

May 14, 2015

VIA ELECTRONIC COMMENT FILING SYSTEM

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Ex Parte, *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261; *Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding*, MB Docket No. 12-83; *Complaint of Sky Angel U.S., LLC Against Discovery Communications LLC and Animal Plant, LLC*, MB Docket No. 12-80

Dear Ms. Dortch:

Discovery Communications, Inc. (“Discovery”) hereby responds briefly to various assertions made by Sky Angel U.S., LLC (“Sky Angel”) in reply comments submitted in the above-captioned dockets.^{1/}

First, Sky Angel’s repeated insistence that the Media Bureau did not tentatively conclude that Sky Angel is not a multichannel video programming distributor (“MVPD”) – and that the Commission and others have always understood the definition of “MVPD” to include OVDs^{2/} – has been flatly and repeatedly contradicted by the Commission. In its Order denying Sky Angel’s Emergency Petition for Temporary Standstill, the Media Bureau stated that Sky Angel had not demonstrated a likelihood of success because while Sky Angel appeared to interpret the term “channel” in a “non-technical sense,” the Act and the Commission’s rules “appear to include a transmission path as a necessary element of a channel” and Sky Angel did not provide a transmission path.^{3/} Since that time, the Media Bureau has confirmed that it views its decision

^{1/} Although the Commission has closed MB Docket No. 12-83 and held MB Docket No. 12-80 in abeyance, Sky Angel filed its reply comments in those dockets, and so Discovery finds it necessary to ensure that its response is appropriately recorded in those proceedings.

^{2/} Reply Comments of Sky Angel U.S., LLC, MB Docket No. 14-261 (filed Apr. 1, 2015) (“*Sky Angel Reply Comments*”) at 2-5.

^{3/} *Sky Angel U.S., LLC Emergency Petition for Temporary Standstill*, Order, 25 FCC Rcd. 3879, 3882, ¶ 7 (2010) (“*Order*”).

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

as a preliminary determination “that the term ‘channel’ as used in the definition of MVPD appears to include a transmission path as a necessary element”^{4/} and the Commission has characterized the *Order* as one in which “the Media Bureau expressed tentative approval of the Transmission Path Interpretation.”^{5/}

Sky Angel’s statement that “Commission precedent unequivocally demonstrates”^{6/} that OVDs have always been considered MVPDs has likewise been contradicted by the Commission, which has stated that Sky Angel’s complaint raises “issues of first impression.”^{7/} Just last month, the full Commission noted that it is:

seeking comment on revisions to the definition of an MVPD. Specifically, the Commission propose[s] to change the interpretation of the term “multichannel video programming distributor” by including within its scope services that make available for purchase, by subscribers or customers, multiple linear streams of video programming, regardless of the technology used to distribute the programming.^{8/}

In the face of such statements, Sky Angel’s continued assertions that Discovery has

^{4/} *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, 3080 ¶ 5 (2012) (“2012 Public Notice”). While Sky Angel makes much of the fact that the Commission has emphasized the Bureau did not make any final determination, that is inherently true of any tentative conclusion. The relevant point, however, is that the tentative conclusion belies Sky Angel’s assertion that the Commission has always viewed OVDs as MVPDs.

^{5/} *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, 29 FCC Rcd 15995, ¶ 17 n.39 (2014) (“MVPD Definition NPRM”).

^{6/} Sky Angel Reply Comments at 4.

^{7/} *In re Sky Angel U.S., LLC*, Docket No. 12-1119, Opposition of the Federal Communications Commission to Sky Angel’s Petition for Writ of Mandamus (D.C. Circuit filed Apr. 5, 2012) at 15. As Discovery noted in its comments, if anything, the precedent has always suggested the opposite, as the Commission has repeatedly found that “the statutory requirements applicable to established categories of service providers should not be applied reflexively to Internet-based services.” Discovery Comments at 8. Sky Angel correctly notes that this statement was not made in the 2004 Notice of Proposed Rulemaking on *IP-Enabled Services*. Rather, it was made by the Media Bureau in the 2012 Public Notice, which cited to the Commission’s 2004 statement that 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.” 2012 Public Notice at 3087, ¶ 15 n. 54, citing *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4886, ¶ 35 (2004).

^{8/} *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 14-16, Sixteenth Report, FCC 15-41 (rel. Apr. 2, 2015) (“16th Annual Video Competition Report”) ¶ 246; see also *id.* n.4 (“In December 2014, the Commission adopted a Notice of Proposed Rulemaking that proposes to change the interpretation of an MVPD[.]”).

misunderstood the law and the Commission is clarifying the common understanding of the definition, not changing its interpretation of the definition, are simply untenable.^{9/}

Further, while Sky Angel argues that its failure to provide closed captioning on its programming “has no direct bearing,”^{10/} the fact that Sky Angel was not complying with MVPD requirements at the same time it claimed it was an MVPD demonstrates that it did not view itself as an MVPD. Contrary to Sky Angel’s assertions,^{11/} Discovery’s filing did not cite itself as support for this fact, but rather Sky Angel’s *own website*, which stated that its service “[did] not recognize the electronic codes used for closed captioning.”^{12/} Sky Angel’s later assertion that it was making “substantial progress” towards captioning its programming^{13/} is irrelevant (and undoubtedly of little interest to those unable to access the programming) – the salient point is that although Sky Angel claimed it was an MVPD for purposes of the program access rules, it was not acting like an MVPD in other respects.

Second, Sky Angel’s assertion that it “did not articulate why it qualified as an MVPD”^{14/} in its program access complaint against Discovery because it could not have reasonably anticipated the need to do so and was denied a chance to do so^{15/} cannot hold water. The program access rules *require* a program access complainant to demonstrate that it is an MVPD with standing to bring a program access complaint.^{16/} This requirement applies regardless of whether the complainant believes the nature of its service “clearly meets” the elements of the definition.^{17/} If the Media Bureau did not have a complete record when it ruled, as Sky Angel wrongly contends,^{18/} any omission in the record was due to Sky Angel’s own failure to follow these rules.

^{9/} While Sky Angel claims that these Commission statements are irrelevant because they occurred after Discovery’s alleged violation of the rules, they are directly on point because they demonstrate that contrary to Sky Angel’s assertions, the common understanding has been that the term “MVPD” does not include Internet-based distributors.

^{10/} *Sky Angel Reply Comments* at 10.

^{11/} *Id.*

^{12/} Discovery Communications, Answer to Program Access Complaint, MB Docket No. 12-80 (filed Apr. 21, 2010), *citing* http://www.skyangel.com/aboutIFAQ/question_8llswer.aspx?tname=Programming%20an<i><<1020Subscription%20Infonation&id=4&CatName=Before%20Y ou%20Buy.

^{13/} *Sky Angel Reply Comments* at 10, *citing* Sky Angel, Reply to Answer to Program Access Complaint, MB Docket No 12-80 (May 6, 2010) at 14, n. 37.

^{14/} *Sky Angel Reply Comments* at 2.

^{15/} *Sky Angel Reply Comments* at 3.

^{16/} *See* 47 C.F.R. § 76.1003(a).

^{17/} *Sky Angel Reply Comments* at 2.

^{18/} Sky Angel’s suggestion that the Bureau ruled before it had a chance to respond to Discovery’s arguments that it was not an MVPD is false. Discovery raised the issue that Sky Angel was not an MVPD entitled to file a program access complaint in its Opposition to Sky Angel’s Emergency Petition

Finally, Sky Angel's argument that, if adopted, the Commission's proposal can be applied retroactively to Sky Angel's program access complaint because the Commission would be merely "clarifying," not changing, the definition and so is an interpretive rule that can be applied retroactively is wrong.^{19/} As noted above, the Commission's proposal is not merely a clarification of the existing definition, but rather is an effort to "change," "revis[e]" and "update" the definition.^{20/}

Moreover, the rule change could not possibly be viewed as "interpretive" since it would admittedly alter the existing rights and obligations of numerous regulated entities. The Commission has stated that resolution of this issue "could have repercussions for a wide range of Internet-based distributors of video programming."^{21/} The *NPRM* in the *MVPD Definition* proceeding contained an entire section analyzing the regulatory implications of a change in definition, noting that "[t]o the extent that an Internet-based distributor of video programming falls within the definition of an MVPD, it will be able to take advantage of the privileges of MVPD status but will also be subject to MVPD obligations unless the Commission waives some or all of them if authorized to do so"^{22/} as well as the possibility that cable-affiliated programmers could "be required to negotiate with and license programming to potentially large numbers of Internet-based distributors."^{23/} And the comments in this proceeding contain extensive analysis of the pros and cons of applying MVPD regulations to OVDs – without suggesting that OVDs are now subject to such MVPD obligations.^{24/} Because the change in rule

for Temporary Standstill on April 12, 2010. Sky Angel submitted an unauthorized "Emergency Request for Immediate Grant of Petition" on April 14, 2010, in which it still failed to demonstrate (or even argue) that it was an MVPD. Discovery noted this failure in its April 15, 2010 response to that Emergency Request, and Sky Angel did not respond. The Media Bureau did not issue its ruling denying the Emergency Petition until April 21, 2010.

^{19/} *Sky Angel Reply Comments* at 5-6.

^{20/} *MVPD Definition NPRM* at 15996; *see also 16th Annual Video Competition Report* ¶ 246 (the NPRM "seek[s] comment on revisions to the definition of MVPD"); *see also id.* n.4.

^{21/} *In re Sky Angel U.S., LLC*, Docket No. 12-1119, Opposition of the Federal Communications Commission to Sky Angel's Petition for Writ of Mandamus (D.C. Circuit filed Apr. 5, 2012) at 15.

^{22/} *MVPD Definition NPRM* ¶ 37.

^{23/} *Id.* ¶ 41.

^{24/} *See, e.g.*, Comments of FilmOnX at 19 ("Newly recognized MVPDs should be required to prospectively satisfy MVPD obligations."); Electronic Frontier Foundation at 3 ("today's flexible and innovative video streaming services should not be burdened with rules and obligations shaped a long time ago for the administration of services of a completely different nature"); Comments of the Competitive Enterprise Institute et al. at 2 (noting that the Linear Programming Interpretation would subject "certain OVDs to the regulatory privileges and obligations of MVPDs"); Comments of the National Association of Broadcasters at 1-2 (the Commission seeks comment on "whether and how certain privileges and obligations under the Communications Act of 1934 and FCC rules will apply" to OVDs); Comments of ABC Television Affiliates Association et al at 2 (if classified as MVPDs, OVDs will be "subject to various regulatory benefits and obligations of MVPDs"); Comments of AT&T at 6 ("if OTT providers are classified as MVPDs, they also could be subject to a wide range of new obligations imposed on MVPDs

would impose expansive new obligations on programmers and expansive new requirements on OVDs, it is well-settled that it cannot be viewed as “interpretive,” and so cannot be applied retroactively.^{25/}

Pursuant to section 1.1206(b) of the Commission’s rules, a copy of this letter is being filed electronically with the Office of the Secretary.

Respectfully Submitted,

/s/

Tara M. Corvo

in the future.”); Motion Picture Association of America at 4 (“[I]mposing MVPD obligations on companies wishing to offer multiple linear streams of video programming online would create burdens and regulatory uncertainties that might divert resources and attention from such experimentation, to the detriment of consumers.”).

^{25/} The D.C. Circuit has stated that the “most important factor” in determining whether a rule is legislative or interpretive is “the actual legal effect (or lack thereof) of the agency action in question on regulated entities.” *National Mining Ass’n. v. McCarthy*, 758 F. 3d 243, 251–252 (D.C. Cir. 2014) (distinguishing between a legislative rule “that purports to impose legally binding obligations or prohibitions on regulated parties” and an interpretive rule “that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties”). *See also* Discovery Comments at 8-10.