

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In re Sky Angel U.S., LLC, )  
 )  
 ) No. 12-1119  
Petitioner. )  
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**OPPOSITION OF THE FEDERAL COMMUNICATIONS  
COMMISSION TO SKY ANGEL’S PETITION FOR  
A WRIT OF MANDAMUS**

The Court should deny Sky Angel’s petition for a writ of mandamus. Mandamus is a “drastic” remedy available only in “extraordinary” situations. *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Eng’rs*, 570 F.3d 327, 333 (D.C. Cir. 2009). Sky Angel has failed to show that such circumstances are present here or that it has a “clear and indisputable” right to such rarely granted relief. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). There has been no unreasonable administrative delay in this case – much less the “egregious” delay required to justify mandamus. *In re Monroe Commc’ns Corp.*, 840 F.2d 942, 945 (D.C. Cir. 1988). This Court has consistently declined to grant such extraordinary relief where petitioners have alleged “delays” of similar length.

The Commission's five-month target for resolving cases of this type specifically was not intended to apply to cases like this one, which presents both voluminous pleadings and novel, difficult questions of law and policy. This matter has potentially sweeping consequences for providers of video programming via the Internet, making carefully considered decisionmaking essential. Indeed, to ensure that it has a full understanding of the implications of its decision, the Commission has recently issued a Public Notice asking all interested persons for comment. Once it receives public input, the agency will be positioned to resolve the matter in a well-informed manner. "[I]t is to be expected that consideration of such [complex] matters will take longer than might rulings on more routine items." *Monroe Commc'ns*, 840 F.2d at 946. Because the agency's actions here have been reasonable – and do not approach the extreme level of delay required for mandamus – the petition should be denied.

### **BACKGROUND**

This case involves a complaint under the FCC's "program access" rules – rules intended to promote competition in the video distribution market by, among other things, enabling distributors of "multichannel video programming" to obtain access on non-discriminatory terms to programming owned by incumbent cable operators and their affiliated programming

networks. *See* 47 U.S.C. § 548; 47 C.F.R. §§ 76.1001-1002. Sky Angel, a provider of video programming via the Internet (Pet. at 6-7), filed a complaint with the FCC, alleging that Discovery Communications (the owner of various programming networks, including the Discovery Channel) unlawfully denied Sky Angel access to its programming. The Commission has not yet resolved the complaint, which Sky Angel first filed in March 2010 and has since supplemented with various filings over the following year. In its petition for mandamus, Sky Angel asks the Court to order the Commission to resolve its complaint within thirty days.

1. In 1992, long before the rise of the Internet as a medium for distribution of video programming, Congress enacted Section 628 of the Communications Act, 47 U.S.C. § 548, to promote “competition and diversity in the multichannel video programming market.” *Id.* § 548(a). As relevant here, the statute makes it unlawful for cable operators and certain cable-affiliated programming networks<sup>1</sup> “to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of

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<sup>1</sup> More precisely, the statute covers conduct by “a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor.” 47 U.S.C. § 548(b). “Although ‘satellite cable programming’ and ‘satellite broadcast programming’ differ somewhat ... both terms essentially refer to programming (*i.e.*, television shows) transmitted to [multichannel video programming distributors] via satellite for retransmission to subscribers.” *Nat’l Cable & Telecomm. Ass’n v. FCC*, 567 F.3d 659, 662 (D.C. Cir. 2009).

which is to hinder significantly or to prevent any *multichannel video programming distributor* from providing satellite cable programming or satellite broadcast programming” to its customers. *Id.* § 548(b) (emphasis added). Congress directed the Commission to issue regulations that “prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest ... in the prices, terms, and conditions of sale or delivery of satellite cable programming ... among or between cable systems, cable operators, or other *multichannel video programming distributors* ....” *Id.* § 548(c)(2)(B) (emphasis added). Pursuant to that statutory directive, the Commission has promulgated rules requiring that owners of programming who are affiliated with cable operators generally must make their programming available to all multichannel video programming distributors on a non-discriminatory basis. *See* 47 C.F.R. §§ 76.1001-1002.

By their terms, the program access statute, 47 U.S.C. § 548(b) & (c), and the FCC’s implementing rules, 47 C.F.R. §§76.1001, 76.1002(b), apply to unfair methods of competition that affect “multichannel video programming distributors” (MVPDs). Thus, only MVPDs may file complaints for violations of the program access statute and implementing rules. *See Wizard Programming, Inc.*, 12 FCC Rcd 22102, 22110-22111

(Cable Servs. Bur. 1997). Congress defined “multichannel video programming distributor” to mean “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.” 47 U.S.C. § 522(13) (emphasis added). Congress defined “channel” to mean “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel ....” 47 U.S.C. § 522(4).

2. Congress authorized the Commission to adjudicate disputes involving MVPDs’ access to programming. 47 U.S.C. § 548(d); *see* 47 C.F.R. § 76.1003(a). Congress also directed the Commission to “prescribe regulations to implement this section ... [that] shall provide for an expedited review of any complaints made pursuant to this section.” *Id.* § 548(f)(1). Congress did not, however, specify a time limit for such review.

Pursuant to its rulemaking authority, the Commission has “set forth goals for the resolution of program access complaints.” *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 17791, 17855 (2007) (*Cable Act Order II*). The timing targets are five months for “denial of programming cases” and nine months for “all

other program access” disputes, such as price discrimination cases. *Id.* at 17856; see also *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd 15822, 15842-15843 (1998) (*Cable Act Order I*). The Commission explained that most simple denial of programming cases “can typically be processed” in five months, unlike other, more complex cases, “which often involve numerous issues requiring legal, economic and accounting expertise” and therefore take additional time. *Id.* at 15842. The Commission noted further that the five-month timing goal “contemplate[d] resolution times applicable to most *typical* program access disputes which do not involve ... pleading extensions or extra pleadings based upon new information.” *Id.* at 15843 (emphasis added). Such extended filings, the agency cautioned, may affect “the Commission’s ability to resolve such disputes within the time limits discussed herein.” *Ibid.* Thus, although the Commission has recognized that program access complaints “should be resolved in a timely manner,” it also has admonished that “the time frames for resolving complaints must be realistic.” *Cable Act Order II*, 22 FCC Rcd at 17856.

3. Sky Angel states that it provides video programming to customers via the Internet. Pet. 6-7. A Sky Angel customer who purchases a broadband Internet connection from a third-party Internet service provider

may use home equipment provided by Sky Angel to watch programming supplied by Sky Angel using the customer's Internet connection. *Id.* 7-8. Sky Angel markets itself as a service to “deliver faith-based entertainment choices in a day and age when the secular media is not always in tune with our Christian values,” serving the “mission” of being an “effective means of assuring that the Gospel will penetrate every nation, culture and people.” <http://www.skyangel.com/About/CompanyInfo/Overview>. Unlike the typical cable or similar MVPD system, however, Sky Angel does not provide its customers with access to local broadcast television stations. *See* [http://www.skyangel.com/About/faq/general\\_faq.aspx](http://www.skyangel.com/About/faq/general_faq.aspx).

In October 2007, Sky Angel entered into an agreement with Discovery Communications, which operates video programming networks such as the Discovery Channel and Animal Planet, for access to Discovery's programming. In January 2010, Discovery notified Sky Angel that it planned to exercise its contractual right to terminate the agreement the following April.

On March 24, 2010, Sky Angel filed a program access complaint with the FCC alleging that Discovery had discriminatorily denied access to its programming in violation of Section 628. That same day, Sky Angel also asked the Commission for a “standstill” order – an emergency stay that

would have preserved Sky Angel's access to Discovery's programming pending the Commission's resolution of the complaint. Discovery opposed the standstill petition, principally on the ground that Sky Angel does not meet the statutory definition of an MVPD and thus is not entitled to the protections of Section 628 and the Commission's implementing rules.

Less than one month later, on April 21, the FCC's Media Bureau denied Sky Angel's standstill request. Applying a test akin to the standard for obtaining a judicial stay pending review, the Bureau determined that at that time Sky Angel had not shown a likelihood of success on the merits. *Sky Angel U.S., LLC*, 25 FCC Rcd 3879 (Media Bur. 2010) (“*Standstill Order*”). The Bureau reasoned that Section 628 and the Commission's implementing rules “allow only a ‘multichannel video programming distributor’ ... to seek relief under the program access rules. Sky Angel, however, has not carried its burden of demonstrating that it is likely to succeed in showing on the merits that it is an MVPD ....” *Id.* ¶7 (citing 47 U.S.C. § 548(d) and 47 C.F.R. § 76.1003(c)(1)).

The Bureau determined specifically that Sky Angel had not shown “whether and how it meets the key elements of the definition of the term ‘MVPD.’” Section 628 defines an MVPD as an entity that provides “channels” of programming, and the Bureau found that the statute “appear[s]

to include a transmission path as a necessary element of a ‘channel.’”

*Standstill Order* ¶7. Thus, the Bureau concluded, “[t]he evidence put forth at this stage of the proceeding indicates that Sky Angel does not provide its subscribers with a transmission path; rather, it is the subscriber’s Internet service provider that provides the transmission path.” *Ibid.* Determining that Sky Angel was unlikely to succeed on the merits, the Bureau found that the remaining factors of the test for a stay did not “tip decisively in favor of granting the standstill petition,” *id.* ¶8, and it thus denied the petition.

Subsequent to Sky Angel’s initial complaint and standstill request, the record expanded as the parties filed a slew of additional pleadings. In November and December 2010, Sky Angel sent several letters to the Bureau “updating the record” with new information regarding Discovery’s provision of programming to other distributors; each letter prompted a response from Discovery. In May 2011, Sky Angel filed another petition for a standstill order as well as a motion for sanctions against Discovery for an alleged lack of candor and misrepresentations to the Commission, both of which Discovery opposed. Discovery also filed a motion to strike the renewed standstill request, which Sky Angel opposed.

4. On March 30, 2012, the Media Bureau issued a Public Notice seeking input on the questions presented in Sky Angel’s program access

complaint. The Commission’s ultimate interpretation of the key terms “multichannel video programming distributor” and “channel,” the Bureau explained, will have “legal and policy implications that extend beyond the parties to this complaint.” Public Notice DA 12-507 ¶1 (Media Bur. March 30, 2012) (attached hereto and available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-12-507A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-507A1.pdf)).

With respect to questions of law, the Bureau noted Congress’s stated intent to promote “facilities-based” competition by enacting the program access statute. Public Notice ¶8. The Bureau asked whether the statutory terms “channel” and “MVPD” should be interpreted to cover only entities that provide both programming and distribution facilities (such as a cable television system or Direct Broadcast Satellite system like DISH or DirecTV), or whether those terms should be understood to also cover entities that provide programming over facilities their customers must obtain from a third-party source (such as Internet-based distributors). *Id.* ¶¶6-7, 11.

With respect to the policy implications of those questions, the Bureau noted that an entity’s classification as an MVPD is an important determination that carries both benefits (such as statutorily mandated access to programming) and burdens (such as closed captioning requirements, regulation of the set-top boxes through which customers access

programming, and equal employment opportunity requirements). *See* Public Notice ¶2. The Bureau sought comment on “whether and how the public will be impacted” if online video providers like Sky Angel “are not considered MVPDs and therefore are not required to comply with regulations applicable to traditional MVPDs,” and 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” program access regulation. *Id.* ¶8; *see id.* ¶12.

The Bureau noted the potentially far-reaching implications of the Commission’s ultimate resolution of this matter. Internet-based video distribution has a substantial potential to increase competition, *see* Public Notice ¶8 & n.34, but subjecting a possibly large number of entities to regulation may affect investment in such companies or even drive them from the market, *see id.* ¶12. As the number of online distributors of video programming (such as Netflix and other similar services) increases, whether or not they are classified as MVPDs could affect a growing array of businesses.

Comments are due April 30, 2012, and reply comments are due May 30, 2010.

5. Sky Angel now asks this Court to compel the Commission to issue an order resolving the program access complaint in thirty days.

### **ARGUMENT**

#### **SKY ANGEL HAS NOT SHOWN A CLEAR AND INDISPUTABLE RIGHT TO MANDAMUS**

“[M]andamus is ‘drastic;’ it is available only in ‘extraordinary situations;’ it is hardly ever granted; those invoking the court’s mandamus jurisdiction must have a ‘clear and indisputable’ right to relief; and even if the plaintiff overcomes all these hurdles, whether mandamus relief should issue is discretionary.” *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc). Sky Angel has failed to show that this case is “one of the exceptionally rare cases,” *In re Barr Laboratories*, 930 F.2d 72, 76 (D.C. Cir.), *cert. denied*, 502 U.S. 906 (1991), that warrants a judicial decree directing agency action.

##### *1. Sky Angel Has Not Shown An Unreasonable Delay.*

Sky Angel’s basic argument for mandamus is that the FCC has taken too long to resolve its program access complaint. This Court will order mandamus, however, only where delay is “egregious,” and the Court has made clear that the determination whether an “agency’s delay is so egregious as to warrant mandamus,” must be “governed by a ‘rule of reason.’” *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79-80

(D.C. Cir. 1984) (“*TRAC*”). The “rule of reason” cannot be applied “in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful.” *Mashpee Wampanoag Tribal Council v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003). Rather, “[r]esolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court.” *Id.* at 1100. Thus, before determining whether an agency’s delay is sufficiently unreasonable to justify extraordinary relief, the Court must consider (among other things) “the complexity of the task at hand” and “the resources available to the agency.” *Id.* at 1102. All of those factors weigh against a finding of unreasonable delay in this case.

At the outset, Sky Angel’s assertion that this case involves a two-year delay in responding to Sky Angel’s requests for relief is misguided. The Media Bureau acted almost immediately on Sky Angel’s standstill request – it was filed on March 24, 2010, and decided on April 21, 2010. Moreover, although the initial complaint was filed almost two years ago, the matter did not become ripe for decision at that time because Sky Angel continued to file pleadings, including a renewed motion for a standstill, several letters to “update the record,” and a motion to impose sanctions on Discovery. The

letters and motion for sanctions raised new allegations of fact concerning whether other video distributors to which Discovery furnishes programming distribute that programming via the Internet. Those pleadings were filed less than one year ago. The agency's response to Sky Angel's filings in this matter thus hardly amounts to "delay" at all, let alone an "egregious" delay of the sort that would justify mandamus. *TRAC*, 750 F.2d at 79-80.

Even if it had taken the agency two years from the time the issues presented were ripe for decision, this Court routinely finds such a time period insufficient to warrant mandamus. *See, e.g., Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1534 (D.C. Cir. 1990) (delay of "more than nine years" not unreasonable); *Monroe Commc'ns*, 840 F.2d at 945-947 (delay of several years did not warrant mandamus); *TRAC*, 750 F.2d at 81 (delays of two and five years did not warrant mandamus); *Oil, Chemical and Atomic Workers Intern. Union v. Zegeer*, 768 F.2d 1480, 1487-1488 (D.C. Cir. 1985) (dismissing mandamus petition upon showing, after five year-delay, that agency would complete rulemaking within two years). Two years does not justify drastic relief in the ordinary course, particularly in light of the "considerable deference" afforded to the Commission in "establishing a timetable for completing its proceedings." *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987).

Moreover, the Commission currently is taking steps to gather a complete record on which to decide the complex and potentially far-reaching legal and policy issues presented by Sky Angel's complaint. *See Monroe Commc'ns*, 840 F.2d at 946 (denying mandamus where the agency was acting to complete its proceeding). In seeking comment, the Commission has made concrete and necessary strides toward resolution of this matter. As discussed in greater detail below, the complaint presents issues of first impression that could have repercussions for a wide range of Internet-based distributors of video programming, and the Commission prudently has decided to seek input and guidance from potentially affected parties before reaching a decision here.

Sky Angel rests much of its argument for mandamus on the directive in Subsection 628(f) that the Commission's rules provide for "expedited" resolution of program access complaints. Pet. 13-15. Importantly, while Congress expressed a general desire for expedited treatment, it specified no time limit for resolving access complaints, leaving it to the Commission to determine a reasonable procedural approach, consistent with the agency's workload and the complexity of individual matters. Had Congress wished complaints to be resolved on a specific schedule, it would have so directed.

*See, e.g.*, 47 U.S.C. § 208(b)(1) (5-month deadline for certain complaints against common carriers).

Implementing the congressional directive of expedition, the Commission has adopted a five-month target for resolution of complaints that involve the denial of programming. Sky Angel is wrong, however, in contending that the FCC's doing so represents an enforceable "binding commitment" by the agency to resolve *all* program access complaints in that time. Pet. 15. To the contrary, the Commission has always recognized that a one-size-fits-all timeframe is unrealistic given the varying complexity of program access cases. Indeed, the Commission recognized when it implemented the timing goal that it was to apply to "most typical program access disputes which do *not* involve ... pleading extensions or extra pleadings based upon new information." *Cable Act Order I*, 13 FCC Rcd at 15842-15843 (emphasis added). By contrast, cases that "involve numerous issues requiring legal, economic and accounting expertise," the Commission explained, would take additional time. *Id.* at 15842.<sup>2</sup>

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<sup>2</sup> In fact, the Commission has taken longer than five months to resolve program denial complaints where the circumstances warrant. *See DirecTV v. Comcast*, 13 FCC Rcd 21822 (1998) (13 months); *Verizon Tel. Cos. v. Madison Square Garden L.P.*, 26 FCC Rcd 15849 (2011) (26 months for initial Bureau order); *Wave Division Holdings*, 26 FCC Rcd 182 (2011) (13 months). That the Commission attempts to meet the five-month goal in

The five-month target for “most program access disputes” thus was not intended to apply to cases like this one, which involves numerous pleadings beyond the complaint and answer (including supplemental pleadings filed within the last year) and also presents legal and policy issues that are new, complex, and potentially far-reaching in their effect. Unlike garden-variety program access complaints, this case presents novel questions of statutory interpretation that determine whether Sky Angel and potentially other similarly situated entities are entitled to the protections of Section 628. For example, is the term “channel” in the definition of an MVPD limited to its statutory definition or did Congress use that term in a vernacular sense? *See* Public Notice ¶¶6-7, 11. To qualify as an MVPD, must a video provider also provide the transmission path by which a customer receives programming? *See id.* ¶¶8-9. More generally, did Congress intend for the definition of “MVPD” to be broad and open-ended to ensure that it would not be limited to video providers that existed in 1992 (when the program access statute was enacted) but instead would also encompass new providers of video services that emerge in the future? *See id.* ¶11.

The answers to those questions may have profound effects throughout the Internet-based video distribution industry. For example, concluding that

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most cases, *see* Pet. 17 & n.13, proves only that the agency strives to resolve program access issues as quickly as possible.

Internet-based distributors of programming like Sky Angel are MVPDs would entitle a large – and growing – number of entities that never previously have been recognized by the Commission as beneficiaries of the program access rules to demand programming on non-discriminatory terms from cable operators and other MVPDs (while having to comply with other regulatory obligations placed on MVPDs). The entities that could be significantly affected include popular services such as Netflix or Hulu Plus, which consumers commonly use to watch video programming “streamed” over the Internet. *See* Public Notice ¶8. Sky Angel does not disagree – and in fact affirmatively emphasizes the difficult policy issues presented. Pet. 20-21 & nn.16 & 17. In short, because “the number of suppliers of online video . . . is almost limitless,” *Implementation of the Child Safe Viewing Act*, 24 FCC Rcd 11413, 11468 (2009), the ruling requested by Sky Angel could have sweeping implications for the Internet economy.

When the Commission first adopted the five-month target for resolving program access complaints, it foresaw such difficult cases and appropriately exempted them from the timing goal. *Cable Act Order I*, 13 FCC Rcd at 15842-15843. Consistent with that determination, it is reasonable in this case for the Commission to take the time necessary to consider the full implications of its decision – including seeking and

considering public comment – rather than making a potentially far-reaching ruling without a complete record. Mandamus is inappropriate in such circumstances because “it is to be expected that consideration of such [complex] matters will take longer than might rulings on more routine items.” *Monroe Commc’ns*, 840 F.2d at 946; *see also Cutler*, 818 F.2d at 898 (“complexity of the task confronting the agency” is relevant to ascertaining reasonableness of delay). In the circumstances, Sky Angel can show no “transparent violations of a clear duty to act.” *In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000).

This Court has also recognized that alleged administrative delay must be assessed in the context of an agency’s overall workload. Since Sky Angel’s complaint was filed, the staff of the Media Bureau were assigned primary responsibility for at least three large Commission rulemaking proceedings with statutory deadlines, all of which were met. *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) (six-month deadline); *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, Report and Order, 26 FCC Rcd 17222 (2011) (one-year deadline); *Video Description: Implementation of the*

*Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 26 FCC Rcd 11847 (2011) (one-year deadline). As the Court has long realized, an administrative agency “has broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most pressing.” *Cutler*, 818 F.2d at 896.

2. *Sky Angel Has Failed To Show Significant Harm.*

The Court has recognized that the “most important factor” in considering requests for mandamus is unreasonable delay, which we have shown above does not justify relief here. *In re Core Commc’ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008). Nevertheless, the Court also “take[s] into account the nature and extent of the interests prejudiced by delay.” *TRAC*, 750 F.2d at 80. Sky Angel claims that it has suffered harm in the absence of a ruling on its complaint, but it has failed to quantify the degree of harm and thus has not overcome the absence of unreasonable delay.

The essence of Sky Angel’s claim of harm is that the lack of Discovery programming is causing existing customers to leave and making it harder to attract new ones. Pet. 25-26. Notably, however, Sky Angel presents no information detailing the degree to which it actually suffers those alleged harms. The company “believes” (Pet. 25) that it has lost revenue, but has failed to document how many subscribers have canceled

their service or whether they ascribed cancellation to the loss of Discovery programming. Similarly, Sky Angel refers to “the untold number of potential subscribers who opt not to purchase Sky Angel’s service” in the absence of Discovery programming, Pet. 26, but Sky Angel provides no data showing how many customers it signed per month before and after it lost access to Discovery programming. In the absence of such information, it is impossible to gauge the magnitude of any harm. *Cf. Washington Area Transit Comm’n v. Holiday Tours*, 559 F.2d 841, 843 n.3 (party asserting harm must “substantiate” its claim).

Such proof is particularly necessary to evaluate any claim of harm by Sky Angel, which by design serves a niche audience with a circumscribed range of programming and thus may be less likely to lose customers (or fail to attract new ones) from the loss of Discovery’s programming. Thus, although the Bureau acknowledged in denying Sky Angel’s standstill request that Sky Angel would suffer *some* injury from the lack of Discovery programming, it also determined that the harm was minor enough to be outweighed by other factors. *Standstill Order* ¶9 (“the balance of harms does not tip sharply in Sky Angel’s favor”). That analysis holds – and Sky Angel notably did not seek further administrative or judicial review of the initial standstill denial.

Sky Angel also claims that the public is being harmed while the agency considers this matter because the market is deprived of competition in the meantime. That contention rests largely on 20-year-old legislative history stressing the importance of competition in the MVPD market. Pet. 22-23. It begs the question, presented for public comment by the Bureau's Public Notice, whether Congress intended to promote only facilities-based competition such as rival cable TV systems, or intended to promote non-facilities based competition as well. Public Notice ¶8. Moreover, the past 20 years have seen significant market changes since 1992, when cable held a virtual MVPD monopoly. Direct broadcast satellite service (DBS) now claims nearly 30 percent of the MVPD market, *see Thirteenth Annual Report to Congress on Video Competition*, 24 FCC Rcd 542, 687 Table B-3 (2009), and the cable share of the MVPD market has fallen steadily, *see id.* at 684 Table B-1. While Internet-based video distribution is a potential competitor to cable and DBS, its current market share is sufficiently small that any delay in the resolution of this program access dispute is unlikely to have a significant effect on the video distribution marketplace.

## CONCLUSION

“A writ of mandamus is ‘an extraordinary remedy, to be reserved for extraordinary situations.’” *In re Brooks*, 383 F.3d 1036, 1041 (D.C. Cir.

2004) (quoting *Cobell v. Norton*, 334 F.3d 1128, 1137 (D.C. Cir. 2003)).

Because no such circumstances are present here, the Court should deny the petition for a writ of mandamus.

Respectfully submitted,

/s/ Joel Marcus

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April 5, 2012

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**In re Sky Angel U.S., LLC**

**No. 12-1119**

**CERTIFICATE OF SERVICE**

I, Joel Marcus, hereby certify that on April 5, 2012, I electronically filed the foregoing Opposition to Sky Angel's Petition for a Writ of Mandamus with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Counsel listed below are registered CM/ECF users and will be served by the CM/ECF system.

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**ATTACHMENT**

**PUBLIC NOTICE DA NO. 12-507  
(MEDIA BUREAU MARCH 30, 2012)**



# 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**

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**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.<sup>1</sup> 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 rules<sup>2</sup> and the retransmission consent rules.<sup>3</sup> Among the

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<sup>1</sup> 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).

<sup>2</sup> 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,<sup>4</sup> the competitive availability of navigation devices (including the integration ban),<sup>5</sup> the requirement to negotiate in good faith with broadcasters for retransmission consent,<sup>6</sup> Equal Employment Opportunity (“EEO”) requirements,<sup>7</sup> closed captioning and emergency information requirements,<sup>8</sup> various technical requirements (such as signal leakage restrictions),<sup>9</sup> and cable inside wiring requirements.<sup>10</sup>

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*.<sup>11</sup>

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).”<sup>12</sup> 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.”<sup>13</sup> The Commission’s regulations also define a “cable television channel” as a “signaling path provided by a cable television system.”<sup>14</sup> The Act defines “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”<sup>15</sup>

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<sup>3</sup> 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.

<sup>4</sup> See 47 U.S.C. § 536; 47 C.F.R. §§ 76.1300-1302.

<sup>5</sup> See 47 U.S.C. § 549; 47 C.F.R. §§ 76.1200-1210.

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

<sup>7</sup> See 47 C.F.R. §§ 76.71-79, 76.1792, 76.1802.

<sup>8</sup> 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.

<sup>9</sup> 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).

<sup>10</sup> See 47 C.F.R. §§ 76.800-806.

<sup>11</sup> 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).

<sup>12</sup> 47 U.S.C. § 522(4).

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

<sup>14</sup> 47 C.F.R. § 76.5(r)-(u).

<sup>15</sup> 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.<sup>16</sup> As described in the complaint, Sky Angel provides a subscription-based service of approximately eighty channels of video and audio programming.<sup>17</sup> Sky Angel offers programming such as the MLB Network, NFL Network, Hallmark Channel, and Weather Channel.<sup>18</sup> 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.<sup>19</sup> Sky Angel explains that its service is available to anyone nationwide with a wired or wireless broadband Internet connection.<sup>20</sup> 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.<sup>21</sup> The Bureau determined that the term “channel” as used in the definition of MVPD appears to include a transmission path as a necessary element.<sup>22</sup> Based on the limited record at the time, the Bureau was unable to find that Sky Angel provides its subscribers with a transmission path.<sup>23</sup> 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.”<sup>24</sup> Sky Angel’s complaint is pending.<sup>25</sup>

### 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

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<sup>16</sup> 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).

<sup>17</sup> See *Sky Angel Complaint* at 1.

<sup>18</sup> See *id.* at 9.

<sup>19</sup> See *id.* at 2.

<sup>20</sup> See *id.*

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

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> *Id.* at 3884, ¶ 10.

<sup>25</sup> 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.”<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> 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.<sup>31</sup> 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?<sup>32</sup> 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”?

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

<sup>27</sup> 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”).

<sup>28</sup> 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, . . .”).

<sup>29</sup> 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.*”).

<sup>30</sup> 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”).

<sup>31</sup> 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).

<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> 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?<sup>35</sup>

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.<sup>36</sup> Rather, an MVPD may use a third party’s distribution facilities in order to make video programming available to subscribers.<sup>37</sup> 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

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<sup>33</sup> 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.”).

<sup>34</sup> 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*”).

<sup>35</sup> See *supra* ¶ 2.

<sup>36</sup> 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.”).

<sup>37</sup> 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?<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> 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?<sup>41</sup> 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,

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<sup>38</sup> See 47 C.F.R. § 76.501.

<sup>39</sup> 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).

<sup>40</sup> 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).

<sup>41</sup> *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”<sup>42</sup> 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?<sup>43</sup> 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?<sup>44</sup> Is it also consistent with other provisions of the Act and the Commission’s Rules which impose regulatory burdens on MVPDs?<sup>45</sup>

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?<sup>46</sup>

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.”<sup>47</sup> This definition was added to the Act by the 1984 Cable

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<sup>42</sup> 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.”).

<sup>43</sup> 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.

<sup>44</sup> 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.”).

<sup>45</sup> *See supra* ¶ 2.

<sup>46</sup> 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).

<sup>47</sup> 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,<sup>48</sup> and the Commission has accordingly interpreted this term to mean programming comparable to that provided by broadcast television stations in 1984.<sup>49</sup> 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, linear<sup>50</sup> streams of programming, as television broadcast stations provided in 1984?<sup>51</sup> We note that the Commission has previously explained that video-on-demand “images” constitute “video programming.”<sup>52</sup> 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?<sup>53</sup> 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”?

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

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

<sup>50</sup> 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’).”).

<sup>51</sup> 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.

<sup>52</sup> 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).

<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> Commenters will not become Parties<sup>57</sup> 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*.<sup>58</sup> 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”).<sup>59</sup>

- 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.

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<sup>54</sup> 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”).

<sup>55</sup> See 47 C.F.R. § 1.1208.

<sup>56</sup> See *id.*; 47 C.F.R. § 1.1204(a).

<sup>57</sup> 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 . . .”).

<sup>58</sup> 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.

<sup>59</sup> 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 12<sup>th</sup> 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 12<sup>th</sup> 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 12<sup>th</sup> 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](mailto: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](mailto:David.Konczal@fcc.gov), or Diana Sokolow, [Diana.Sokolow@fcc.gov](mailto:Diana.Sokolow@fcc.gov), of the Media Bureau, Policy Division, (202) 418-2120. Press contact: Janice Wise (202-418-8165; [janice.wise@fcc.gov](mailto:janice.wise@fcc.gov)).

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