

Holland & Knight

2099 Pennsylvania Avenue, N.W., Suite 100 | Washington, DC 20006 | T 202.955.3000 | F 202.955.5564
Holland & Knight LLP | www.hklaw.com

December 10, 2010

LEIGHTON T. BROWN
(202) 457-7161

Via Hand Delivery

Marlene H. Dortch, Esq., Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
Attn: Media Bureau

FILED/ACCEPTED
Internet Address:
Leighton.Brown@hklaw.com

DEC 10 2010

Federal Communications Commission
Office of the Secretary

Re: *Complaint of Sky Angel U.S., LLC Against Discovery Communications, LLC et al. for Violation of the Commission's Competitive Access to Cable Programming Rules*

Dear Ms. Dortch:

Sky Angel U.S., LLC ("Sky Angel"), by its counsel, hereby responds to the letter submitted by Discovery Communications, LLC ("Discovery") on December 3, 2010, in which Discovery mischaracterized the substance of a Media Bureau ("Bureau") decision¹ denying a temporary standstill requested by Sky Angel on March 24, 2010 in conjunction with a program access complaint it filed against Discovery. As detailed below, the Bureau's decision related solely to Sky Angel's petition for a temporary standstill, not to the merits of the program access complaint proceeding, which remains pending before the FCC.

Sky Angel provides a subscription-based service of approximately eighty linear channels of family-friendly video and audio programming using Internet Protocol Television ("IPTV") technology. Subscribers receive Sky Angel's programming through a set-top box that has broadband Internet inputs and video outputs that connect directly to a television set. The box receives and decrypts the programming channels, which a subscriber accesses on a television set via a channel guide. Therefore, to a consumer, Sky Angel is functionally identical to traditional satellite or cable video distribution services, not web-based streaming video providers.

In its letter, Discovery contends that the new facts Sky Angel recently brought to the Commission's attention are not relevant because, according to Discovery, it "has demonstrated in this proceeding that Sky Angel is not a multichannel video programming distributor ('MVPD') entitled to invoke the program access rules . . ." Discovery then falsely implies that the Bureau has come to a similar conclusion. Specifically, Discovery asserts that the Bureau concluded that

¹ *Emergency Petition for Temporary Standstill*, 25 FCC Rcd 3879 (Apr. 21, 2010) ("Standstill Order").

“Sky Angel . . . has not carried 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” because, according to Discovery, Sky Angel “does not make available programming ‘channels’ as that term is defined in the Cable Act.”

On the contrary, although the Bureau declined to grant Sky Angel’s request for a temporary standstill, it expressly did not determine that Sky Angel failed to meet the definition of an MVPD. Instead, the Bureau simply concluded that, “based on the record before [it] at this stage in the complaint proceeding,” Sky Angel had not satisfied the heavy burden imposed upon a party moving for injunctive relief.² In doing so, the Bureau considered several factors, including whether Sky Angel had convincingly demonstrated that it is likely to succeed on the merits that it is an MVPD entitled to seek relief under the program access rules. Significantly, the Bureau issued its standstill decision before Sky Angel timely filed its Reply in this proceeding, and therefore prior to a complete factual and legal record.³ In doing so, the Bureau noted the limited record before it and clearly stated that its decision had no bearing on its ultimate conclusion as to whether Sky Angel qualified as an MVPD.

Our 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. Rather, based on the limited record before us at this stage and the lack of Commission precedent on that issue, we are unable to conclude that Sky Angel has met its burden of demonstrating that the extraordinary relief of a standstill order is warranted.⁴

Accordingly, despite Discovery’s mischaracterization, neither the Bureau nor the full Commission has ruled on any of the merits of Sky Angel’s program access complaint, including whether Sky Angel qualifies as an MVPD.

Sky Angel had not detailed why it qualifies as an MVPD in its initial filings because the nature of its service makes it clear that Sky Angel is an MVPD under the program access definition.⁵ However, in its Reply, Sky Angel fully demonstrated that it is, in fact, an MVPD

² *Id.* at 3881-82 (citing *Amendment of Part 22 of the Commission’s Rules*, 8 FCC Rcd 5087, ¶ 2 (1993) (movant must “convincingly demonstrate” necessity of a stay)); 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.”).

³ *Id.* at 3883, n. 34 (“We note that the pleading cycle has not yet ended . . .”). Discovery forced the Bureau to issue its order on April 21, before Sky Angel could respond to Discovery’s claimed defenses, including that Sky Angel fails to qualify as an MVPD, because Discovery was threatening to, and subsequently did, withhold its programming on April 22 – fourteen days prior to Sky Angel’s deadline to file a Reply.

⁴ *Id.* at 3884 (emphasis added).

⁵ “The term ‘multichannel video programming distributor’ means an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.” 47 C.F.R. §76.1000(e) (emphasis added).

entitled to the protection of the program access rules. For instance, although the definition does not specifically list an IPTV service as an example of an MVPD, the intentionally broad definition expressly notes that the list of examples is non-exhaustive because the definition encompasses any entity that otherwise fits within the flexible definition of an MVPD.⁶ Indeed, because the rule expressly states that an MVPD may distribute video using technologies *not limited to* cable, satellite, SMATV, and EBS, Sky Angel's linear video programming service making use of IPTV technology necessarily falls within the MVPD definition.

In its Reply, Sky Angel also addressed, and fully refuted, Discovery's current claim that Sky Angel fails to qualify as an MVPD because it "does not make available programming 'channels' as that term is defined in the Cable Act." For instance, the only type of "channel" defined in the Act is a "cable channel," which is "a portion of the electromagnetic frequency spectrum which is used in a cable system . . ."⁷ In other words, the sole definition of "channel" expressly limits its application to a cable system. Because a cable system is but one type of distributor classified as an MVPD, no definition of channel expressly limited to a cable system can rationally be used to limit what constitutes an MVPD. In fact, "channels" cannot be defined by any reference that is expressly technology-specific because Congress did not intend for the program access protections to be limited to a specific type of technology.⁸ Rather, as it did in other portions of the Act, Congress used potentially technical terms in an everyday sense.⁹ In the MVPD definition, Congress used "multiple channels" to mean multiple programming networks, certainly not multiple portions of electromagnetic frequency spectrum used in a cable system.

Moreover, interpreting "channels" in Discovery's narrow way would impermissibly restrict the intended breadth of the MVPD definition. Congress intentionally created a broad, open-ended definition of MVPD to provide the Commission the flexibility necessary to address the entry of new video programming distributors into the marketplace in order to "spur the development of communications technologies."¹⁰ Forcing Congress to act each time a new distribution technology emerges simply is bad public policy that would deter investment in innovative technologies and impede competition. Accordingly, the program access provisions

⁶ See *Implementation of Cable Television Consumer Protection and Competition Act*, 8 FCC Rcd 2965, 2997 (1993) ("[L]ist of multichannel distributors in the definition is not meant to be exhaustive . . ."); *NCTA v. FCC*, 567 F.3d 659, 664-65 (D.C. Cir. 2009) (finding a broad interpretation of MVPD in accord with the "broad and sweeping terms" of the program access provisions, which were designed to "be given broad, sweeping application"); S. Rep. No. 102-92, at 1161 (1991) (program access rules created to ensure competition by banning vertically integrated programmers "from unreasonably refusing to deal with any multichannel video distributor . . .").

⁷ 47 U.S.C. §522(4) (emphasis added).

⁸ See S. Rep. No. 102-92, at 1159 ("Without fair and ready access on a consistent, technology-neutral basis, an independent entity . . . cannot sustain itself in the market."); *Implementation of Cable Television Consumer Protection and Competition Act*, 9 FCC Rcd 1902, 1950 (1994) ("Congress did not differentiate among the technologies used by competitors in the program access provisions . . .").

⁹ See *Implementation of Cable Act Reform Provisions*, 14 FCC Rcd 5298, 5356 (1999) ("Congress appears to have used the phrase in the everyday sense . . .").

¹⁰ 47 U.S.C. §548(a). Similarly, the Commission's stated intention is to broadly interpret the program access rules because their fundamental purpose is to encourage and protect new or emerging competition. See *Review of the Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746, 754 (2010).

clearly were intended to apply to all present and future MVPDs.¹¹ Otherwise, vertically integrated cable programmers could permissibly discriminate against innovative competitors such as Sky Angel, whose particular service could not have been envisioned in 1991 when Congress drafted the Act.

In addition, interpreting “channels” to restrict the definition of an MVPD in this way would immediately remove the protections of the program access rules from most “traditional” MVPDs, as well as substantially strip the Commission of jurisdiction over these entities. For example, in order to address capacity problems, most cable operators have turned to Switched Digital Video, whereby “a channel is transmitted . . . only when the subscriber tunes to that channel.”¹² In other words, from a technical perspective, cable operators, like Sky Angel, now transmit only a single “channel” to subscribers rather than simultaneously transmitting “multiple channels” to every viewer.¹³ Also like Sky Angel, local exchange carriers are increasingly utilizing IPTV technologies.¹⁴ If the Commission bows to Discovery’s constrained view of the program access rules, then many high-capacity digital video distribution systems would not qualify as MVPDs, including, but certainly not limited to, components of the video systems of Verizon FiOS, AT&T U-verse, DirecTV, DISH and Comcast.¹⁵

In this respect, Sky Angel notes the vast difference between an IPTV service and a web-based service that makes unencrypted video programming available on a publicly accessible website. A service such as Sky Angel, which simply uses a broadband Internet connection as one piece of its distribution system, cannot be equated with a website that provides video programming. “Internet” and the “World Wide Web” are discrete terms. “Internet” is a broad term that encompasses the various technology, paths, and equipment that allow the exchange of information.¹⁶ In contrast, the “World Wide Web” is simply a form of communication that utilizes the Internet to make information publicly accessible via any connected computer terminal.¹⁷ Accordingly, an IPTV operator, such as Sky Angel, which simply uses the Internet as

¹¹ See *Implementation of the Cable Television Consumer Protection and Competition Act*, 8 FCC Rcd 3359, 3365 (1993) (“The program access requirements . . . have at their heart the objective of releasing programming to existing or potential competitors of traditional cable systems so that the public may benefit from the development of competitive distributors.”).

¹² *Carriage of Digital Television Broadcast Signals*, 22 FCC Rcd 21064, ¶ 60 (2007) (“[S]witched digital gives cable operators the means of adding channels and never running out of capacity.”) (emphasis added).

¹³ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 07-206, ¶ 276 (2009) (“Rather than transmitting all available channels to viewers at once . . .”) (emphasis added).

¹⁴ *Id.* at ¶¶ 131-34 (citing Verizon, AT&T, BellSouth and Qwest).

¹⁵ See <http://www.att.com/u-verse/explore/what-is-u-verse.jsp?wtSlotClick=1-002TN9-0-2> (“Your high speed Internet connection is plugged into the set-top boxes.”). Comcast is using DOCSIS 3.0 to develop a services overlay to put all IP services, including video, into a common provisioning and management system, at which time Comcast will be distributing its video programming over the “Internet.” See, Jeff Baumgartner, *Comcast Forges ‘Excalibur’ for IPTV* (Oct. 28, 2009) (http://www.lightreading.com/document.asp?doc_id=183740&site=lr_cable&print=yes).

¹⁶ See *IP-Enabled Services*, 19 FCC Rcd 4863, 4869, n. 23 (2004) (“In essence, the Internet is a global, packet-switched network of networks that are interconnected through the use of the common network protocol – IP.”).

¹⁷ See *Reno v. ACLU*, 521 U.S. 844, 852 (1997).

a conduit to distribute encrypted video programming to a proprietary set-top box, cannot be considered the functional equivalent of a web-based video provider.

Sky Angel also notes the inaccuracy of Discovery's unsupported contention in its letter that its unilateral termination of the programming contract, which has a term extending through December 31, 2014, was a valid exercise of its contractual rights. Although Sky Angel filed its complaint over eight months ago, Discovery still has not provided Sky Angel or the Commission with any reasonable justification for its actions even though, per the contract, Discovery has a legal obligation to act in good faith and deal fairly with Sky Angel.

The purpose of Sky Angel's previous letter was to provide the Commission with new facts that wholly refute most of Discovery's primary contentions and defenses. Specifically, Discovery has repeatedly claimed that no distributor of Discovery programming uses the Internet as a distribution path.¹⁸ Now, however, Discovery channels are being distributed by DISH Network over the Internet.¹⁹ In its responsive letter, Discovery did not refute that fact, and therefore, has conceded in this proceeding that it permits the distribution of its programming via the Internet by some carriers even though it terminated distribution by Sky Angel on the pretext of distribution over the Internet (despite the fact that the agreement between Discovery and Sky Angel – which is on file with the Commission – expressly permits IPTV distribution).

In sum, Discovery has mischaracterized the actual status of the complaint proceeding by contending that there has been a dispositive determination that Sky Angel fails to meet the definition of an MVPD. In reality, the Bureau has made no such determination – and so stated. Sky Angel clearly falls within the definition of an MVPD under the Commission's program access rules. Sky Angel expects that the Commission will reach that determination once it has the benefit of examining the complete record before it. Discovery argues that the FCC's definition of MVPD requires video distribution by "channels." That false Discovery distinction is contrary to the plain language of the FCC's definition and would exclude video distribution by major carriers from the MVPD definition (including Verizon Fios, Comcast and AT&T U-verse).

In this era of dramatically increasing access to, and use of, high-speed broadband connections, the public interest requires that an innovative company such as Sky Angel, which is attempting to use this new technology to distribute family-friendly programming at affordable rates, receives the benefits of the Commission's program access rules because, ultimately, it will be the American public that benefits from this inclusion due to the increased competition, innovation, and amount of programming available to them. The public interest in consumer choice and an expansive national broadband network requires that the Commission promptly conclude that Sky Angel qualifies as an MVPD under its program access rules so that Discovery's continued discrimination against it ends.

¹⁸ See Letter from Charles R. Naftalin, Holland & Knight, LLP, counsel for Sky Angel, to Marlene H. Dortch, FCC, p. 2 (Nov. 24, 2010) (providing quotes of Discovery's statements).

¹⁹ See *id.*

Marlene H. Dortch, Esq., Secretary

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In the event that there are questions concerning this matter, please communicate with the undersigned.

Very truly yours,



Charles R. Naftalin

Leighton T. Brown

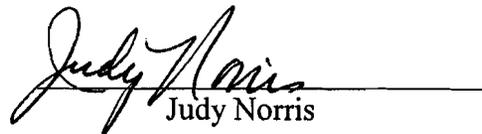
Counsel to Sky Angel U.S., LLC

cc: William Lake (*via e-mail*) (William.Lake@fcc.gov)
Steven Broeckaert (*via e-mail*) (Steven.Broeckaert@fcc.gov)
Nancy Murphy (*via e-mail*) (Nancy.Murphy@fcc.gov)
Michael Perko (*via e-mail*) (Michael.Perko@fcc.gov)
Mary Beth Murphy (*via e-mail*) (MaryBeth.Murphy@fcc.gov)
David Konczal (*via e-mail*) (David.Konczal@fcc.gov)
Diana Sokolow (*via e-mail*) (Diana.Sokolow@fcc.gov)

Certificate of Service

I, Judy Norris, a legal secretary with the firm of Holland & Knight LLP, hereby certify that on the 10th day of December, 2010, a copy of the foregoing Letter was deposited in the U.S. mail, postage prepaid, first-class, addressed to:

Christopher J. Harvie
Tara M. Corvo
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, DC 20004
Counsel for Discovery Communications, LLC


Judy Norris