Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	MB Docket No. 12-83
Interpretation of the Terms Multichannel Video	)	
Programming Distributor and Channel	)	
as raised in the pending Program Access Complaint	)	
	)	
	)	

COMMENTS OF THE WRITERS GUILD OF AMERICA, WEST, INC.

Ellen Stutzman
Director of Research & Public Policy
Writers Guild of America, West, Inc.
7000 West Third Street
Los Angeles, CA 90048
(323) 782-4660

May 14, 2012

I. Introduction

Writers Guild of America, West, Inc. (WGAW) is pleased to submit the following comments in response to the Federal Communication Commission's (FCC) Public Notice, "On Interpretation of the Terms 'Multichannel Video Programming Distributor' and 'Channel' as raised in the pending Program Access Complaint," released on March 30, 2012, MB Docket No. 12-83.

WGAW is a labor organization representing more than 8,000 professional writers working in film, television and new media, including news and documentaries. Virtually all of the entertainment programming and a significant portion of news programming seen on television and in film are written by WGAW members and the members of our affiliate, Writers Guild of America, East (jointly, "WGA"). WGA members are also writing video programming for distribution over the Internet by entities such as Netflix, Hulu and Amazon.

The WGAW supports an interpretation of the definition of a "Multichannel Video Programming Distributor" (MVPD) that promotes competition and furthers the public interest. Such an interpretation would recognize that MVPDs need not provide the transmission path in addition to the video programming. The inclusion in the MVPD definition of entities that make use of third-party facilities to provide video programming would be consistent with Congressional intent to enhance competition in video programming distribution. To interpret the definition by applying cable technology-specific terms, drafted in 1984, would restrict competition in the market, to the detriment of consumers and content providers. Such a technologically specific definition would limit the potential of the Internet to enhance competition and innovation in video programming delivery.

II. Competition is Needed in the MVPD Market

The WGAW is extremely concerned with the lack of meaningful competition and diversity in the market for the delivery of video programming. The detrimental impact market concentration has on news, information and entertainment content across distribution platforms harms both democratic discourse and the democratic process. The market for video programming delivery lacks effective competition resulting from high levels of concentration. The introduction of telephone and satellite providers into the cable distribution business has not had a significant effect on competition. The four largest MVPDs in the U.S. provided service to 68 percent of all MVPD subscribers nationally in 2010, up from 50 percent in 2002.[1] A four-firm concentration ratio of 68 percent reveals that the market for MVPD services is an oligopoly, where these top firms unfairly profit from their ability to exercise their market power and increase prices. To reach a majority of consumers, broadcast networks must reach agreement with these four companies.

Many local markets are also exceedingly concentrated. In the Comcast proceeding, Consumer Federation of America and other public interest groups noted, "While Comcast's national market share is 25 percent, its share of individual markets is well over 50 percent in every market in which it provides service, and an upwards of 60 percent in other markets, including Boston, Philadelphia, and Chicago."[2] Verizon's proposed spectrum acquisition and plans for joint operations with cable competitors suggests that the MVPD market will only become less competitive in the future.

---

[1] Jeffery Eisenach, "The Economics of Retransmission Consent," National Association of Broadcasters, March 2009, p.1, Available from National Association of Broadcasters, http://www.nab.org/documents/resources/050809EconofRetransConsentEmpiris.pdf, accessed May 17, 2011. SNL Kagan, "U.S. Multichannel Industry Benchmarks," and "U.S. Cable Subscriber Highlights," Available from SNL Kagan, http://www.snl.com, accessed May 23, 2011.

[2] Consumer Federation of America *et al.* "Joint Position to Deny of Consumer Federation of America, Consumers Union, Free Press and Media Access Project," In the Matter of Applications for Consent to the Transfer and Control of Licenses from General Electric Company to Comcast Corporation, MB Docket No 10-56, June 21, 2010, p. 15.

Concentration in the MVPD market helps explain why cable prices continue to rise faster than the consumer price index (CPI). The lack of effective competition allows the oligopoly firms to raise prices above that of a competitive market and maximize profit at the expense of consumers. The FCC's most recent Cable Industry Price Report found that average monthly price for expanded basic cable in 2008 increased 5.9 percent over the previous year, to an average of $52.37. The increase in the CPI in the same period was just 0.1 percent. [3] The rising cost of basic cable services is a symptom of the decline in competition among MVPDs.

Given the market concentration and rising costs to consumers, it is vitally important to the competitive landscape that MVPDs include not only those entities that provide the transmission path but also those that utilize new distribution platforms, such as the Internet, to deliver video programming.

III. A Broad Interpretation of the MVPD Definition is Consistent with Congressional Intent

The Communications Act defines an MVPD as:

> A person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.[4]

The definition is careful not only to mention existing MVPDs but also to note that the term is not limited to those types of distributors specifically enumerated. The MVPD definition was crafted in the 1992 Cable Act, which Congress passed with the intent of enhancing competition in video programming delivery. Although the legislative history notes that Congress discussed the promotion of "facilities-based" competition, in reality it was the only type of

[3] Federal Communications Commission, "Annual Report on Cable Industry Prices," February 14, 2011, p. 2, Available from FCC website, MM Docket No. 92-266, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-284A1.pdf.
[4] 47 U.S.C. § 522(13)

competition available at the time. In recent years, with the development and adoption of high-speed Internet, it has become possible for MVPDs to deliver multiple channels of video programming without owning the "facilities" or the transmission path. Given the concentration that currently exists in the MVPD market, this technological breakthrough could play an integral role in enhancing competition.

Sky Angel serves as a prime example of how a broad interpretation of the MVPD definition would benefit consumers. Sky Angel provides a service to a niche market of consumers seeking access to family-friendly networks and programs. Because these consumers wish for religious reasons to subscribe to some, but not all, cable channels, they are underserved by existing MVPDs that do not offer packages tailored to their needs. Moreover, because these consumers are spread across the country, it would not be economically feasible for an entity to develop its own infrastructure to serve this market segment. Without Sky Angel's ability to use the Internet as a distribution link, these consumers would remain underserved.

Recently there have been news reports that several entities, including Sony, Intel and Apple, may enter the cable distribution business.[5] All reportedly intend to deliver a bundle of television networks over the Internet, similar to Sky Angel's model. Without including these new entities within the MVPD definition, vertically integrated MVPDs such as DirecTV, Comcast and Cablevision could opt to withhold their programming from new competitors. Should the Commission choose to narrowly define MVPDs as entities that provide both the transmission path and the channels of video programming, consumers will be deprived of the innovative offerings that would result from a truly competitive market.

---

[5] Nick Wingfield, "Intel Talking to Networks About Internet TV Service," *The New York Times,* March 12, 2012, New York Times on the web, Accessed May 11, 2012. Andrew Wallenstein, "Sony virtual MSO play could hinge on Comcast," *Variety,* April 30, 2012, Variety on the web, Accessed May 11, 2012. Sam Schechner and Don Clark, "The New Cable-TV Guy: Intel," *The Wall Street Journal,* March 13, 2012, Wall Street Journal on the Web, accessed May 11, 2012.

IV. Application of a Cable Technology-Specific Definition of Channel Would Hinder Competition

In the *Public Notice,* the Commission defines a Channel as:

> A portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation).[6]

This definition was adopted in the 1984 Cable Act. At the time, cable providers were the only distributors of multiple channels of video programming. When the Act was amended in 1992 to include other distributors such as satellite and telephone providers, the definition was not revised. Because MVPDs have expanded beyond cable systems, the WGAW questions the wisdom of continuing to apply the cable technology-specific definition of a channel. To do so would anchor the Commission's rules and protections in the past, while failing to realize the potential benefit provided by current and future technologies. We urge the FCC to adopt a technologically neutral interpretation of the MVPD definition so that consumers and content creators may benefit from a more competitive market that harnesses the power of the Internet to increase video programming choice and variety.

There can be no question that the Commission's public interest goals are best served by an MVPD definition that includes entities that make available for purchase multiple channels of video programming but do not own the transmission path. Such an interpretation will ensure that the Commission's program access rules continue to promote competition as technology changes. As MVPDs consolidate with video programmers--the merger of Comcast and NBC Universal is the only most recent example--protecting these rules and ensuring their application to current and future distributors becomes increasingly important. Expanding MVPD competition through

[6] 47 U.S.C. § 522(4).

Internet delivery of content could help increase independent production and competition in consumer set-top boxes.

The WGAW has commented at length in other proceedings about the lack of independent production on both broadcast and cable networks.[7] The current television marketplace is controlled by a handful of companies that produce content and control the major broadcast and cable networks. Expanding MVPD competition beyond the current entities that distribute video programming would create opportunities for content from independent sources to become part of this concentrated system. Existing MVPDs have actively lobbied against the development of All-Vid adapters that would allow consumers to purchase a set-top box at retail and access MVPD content. Recognition that MVPDs can deliver video programming using Internet distribution would increase consumer choice in set-top boxes. A narrow definition of an MVPD will harm the Commission's stated public interest goals and deprive consumers of the benefit offered by competition from entities utilizing the Internet to deliver content.

V. Conclusion

The current MVPD market lacks competition. Consolidation of control among a few firms has had a detrimental effect on consumers who face limited choice and rising costs. Congress acted to enhance competition by expanding the MVPD market beyond cable providers. The definition of such providers was left open so as to include entities that did not exist at the time. Sky Angel represents the next generation of MVPDs that can take advantage of new

[7] See Comments of the Writers Guild of America, West, Inc., In the Matter of 2010 Quadrennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 2020 of the Telecommunications Act of 1996, MB Docket No. 09-182 and Promoting Diversification of Ownership in the Broadcasting Services, MB Docket No. 07-294, March 5, 2012, and Comments of the Writers Guild of America, West, Inc., In the Matter of Annual Assessment of Competition in the Market for Delivery of Video Programming, MB Docket No. 07-269, June 8, 2011, and Comments of the Writers Guild of America, West, In the Matter of Applications of Comcast Corporation, General Electric and NBC Universal, Inc., for Consent to Assign Licenses or Transfer Control of Licenses, MB Docket No. 10-56, June 21, 2010, and Reply Comments of the Writers Guild of America, West, In the Matter of Preserving the Open Internet Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, April 26, 2010.

delivery routes to "make available for purchase… multiple channels of video programming." The rise of new providers will enhance competition and further the public interest. As such, the WGAW strongly supports a technologically-neutral definition of MVPDs that contemplates the separation of transmission path and subscription to video programming.