Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	MB Docket No. 12-68
Revision of the Commission's Program Access	)	
Rules	)	
	)	
	)	
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COMMENTS OF THE WRITERS GUILD OF AMERICA, WEST, INC.

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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) Noticed of Proposed Rulemaking, "Revision of the Commission's Program Access Rules," released on March 30, 2012, MB Docket No. 12-68.

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"). The WGAW is an advocate for a competitive media marketplace that allows diverse stories created by writers an opportunity to reach the public.

The continued prohibition on exclusive contracts between a cable operator and its affiliated programming is necessary to promote competition among MVPDs (multichannel video programming distributors). The Commission extended these rules in 2002 and 2007 based on findings that exclusivity would harm competition. We believe that market conditions remain substantially the same as prior years and do not think a repeal of the rule will result in increased investment in programming to differentiate MVPD competitors. Rather, a repeal would undoubtedly increase program costs for competing MVPDs or, worse still, lead to programming exclusivity that drives competitors out of the market. Furthermore, the WGAW is extremely concerned that a repeal of the exclusivity ban could lead to further vertical integration and industry consolidation as MVPDs acquire programming networks to enhance negotiating leverage.

II. Historical Context of Program Access Rules

The Program Access rules prohibit exclusive contracts for satellite-delivered programming between any cable operator and any cable-affiliated programmer. These rules were implemented following skyrocketing cable bill prices that resulted from deregulation of the cable industry in 1986.[1] In 1992 Congress found that both the horizontal concentration of cable operators and the vertical integration of cable systems and cable programmers created market entry barriers. To promote competition in the MVPD marketplace, Congress believed that new entrants needed access to “must have” programming to compete with incumbent operators.[2] While these rules were not intended to remain in effect in perpetuity, the FCC concluded in both 2002 and 2007 that vertically-integrated cable programmers and their affiliated operators had the ability and incentive to withhold programming from competing MVPDs in some markets. As such, the Commission has held that the rules remain necessary and extended their application to October 2012.

Since passage of the Cable Act in 1992 the FCC has taken additional steps to promote competition within the MVPD marketplace. In 2006 the Commission applied program access rules to Regional Sports Networks (RSNs) acquired by Comcast and Time Warner Cable (TWC) in the *Adelphia* order. In 2010 the Commission closed the terrestrial delivery exception to the program access rules. That same year the Commission applied program access conditions, extended to online video content, in the *Comcast-NBCU* order. These steps were meant to encourage competition in a marketplace where both content and distribution are concentrated among a few national owners. The WGAW supports such efforts to enhance competition in the

[1] Cable Television Consumer Protection and Competition Act of 1992, Section 2, (a)(1). Monthly cable bill prices increased by more than 40% for over 28% of cable subscribers after deregulation.
[2] See Notice of Proposed Rulemaking, *Revision of the Commission’s Program Access Rules*, MB 12-68, March 20, 2012, Section II, item A, at 5 (hereafter *NPRM*).

video distribution market and believes the Commission should identify additional protections to enact, rather than the deregulation under consideration in this NPRM.

III. A Prohibition on Exclusivity Remains Necessary for Competition

Current market conditions, including control of must-have programming and cable MVPD control of subscribers in top local markets, demonstrate that competition remains a concern in the video distribution market. While the Commission notes that 369 new networks have launched since the last review of the Program Access rules in 2007, the top 50 cable networks account for 83% of cable primetime ratings, according to SNL Kagan. While the percentage of cable-affiliated networks has fallen from 22% (116 networks) in 2007 to 14.4% (115 networks) today, the total number controlled by cable MVPDs remains the same.[3] Furthermore, cable operators still maintain control of a sizable share of must-have programming. Seven of the top 20 networks, ranked by subscribers and primetime ratings, are cable-affiliated and 52% of RSNs are affiliated with cable operators.[4] The Commission previously held in the 2007 review that the quantity of networks available to MVPDs was less relevant than the popularity of available networks. [5] We believe this remains a relevant fact in the current review. Despite the increase in new, independent networks, cable's share of must-have programming is essentially the same as in 2007. While the separation of TWC and Time Warner created 30 unaffiliated networks in 2008, this pro-competitive development was essentially nullified by the Commission's approval of the Comcast-NBC Universal merger, which increased Comcast's networks from 11 in 2007 to 60 post-merger. Although Comcast is subject to Program Access rules through 2018, as a merger

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[3] *NPRM,* Appendix B, Table 1 at 64.
[4] *NPRM*, Appendix B, Table 1 at 64 and Appendix C, Table 1 at 70.
[5] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992—Development of Competition and Diversity in Video Programming Distribution: Section 628 (c)(5) of the Communications Act: Sunset of Exclusive Contract*, Report and Order, 22 FCC Rcd 17791, 17840-41, ¶ 37 (2007).

condition, it is important to include its networks in the Commission's market analysis because it demonstrates cable's continued control over must-have programming.

In addition to cable's control of must-have programming, the Commission also found in 2007 that in areas where a competing MVPD had a smaller market share, a vertically integrated cable MVPD had an incentive to withhold affiliated-programming. A short-term loss from advertising and subscription revenues would lead to a long-term gain of subscribers as customers switched to receive exclusive programming. The Commission described exclusive contracts as a "kind of "investment," in which an initial loss of profits from programming is incurred in order to achieve higher profits later from increased cable distribution." [6]

Repealing the prohibition on exclusivity would encourage MVPDs to compete by offering exclusive programming, which the WGAW believes would be detrimental to consumers and content creators. Exclusivity of programming networks would ensure that no consumer could access the full range of programming available without having to subscribe to more than one service. Consumers would be faced with the option of less choice in programming or paying more for multiple services. Similarly, content would be deprived of full access to a national market.

Video Distribution System and Market Share by % of Total Video Subscribers, 2002-2012			
MVPD	2002	2007	Current
Cable	78%	67%	58.5%
DBS	18.2%	>30%	33.9%
Wireline	.7%	1.9%	7.6%

[6] *2007 Extension Order* ¶44.

Although cable systems have lost national market share to DBS systems over the last two decades, the FCC found that while the emergence of DBS resulted in more services it had little effect on price competition.[7] This may be the result of DBS being an imperfect substitute for cable television. DBS can suffer from loss of reception due to inclement weather. It also requires a direct line of sight to its satellites which limits adoption in very high density housing areas. Where the Commission did find price competition was in markets where a second wireline operator (usually Telco) existed. Prices in markets where the Commission had made no finding of effective competition had prices that were 20.6% higher than markets with wire to wire competition.[8] Given recent indications that wireline competitors such as AT&T and Verizon will not continue to expand their footprint, and Verizon's joint-marketing plan with cable MVPD competitors, we do not expect the majority of consumers to benefit from this competition.[9]

Cable remains the dominant distribution system nationally and accounts for a majority of subscribers in 20 of the top 25 populated designated market areas (DMA). Despite the national market share gains of wireline and satellite competitors, cable MVPDs' control of the top television markets creates the continued incentive and ability to withhold affiliated programming and harm competition. The Commission should pay careful attention to cable MVPD control of these top markets and how retiring the exclusivity provision might harm consumers living in the top 25 DMAs. Cable MVPD control of video distribution is concentrated in the hands of 4 companies; Comcast, Time Warner Cable, Cox Communications and Charter Communications.

[7] Federal Communications Commission, *13th Annual Video Competition Report*, MB 06-189, at 22 ¶ 45.
[8] *Ibid.*
[9] Peter Szensson, "Verizon winds down expensive FiOS expansion," *Associated Press*, 3/26/2010, http://www.usatoday.com/tech/news/2010-03-26-verizon-fios_N.htm.

Collectively, these 4 companies account for 42.7% of the MVPD marketplace and 73% of cable MVPD market share, according to SNL Kagan.

Video Distribution Market Share (%)[10]				
Rank	DMA	Cable	DBS	Telco
1	New York, NY	70.6	14.0	15.4
2	Los Angeles, CA	47.3	38.4	14.3
3	Chicago, IL	58.8	31.2	10.0
4	Philadelphia, PA	66.1	16.3	17.6
5	Dallas-Ft. Worth, TX	29.1	44.9	26.0
6	San Francisco-Oakland-San Jose, CA	61.0	31.1	7.9
7	Boston, MA (Manchester, NH)	70.5	16.2	13.3
8	Washington, DC (Hagerstown, MD)	48.6	28.7	22.7
9	Atlanta, GA	50.6	42.2	7.2
10	Houston, TX	45.7	37.3	17.0
11	Detroit, MI	61.5	27.6	11.0
12	Seattle-Tacoma, WA	72.1	27.9	-
13	Phoenix (Prescott), AZ	60.8	39.2	-
14	Tampa-St. Petersburg (Sarasota), FL	65.3	16.8	17.8
15	Minneapolis-St. Paul, MN	60.6	39.4	-
16	Miami-Ft. Lauderdale, FL	54.9	35.0	10.1
17	Denver, CO	58.5	41.5	-
18	Cleveland-Akron (Canton), OH	62.8	29.9	7.3
19	Orlando-Daytona Beach-Melbourne, FL	69.3	27.1	3.7
20	Sacramento-Stockton-Modesto, CA	48.1	44.4	7.5
21	St. Louis, MO	39.0	47.5	13.5
22	Portland, OR	63.7	36.3	-
23	Pittsburgh, PA	64.0	25.5	10.5
24	Raleigh-Durham (Fayetteville), NC	59.2	38.6	2.2
25	Charlotte, NC	58.6	38.2	3.2

Because cable MVPDs retain control of a significant amount of must-have programming and are the top providers of video programming both nationally and in 80% of the top 25 DMAs, prohibitions on exclusivity remain necessary to protect market competition.

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[10] SNL Kagan, U.S. Multichannel Market List, 4th Quarter, 2011 .

IV. The Anticompetitive Effects of RSN Exclusivity Demonstrate the Harm Exclusivity Could Cause Consumers

The experience of Regional Sports Networks provides important insight into what could happen should the Commission repeal the exclusivity prohibition of the Program Access rules. Prior to 2006, MVPDs were able to enter exclusive contracts with satellite delivered RSNs. MVPDs were able to enter into exclusive contracts for terrestrial RSNs until 2010. As a result, cable MVPDs such as Comcast withheld its RSNs from competitors. The anticompetitive effect of programming exclusivity is evident in the Philadelphia market, where Comcast is the dominant MVPD. Comcast controls 56% of the distribution market, Dish and DirecTV have a combined 16.3% of the subscribers and Verizon accounts for 17.6%. In the Comcast-NBCU merger, Comcast noted that it refused to provide Philadelphia RSNs to DirecTV and Dish as a "long standing business policy."[11] Exclusive access to local sports teams boosted Comcast's subscriber base to 450,000 customers in the Philadelphia area.[12] By the Commission's estimate, lack of access to RSNs lowered satellite subscriptions in the Philadelphia area by 40%.[13] The Commission recently closed the terrestrial loophole in 2010, but satellite providers in the Philadelphia area have still not been able to license Comcast's sports programming due to high costs. Derek Chang, executive Vice President of DirecTV, believes that Comcast's market dominance has allowed the company to determine the "fair market value" of RSNs in favor of their incumbency. Chang, commenting on DirecTV's inability to secure RSN access, said "They [Comcast] win either way…They're either going to gouge our customers, or they're going to

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[11] *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses, Memorandum Opinion and Order*, 26 FCC Rcd 4238, ¶ 71 (2011)

[12] Bob Fernandez, "FCC: Comcast must share Phila. Sports coverage," Philly.com, January 21, 2010, http://www.philly.com/philly/sports/20100121_FCC_ends_Comcast_s_local_sports_monopoly.html.

[13] *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors to Time Warner Cable Inc., Assignees, et al.*, MB Docket No. 05-192, Memorandum and Order, 21 FCC Rcd 8203, ¶ 149.

withhold it from our customers."[14]Comcast's dominance in the Philadelphia area is currently the subject of a class action lawsuit which alleges that Comcast engaged in monopoly practices by acquiring local cable systems in the Philadelphia area to artificially raise the price of cable subscriptions.[15]

Exclusivity in regional sports programming highlights precisely how the contemplated sunsetting of the exclusivity prohibition might harm competition. Access to must-have programming on reasonable terms is vital to foster competition in regional markets.

V. Reliance on Enforcement of Merger Orders May be Insufficient to Protect Competition

In the NPRM, the Commission suggests that Program Access rules might best be dealt with through conditions related to specific transactions, citing the conditions set forth in the *Comcast-NBCU* order. While addressing competitive concerns on a case-by-case basis is a possible alternative to the existing regime, we do not believe it to be an ideal method. Experience has shown that enforcing merger conditions has at times been a difficult and lengthy process. A recent example is the request of Bloomberg to have its news channel placed in the news "neighborhood" on Comcast cable packages. While this is a condition of the *Comcast-NBCU* order, the Bloomberg news channel has yet to be moved to the news neighborhood. It took two years between Bloomberg's initial contact with Comcast and the Media Bureau's consideration of Bloomberg's complaint before the Commission found in favor of Bloomberg. Despite the Commission's finding, Comcast has publicly stated they intend to appeal the Commission's

[14] Jeff Gelles, "Comcast and satellite companies at impasse over SportsNet programming," Philly.com, April 15, 2012, http://articles.philly.com/2012-04-15/business/31345434_1_satellite-providers-cable-companies-comcast-sportsnet.
[15] *Caroline Behrend, et al. v. Comcast Corporation, et al.*, US District Court for the Eastern District of Pennsylvania, No. 03-6604.

decision and has filed an Application for Review. [16] Comcast's actions highlight the potential problems that could arise should the Commission choose to address program access issues by way of merger conditions.

VI. Exclusive Contracts Could Lead to Further Vertical and Horizontal Consolidation

The WGAW is extremely concerned with the potential industry consolidation that may occur should the Commission allow programming exclusivity. To ensure access to the affiliated programming of competitors, the WGAW fears that MVPDs will acquire unaffiliated programming networks to use as leverage in negotiations. The WGAW is not in favor of further industry consolidation and urged the Commission to deny the Comcast-NBCU merger unless stringent conditions were applied. If exclusivity is allowed, we are concerned that content created by WGA members for affiliated programming networks may be withheld from competitors. Losing access to portions of the market could have a detrimental effect on the television series written by our members, even if it provides a larger reward for the MVPD that controls it.

Exclusivity may also encourage further horizontal consolidation in the MVPD market. Many competitive MVPDs lack the appropriate capital or experience to acquire or develop new programming networks to compete with the dominant providers. Lifting the prohibition on exclusivity will make these smaller competitors vulnerable to incumbent operators who could now withhold programming. Such a scenario provides smaller MVPDs with little choice but to be acquired by incumbent MVPDs.

[16] Katy Bachman, "Bloomberg Wins FCC Complaint Against Comcast: Comcast must move Bloomverg TV to its news neighborhoods," Ad Age, May 2, 2012, http://www.adweek.com/news/television/bloomberg-wins-fcc-complaint-against-comcast-140004 see also *Application for Review of Comcast Cable Communications, LLC*, MB Docket 11-104, June 1, 2012.

VII. Online Video Distributors Should Not be Included in Market Analysis

The Commission seeks comment on whether online programming should be included in consideration of the exclusivity rule.[17] While the Commission has previously held that online video distribution is emerging as a potential competitor to MVPDs, video providers delivering programming through the Internet are not currently entitled to the rights and obligations of the Program Access rules. Online video distributor access to cable-affiliated programming is an issue currently before the Commission in the pending Sky Angel Program Access complaint and the definition of MVPDs is being contemplated in Proceeding 12-83.[18] As the Commission separately considers whether online video providers should be classified as MVPDs, it seems inappropriate to include online video distribution as an indicator of market competition in the current proceeding.

Conclusion

In the 1992 Cable Act, Congress found there was "substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media."[19] In 2007 the Commission held that cable MVPDs have the incentive and ability to withhold programming in markets where the MVPD has a large number of subscribers. To the extent that cable MVPDs own "must have" programming, consumers will be unlikely to switch to competitive MVPDs unless the same program is offered. As a cable MVPD's market share increases, the cost of withholding programming from competitive MVPDs through loss of advertising and retransmission revenues decreases. The Commission determined that "where competitive MVPDs are limited in their market share, a cable-affiliated programmer will be able

[17] *NPRM*, ¶25.
[18] See *Complaint of Sky Angel Against Discovery Communications, LLC, et al For Violation of the Commission's Competitive Access to Cable Programming Rules*, May 6, 2010; See NPRM 12-83.
[19] 1992 Cable Act, item 6, at 2 http://transition.fcc.gov/Bureaus/OSEC/library/legislative_histories/1439.pdf.

to recoup a substantial amount, if not all of the revenues foregone by pursuing a withholding strategy" while affiliated cable owners grow their market share.[20]

Despite the increase in satellite and wireline market share, the WGAW believes that further progress is needed to reach a more competitive MVPD market. It is vitally important that the Commission retain its prohibition of affiliated programming exclusivity for another 5 years. Allowing exclusivity would alter the basis of competition from price and technology to exclusive programming and that is an unmitigated move backward for the consumer. Indeed, the necessary programming policy for increasing competition that benefits the consumer is a requirement of a la carte program network availability, prohibiting bundling by both the program network owners and the MVPDs. In this way, all MVPDs would be incentivized to carry all program networks, and competition would be firmly based in technology and price, spurring competition and investment in the programming that viewers demand.

[20] *2007 Extension Order.*