

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
**WASHINGTON, DC 20554**

In the Matter of	)	
	)	
Promoting Innovation and Competition in the	)	MB Docket No. 14-261
Provision of Multichannel Video Programming	)	
Distribution Services	)	

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

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## **I. Introduction**

The Writers Guild of America, West, Inc. (“WGAW”) is pleased to submit the following comments in response to the Federal Communication Commission (“FCC”) Notice of Proposed Rulemaking In the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, MB Docket No. 14-261, released December 19, 2014.

The WGAW supports an interpretation of the term Multichannel Video Programming Distributor (“MVPD”) that benefits the public interest by enhancing competition and program diversity. The development of online video has created an opportunity to expand consumer choice and competition for programming in the MVPD industry. By classifying Online Video Distributors (“OVDs”) that provide linear programming as MVPDs, the FCC can strengthen competition in that industry by giving OVDs fair access to must-have programming. The WGAW supports the Commission’s proposed Linear Programming Interpretation of the term MVPD, which is consistent with Congressional intent, would increase competition in the MVPD market and would benefit consumers.

We encourage the Commission to ensure that online MVPDs benefit the public interest by extending and strengthening rules that apply to traditional MVPDs, such as the program access rules, broadcast station retransmission and program carriage rules. Such pro-competitive guidelines are necessary to curb the incumbents’ incentive to deter new entrants in an oligopolistic market.

## **II. The Linear Programming Interpretation of the Term “MVPD” is a Reasonable Interpretation of Congressional Intent**

The term “Multichannel Video Programming Distributor” was defined in the Cable Television Consumer Protection and Competition Act of 1992. One of the primary purposes of the Act is to increase inter-platform competition in the delivery of television service. As Public Knowledge wrote in the Sky Angel Complaint Proceeding, “A ‘principal goal’ of the 1992 Cable Act was ‘to encourage competition from alternative and new technologies,’ by extending like treatment (e.g., under the program access rules, and for retransmission consent purposes) to like services.”<sup>1</sup> It would, therefore, contradict the intention of the Act to limit MVPD competition by excluding innovative new technological platforms like the Internet by adopting a definition that requires an MVPD to have complete control of the transmission path. Furthermore, from a consumer standpoint, control of the transmission path is an imperceptible factor that should not undermine greater choice in providers.

We agree that the appropriate reading of “channels of video programming” in the definition of MVPD is providing multiple streams of linear video programming. The Communications Act uses the term “channel” both in the colloquial way, referring to a programming stream, and as a more technical definition of “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel.” However, given the 1992 Act’s mission of increasing inter-platform competition and including non-cable examples of distribution in the definition of an MVPD, it makes no sense to apply a cable system-specific interpretation of “channel”. Even if there is

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<sup>1</sup> Comments of Public Knowledge, MB Docket No. 12-83, at 13 (May 14, 2012).

ambiguity in the use of the term, the Commission has the legal authority to decide which definition to use.

As the Commission correctly points out, it “has previously held that an entity need not own or operate the facilities that it uses to distribute video programming to subscribers in order to qualify as an MVPD. Rather, an MVPD may use a third party’s distribution facilities in order to make video programming available to subscribers.”<sup>2</sup> Therefore, the Linear Programming Interpretation is consistent with FCC precedent. Limiting MVPDs to those services that control 100% of the transmission path would not only limit competition but might disqualify services that are currently considered MVPDs. For example, satellite MVPDs may lease capacity on another company’s satellite.

### **III. The Linear Programming Interpretation Would Increase Competition in the Video Industry**

The MVPD market continues to be dominated by a small number of large firms. Given the limited deployment of television service by telephone companies, the majority of Americans must choose between a local cable company and two satellite TV providers. At the end of the third quarter of 2014, the top five MVPDs controlled 73% of the market by number of subscribers. If the Comcast-Time Warner Cable and AT&T-DirecTV mergers are approved, 59% of the market nationally will be controlled by just two firms.<sup>3</sup> However, at the local level

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<sup>2</sup> FCC, Notice of Proposed Rulemaking In the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, MB Docket No. 14-261, ¶ 20 (December 19, 2014).

<sup>3</sup> WGAW analysis based on SNL data.

concentration would be even higher in some markets. For instance, the merged companies would control about 70% of the Los Angeles DMA.<sup>4</sup>

The result of this oligopoly has been rising prices and abysmal customer service.

According to the FCC's Report on Cable Industry Prices:

The average monthly price of expanded basic service (the combined price of basic service and the most subscribed cable programming service tier excluding taxes, fees and equipment charges) for all communities surveyed increased by 5.1 percent over the 12 months ending January 1, 2013, to \$64.41, compared to an annual increase of 1.6 percent in the Consumer Price Index (CPI). The price of expanded basic service has increased at a compound average annual growth rate of 6.1 percent during the period 1995-2013. The CPI increased at a compound average annual growth rate of 2.4 percent over the same period.<sup>5</sup>

Additionally, the American Consumer Satisfaction Index ("ACSI") rates subscription television service companies as second from last of 43 industries it tracks, second only to Internet Service Providers ("ISPs").<sup>6</sup> Pay TV providers' score in the ACSI also declined by 4.4% from 2013 to 2014.<sup>7</sup>

In contrast, the Transmission Path Interpretation would restrict Internet pay TV services with must-have programming to those MVPDs that own broadband facilities. The online market would be even more concentrated than the current MVPD market because high-speed broadband is largely limited to coaxial cable and fiber-to-the-home networks. Only those networks have the capacity to transmit multiple streams of next generation 4K video.

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<sup>4</sup> *Id.*

<sup>5</sup> FCC, Report on Cable Industry Prices, MM Docket No. 92-266, at 3 (May 16, 2014).

<sup>6</sup> Jon Brodtkin, *Survey says: Comcast, Time Warner Cable customers are still the angriest*, Ars Technica (May 19, 2014), <http://arstechnica.com/business/2014/05/comcast-time-warner-cable-still-have-the-angriest-customers-survey-finds/>.

<sup>7</sup> *Id.*

Online MVPDs would create new avenues for consumers to watch broadcast or cable networks. Dish Network has already launched an online TV service called Sling TV with networks such as ESPN, TNT, TBS and CNN, among others.<sup>8</sup> However, some of the networks on the new service have restricted the use of DVR functions or access to video on demand versions of recent episodes. Several other companies have expressed interest in selling online bundles of channels to consumers. Sony and Verizon have announced plans to launch their own online TV services and Apple is reportedly in discussions with networks.<sup>9</sup> Allowing these new competitors the same legal privileges and responsibilities that incumbent MVPDs enjoy would increase consumer choice and benefit the public interest.

Online MVPDs would also help bring the TV industry into the 21<sup>st</sup> century by allowing the kind of flexible, cross-platform experience that consumers anticipate and that has been technologically possible for some time. Despite industry initiatives like TV Everywhere, consumers still face a confusing variety of restrictions on how and when they can view their favorite programs. Compare this to Aereo's defunct service, which allowed subscribers to watch linear streams of television on numerous devices either as they aired or from a cloud DVR.

Consumer choice would expand not only in how films and television can be watched but also in the breadth of content available. For example, independent production has declined on broadcast TV since the repeal of the Financial Interest and Syndication rules. In 1989, 76% of the Fall primetime lineup was independently produced but by 2013, that figure had plummeted to

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<sup>8</sup> Chris Welch, *Sling TV review: \$20 has changed the way I watch ESPN*, The Verge (Jan. 26, 2015), <http://www.theverge.com/2015/1/26/7904887/dish-sling-tv-review>.

<sup>9</sup> Andrew Wallenstein, *Apple in Talks (Again) to Offer TV Channels: Report*, Variety (Feb. 4, 2015), <http://variety.com/2015/digital/news/apple-in-talks-again-to-offer-tv-channels-report-1201424182/>.

10%.<sup>10</sup> Virtual MVPDs could create a new outlet for programming that is not created by the small number of studios that currently dominate the market for video programming. As OVD FilmOn has told the Commission, “Online video distributors are not subject to the same capacity constraints of traditional cable systems or satellite systems and as a result could open carriage opportunities for new, independent and niche video programming services to achieve greater distribution and access new markets historically foreclosed to such services.”<sup>11</sup>

#### **IV. Virtual MVPDs Need Strong Program Access Rules**

One of the major obstacles for new MVPDs is the ability to acquire popular, or must-have, video programming. If the Commission extends MVPD status to linear OVDs, they would have some protection against unfair discrimination by networks affiliated with cable systems through the program access rules. This is particularly important for regional sports programming, for which there is no close substitute. However, the rules must be strengthened to the extent possible so that incumbent MVPDs cannot use anti-competitive tactics to deny programming to new OVD competitors. Such protections are warranted given that reports have surfaced of MVPDs demanding that contracts with programmers contain “clauses that expressly prohibit the channels to be sold to an Internet distributor like Intel, while other contracts merely discourage such competition by including financial incentives or penalties.”<sup>12</sup>

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<sup>10</sup> WGAW analysis.

<sup>11</sup> FilmOnX, LLC, Re: Ex Parte Notice, Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel,” MB Docket No.12-83, at 4 (Nov. 10, 2014).

<sup>12</sup> Brian Stelter, *Gatekeepers of Cable TV Try to Stop Intel*, The New York Times (Jun. 12, 2013), <http://www.nytimes.com/2013/06/13/business/media/gatekeepers-of-cable-tv-try-to-stop-intel.html>.

Similarly, broadcast networks continue to command some of the highest ratings on television and constitute must-have programming. In order to carry broadcast networks, OVDs need both copyright permission to distribute their programming and the broadcast station's permission to retransmit its signal. Although the FCC does not have authority to change copyright regulations, it can encourage the Copyright Office to consider how the current compulsory copyright licenses might be extended to OVDs. However, by classifying OVDs as MVPDs, the Commission would extend the must-carry/retransmission consent rules to OVDs.

While online MVPDs should have non-discriminatory access to must-have programming, video programmers should likewise have non-discriminatory access to carriage on all MVPDs. Therefore, the program carriage rules should also apply to virtual MVPDs as they have to cable and satellite distributors. Furthermore, as traditional MVPDs enter the online distribution market, they should not be allowed to demand exclusive distribution or a financial interest in independent programmers as a condition of carriage.

## **V. Conclusion**

For the foregoing reasons, the Commission should adopt the Linear Programming Interpretation of the MVPD definition. Such a step would increase competition in the video distribution market, encourage local and national programming diversity and serve the public interest. All of these outcomes are consistent with the policy goals of the 1992 Cable Act and the Communications Act in general.