Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of:	)	
Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel"	)))))	MB Docket No. 12-83

Comments of

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI)
National Association of the Deaf (NAD)
American Foundation for the Blind (AFB)
Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN)
Hearing Loss Association of America (HLAA)
Association of Late-Deafened Adults (ALDA)

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SUMMARY

In order to vindicate the important civil right of all Americans to view video programming on equal terms, we urge the Media Bureau to adopt a common-sense interpretation of multichannel video programming distributors ("MVPDs") that encompasses all entities, including Sky Angel, that deliver what consumers understand to be multiple "channels" of programming. A common-sense interpretation squarely comports with the statutory requirements and long-standing Commission precedent in the context of its video programming accessibility rules. Such an interpretation should encompass multichannel Internet-based entities and those who deliver programming on-demand to ensure that new entrants in the video programming marketplace deliver programming in accessible formats in line with consumer expectations and congressional intent.

We further urge the Bureau to reject a technical interpretation of MVPDs that would depend on a narrow, cable-specific understanding of "channels." The statutory underpinnings of the accessibility rules, which apply to many technologies other than cable, do not permit the Commission to narrow the scope of the rules based on the requirements of cable-specific regulations such as the program access rules. Should the Bureau nevertheless find it necessary to adopt a technical interpretation of MVPDs in the context of cable-specific regulations such as the program access rules, it must clarify that its interpretation does not affect Commission's long-standing common-sense interpretation of MVPDs in the context of the accessibility rules.

COMMENTS

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), the National Association of the Deaf (NAD), the American Foundation for the Blind (AFB), the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), the Hearing Loss Association of America (HLAA), and the Association of Late-Deafened Adults (ALDA), collectively, "Consumer Groups," respectfully submit these comments in response to the Media Bureau's request for comment in the above-referenced proceeding.[1] Consumer Groups seek to promote equal access to telecommunications, including video programming, for the millions of Americans who are deaf, hard of hearing, late-deafened, blind, visually impaired, visually impaired and hard of hearing, or deaf-blind so that they may fully experience the informational, educational, cultural, and societal opportunities afforded by the telecommunications revolution.

In this proceeding, the Media Bureau seeks comment on how it should interpret the term "multichannel video program distributor," or "MVPD," in the context of a program access complaint by Sky Angel, an Internet-based multichannel video programming service.[2] As the Bureau notes, however, the regulatory obligations and benefits of MVPDs extend far beyond the program access rules.[3]

In particular, MVPDs must comply with the important rules promulgated by the Commission over the past fifteen years to ensure that video programming,

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[1] *Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding*, *Request for Comment,* MB Docket No. 12-83 (Mar. 30, 2012), http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0330/DA-12-507A1.pdf ("*Sky Angel RFC")*.
[2] *Sky Angel RFC* at ¶ 4.
[3] *Id.* at ¶ 2.

including emergency information, is accessible to all viewers through the inclusion of closed captions, video description, and other measures.[4] Because any changes to the Commission's interpretation of MVPDs could affect compliance with the accessibility rules, we urge the Bureau to proceed carefully to avoid any unforeseen consequences that could impact the important civil right of all Americans to access video programming on equal terms, as required by Congress under section 305 of the Telecommunications Act of 1996 ("1996 Act")[5] and section 202 of Twenty-First Century Communications and Video Accessibility Act ("CVAA").[6]

The Bureau seeks comment on two possible interpretations of MVPDs. In one interpretation, the Bureau proposes to consider any entity an MVPD that "makes available for purchase multiple 'video programming networks,' without regard to whether it offers a transmission path."[7] Under this "common-sense" interpretation, MVPDs would include those entities that consumers understand to be delivering multiple "channels" under the colloquial meaning of the term "channel," which entities like Sky Angel often use to describe the various networks or categories of programming they carry.

In another interpretation, derived from the 1984 Cable Act and the 1992 Cable Act ("Cable Acts"), MVPDs would include "only those entities that make available for purchase both a transmission path (capable of delivering 'video programming') and content (multiple streams of 'video programming')."[8] Under this "technical" interpretation, MVPDs would have to make available for

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[4] *See generally* 47 C.F.R. pt. 79.
[5] Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 613)
[6] Pub. L. 111-260, 124 Stat. 2751 (codified at 47 U.S.C. § 613).
[7] *See Sky Angel RFC* at ¶¶11-15.
[8] *Id.* at ¶¶ 6-10.

purchase "multiple channels of video programming;" the term "channel" would be defined according to its definition in the 1984 Cable Act as a "a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel."[9]

We believe adopting a common-sense interpretation of MVPDs—as including all entities delivering what consumers understand to be multiple "channels" of programming—is the appropriate approach for the Bureau to take in this proceeding in light of the Commission's consistently similar interpretation of MVPDs in enacting accessibility rules pursuant to the 1996 Act and the CVAA. Accordingly, we urge the Bureau to reject a technical interpretation of MVPDs rooted in definitions from the Cable Acts, which could risk impermissibly narrowing the scope of the accessibility rules in violation of statutory requirements.

I. The Bureau should adopt a common-sense interpretation of MVPDs.

In requesting comment on a common-sense interpretation of MVPDs as entities that offer multiple video programming network "channels" to consumers under a "common, everyday" understanding of the term channel, the Bureau notes that such an interpretation finds support in the legislative history of the 1992 Cable Act.[10] The Bureau first asks whether such an interpretation would be consistent with other statutory provisions and Commission rules.[11]

This common-sense interpretation finds extensive support in section 305 of the 1996 Act, section 202 of the CVAA, and throughout Commission's extensive accessibility rulemakings over the past fifteen years. While section 305 and

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[9] *Id.* at ¶¶ 6-7.
[10] *Id.* at ¶ 11 & n.42 (citing S. Rep. No. 102-92 (1991)).
[11] *Id.* at ¶ 11.

section 202 contain broad accessibility requirements for video programming that are not limited to MVPDs, the Commission has routinely applied the rules to MVPDs as a matter of convenience, using the term "MVPD" as a commonly-understood, illustrative reference point for the various types of multichannel video delivery services that must comply with the rules rather than as a means of imposing specific technical limitations on the scope of the rules.

The Bureau also asks whether adopting a common-sense interpretation of MVPDs would permissibly apply statutory requirements to Internet-based services.[12] The Commission has already considered this issue in the context of the accessibility rules and concluded that at least some Internet-based entities fall within the Commission's interpretation of MVPDs.

Next, the Bureau asks whether a common-sense interpretation of MVPDs should encompass entities that provide "on-demand" programming.[13] Again, the Commission has already considered this issue in the context of the accessibility rules and concluded that on-demand services fall within the Commission's interpretation of MVPDs.

Finally, the Bureau asks about the policy ramifications of adopting a common-sense interpretation of MVPDs, including whether the interpretation should encompass only entities that make programming available "for purchase."[14] A common-sense interpretation of MVPDs that includes all multi-channel entities, including those that make video programming available without requiring a purchase, will ensure that new market entrants like Sky Angel compete fairly with traditional video providers without undermining

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[12] *Id.* at ¶ 15.
[13] *Id.* at ¶¶ 13-14.
[14] *Id.* at ¶ 12.

consumer expectations that video programming and emergency information will be delivered in accessible formats.

A. The Commission has consistently relied on a common-sense interpretation of MVPDs in enacting the accessibility rules.

The Commission's accessibility rules fall into three primary categories: closed captioning for viewers with hearing disabilities, video description for viewers with visual disabilities, and specific rules for the accessibility of emergency information. In all of these categories, the Commission has consistently applied the rules to MVPDs using a common-sense interpretation.

Television Closed Captioning Rules. Section 305 of the 1996 Act, which added new section 713 to the Communications Act of 1934 ("1934 Act"), requires the Commission to prescribe regulations to "ensure that . . . video programming first published or exhibited after the effective date of such regulations is fully accessible through the provision of closed captions."[15] The Commission's corresponding rules for television closed captioning, 47 C.F.R. § 79.1, require "video programming distributors" ("VPDs") to provide closed captioning for video programming, subject to certain limitations and exceptions.[16] The rules define VPDs to include MVPDs as well as licensed television broadcast stations and "any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission."[17]

Internet Protocol Closed Captioning Rules. Section 202(b) of the CVAA, which added new subsection 713(c)(2) to the 1934 Act, requires the Commission to

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[15] 47 U.S.C. § 613(b)(1).
[16] 47 C.F.R. § 79.1(b).
[17] 47 C.F.R. § 79.1(a)(2). The television closed captioning rules specifically rely on the definition of "MVPD" in 47 C.F.R. § 76.1000(e).

prescribe regulations that "require the provision of closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of such regulations." The Commission's corresponding Internet Protocol ("IP") closed captioning rules, 47 C.F.R. § 79.4, operate in a slightly different fashion than the television rules, requiring video programming owners ("VPOs") to include captions when they send programming that has been published or exhibited on television with captions to VPDs and video programming providers ("VPPs") to deliver the programming via IP.[18] VPDs and VPPs, both defined to include "[a]ny person or entity that makes available directly to the end user video programming through a distribution method that uses Internet protocol,"[19] must then render or pass through the captions to consumers receiving the programming via IP.[20] The IP rules "[do] not apply to a broadcaster's or MVPD's provision of programming that is subject to the Commission's television closed captioning rules," even where that programming is delivered via IP.[21]

Video Description Rules. Section 202(a) of the CVAA, which added new section 713(f) to the 1934 Act, required the Commission to reinstate the video description rules it had adopted in 2000 and which had initially been vacated by the D.C. Circuit.[22] The video description rules, 47 C.F.R. § 79.3, generally mirror

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[18] 47 C.F.R. § 79.4(c)(1).
[19] 47 C.F.R. § 79.4(a)(3).
[20] 47 C.F.R. § 79.4(c)(2).
[21] *See Closed Captioning of Internet Protocol-Delivered Video Programming*, *Report and Order*, MB Docket No. 11-154, 27 FCC Rcd. 787, 795, ¶ 11 (Jan. 13, 2012) ("*2012 IP Captioning R&O*").
[22] 47 U.S.C. § 613(f); *Implementation of Video Description of Video Programming*, *Report and Order*, MM Docket No. 99-399, 15 FCC Rcd. 15,230 (2000) ("*2000 Video Description R&O*"), *recon. granted in part and denied in part*, 16 FCC Rcd. 1251 (2001), *reversed and vacated in part*, *MPAA v. FCC*, 309 F.3d 796, 807 (D.C. Cir.

the structure of the television captioning rules, requiring VPDs to provide video programming with video description subject to certain limitations and exceptions.[23] Like the television captioning rules, the video description rules define VPDs to include licensed television broadcast stations, MVPDs, and "any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission."[24]

Emergency Accessibility Rules. Finally, as part of its initial rulemakings adopting closed captioning and video description rules, the Commission adopted special rules applying to the accessibility of emergency information.[25] The emergency accessibility rules, 47 C.F.R. § 79.2, require VPDs to make emergency information accessible to both viewers with hearing disabilities and viewers with visual disabilities, above and beyond the requirements of the television captioning and video description rules.[26] The emergency rules do not separately define VPDs, but instead apply to VPDs as defined in the television captioning and video description rules, including MVPDs.[27] Section 202(a) of the

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2002), *reinstated in part*, *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010: Report and Order*, MB Docket No. 11-43, 26 FCC Rcd. 12,662 (2011) ("*2011 Video Description R&O*").

[23] 47 C.F.R. § 79.3(b).

[24] 47 C.F.R. § 79.3(a)(5). Unlike the television captioning rules, the video description rules do not reference the definition of "MVPD" in 47 C.F.R. § 76.1000(e).

[25] *See generally Accessibility of Emergency Programming*, *Second Report and Order*, MM Docket No. 95-176, 15 FCC Rcd. 6615 (2000) ("*2000 Emergency R&O*"); *2000 Video Description R&O*, 15 FCC Rcd. at 15,250-15-251, § VII, ¶¶ 48-52.

[26] 47 C.F.R. § 79.2(b).

[27] *See* 47 C.F.R. § 79.2(a)(1) ("For the purposes of [the emergency accessibility rules], the definitions in §§ 79.1 [the television captioning rules] and 79.3 [the video description rules] apply.").

CVAA, which added new section 713(f) to the 1934 Act, requires the Commission to promulgate new emergency accessibility rules;[28] the Media Bureau and Consumer and Governmental Affairs Bureau are currently conducting associated rulemakings.[29]

In its initial rulemaking implementing the television closed captioning requirements, the Commission noted that section 305 of the 1996 Act required "all types of video programming delivered electronically to consumers, *regardless of the entity that provide[d] the programming*" to be captioned.[30] Accordingly, the Commission proposed to "require those entities that deliver video programming directly to consumers *(i.e., television broadcasters and MVPDs)* to be ultimately responsible" for captioning programming.[31] The Commission enacted its common sense interpretation of MVPDs as broadly constituting the entire relevant universe of non-broadcaster, consumer-focused video delivery entities, defining VPDs responsible for complying with the rules as "all entities who provide video programming directly to customers' homes, regardless of distribution technology used (*i.e., broadcasters and MVPDs*)."[32]

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[28] 47 U.S.C. § 613(g).

[29] *See generally Second VPAAC [Video Program Accessibility Advisory Committee] Report: Video Description and Access to Emergency Information*, *Request for Comment*, MB Docket No. 12-107 (April 24, 2012), http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0425/DA-12-636A1.pdf.

[30] *See Closed Captioning and Video Description of Video Programming*, *Notice of Proposed Rulemaking*, MM Docket No. 95-176, 12 FCC Rcd. 1044, 1048, ¶ 5 (1997) (citing H.R. Report No. 104-458, at 182 (1996)) ("*1997 TV Captioning NPRM*") (emphasis added).

[31] *Id.* at 1048-49, ¶ 6.

[32] *Closed Captioning and Video Description*, *Report and Order*, MM Docket No. 95-176, 13 FCC Rcd. 3272, 3280, ¶ 18 (1997) ("*1997 TV Captioning R&O*").

The Commission has reiterated this broad interpretation of MVPDs in further developing the television captioning rules,[33] in developing the video description rules,[34] and the emergency accessibility rules.[35] And the Commission recently reaffirmed its all-encompassing interpretation of MVPDs in adopting the IP captioning rules, holding that MVPDs include all entities that offer "traditional managed video services . . . *regardless of the transmission protocol used*."[36] Accordingly, a common-sense interpretation of MVPDs is strongly supported by section 202(a) of the CVAA, section 305 of the 1996 Act, and the Commission's extensive accessibility rulemaking precedent.

B. The Commission has already interpreted MVPDs to include some Internet-based services.

The Bureau expresses concern that a common-sense interpretation of MVPDs could violate the principle that "statutory requirements applicable to

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[33] *E.g.*, *The Wild Outdoors*, CSR 5444, 16 FCC Rcd. 13,611, 13,615, ¶ 11, n.28 (CSB 2001) ("The responsibility for compliance with the closed captioning rules is on video programming distributors, defined as all entities who provide video programming directly to customers' homes (*i.e. broadcasters and MVPDs*)" (emphasis added)); *Outland Sports*, CSR 5443, 16 FCC Rcd. 13,605, 13,609, ¶ 12 n.34 (CSB 2001) (same).

[34] *See Implementation of Video Description of Video Programming*, *Notice of Proposed Rulemaking*, MM Docket No. 99-339, 14 FCC Rcd. 19,845, 19,848, ¶¶9-10 (1999) ("*1999 VD NPRM*") (describing the equipment necessary for a "broadcaster or [MVPD]" to transmit video descriptions); *2000 Video Description R&O*, 15 FCC Rcd. at 15,232, 15233, ¶¶ 3, 6 (referring to "broadcast stations and MVPDs" as the distributors of video programming).

[35] *See 2000 Emergency R&O*, 15 FCC Rcd. at 6615, ¶ 1 & n.2 (2000) ("*2000 Emergency R&O*") (citing 47 C.F.R. § 79.1(a)(2)) (adopting the definition of VPD from the closed captioning rules); *2000 VD R&O*, 15 FCC Rcd at 15250, ¶ 49.

[36] *See 2012 IP Captioning R&O*, 27 FCC Rcd. at 796, ¶ 12. The Commission affirmed that all video programming delivered via IP that does not fall under the television captioning rules must nevertheless be captioned pursuant to the IP captioning rules if it is shown on television with captions. *Id.* at 796-97, ¶ 12.

established categories of service providers should not be applied reflexively to Internet-based services."[37] The Commission, however, has already affirmed in the context of the accessibility rules that it interprets MVPDs to include at least some Internet-based services.

More specifically, the Commission affirmed in enacting the IP captioning rules that all services "offer[ing] multiple channels of video programming, *including IP-based video offerings* such as those provided by AT&T" are MVPDs that must comply with the television closed captioning rules.[38] In doing so, the Commission explicitly acknowledged that an entity may be an MVPD simply by virtue of providing what consumers understand to be "channels" of programming, even when the programming is delivered via IP, thereby affirming that section 202 of the CVAA and section 305 of the 1996 Act permit the Commission's interpretation of MVPDs to extend to Internet-based entities in the context of the accessibility rules. And the Commission correctly noted that the CVAA's introduction of IP captioning mandates did not narrow the broad scope of MVPDs required to comply with the television captioning rules, including those that deliver programming via IP.[39]

This mandate sensibly guarantees that consumers will have access to video programming even where future market developments lead MVPDs to alter the underlying technical means by which they deliver their programming. If the Commission had excluded MVPDs from the scope of the television captioning

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[37] *Sky Angel RFC* at ¶ 15.
[38] *See 2012 IP Captioning R&O*, 27 FCC Rcd. at 796, ¶ 12 & n.64.
[39] *Id.* at 796, ¶ 11. Rather, Congress enacted the CVAA to clarify that even entities delivering programming through mechanisms that consumers do not understand to be "channels" must still caption programming if they utilize IP to deliver it. *See id.*

rules simply by virtue of the fact that they delivered programming via IP, all MVPDs could "opt out" of the television rules and "opt in" to the IP rules simply by switching to IP-based transmission. But if all MVPDs and broadcasters eventually migrate to IP-based delivery—a real possibility discussed at length during a recent congressional hearing[40]—they could claim that they are no longer subject to the television captioning rules. As a result, no entities would be subject to the television captioning rules, and no programming would have to be captioned in the first instance. This absurd result cannot have been what Congress intended in enacting section 202 of the CVAA—a law specifically designed to increase the amount of accessible programming.[41]

C. The Commission has already interpreted MVPDs to include entities delivering on-demand programming.

The Bureau asks whether a common-sense interpretation of MVPDs should exclude entities that provide on-demand programming, as opposed to "pre-scheduled, real-time, linear streams of programming."[42] The Bureau asks whether such a result is mandated by the definition of "video programming" at the time of the 1984 Cable Act as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station," noting that broadcast stations did not offer on-demand programming in 1984.[43]

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[40] *The Emergence of Online Video: Is It the Future?* (Apr. 24, 2012), http://commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=27bf5daa-6734-4689-836b-8db91a3a41bf&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a.

[41] *E.g.*, CVAA Statement of Purpose ("An Act To *increase the access* of persons with disabilities to modern communications . . . ." (emphasis added)).

[42] *Sky Angel RFC* at ¶¶ 13-14.

[43] *See id.* at ¶ 13.

Whatever limitations the term "video programming" may impose in other contexts, those limitations do not apply in the context of the accessibility rules. Section 202(a) of the CVAA, signed into law more than 25 years after the original definition of "video programming" in the 1984 Cable Act, defines "video programming" as "programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media" for the purposes of the accessibility rules and other regulations.[44] Thus, to whatever extent the 1984 Cable Act in fact restricted "video programming" to "programming comparable to that provided by broadcast television stations in 1984,"[45] section 202(a) of the CVAA obviates that restriction in the context of the accessibility rules. For example, broadcast stations now routinely offer programming on-demand via their websites.[46]

Moreover, the Commission has long recognized that on-demand programming constitutes a "channel" for the purposes of determining whether the entity providing it is an MVPD subject to the accessibility rules. More specifically, the Commission has expressly noted that the television closed captioning rules apply to "'video on demand' type of service[s]" or other services where "the content of a *channel* is . . . dependent on specific subscriber requests."[47] And without qualification, the Commission has held that "video-on-

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[44] *See* 47 U.S.C. § 613(h)(2) (applying the new definition of video programming in the context of 47 U.S.C. § 613 (the video programming accessibility requirements), 47 U.S.C. § 303 (governing the powers and duties of the Commission, including the regulation of apparatuses designed to play back, receive, or record video programming), and 47 U.S.C. § 330 (governing the shipment of television receivers)).

[45] *Sky Angel RFC* at ¶ 13.

[46] *E.g.*, WJLA Video, http://www.wjla.com/news/video/ (last visited May 13, 2011).

[47] *See 1997 TV Captioning R&O*, 13 FCC Rcd. at 3309, ¶ 80.

demand services must be offered with closed captions."[48] Accordingly, a common-sense interpretation of MVPDs should encompass entities that offer on-demand programming.

D. A common-sense interpretation of MVPDs will ensure that Internet-based multichannel television providers continue to provide the accessible programming that consumers expect.

The Bureau specifically seeks comment on the policy ramifications of adopting a common-sense interpretation of MVPDs, including whether the interpretation should include entities that do not require consumers to make a purchase to access video programming As discussed above, section 202 of the CVAA, section 305 of the 1996 Act, and the Commission's corresponding accessibility rules are specifically intended to ensure that consumers receive accessible video programming, without regard to the underlying distribution technology or financial model adopted by their video programming providers. Accordingly, adopting a common-sense interpretation of MVPDs will ensure that Internet-based entities positioning themselves as replacements for traditional broadcast and cable television platforms are accountable for delivering the accessible programming that their customers expect.

Sky Angel, the subject of this proceeding, provides a particularly salient example of an entity positioning itself as a fungible substitute for a traditional television service. Sky Angel's website poses the question "Is Sky Angel just like having cable or satellite TV?" and answers "Yes! Sky Angel is similar to other television providers . . . ."[49] Specifically, Sky Angel "offer[s] more than *50 TV &*

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[48] *Motion Picture Association of America*, *Petition for Expedited Special Relief*, MB Docket No. 08-82, Case No. CSR-7947-Z, 25 FCC Rcd. 4799, 4807, ¶ 16 & n.60 (MB 2010) ("*MPAA 2010*") (citing 47 C.F.R. § 79.1).

[49] Sky Angel Frequently Asked Questions, http://www.skyangel.com/About/

radio channels to choose from, as well as over 3000 titles in an ever-increasing [Video On Demand] library," and "30 popular mainstream TV *channels*."[50]

A consumer considering switching from his cable provider to Sky Angel would rightfully expect that a multichannel service "just like" cable TV would be required to include closed captions—just like the consumer's cable provider. But conflicting messages on Sky Angel's website make it unclear whether or Sky Angel in fact provides closed captioning or otherwise complies with the Commission's accessibility rules.[51]

We are gravely concerned that Sky Angel and similar entities represent the beginning of a growing influx of distributors poised to compete with traditional broadcast, cable, and satellite television, promising consumers the important benefits of switching to an Internet-based service but undercutting consumers' expectations by failing to provide closed captions, video description, or

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faq/general_faq.aspx?aid=&DNIS=&rpid=#/TEXT;splash=f;supportID=195 (last visited May 13, 2012).

[50] *Id.*

[51] *Compare* Sky Angel Programming and Subscription Information, "Are the Sky Angel channels/programming closed captioned?," http://www.skyangel.com/about/faq/question_answer.aspx?tname=Programming%20and%20Subscription%20Information&id=4&CatName=Before%20You%20Buy ("Unfortunately, the Sky Angel service does not recognize the electronic codes used for closed captioning. Sky angel [sic] is looking into enhancements that will allow for this type of feature to be available in the future.") (last visited May 13, 2012) *with* "Are the Sky Angel channels/programming closed captioned?," http://www.skyangel.com/About/Faq/Default_flash.aspx?aid=&DNIS=&rpid=#/TEXT;splash=f;supportID=60 ("The Sky Angel TV service is Closed Captioned for the hearing impaired where Closed Captioning is embeded [sic] at the channel level. Certain programs and channels are except from providing the Closed Caption signal - go to the Sky Angel online program guide and look for CC in the guide. You must enable Closed Captioning on your television in order to use it. . . . At this time, Closed Captioning is not available on VOD and SVOD programs.") (last visited May 13, 2012).

emergency information in violation of the Commission's accessibility rules. Such entities take advantage of comparative advertising to position themselves as functional substitutes for traditional television providers. And it is conceivable that similar entities will adopt financial models that do not require purchase, such as mimicking broadcast television's free-to-view, advertising-supported model.

Thus, it is essential that these entities are not able to take advantage of consumers by failing to provide the same important accessibility features that traditional providers are required to. A common-sense interpretation of MVPDs that includes these entities will ensure that the video marketplace evolves in a way that guarantees Americans with disabilities equal access to video programming, as required by section 305 of the 1996 Act and section 202 of the CVAA.

II. The Bureau should reject a technical interpretation of MVPDs.

A common-sense interpretation of MVPDs as including all entities delivering what consumers understand as multiple "channels" of programming would sensibly comport with congressional intent, the Commission's long-standing and well-developed precedent in enacting the accessibility rules, and sound public policy. Accordingly, we urge the Bureau to reject a contrary technical interpretation of MVPDs that would depend on the specific definition of the terms "MVPD" and "channel" in the context of the Cable Acts. Should the Bureau nevertheless determine that a technical interpretation of MVPDs is necessary to apply cable-specific regulations such as the program access rules, it must clarify that such an interpretation does not impact the scope of the accessibility rules.

A. The Commission has plainly rejected a technical interpretation of MVPDs in the accessibility rules.

As discussed above, the Commission has repeatedly and consistently adopted a common-sense interpretation of MVPDs in the context of the accessibility rules, using MVPDs a convenient reference point for the various types of multichannel video delivery services that must comply with the rules. But the Commission has also expressly rejected the possibility that the scope of MVPDs subject to accessibility rules should hinge on technical distinctions of delivery mechanisms.

More specifically, the Commission has expressly held that MVPDs subject to the television closed captioning rules include "all [non-broadcaster] entities who provide video programming directly to customers' homes, *regardless of distribution technology used*"[52] as well as all entities that offer "traditional managed video services . . . *regardless of the transmission protocol used*."[53] And the Commission has rejected the possibility that entities delivering video to consumers can avoid classification as MVPDs simply by delivering programming in a manner other than the Cable Act's technical conception of "channels." For example, the Commission has clarified that an entity may provide multiple "channels" and thus be an MVPD simply by making a library of video programming available on-demand.[54]

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[52] *1997 TV Captioning R&O*, 13 FCC Rcd. at 3280, ¶ 18 (emphasis added).
[53] *See 2012 IP Captioning R&O*, 27 FCC Rcd. at 796, ¶ 12 (emphasis added).
[54] *See 1997 TV Captioning R&O*, 13 FCC Rcd. at 3309, ¶ 80 (noting that the Closed captioning rules apply to "'video on demand' type of service[s]" or other services where "the content of a *channel* is otherwise dependent on specific subscriber requests" (emphasis added)); *see also MPAA 2010*, FCC Rcd. at 4807, ¶ 16 & n.60 (citing 47 C.F.R. § 79.1) ("[V]ideo-on-demand services must be offered with closed captions.").

B. A technical interpretation of MVPDs in the context of cable regulations cannot narrow the scope of the accessibility rules.

It may be the case, as the Bureau notes, that the Cable Acts require a technical interpretation of MVPDs in the context of cable-specific regulations such as the program access rules[55]—a possibility about which we express no opinion. But any specific, narrow requirements of cable-specific regulations cannot override the broad, non-cable-specific requirements of the accessibility rules or the Commission's consistent common-sense interpretation of MVPDs subject to the accessibility rules.

Not only is the Commission's common-sense interpretation of MVPDs in the context of the accessibility rules long-standing and consistent, it is required by statute. Neither section 202 of the CVAA nor section 305 of the 1996 Act permit the Commission to restrict the scope of the accessibility rules according a technical interpretation of MVPDs rooted in the Cable Acts; in fact, neither section 202 nor section 305 specifically reference MVPDs or "channels." Rather, they simply require that "video programming," broadly defined, be made accessible.[56]

Accordingly, the Bureau cannot permissibly reinterpret the scope of MVPDs subject to the program access rules in a way that narrows the scope of the accessibility rules. Should the Bureau determine that a technical interpretation of MVPDs is necessary in the context of cable-specific regulations, it must clarify that the interpretation does not affect the broad common-sense interpretation of MVPDs that the Commission has adopted pursuant to section 202 of the CVAA and section 305 of the 1996 Act in promulgating the

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[55] *See Sky Angel RFC* at 7.
[56] *See generally* 47 U.S.C. § 613.

accessibility rules. We urge the Bureau to solicit further comment from consumers who rely on the Commission's accessibility rules to ensure that no unintended consequences occur in the course of resolving this proceeding.

CONCLUSION

Because the civil rights of millions of Americans are at stake, we urge the Bureau to proceed carefully. The Commission's long-standing common-sense interpretation of MVPDs in the context of the accessibility rules suggests that the Bureau should take a similar approach here. Accordingly, we urge the Bureau to adopt a common-sense interpretation of MVPDs to include all entities, such as Sky Angel, delivering what consumers understand to be multiple "channels" of programming—and including on-demand programming and programming that does not require a purchase. Conversely, we urge the Bureau to reject a technical interpretation of MVPDs to avoid any conflict with the accessibility mandates of section 202 of the CVAA and section 305 of the 1996 Act.

Respectfully submitted,

/s/

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