



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: <http://www.fcc.gov>
TTY: 1-888-835-5322

DA 12-507
Released: March 30, 2012

**MEDIA BUREAU SEEKS COMMENT ON INTERPRETATION OF THE TERMS
“MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTOR” AND “CHANNEL”
AS RAISED IN PENDING PROGRAM ACCESS COMPLAINT PROCEEDING**

MB Docket No. 12-83

Comments Due: April 30, 2012
Reply Comments Due: May 30, 2012

I. INTRODUCTION

1. A program access complaint is pending before the Media Bureau (“Bureau”) that raises the threshold legal issue of how to interpret the term “multichannel video programming distributor” (“MVPD”), as defined in the Communications Act of 1934, as amended (“Communications Act” or the “Act”). The complaint also raises the issue of how to interpret the term “channel” as used in the definition of the term “MVPD.” The interpretation of these terms has legal and policy implications that extend beyond the parties to this complaint. We issue this *Public Notice* to ensure that before deciding the proper interpretation of the terms, we will have the benefit of broad public input and carefully consider all legal and policy implications.¹ We seek public comment on the most appropriate interpretations of these terms, including two possible interpretations raised in the record of the complaint proceeding, and the policy ramifications of each interpretation: (i) interpreting “channel” as used in the definition of the term “MVPD” to include the provision of a transmission path, thus treating as MVPDs only those entities that make available for purchase multiple streams of “video programming” as well as the transmission path; or (ii) interpreting “channel” as used in the definition of the term “MVPD” to provide that any entity that makes multiple “video programming networks” available for purchase is considered an “MVPD” without regard to whether it makes available a transmission path for purchase. We also seek comment on any alternative interpretations of the terms “channel” and “MVPD” as well as the policy ramifications of such alternative interpretations.

II. BACKGROUND

2. An entity that is defined as an MVPD in the Act is subject to both benefits and legal obligations under the Act and the Commission’s Rules. The regulatory benefits of MVPD status include the right to seek relief under the program access rules² and the retransmission consent rules.³ Among the

¹ This action is taken pursuant to Section 4(j) of the Act and Sections 1.1, 1.1200(a), and 76.7(e) of the Commission’s Rules. See 47 U.S.C. § 4(j); 47 C.F.R. §§ 1.1, 1.1200(a), 76.7(e).

² See 47 U.S.C. § 548; 47 C.F.R. §§ 76.1000-1004. Among other things, these rules require cable-affiliated programmers to make their programming available to MVPDs on nondiscriminatory rates, terms, and conditions.

regulatory obligations of MVPDs are statutory and regulatory requirements relating to program carriage,⁴ the competitive availability of navigation devices (including the integration ban),⁵ the requirement to negotiate in good faith with broadcasters for retransmission consent,⁶ Equal Employment Opportunity (“EEO”) requirements,⁷ closed captioning and emergency information requirements,⁸ various technical requirements (such as signal leakage restrictions),⁹ and cable inside wiring requirements.¹⁰

3. The 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*.¹¹

The Act also defines the terms “channel” and “video programming.” A “channel” is defined 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).”¹² The Commission’s regulations define a “television channel” as “a band of frequencies 6 MHz wide in the television broadcast band and designated either by number or by the extreme lower and upper frequencies.”¹³ The Commission’s regulations also define a “cable television channel” as a “signaling path provided by a cable television system.”¹⁴ The Act defines “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”¹⁵

(Continued from previous page) _____

³ See 47 U.S.C. § 325(b)(3)(C)(ii); 47 C.F.R. § 76.65(b). Among other things, these rules require broadcasters to negotiate with MVPDs in good faith.

⁴ See 47 U.S.C. § 536; 47 C.F.R. §§ 76.1300-1302.

⁵ See 47 U.S.C. § 549; 47 C.F.R. §§ 76.1200-1210.

⁶ See 47 U.S.C. § 325(b)(3)(C)(iii); 47 C.F.R. § 76.65(b).

⁷ See 47 C.F.R. §§ 76.71-79, 76.1792, 76.1802.

⁸ See 47 C.F.R. §§ 79.1-2. A non-MVPD that makes video programming available directly to the end user through a distribution method that uses Internet protocol (“IP”) would be subject to the Commission’s new IP closed captioning requirements. See *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787 (2012); see also 47 U.S.C. § 613; 47 C.F.R. § 79.4.

⁹ See 47 C.F.R. § 76.610; see also 47 C.F.R. §§ 76.605(a)(12), 76.611, 76.614, 76.1803; 1.1705(a)(1) (FCC Form 320 – Basic Signal Leakage Performance Report).

¹⁰ See 47 C.F.R. §§ 76.800-806.

¹¹ 47 U.S.C. § 522(13) (emphasis added); see also 47 C.F.R. § 76.1000(e); 47 C.F.R. § 76.64(d); 47 C.F.R. § 76.71(a); 47 C.F.R. § 76.1200(b); 47 C.F.R. § 76.1300(d). We note that the Commission previously characterized this definition as “broad in its coverage” and “unclear” in its scope. See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Notice of Proposed Rulemaking, 7 FCC Rcd 8055, 8065, ¶ 42 (1992); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rulemaking, 8 FCC Rcd 194, 195, ¶ 6 n.13 (1992).

¹² 47 U.S.C. § 522(4).

¹³ 47 C.F.R. § 73.681; see also 47 C.F.R. §§ 73.603, 73.606, 73.682(a)(1).

¹⁴ 47 C.F.R. § 76.5(r)-(u).

¹⁵ 47 U.S.C. § 522(20).

4. *Sky Angel's Pending Complaint.* In March 2010, Sky Angel U.S., LLC (“Sky Angel”) filed a program access complaint against Discovery Communications, LLC and its affiliate, Animal Planet, L.L.C. (collectively, “Discovery”), as well as a petition for a standstill of its affiliation agreement with Discovery.¹⁶ As described in the complaint, Sky Angel provides a subscription-based service of approximately eighty channels of video and audio programming.¹⁷ Sky Angel offers programming such as the MLB Network, NFL Network, Hallmark Channel, and Weather Channel.¹⁸ According to Sky Angel, its subscribers receive programming through a set-top box that has a broadband Internet input and video outputs that connect directly to a television set.¹⁹ Sky Angel explains that its service is available to anyone nationwide with a wired or wireless broadband Internet connection.²⁰ After receiving notice that Discovery intended to terminate its affiliation agreement with Sky Angel covering certain Discovery networks, Sky Angel filed a program access complaint and petition for a standstill with the Commission.

5. As discussed in greater detail below, the Bureau denied the petition on the basis that Sky Angel failed to carry its burden of demonstrating that it is likely to succeed in showing on the merits that it is an “MVPD” entitled to seek relief under the program access rules.²¹ The Bureau determined that the term “channel” as used in the definition of MVPD appears to include a transmission path as a necessary element.²² Based on the limited record at the time, the Bureau was unable to find that Sky Angel provides its subscribers with a transmission path.²³ The Bureau was careful to note, however, that the decision “should not be read to state or imply that the Commission, or the Bureau acting on delegated authority, will ultimately conclude, in resolving the underlying complaint, that Sky Angel does not meet the definition of an MVPD.”²⁴ Sky Angel’s complaint is pending.²⁵

III. INTERPRETING “CHANNEL” AS USED IN THE TERM “MVPD” AS REQUIRING AN ENTITY TO MAKE AVAILABLE A “TRANSMISSION PATH” TO SUBSCRIBERS

6. We seek comment on the most appropriate interpretation of the terms “channel” and “MVPD” as defined in the Act. As discussed in the *Sky Angel Standstill Denial*, one interpretation of these terms is to treat as MVPDs only those entities that make available for purchase both a transmission

¹⁶ See *Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Program Access Complaint, MB Docket No. 12-80, File No. CSR-8605-P (March 24, 2010) (“Sky Angel Complaint”); *Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Emergency Petition for Temporary Standstill, MB Docket No. 12-80, File No. CSR-8605-P (March 24, 2010) (“Sky Angel Petition”); see also *Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Renewed Petition for Temporary Standstill, MB Docket No. 12-80, File No. CSR-8605-P (May 27, 2011).

¹⁷ See *Sky Angel Complaint* at 1.

¹⁸ See *id.* at 9.

¹⁹ See *id.* at 2.

²⁰ See *id.*

²¹ See *Sky Angel U.S., LLC*, Order, 25 FCC Rcd 3879, 3882-83, ¶ 7 (MB, 2010) (“*Sky Angel Standstill Denial*”).

²² See *id.*

²³ See *id.*

²⁴ *Id.* at 3884, ¶ 10.

²⁵ The issue of how to interpret the terms “MVPD” and “channel” was also raised in complaints filed by VDC Corporation. See *VDC Corporation v. Turner Network Sales, Inc., et al.*, Program Access Complaint (Jan. 18, 2007); *VDC Corporation v. CBS Broadcasting Inc., Good Faith and Exclusive Retransmission Consent Complaint* (Jan. 25, 2007); *VDC Corporation v. John Doe 1 Cable Operator, et al.*, Program Access Complaint (Jan. 26, 2007). In addition to these complaints, DIRECTV submitted a letter in a pending proceeding regarding navigation devices urging the Commission to resolve the issue of whether online distributors of video programming are MVPDs. See Letter from William M. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-91 *et al.* (Feb. 2, 2011).

path (capable of delivering “video programming”) and content (multiple streams of “video programming”) in order to qualify as an MVPD. As explained in that decision, to qualify as an MVPD, an entity must make available for purchase “multiple channels of video programming.”²⁶ The Bureau explained that the term “channel,” defined in the Act as “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel,” appears to include a transmission path as a necessary element.²⁷ Moreover, the Bureau noted that the entities in the illustrative list in the Act’s definition of an MVPD all provide a transmission path for the delivery of video programming.²⁸ The Bureau noted that, although the list is preceded by the phrase “not limited to,” making it clear that the list is illustrative rather than exclusive, it is also preceded by the phrase “such as,” which suggests that other covered entities should be similar to those listed.²⁹

7. We seek comment on this interpretation and its policy ramifications. Is this interpretation consistent with the text, purpose, legislative history, and structure of the statutory definitions and the provisions of the Act in which the terms are used? We note that the Act’s definition of “channel” was adopted in the 1984 Cable Act, which focused exclusively on the regulation of cable television.³⁰ Accordingly, Section 602 of the Act defines the term “channel” as “a portion of the electromagnetic frequency spectrum *which is used in a cable system . . .*,” suggesting that, at least when the definition was adopted, it applied only to cable systems.³¹ Could the Commission reasonably read the definition of “MVPD,” adopted eight years later in the 1992 Cable Act and which includes the term “channels,” not to incorporate by reference the preexisting definition of “channel” contained in the same provision of the Communications Act? On what basis can the Commission ignore a statutorily defined term?³² Does the fact that Congress did not alter the pre-existing definition of “channel” when adopting the definition of “MVPD” in the 1992 Cable Act indicate that Congress intended for the pre-existing definition of “channel” to apply in interpreting the term “MVPD”?

²⁶ See *Sky Angel Standstill Denial*, 25 FCC Rcd at 3882-83, ¶ 7 (quoting 47 U.S.C. § 522(13)).

²⁷ See *id.*; see also 47 U.S.C. § 522(4) (defining “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)”); 47 C.F.R. § 73.681 (defining “television channel” as “a band of frequencies 6 MHz wide in the television broadcast band and designated either by number or by the extreme lower and upper frequencies”); 47 C.F.R. § 76.5(r)-(u) (defining “cable television channel” as a “signaling path provided by a cable television system”).

²⁸ See *Sky Angel Standstill Denial*, 25 FCC Rcd at 3882-83, ¶ 7; see also 47 U.S.C. § 522(13) (defining “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, . . .”).

²⁹ See *Sky Angel Standstill Denial*, 25 FCC Rcd at 3882-83, ¶ 7; see also *Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20301, ¶ 171 (1996) (“the list of entities enumerated in that section is expressly a non-exclusive list”) (“*OVS Second Order on Recon.*”).

³⁰ See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779 (“1984 Cable Act”); see also H.R. Rep. No. 98-934 (1984), at 19, reprinted in 1984 U.S.C.C.A.N. 4655, 4656 (stating that the bill “establishes a national policy that clarifies the current system of local, state and federal regulation of cable television”).

³¹ 47 U.S.C. § 522(4). The Act also requires that a “channel” be “capable of delivering a television channel (as television channel is defined by the Commission by regulation).” See *id.* The Commission’s regulations define a “television channel” as “a band of frequencies 6 MHz wide in the television broadcast band and designated either by number or by the extreme lower and upper frequencies.” 47 C.F.R. § 73.681; see also 47 C.F.R. §§ 73.603, 73.606, 73.682(a)(1). The Commission’s regulations also define a “cable television channel” as a “signaling path *provided by a cable television system.*” 47 C.F.R. § 76.5(r)-(u) (emphasis added).

³² But see *infra* ¶ 11 (asking whether it is reasonable to use a cable-specific definition of the term “channel” to define the term “MVPD,” which is intended to encompass video programming distributors that include, but are not limited to, cable systems).

8. We note that the legislative history of the 1992 Cable Act includes a statement that Congress intended to promote “facilities-based” competition.³³ Does this statement indicate that Congress’s concern was limited to facilities-based competition in the video distribution market and did not intend to cover other potential sources of competition? What did Congress intend by the term “facilities-based”? What entities today make available “multiple channels of video programming” for purchase without also making available a transmission path? Do these entities include Netflix, Hulu Plus, and other online distributors of video programming that rely on their subscribers’ broadband Internet service providers to make available the transmission path? We seek comment on the public interest ramifications, if any, if these entities are not considered MVPDs and therefore are not required to comply with legal requirements applicable to MVPDs. We also seek comment on whether and how competition in the video distribution market (both at present and in the future) would be impacted if these entities are not considered MVPDs and therefore are not able to take advantage of the program access and retransmission consent rules.³⁴ Does the fact that many of the legal requirements applicable to MVPDs presume that the MVPD provides facilities provide support for interpreting “MVPD” and “channel” as requiring that an entity make available a transmission path?³⁵

9. The Commission 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.³⁶ Rather, an MVPD may use a third party’s distribution facilities in order to make video programming available to subscribers.³⁷ To the extent the Commission interprets the terms “channel” and “MVPD” to require an entity to make available for purchase both a transmission path and content in order to qualify as an MVPD, we seek comment on what type of arrangement would suffice. That is, would it be sufficient for the online video programming distributor and the broadband Internet provider to have a joint marketing

³³ See H.R. Rep. No. 102-862 (1992) (Conf. Rep.), at 93, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275 (discussing the program access provision of the 1992 Cable Act and stating that the “conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable”); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3384, n.79 (1993) (“‘Facilities-based competition’ is a term used in the legislative history of the Act to emphasize that program competition can only become possible if alternative facilities to deliver programming to subscribers are first created. The focus in the 1992 Cable Act is on assuring that facilities-based competition develops.”).

³⁴ The Commission recently stated that online distributors of video programming “offer a tangible opportunity to bring customers substantial benefits” and that they “can provide and promote more programming choices, viewing flexibility, technological innovation and lower prices.” See *Comcast Corporation, General Electric Company and NBC Universal, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4268-69, ¶ 78 (2011) (“*Comcast/NBCU Order*”). While the Commission concluded that consumers today do not perceive online distributors as a substitute for traditional MVPD service, it stated that online distributors are a “potential competitive threat” and that they “must have a similar array of programming” if they are to “fully compete against a traditional MVPD.” *Id.* at 4269, ¶ 79, 4272-73, ¶ 86; see also *id.* at 4266, ¶ 70 (“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.”); *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 17975-76, ¶ 129 (2010) (“online transmission of programming by DBS operators or stand-alone online video programming aggregators [] may function as competitive alternatives to traditional MVPDs”) (“*Preserving the Open Internet Order*”).

³⁵ See *supra* ¶ 2.

³⁶ See *OVS Second Order on Recon.*, 11 FCC Rcd at 20301, ¶ 171 (“[W]e find Rainbow’s argument that video programming providers cannot qualify as MVPDs because they may not operate the vehicle for distribution to be unsupported by the plain language of Section 602(13), which imposes no such requirement.”).

³⁷ The Commission noted that the effective competition test in Section 623 of the Act suggests that an MVPD can use another entity’s facilities (e.g., that of a local exchange carrier or its affiliate) to provide video programming. See *id.*; see also 47 U.S.C. 543(l)(1)(D) (referring to video programming provided by “a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate)”).

arrangement? What if they formed a joint venture? Alternatively, must there be some common ownership or controlling interest? How should we interpret “make available” in this context? Moreover, what would be the practical and regulatory implications of finding that certain contractual arrangements between an online distributor of video programming and a third-party broadband Internet provider turned that distributor into an MVPD? Under such a regime, some online distributors of video programming (*i.e.*, those that also make a broadband connection available) would be subject to MVPD regulations whereas others (*i.e.*, those that do not make a broadband connection available) would not. Would this regime provide flexibility for online distributors of video programming, allowing those online distributors that want MVPD status to take certain actions to obtain such status? Would this result in an unduly confusing regulatory regime, where an entity’s regulatory status could vary from market to market (or even customer to customer) based on its contractual arrangements with third parties?

10. We also seek comment on whether, under the interpretation suggested above, an online distributor of video programming that is affiliated with a broadband Internet service provider could avoid regulation as an MVPD if the transmission path is made available through a separate legal entity? Or, conversely, should the Commission apply its cable attribution rules to determine whether the entity making the transmission path available is affiliated with the online video programming distributor?³⁸ If the transmission path provider and the online video programming distributor are affiliated under the attribution rules, should the Commission deem the online video programming distributor to qualify as an MVPD? Would that same online distributor of video programming no longer qualify as an MVPD when the transmission path is made available by an unaffiliated broadband provider? Does this present a workable regulatory regime, where an online video programming distributor’s status as an MVPD depends upon whether the programming and broadband transmission service are provided by separate legal entities or affiliated entities? What are the potential consequences to video competition and to consumers if MVPD status can be circumvented by avoiding affiliation?

IV. INTERPRETING “CHANNEL” AS USED IN THE TERM “MVPD” AS REQUIRING AN ENTITY TO MAKE AVAILABLE MULTIPLE “VIDEO PROGRAMMING NETWORKS” TO SUBSCRIBERS

11. We seek comment on an alternative interpretation of the terms “channel” and “MVPD” under which an entity would be considered an MVPD if it makes available for purchase multiple “video programming networks,” without regard to whether it offers a transmission path, in order to qualify as an MVPD. As noted above, the Act’s definition of “channel” was adopted in the 1984 Cable Act and refers specifically to cable systems only.³⁹ The term “MVPD,” however, was adopted by Congress eight years later in 1992 when new competitors to cable were emerging and is intended to cover both cable and non-cable providers of video programming.⁴⁰ Is it reasonable to use a cable-specific definition of the term “channel” to define the term “MVPD,” which is intended to encompass video programming distributors that include, but are not limited to, cable systems? Is there a reasonable reading of “MVPD” that does not incorporate the cable-specific definition of “channel” in the same provision of the Act?⁴¹ Do the examples listed in the definition of “MVPD” make available “multiple *channels* of video programming” when applying the cable-specific definition of the term “channel”? Is there any basis in the statute to interpret the phrase “multiple channels of video programming” in the more common, less technical,

³⁸ See 47 C.F.R. § 76.501.

³⁹ See *supra* ¶ 7; 47 U.S.C. § 522(4) (defining 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)”) (emphasis added).

⁴⁰ See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2, 106 Stat. 1460 (1992) (adding Section 602(13) to the Act).

⁴¹ *But see supra* ¶ 7 (asking whether the Commission could reasonably read the definition of “MVPD” not to incorporate by reference the preexisting definition of “channel” contained in the same provision of the Communications Act).

everyday sense to mean “multiple video programming networks”⁴² Under such an interpretation, an entity would qualify as an MVPD if it makes available for purchase multiple video programming networks, regardless of whether it also makes available a transmission path. Could Congress possibly have had in mind in 1992 something analogous to what we would now consider to be video programming in an everyday sense? Did Congress intend for the definition of “MVPD” to be broad and open-ended to ensure that it would not be limited to only video providers that existed as of 1992 and would instead encompass new providers of video services that emerge in the future?⁴³ Is this consistent with the purposes of the program access statute to increase competition and diversity in the multichannel video programming market and to spur the development of communications technologies?⁴⁴ Is it also consistent with other provisions of the Act and the Commission’s Rules which impose regulatory burdens on MVPDs?⁴⁵

12. We seek comment on the policy ramifications of this interpretation. If the term MVPD is interpreted to mean an entity that makes available for purchase multiple “video programming networks,” will this necessarily encompass a large number of entities, such as online distributors of video programming, some of which may be operating without regard for the regulations applicable to MVPDs? If so, what impact would MVPD status and associated regulations have on new and emerging online distributors of video programming? Would subjecting these entities to MVPD regulations deter investment in new online programming ventures and drive some current online distributors of video programming from the market? Would such an interpretation unreasonably burden cable-affiliated programmers and broadcasters with the requirement to negotiate with a large number of entities pursuant to the program access and good faith retransmission consent rules? Does the fact that the definition of “MVPD” requires an entity to make video programming available “for purchase” necessarily limit the number of entities that would qualify as MVPDs under this interpretation?⁴⁶

13. We also seek comment on whether the definition of “video programming” further limits the number of entities that would qualify as MVPDs under this interpretation. The Act defines “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”⁴⁷ This definition was added to the Act by the 1984 Cable

⁴² We note that at least one sentence in the legislative history of the 1992 Cable Act appears to refer to a “channel” as a programming network. *See* S. Rep. No. 102-92 (1991), at 24, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1157 (“[T]here are certain major programmers that are more able to fend for themselves. It is difficult to believe a cable system would not carry the sports channel, ESPN, or the news channel, CNN.”).

⁴³ We note that the Commission previously characterized the definition of “MVPD” as “broad in its coverage” and “unclear” in its scope. *See supra* n.11.

⁴⁴ 47 U.S.C. § 548(a) (“The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.”).

⁴⁵ *See supra* ¶ 2.

⁴⁶ While the Commission has characterized the “number of suppliers of online video” as “almost limitless,” it appears to have been discussing both subscription-based (*i.e.*, “for purchase” services) as well as free services. *See Implementation of the Child Safe Viewing Act*, Report, 24 FCC Rcd 11413, 11468, ¶ 126 (2009).

⁴⁷ 47 U.S.C. § 522(20). Although the Commission stated a decade ago that “Internet video, called ‘streaming video’ . . . has not yet achieved television quality . . . and therefore is not consistent with the definition of video programming,” it recently reached the opposite conclusion in light of technological developments. *Compare Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4834, ¶ 63 n.236 (2002) *with Preserving the Open Internet Order*, 25 FCC Rcd at 17976, ¶ 129 n.408 (“intervening improvements in streaming technology and broadband availability enable such programming to be ‘comparable to programming provided by . . . a television broadcast station’”) (quoting definition of “video programming” in 47 U.S.C. § 522(20)).

Act,⁴⁸ and the Commission has accordingly interpreted this term to mean programming comparable to that provided by broadcast television stations in 1984.⁴⁹ Should the definition of “video programming” be limited to the 1984 conception of programming provided by a television broadcast station? By requiring that the programming be comparable to that provided by a television broadcast station in 1984, does the definition of “video programming” limit MVPDs to only those entities making available for purchase pre-scheduled, real-time, linear⁵⁰ streams of programming, as television broadcast stations provided in 1984?⁵¹ We note that the Commission has previously explained that video-on-demand “images” constitute “video programming.”⁵² Under this interpretation, does an entity that offers video programming for purchase only on an on-demand basis (to the exclusion of pre-scheduled, real-time, linear streams of programming) make available “video programming” as defined in the Act?

14. If the phrase “multiple channels of video programming” is interpreted in a non-cable-specific, everyday sense to mean “multiple video programming networks,” can and should the term “video programming network” be interpreted to include only entities that make available for purchase multiple pre-scheduled, real-time, linear streams of programming, as traditional MVPDs provide today?⁵³ Stated differently, should the term “video programming network” be interpreted to exclude from the definition of an MVPD any entity that makes available programming for purchase or rental exclusively on an on-demand basis (such as a per-episode or per-clip basis)? Is it possible that traditional MVPDs will eventually make available video programming for purchase or rental exclusively on an on-demand basis? In the event this occurs, would such an interpretation mean that traditional MVPDs would no longer satisfy the definition of “MVPD”?

⁴⁸ See 1984 Cable Act, § 2 (adding Section 602(3) to the Act).

⁴⁹ See *Telephone Company-Cable Television Cross-Ownership Rules*, Second Report and Order, 7 FCC Rcd 5781, 5820, ¶ 74 (1992) (“*Cross-Ownership Second R&O*”).

⁵⁰ See *Implementation of Section 304 of the Telecommunications Act of 1996*, Fourth Further Notice of Proposed Rulemaking, 25 FCC Rcd 4303, 4308, ¶ 14 n.43 (2010) (“The term ‘linear programming’ is generally understood to refer to video programming that is prescheduled by the programming provider. Cf. 47 U.S.C. § 522(12) (defining ‘interactive on-demand services’ to exclude ‘services providing video programming prescheduled by the programming provider’).”).

⁵¹ The Commission has explained that “[o]ne of the key characteristics of the programming offered in 1984 by broadcast stations, superstations, cable networks and pay cable was that it was ‘one-way’-*i.e.*, it provided no opportunity for viewer interaction, manipulation or customization. . . . Congress intended for video services involving such complex viewer interaction generally to fall outside the scope of ‘video programming,’ since they would not be comparable to the programming provided by broadcast stations and others in 1984.” *Cross-Ownership Second R&O*, 7 FCC Rcd at 5821, ¶ 75.

⁵² Here, the Commission was interpreting “video programming” as used in a section of the 1984 Cable Act which made it “unlawful for any common carrier . . . to provide video programming directly to subscribers in its telephone service” 1984 Cable Act, § 2 (adding Section 613(b)(1) to the Act). The Commission concluded that “to the extent a service contains severable video images capable of being provided as independent video programs comparable to those provided by broadcast stations in 1984, that portion of the programming service will be deemed to constitute ‘video programming’ for purposes of the statutory prohibition.” *Cross-Ownership Second R&O*, 7 FCC Rcd at 5820-21, ¶ 75. The Commission found that “video-on-demand images can be severed from the interactive functionalities and thereby constitute video programming.” *Telephone Company-Cable Television Cross-Ownership Rules*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 244, 296, ¶ 109 (1994).

⁵³ The term “traditional MVPDs” as used in this *Public Notice* refers to the entities listed in either the statutory definition or the Commission’s definitions of “MVPD.” See 47 U.S.C. § 522(13) (listing a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, and a television receive-only satellite program distributor as examples of MVPDs); 47 C.F.R. § 76.1000(e) (in addition to the examples listed in the statutory definition, listing a satellite master antenna television system operator, a video programming provider (defined in 47 C.F.R. § 76.1500(c)), and a buying group or agent of an MVPD as examples of MVPDs); see also 47 C.F.R. § 76.64(d); 47 C.F.R. § 76.71(a); 47 C.F.R. § 76.1200(b); 47 C.F.R. § 76.1300(d).

15. Finally, we note that the Commission has previously stated that statutory requirements applicable to established categories of service providers should not be applied reflexively to Internet-based services.⁵⁴ How, if at all, should this policy impact the definitional and policy issues raised in this *Public Notice*?

V. PROCEDURAL MATTERS

16. We establish MB Docket No. 12-83 for the purpose of facilitating electronic filing of written submissions in response to this *Public Notice*. All written submissions filed in this docket will be made part of the record of the pending Sky Angel complaint. The pending Sky Angel complaint is a “restricted” proceeding under the Commission’s *ex parte* rules.⁵⁵ Because the issues raised in this *Public Notice* are intertwined with the Sky Angel complaint, we also designate the proceeding initiated by this *Public Notice* as “restricted” for purposes of the *ex parte* rules. *Ex parte* presentations (other than *ex parte* presentations exempt under Section 1.1204(a)) to or from Commission decision-making personnel are prohibited until the proceeding is no longer subject to administrative reconsideration or review or judicial review.⁵⁶ Commenters will not become Parties⁵⁷ to the Sky Angel complaint proceeding by virtue of filing a written submission in this docket that is responsive to the questions presented in this *Public Notice*.

17. Although written submissions in a restricted proceeding are required to be served on Parties to the proceeding, we waive this requirement for written submissions filed in response to this *Public Notice*.⁵⁸ Because all written submissions filed in response to this *Public Notice* will be available to the Parties to the pending Sky Angel complaint on the Commission’s Electronic Comment Filing System (“ECFS”), requiring service on the Parties is unnecessary.

18. Comments and Replies. Interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments and Reply Comments may be filed using the Commission’s Electronic Comment Filing System (“ECFS”).⁵⁹

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

⁵⁴ See *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4886, ¶ 35 (2004) (IP-based services “have arisen in an environment largely free of government regulation, and the great majority, we expect, should remain unregulated. To the extent - if any - that application of a particular regulatory requirement is needed to further critical national policy goals, that requirement must be tailored as narrowly as possible, to ensure that it does not draw into its reach more services than necessary.”); *id.* at 4895, ¶ 45 (recognizing that “the nature of IP-enabled services may well render the rationales animating the regulatory regime that now governs communications services inapplicable here”).

⁵⁵ See 47 C.F.R. § 1.1208.

⁵⁶ See *id.*; 47 C.F.R. § 1.1204(a).

⁵⁷ See 47 C.F.R. § 1.1202(d)(2) (defining “party” as “[a]ny person who files a complaint . . . which shows that the complainant has served it on the subject of the complaint . . . , and the person who is the subject of such a complaint . . .”).

⁵⁸ See 47 C.F.R. §§ 1.1202(b)(1), 1.1208. This waiver only applies to written submissions filed in response to this *Public Notice*. Any other written submission pertaining to the pending Sky Angel complaint must be served on the Parties.

⁵⁹ See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

19. Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

20. People with Disabilities. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

21. Additional Information. For additional information on this proceeding, contact David Konczal, David.Konczal@fcc.gov, or Diana Sokolow, Diana.Sokolow@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120. Press contact: Janice Wise (202-418-8165; janice.wise@fcc.gov).

- FCC -