

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)
)
)

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

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The Writers Guild of America, West (WGAW) is pleased to submit reply comments 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.

I. A Broad Interpretation of the MVPD Definition will Enhance Competition

As stated in our initial comments, the WGAW supports a non facilities-based, technology neutral definition of a "Multichannel Video Programming Distributor" (MVPD) as such a definition would promote competition and further the public interest. Sky Angel's distribution service, comprised of multiple networks of linear video programming delivered by Internet, is comparable to the services provided by cable, satellite and wireline MVPDs and demonstrates precisely how a broader definition will enhance competition and benefit consumers. Sky Angel provides a unique service to a distinct segment of the population, which is underserved by existing MVPDs. Narrowly defining MVPDs to require both the transmission path and the video programming channels would deprive consumers of competitive offerings from Sky Angel and other potential market entrants such as Intel, Sony and Apple.

Comments submitted in response to the Public Notice indicate that there is broad support for a non facilities-based definition of MVPD. A wide range of industry stakeholders, including ABC, CBS and NBC Network Affiliates, public interest group Public Knowledge and online video service providers like Sky Angel and M3X Media support an MVPD definition that does not require the transmission path. Unsurprisingly, existing MVPDs such as Comcast and Cablevision do not support a broader interpretation of the definition. The Commission should carefully weigh comments from existing MVPDs, who we fear may be motivated to limit competition rather than protect the public interest.

II. The FCC Must Protect the Internet's Development as a Competitive Platform

The rapid adoption of tablets and other Internet-connected devices has allowed the Internet to become a viable distribution platform for video programming. It has the potential to introduce much needed competition in both distribution and production of video content. However, it is evident that Internet distribution represents a threat to existing MVPDs and absent FCC action, consumers and content creators will not realize the benefit of this platform. Already, the Commission has recognized that online video is an important component of MVPD service. In the Comcast-NBCU order the Commission concluded that online viewing is “becoming an important service demanded by consumers—one that every major MVPD is offering its subscribers. Without access to online content on competitive terms, an MVPD would suffer a distinct competitive disadvantage compared to Comcast, to the detriment of competition and consumers.”¹ This same logic applies to services such as Sky Angel that deliver video programming over the Internet.

In addition to application of Program Access rules to these new competitors, the Commission should consider additional protections that may be necessary for this new video distribution platform. For instance, as services such as Sky Angel and other online video distributors utilize the broadband networks of rival MVPDs such as Comcast or Time Warner Cable to deliver programming, there is an incentive for the companies that control the transmission path to engage in anticompetitive practices such as broadband caps or managing connection speeds to promote an MVPD's own services.² The Commission explored these concerns in the Comcast-NBC Universal merger finding that Comcast has the ability to use its

¹ *Application of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, MB Docket No. 10-56, FCC 11-4, at ¶70.

² See Comments of the Open Internet Coalition, MB Docket No. 12-83, May 14, 2012, at 6.

broadband network to its own advantage by blocking content from rivals or speeding up access to its own content. Recently, Comcast announced its Xfinity service, when accessed on the Xbox 360, would be excluded from data caps. The Netflix and Hulu applications, also featured on the console, would be subject to Comcast's data caps.³ In addition, recent tests by network engineers raise some concern that Comcast prioritizes its own traffic from Xfinity while independent providers such as Netflix have their performance downgraded.⁴ The actions of Comcast raise serious concerns about how MVPDs may attempt to stifle competition from online distributors. Given the recent reports of the Department of Justice's antitrust investigation of the cable industry, we believe further action may be necessary to protect competition.⁵ As such, the WGAW joins with Public Knowledge to encourage the Commission to release a further Notice of Inquiry to develop a comprehensive policy framework to protect online video programming distributors.

III. Conclusion

The Internet has made it possible for the introduction of much needed competition in the MVPD marketplace. However, it is clear that existing MVPDs will attempt to stifle this competition, to the detriment of content creators and consumers. The WGAW supports a broad definition of an MVPD to include new competitors who utilize the Internet to deliver multiple channels of video programming. Such a definition would extend the rights and responsibilities of

³Matt Peckham, "Netflix CEO Takes Swing at Comcast Xfinity over Net Neutrality," *Time Techland*, April 16, 2012, <http://techland.time.com/2012/04/16/netflix-ceo-takes-swing-at-comcast-xfinity-over-net-neutrality/>.

⁴ Andrew Dugan, "An IP Engineer and Consumer View of Xfinity Traffic Prioritization," Beyond Bandwidth, Level 3 Communications Blog, May 17, 2012, <http://blog.level3.com/2012/05/17/an-ip-engineer-and-consumer-view-of-xfinity-traffic-prioritization/>. Stacey Higginbotham, "He Said, She Said, Is Comcast Prioritizing Traffic or Not?" *GigaOm*, May 15, 2012, <http://gigaom.com/broadband/he-said-she-said-is-comcast-prioritizing-traffic-or-not/>.

⁵ Thomas Catan and Amy Schatz, "U.S. Probes Cable for Limits on Net Video," *The Wall Street Journal*, June 13, 2012, http://online.wsj.com/article_email/SB10001424052702303444204577462951166384624-1MyQjAxMTAyMDEwMjExNDIyWj.html.

the Program Access rules to online video distributors. We also support a broader rulemaking process to protect the Internet's competitive development.