October 21, 2005

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

Re: *Notice of Ex Parte Presentation in MB Docket No. 05-192*

Dear Ms. Dortch:

On October 17, 2005,[1] Andrew Jay Schwartzman, Harold Feld, and Parul Desai of Media Access Project, and Dr. Gregory Rose, an economist consulting for Media Access Project, met with Leslie Marx (OSP), Roy Stewart (MB), Michele Ellison (OGC), Sarah Whitesell (MB), Royce Sherlock (MB), Julie Salovaara (MB), Neil Dellar (OGC), Jamila Bess Johnson (MB), Tracy Waldron (MB), Amy Byett (MB), Patrick Webre (MB), Marcia Glauberman (MB), Daniel Shiman (MB), James Bird (GC), Wayne T. McKee (MB), Jonathan Levy (OSP) and Ann Bushmiller (OGC) to discuss the above captioned proceeding.

In addition to matters raised in the *Petition to Deny* of Free Press, *et al.* and the Reply Comments of NATOA, *et al.*, MAP staff raised the following points:

With regard to merger conditions that would require Comcast and Time Warner to abide by conditions agreed to as part of individual franchise transfers, the Commission should not review these conditions or be involved in any way in negotiations between the Applicants and LFAs. Rather, the Commission, pursuant to its general merger review power and responsibility to preserve the legislative scheme developed by Congress in 1992, should impose conditions that ameliorate the deterioration of the power of LFAs *vis á vis* the Applicants caused by increased merger concentration. Ideally, the Commission would delegate the authority to impose fines or other penalties for violation of LFA conditions to the LFAs. At the least, however, the Commission should create an expedited process whereby an LFA could seek to have the Commission enforce the franchise conditions via fines or other means. The merger condition for open access imposed by the Commission in the AOL/Time Warner merger provides precedent for such an ongoing supervision and enforcement scheme.

The Applicants' argument that the Commission's decision to permit the Comcast/AT&T Broadband merger without an open access or network neutrality condition requires the Commission to approve the merger here without an open access condition fails for two reasons. First, the Commission has recently issued a policy statement in which it sets forth both its jurisdiction and its intent to ensure that all broadband Internet subscribers have access to all lawful content. As demonstrated

[1]This notice is filed late due to the intervening Jewish holiday of Succot.

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by the incident involving www.afterdowningstreet.org, Comcast does not feel any urgency in re_solving consumer complaints when it blocks content. Time sensitive political speech was blocked for more than a week because Comcast and its contractor failed to respond promptly and aggressively to subscriber and content provider complaints. A merger condition is clearly necessary, given the increased ability of Comcast and Time Warner to block time sensitive regional political speech, so that future incidents, whether accidental or deliberate, are resolved quickly. Given the history of Comcast and Time Warner blocking advertising on the basis of content in cable advertising, the Commission has an excellent basis for believing that they will engage in such conduct for broadband content absent a merger condition.

Second, the merger here involves a greater degree of vertical integration and regional clustering than did the Comcast/AT&T Broadband merger. Comcast has increased its video, interactive television, and broadband content holdings since 2002, as documented in the Petition to Deny. The transaction will also allow Applicants to further exploit the terrestrial loophole and move increasing amounts of content online, creating further incentive to block competitors. The recent agreement between Comcast and the National Hockey League is an example of such a migration of content. Accordingly, this merger more closely resembles the AOL/TW merger than the Comcast/AT&T merger, and the Commission should therefore adopt similar safeguards.

Dr. Rose also explained the danger of regional concentration as a matter of game theory. The speed with which any game approaches equilibrium is dependent on the number of actors. The fewer the number of actors, the quicker the game reaches equilibrium and the greater the ability of dominant actors to dictate outcomes. Within each region, Applicants serve a number of markets with different players. In all cases, however, the removal of a competitor such as Adelphia and the increase in market power transferred to the remaining actor has the effect of significantly enhancing the market power of the remaining applicant across all markets within the region. Furthermore, because dominance in one regional market conveys advantages in the other markets, and which in turn provides advantages in the national markets, the damage to competition is synergistic. Looking at each submarket within a region separately, and concluding that sufficient competitors may remain in a given submarket, fails to capture the total change to the competitive environment.

Dr. Rose also opined that, from his observation, Comcast data were inconsistent. It appeared that Comcast had provided most favorable numbers from a variety of industry sources and using a number of different quarters rather than providing a uniform count for a given snapshot in time. This made precise calculation of HHIs impossible, and suggested that Comcast may, in fact be over the 30% limit if a uniform reporting system were used. Dr. Rose did not believe that the Comcast data were falsified, but did believe that it appeared to be making use of all Commission leniencies to produce the lowest possible subscriber count, and that rounding of figures without explanation produced a "sloppy" result.

MAP staff reiterated their concern that the Commission permits Applicants to provide unverified third party data instead of requiring certified data based on actual subscriber counts. MAP suggested that the Commission should require regular real time subscriber counts, with methodology of obtaining the count described, and with accuracy certified under penalty of perjury. Given the emphasis placed by Applicants that they remain under the 30% limit, such information is of great relevance to the merger. At the least, Applicants should be required to provide copies of subscriber counts given quarterly to the SEC.

In accordance with Section 1.1206(b) of the Commission's Rules, 47 C.F.R. § 1.1206, this letter is being filed with your office. If you have questions, please do not hesitate to contact me.

Respectfully Submitted,

/s/

Harold Feld
Senior Vice President

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