or not there is a reversal. I said this would take a considerable amount of time, during which period the broadcast industry's ability to conduct transactions would remain frozen, and that it would be better for the industry and the economy to proceed with executing the Third Circuit's directives. Finally, I told the Commissioner and Ms. Mikes Shelton that other pending proceedings would offer "cleaner" cases which would inevitably allow testing of the legal and policy issues that various of the parties are likely to pursue by seeking *certiorari* in the *Prometheus* case.

Sincerely,

/s/

Andrew Jay Schwartzman
Counsel to Public Interest Petitioners

cc. Commissioner Adelstein
Johanna Mikes Shelton