

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Promoting Innovation and Competition in the)	MB Docket No. 14-261
Provision of Multichannel Video Programming)	
Distribution Services)	
)	
Interpretation of the Terms “Multichannel)	MB Docket No. 12-83
Video Programming Distributor” and)	
“Channel” as Raised in Pending)	
Program Access Complaint Proceeding)	
)	
Complaint of Sky Angel U.S., LLC Against)	MB Docket No. 12-80
Discovery Communications, LLC, <i>et. al.</i> for)	
Violation of the Commission’s Competitive)	
Access to Cable Programming Rules)	

REPLY COMMENTS OF SKY ANGEL U.S., LLC

Sky Angel U.S., LLC (“Sky Angel”) submits these reply comments in order to address the various inaccurate claims made by Discovery Communications, LLC (“Discovery”) in its comments responding to the Notice of Proposed Rulemaking (“NPRM”) released December 19, 2014 in the above-captioned proceeding.¹ For instance, Discovery once again misrepresented the Media Bureau’s ruling with respect to the petition for temporary standstill (“Standstill Petition”) filed by Sky Angel in conjunction with the program access complaint it filed against Discovery (“Complaint”).² Although Sky Angel previously has explained in detail why Discovery is, at best, mistaken in this respect,³ Discovery nonetheless continues to claim that the Media Bureau “tentatively concluded” that an entity that does not own or otherwise control a facilities-based

¹ See *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, 29 FCC Rcd 15995 (2014) (“NPRM”).

² See Sky Angel, Emergency Petition for Temporary Standstill, MB Docket No. 12-80 (Mar. 24, 2010) (“Standstill Petition”); Sky Angel, Program Access Complaint, MB Docket No. 12-80 (Mar. 24, 2010) (“Complaint”).

³ See Letter from Leighton T. Brown, Holland & Knight, LLP, Counsel for Sky Angel U.S., LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-80 (Dec. 10, 2010); Renewed Petition of Sky Angel U.S., LLC for Temporary Standstill, MB Docket No. 12-80 (May 27, 2011); Opposition of Sky Angel U.S., LLC to Motion to Strike Renewed Petition for Temporary Standstill, MB Docket No. 12-80 (June 22, 2011) (“Sky Angel Opposition to Motion to Strike”); Comments of Sky Angel U.S., LLC, MB Docket Nos. 12-80 & 12-83 (May 14, 2012).

transmission path cannot qualify as an MVPD.⁴ In reality, the Bureau simply declined to grant Sky Angel’s request for a temporary standstill, and explicitly did *not* conclude – tentatively or otherwise – whether a service such as that provided by Sky Angel qualifies as an MVPD. Specifically, the Bureau only found that it was “unable to conclude that Sky Angel ha[d] met its burden of demonstrating that the extraordinary relief of a standstill order [was] warranted.”⁵

Discovery also failed to note that the Media Bureau’s finding that Sky Angel had “not carried its burden of demonstrating that it is likely to succeed on the merits that it is an MVPD”⁶ rested solely on the one-sided, and clearly biased, legal arguments set forth by Discovery.⁷ When Sky Angel filed its Complaint and Standstill Petition on March 24, 2010, it did not articulate why it qualified as an MVPD because the nature of its service clearly meets every element contained in the MVPD definition,⁸ and because interpreting this type of innovative new service to fit within that definition is fully “consistent with Congress’s intent to define ‘MVPD’ in a broad and technology-neutral way to ensure that it would not only cover video providers using technologies that existed in 1992, but rather be sufficiently flexible to cover providers using new technologies such as Internet delivery.”⁹ Moreover, because Discovery had steadfastly refused to provide any justification, reasonable or otherwise, for its threatened withholding of programming from Sky Angel before being compelled to respond to the Complaint,¹⁰ Sky Angel could not have reasonably anticipated that Discovery would attempt to defend its discriminatory conduct based primarily on a legal argument which conflicts with the

⁴ Comments of Discovery at 7.

⁵ *Sky Angel U.S., LLC Emergency Petition for Temporary Standstill*, Order, 25 FCC Rcd 3879, 3884 (MB 2010) (“*Preliminary Standstill Order*”) (emphasis added).

⁶ *Id.* at 3882.

⁷ *See id.* (noting that Sky Angel had not “analyze[d] whether and how it meets the key elements of the definition of the term ‘MVPD.’”).

⁸ *See* NPRM, 29 FCC Rcd at 16003 (“We tentatively conclude that our proposed Linear Programming Interpretation is consistent with the language of the statute.”).

⁹ *Id.* at 16005-06.

¹⁰ *See* Complaint at 10.

express statutory language, the underlying legislative history, and the Commission's rule and precedent.

Thus, it was not until April 12, 2010, when Discovery filed an opposition to the Standstill Petition,¹¹ that Sky Angel had any reason to believe that Discovery's unsupported reliance on this legal issue would be the Media Bureau's principal focus in ruling on the Standstill Petition,¹² let alone permit Discovery to evade the public interest protections embodied in the Commission's program access rules for five years and counting. Moreover, Sky Angel never had an opportunity to refute Discovery's claims with respect to this issue because the Media Bureau suddenly, and unexpectedly, adopted the *Preliminary Standstill Order* only nine days after Discovery filed its opposition, which was fifteen days before Sky Angel timely filed its reply.¹³ Unfortunately, the Bureau was forced to hastily act on the Standstill Petition because Discovery was threatening to, and subsequently did, withhold its programming from Sky Angel beginning on April 22, 2010. Given that Discovery, alone, had an opportunity to brief this threshold legal issue before adoption of the *Preliminary Standstill Order*, it is not surprising that the Media Bureau was unable to find that Sky Angel had "convincingly demonstrate[d]" the need for injunctive relief,¹⁴ which the Commission has described as a "heavy" burden of proof.¹⁵

But this cannot be interpreted as a Media Bureau "tentative conclusion" that Sky Angel does not qualify as an MVPD. In fact, the Media Bureau was careful to "note that the pleading

¹¹ See Discovery, Opposition to Emergency Petition for Temporary Standstill, MB Docket No. 12-80 (Apr. 12, 2010) ("Discovery Standstill Opposition").

¹² See *Preliminary Standstill Order*, 25 FCC Rcd at 3883 ("In light of our determination on this threshold issue, we find it unnecessary to address whether Sky Angel has met its burden of demonstrating a likelihood of success on the merits with respect to the remaining elements of its complaint.").

¹³ See Sky Angel, Reply to Answer to Program Access Complaint, MB Docket No. 12-80 (May 6, 2010) ("Sky Angel Reply").

¹⁴ See *Preliminary Standstill Order*, 25 FCC Rcd at 3882, n. 32 (citing *Amendment of Part 22 of the Commission's Rules*, 8 FCC Rcd 5087, 5087 (1993) (a movant must "convincingly demonstrate" the necessity of a stay)).

¹⁵ See *Telecommunications-Visual Corp.*, 34 FCC 2d 292, ¶ 2 (1972) ("A stay is extraordinary relief and the burden upon one who seeks such relief is a heavy one.").

cycle ha[d] not yet ended,”¹⁶ and to underscore that its decision was only “based on the limited record” before it at that stage of the proceeding.¹⁷ Moreover, the Media Bureau stressed that its “decision to deny Sky Angel’s standstill petition 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.”¹⁸ Thus, contrary to Discovery’s absurd claim, neither the Bureau nor the full Commission has ruled on any of the merits of Sky Angel’s Complaint, including whether Sky Angel qualified as an MVPD when it filed the Complaint against Discovery.¹⁹ But Discovery did not stop there. Rather, again without citing any Commission precedent, it contended that throughout the complaint proceeding “the Commission has reinforced that Sky Angel did not qualify as an MVPD,” and that the “Commission has consistently acknowledged that ‘MVPD’ does not currently include OVDs.”²⁰

The *Preliminary Standstill Order*, however, is the only decision issued in the complaint proceeding, so the Commission could not have “consistently acknowledged” anything in that matter. More broadly, even a brief search of Commission precedent unequivocally demonstrates that the opposite is true. In numerous releases since Sky Angel filed its Complaint, after noting that the “issue of whether a certain type of OVD also qualifies as an MVPD under the Act and [its] regulations has been raised in pending program access complaint proceedings,” the Commission, like the Media Bureau in the *Preliminary Standstill Order*, has emphasized that nothing in the item “should be read to state or imply [its] determination on that issue.”²¹

¹⁶ *Preliminary Standstill Order*, 25 FCC Rcd at 3882, n. 34.

¹⁷ *Id.* at 3884 (emphasis added).

¹⁸ *Id.* (emphasis added).

¹⁹ See Comments of Discovery at 7 (“Regardless of the outcome of the present proceeding, it is indisputable that Sky Angel ... was not an MVPD as that term was defined by the Commission at the time Sky Angel filed its program access complaint against Discovery.”).

²⁰ *Id.*

²¹ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd 10496, 10499, n. 4 (2013); see *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Report, 27 FCC Rcd 8610, 8612, n. 6 (2012); *Applications of*

Notably, despite its current claims, Discovery itself has acknowledged on several occasions that the Commission has *not* found that an OVD cannot qualify as an MVPD.²²

Discovery also claimed falsely that, if the Commission adopts its tentative conclusion that certain Internet-based distributors qualify as MVPDs, this interpretation “cannot be applied retroactively,”²³ including with respect to “the facts of the Sky Angel case.”²⁴ In doing so, Discovery primarily relied on the Supreme Court’s decision in *Bowen v. Georgetown Univ. Hosp.*,²⁵ but that case is inapposite to the current situation because it involved an agency reissuing a rule that had been previously struck down by a court, and applying that rule “exclusively to [the] 15-month period” between its initial adoption and when it was struck down by the court.²⁶ In contrast, the Commission is simply proposing a clarifying interpretation that certain Internet-based distributors fall within the scope of an existing statutory definition²⁷ in order to bring its “rules into synch with the realities of the current marketplace and consumer preference where video is no longer tied to a certain transmission technology.”²⁸ As the Third Circuit has explained, “[i]f the rule in question merely clarifies or explains existing law or

Comcast Corp., General Electric Co. and NBC Universal, Inc., Memorandum Opinion and Order, 26 FCC Rcd 4238, 4263, n. 131 (2011); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Further Notice of Inquiry, 26 FCC Rcd 14091, 14093, n. 9 (2011) (“*2011 Video Competition NOI*”); *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 17975, n. 407 (2010).

²² See Motion of Discovery Communications LLC to Strike Renewed Petition of Sky Angel U.S., LLC for Temporary Standstill or, in the Alternative, Response to Renewed Petition, MB Docket No. 12-80, p. 8 (June 9, 2011) (“Discovery Motion to Strike”) (“[T]he Commission has made very clear during this time that the key question of whether an online video distributor (OVD) such as Sky Angel should also be considered to be an MVPD is far from ‘decided’...” (emphasis added) (citing to *2011 Video Competition NOI*, 26 FCC Rcd at 14093, n. 9 (“Nothing in this *Further Notice* should be read to state or imply our determination on this issue.”) (emphasis added)); *In re Sky Angel U.S., LLC*, Case No. 12-1119, Response of Intervenor Discovery Communications, LLC to Sky Angel’s Petition for Writ of Mandamus, p. 1 (D.C. Cir., Apr. 5, 2012) (“[B]efore the FCC can adjudicate Sky Angel’s complaint, it must decide the threshold jurisdictional question of whether Sky Angel is a multichannel video programming distributor...”)).

²³ Comments of Discovery at 7.

²⁴ *Id.* at 8.

²⁵ See *id.* (quoting and citing to *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)).

²⁶ *Bowen*, 488 U.S. at 207.

²⁷ See NPRM, 29 FCC Rcd at 16000 (“[W]e tentatively conclude that the statutory definition of MVPD includes certain Internet-based distributors...” (emphasis added); *id.* at 16002 (noting its “tentative conclusion that entities that provide Subscription Linear video services are MVPDs as that term is defined in the Act...” (emphasis added)).

²⁸ *Id.* at 15997.

regulations, it will be deemed interpretive.”²⁹ Accordingly, “the question of retroactivity [would] not arise in the present case” because the Commission’s ruling would be “merely interpretive.”³⁰

Even assuming Discovery’s claim that the Commission’s use of the terms “update” and “modernize” indicates that its proposed action would constitute more than an interpretation of current law,³¹ this would not support its claim that the Commission’s decision cannot be applied retroactively.³² Rather, in “cases in which there are new applications of existing law, clarifications, and additions, the courts start with a presumption in favor of retroactivity.”³³ As that court explained, “under such circumstances reliance is typically not reasonable, a conclusion that significantly decreases concerns about retroactive application of the rule eventually announced.”³⁴ Courts only depart from this presumption of retroactivity “when to do otherwise would lead to ‘manifest injustice.’”³⁵ In this respect, courts primarily look to whether the agency’s action “overruled any controlling precedent upon which [the petitioner] relied to its detriment.”³⁶ Moreover, in order for such “reliance to establish manifest injustice, it must be reasonable – reasonably based on settled law”³⁷ or in “well established practice.”³⁸

²⁹ *Bailey v. Sullivan*, 885 F.2d 52, 62 (3d Cir. 1989); *see also McKenzie v. Bowen*, 787 F.2d 1216, 1222 (8th Cir. 1986) (“An interpretive rule . . . clarifies or explains existing law or regulations.”).

³⁰ *Farmers Tel. Co. Inc. v. FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999) (“[T]he question of retroactivity does not arise in the present case because its ruling is merely interpretive.”).

³¹ *See* Comments of Discovery at 2.

³² Discovery also implied that the mere issuance of the NPRM demonstrates that the proposed action would be more than an interpretation of current law, and thus cannot have retroactive effect. *See id.* at 3. But both the Commission and the courts have held that actions arising from an NPRM can be applied retroactively. *See, e.g., Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, 7306 (2006) (disagreeing with claims “that, because the Commission issued an NPRM, any rulings in this proceeding should have prospective effect only”); *Qwest Services Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007) (“The NPRM merely reinforced the general understanding that the relevant law was unsettled.”).

³³ *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (internal quotation marks omitted).

³⁴ *Id.* at 1110.

³⁵ *Amer. Telephone and Telegraph Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006) (“AT&T”).

³⁶ *Borden, Inc. v. NLRB*, 19 F.3d 502, 510 (10th Cir. 1994).

³⁷ *Qwest*, 509 F.3d at 540.

According to Discovery, because the “well-established statutory definition” of an MVPD requires that “an entity must own or control the transmission path on which it offers its video programming service,”³⁹ the Commission’s proposed interpretation would constitute a “radical departure from the widely understood definition of MVPD and MVPD service around which an entire regulatory scheme has developed.”⁴⁰ However, as the Commission notes, as far back as 1993, it “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.”⁴¹ Thus, contrary to Discovery’s claim, the Commission’s proposed Linear Programming Interpretation, not the alternative Transmission Path Interpretation, “is consistent with Commission precedent.”⁴² Accordingly, even if Discovery and other vertically-integrated programmers have acted in reliance on their belief that the MVPD definition requires the ownership or control of a transmission path, such reliance would be misplaced, and thus would not prevent the Commission from retroactively enforcing the Linear Programming Interpretation.⁴³ And it would be extremely unfair to

³⁸ *Retail, Wholesale & Dep’t Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); see *Verizon*, 269 F.3d at 1111 (noting that it was “skeptical that retroactive liability ... would actually impose a manifest injustice” because the object of their “reliance was neither settled ... nor ‘well-established’”).

³⁹ Comments of Discovery at 5.

⁴⁰ *Id.* at 19.

⁴¹ NPRM, 29 FCC Rcd at 16004.

⁴² *Id.* Notably, courts have even upheld the retroactive application of an interpretation that conflicted with an agency’s earlier interpretation of a statute where, like here, the reinterpretation was intended to advance Congress’s intent in enacting the statute. See *id.* at 16005 (“We believe that that our proposed interpretation is consistent with Congress’s intent...”). For instance, in *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074 (D.C. Cir. 1987), the D.C. Circuit upheld FERC’s retroactive application of its interpretation of a section of the Federal Power Act even though the interpretation “overruled its contrary conclusion articulated only three years earlier,” *id.* at 1076, where “FERC was animated by the conviction that its prior interpretation thwarted Congressional intent...” *Id.* at 1083. Similarly, the Commission has justified the application of a change in policy to a pending proceeding where, like here, it made the change in order to advance the public interest. See *Policy Regarding Character Qualifications in Broadcast Licensing*, Memorandum Opinion and Order, 1 FCC Rcd 421, 421 (1986) (“Since we determined that our prior approach to character warranted modification because it no longer served the public interest, it is appropriate to apply the new policies to pending proceedings.”).

⁴³ See *Farmers*, 184 F.3d at 1252 (“We are not inclined to agree that a petitioner’s misplaced reliance on his agent’s construction of an agency regulation should prevent that agency from ever ‘retroactively’ enforcing its interpretation of the regulation because it differs from that of the petitioner’s agent.”); see *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (“If the petitioners truly did rely on a one-second benchmark, that reliance was badly misplaced and hence inappropriate for consideration...”).

victimize Sky Angel based upon regulatory delay that it did not cause, and in fact, fought to prevent.⁴⁴

Even assuming Discovery relied on a narrow (and unproven) belief that Internet-using distributors, alone among all distributors that do not own or control a transmission path, fail to qualify as MVPDs, such “reliance” would have been unreasonable, and thus could not prevent retroactive enforcement of the proposed Linear Programming Interpretation. As detailed above, because the Commission has emphasized on numerous occasions that it has not ruled that Internet-based distributors cannot qualify as MVPDs, no “settled law” or “well established practice” exists with respect to this issue. Moreover, although the Commission’s precedent finding that MVPDs need not own or control a transmission path may not be strictly applicable to Internet-based distributors, it “certainly provided ample notice” that these distributors’ use of Internet facilities controlled by other entities would not prevent them from being classified as MVPDs.⁴⁵ As the D.C. Circuit has explained, “a mere lack of clarity in the law does not make it manifestly unjust to apply a subsequent clarification of that law to past conduct.”⁴⁶

Discovery also claimed that the Commission’s previous statement that Sky Angel’s Complaint presented “issues of first impression” demonstrates that Sky Angel did not qualify as an MVPD when it filed the Complaint, and that entities’ reliance on that statement prohibits the

⁴⁴ See, e.g., *In re Sky Angel U.S., LLC*, Case No. 12-1119, Petition for Writ of Mandamus (D.C. Cir., Feb. 27, 2012). In contrast, throughout the proceeding, Discovery has sought to delay action on the Complaint, knowing that it could continue to withhold its programming from Sky Angel, which has been its goal for well over five years, absent a Commission finding to the contrary. See *Sky Angel Opposition to Motion to Strike* at 10 (“Discovery has refused to participate in discovery, it has refused to work toward a mutually agreeable solution, and it even refused to delay its withholding despite a request made by Commission staff. Amazingly, Discovery now asserts that this adjudication would be best resolved through a lengthy rulemaking.”) (citing to *Discovery Motion to Strike* at 8).

⁴⁵ See *Qwest*, 509 F.3d at 537 (“[W]hile that previous determination was not strictly applicable to IP-transport cards, it certainly provided ample notice that merely converting a calling card call to IP format and back does not transform the service from a telecommunications service to an information service.”) (internal quotation marks omitted).

⁴⁶ *Id.* at 540; see *AT&T*, 454 F.3d at 334 (“Rather than exercising caution in light of ambiguous agency law, AT&T unilaterally chose not to pay universal service contributions without Commission sanction or approval. In doing so it assumed the risk of an adverse Commission decision.”).

retroactive application of the proposed Linear Programming Interpretation.⁴⁷ Even assuming hypothetically that this issue is “before the Commission for the first time,” this would only alter a court’s retroactivity analysis if “the Commission’s prior precedents clearly pointed toward the opposite result,”⁴⁸ which, as noted, is not the case here. Discovery makes a similar claim with respect to an alleged Commission “proclamation” that existing statutory requirements “should not be applied reflexively to Internet-based services.”⁴⁹ However, the quote supplied by Discovery does not come from the 2004 Commission precedent to which it cited, but rather from the Media Bureau’s 2012 Public Notice seeking comment on the interpretation of the term MVPD.⁵⁰ Accordingly, Discovery could not have possibly relied on that statement when it decided to withhold its programming from Sky Angel more than *two years prior* to the Media Bureau’s release of that Public Notice.

Sky Angel further notes that, rather than being analogous as Discovery claims,⁵¹ the circumstances here are clearly different than those in 2010, when the Commission adopted rules to address unfair acts involving terrestrially delivered, cable-affiliated programming, but only applied these rules on a prospective basis.⁵² Specifically, in stark contrast to here, where the Commission is simply proposing a clarifying interpretation of an existing definition, in that proceeding, the Commission “adopt[ed] rules permitting complainants to pursue program access claims involving terrestrially delivered, cable-affiliated programming...”⁵³ Notably, in doing so,

⁴⁷ See Comments of Discovery at 8.

⁴⁸ *AT&T*, 454 F.3d at 332; see *Farmers*, 184 F.3d at 1251 (“Although the present case is one of first impression ... we believe that this case falls squarely within the precedents authorizing retroactivity for agency rules that do not represent a shift from a clear prior policy...”) (internal citation omitted).

⁴⁹ Comments of Discovery at 8.

⁵⁰ See *Media Bureau Seeks Comment on Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding*, Public Notice, 27 FCC Rcd 3079, 3087 (MB 2012).

⁵¹ See Comments of Discovery at 9.

⁵² See *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 (2010).

⁵³ *Id.* at 747.

