Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re the Matter of	)	
	)	
COMPLAINT OF SKY ANGEL U.S., LLC	)	
	)	12-80
Against Discovery Communications, LLC, *et. al.*	)	
For Violation of the Commission's Competitive	)	
Access to Cable Programming Rules	)	

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Federal Communications Commission
Office of the Secretary

To: Media Bureau

RENEWED PETITION OF SKY ANGEL U.S., LLC
FOR TEMPORARY STANDSTILL
(or *Justice Delayed is Justice Denied*)

SKY ANGEL U.S., LLC

Charles R. Naftalin
Bill LeBeau
Leighton T. Brown II
HOLLAND & KNIGHT LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, DC 20006-6801
Phone: (202) 955-3000
Fax: (202) 955-5564
Email: leighton.brown@hklaw.com

Its Attorneys

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EXECUTIVE SUMMARY

Sky Angel U.S., LLC ("Sky Angel") distributes multiple channels of exclusively family-friendly video programming on a nationwide basis at affordable rates. Sky Angel was the first American video programming distributor to provide a service which utilizes Internet Protocol Television ("IPTV") technology and a proprietary set-top box. Subscribers cannot access Sky Angel's encrypted programming without the set-top box, which has broadband Internet inputs and video outputs that connect directly to their television sets. Therefore, to a consumer, Sky Angel is functionally identical to traditional cable and satellite video distribution services. Sky Angel's innovative service, and the competition it poses to traditional, well-entrenched video programming distributors, is exactly what Congress envisioned when it applied program access obligations to vertically-integrated programming providers such as Discovery Communications, LLC and its affiliate, Animal Planet, L.L.C. (collectively, "Discovery").

In 2007, Sky Angel and Discovery entered into an Affiliation Agreement for the distribution of multiple channels of Discovery programming. The Affiliation Agreement, the term of which extends through December 31, 2014, expressly permits Sky Angel's use of IPTV technology, and provides a detailed definition of an IP System that is identical to Sky Angel's service. In September 2009, Discovery proposed that the parties expand their relationship, asking Sky Angel to carry, and pay for, additional Discovery-owned networks. However, in December 2009, Discovery unexpectedly informed Sky Angel that it planned to terminate the Affiliation Agreement, and thus withhold its programming from Sky Angel's subscribers and potential subscribers. Although Sky Angel repeatedly sought additional information from Discovery, and offered to cooperate fully to address Discovery's alleged "concerns," Discovery refused to provide any justification, reasonable or otherwise, for its termination. Instead,

Discovery simply repeated that it was "uncomfortable" with Sky Angel's distribution methodology, which had not changed since the parties executed the Affiliation Agreement.

Discovery's threatened and, as of April 22, 2010, actual withholding of its programming not only breached the Affiliation Agreement, it unlawfully discriminated against Sky Angel in violation of the Commission's program access rules. Because of Discovery's threats, on March 24, 2010, Sky Angel filed a *Program Access Complaint* and *Emergency Petition for Temporary Standstill* in an attempt to prevent Discovery's unjustified and unlawful withholding. On April 21, 2010, before Sky Angel timely responded to Discovery's claimed defenses, including that Sky Angel fails to qualify as a multichannel video programming distributor ("MVPD"), the Media Bureau declined to issue a standstill, based only on the incomplete record before it.

Although the Bureau declined to grant a standstill at that time, it expressly did not rule on any of the merits of Sky Angel's program access complaint, including whether Sky Angel qualifies as an MVPD entitled to the program access protections Congress intended to apply to new, innovative competitors in the video distribution marketplace. Rather, the Bureau simply found that, because of "the limited record before" it and "the lack of Commission precedent" regarding a service such as Sky Angel, it was "unable to conclude that Sky Angel has met its burden of demonstrating that the extraordinary relief of a standstill order is warranted." As noted, the pleading cycle did not conclude until after the Bureau declined to grant a standstill, so Sky Angel had no opportunity to address Discovery's unexpected, and strained, legal and factual contentions made in opposition to Sky Angel's complaint and standstill petition.

However, after the Bureau's preliminary standstill order, Sky Angel timely filed its reply to Discovery's opposition, in which Sky Angel detailed why it is entitled to the protections of the program access rules and how Discovery continues to blatantly violate those rules. Moreover, during the thirteen months since the Bureau's order, there have been decisive legal, regulatory,

and factual developments that further demonstrate the merit of Sky Angel's program access complaint, and thus the need for the Bureau to grant a temporary standstill in order to restore the *status quo* pending the outcome of this proceeding. A temporary standstill, and thus the continuation of the parties' relationship pursuant to the existing Affiliation Agreement, should be granted because:

- Sky Angel is an MVPD entitled to relief under the program access rules. Sky Angel clearly falls within the broad statutory and regulatory definitions of an MVPD, and its innovative service, while not known to Congress twenty years ago, is exactly the type of new entrant Congress intended to promote in order to increase competition in the video distribution marketplace.

- Discovery continues to engage in unfair acts and unlawful discrimination by withholding its programming from Sky Angel while permitting far larger video programming distributors, including its affiliates, to offer their subscribers multiple linear channels of Discovery programming via IPTV technology and broadband Internet connections.

- Sky Angel has suffered, and will continue to suffer, irreparable harm due to Discovery's withholding of its programming. Sky Angel subscribers no longer can access Discovery programming, and consumers considering subscribing to Sky Angel have had less incentive to do so for more than a year. Further, Sky Angel's "first to market" advantage in offering this innovative and affordable service continues to deteriorate, and several large programming providers continue to hesitate to enter into distribution agreements with Sky Angel expressly because of Discovery's unlawful withholding.

- Discovery would suffer no harm because it would simply be providing programming to a distributor which uses the same distribution technology as other distributors of its programming, and Discovery would receive additional revenue on a per-subscriber basis at rates it required and contractually agreed to.

- The public interest strongly favors a standstill because Sky Angel's subscribers and potential subscribers could receive Discovery's programming at rates far below those offered by most pay-TV providers, and because the distribution of valuable programming such as Discovery's is required for new and emerging innovators to successfully compete in the MVPD marketplace as Congress intended and the public requires in order to spur innovation, increase programming options, and reduce rates.

Concurrently filed with this Renewed Petition for Standstill is Sky Angel's Motion for Sanctions against Discovery, in which Sky Angel demonstrates that Discovery violates its duty of candor to the Commission by maintaining the blatant falsehood that it never permits any form of Internet distribution of its linear channels, even though it permits millions of large MVPD

subscribers to receive its channels via the Internet. That false claim was decisive to the Bureau when it declined to grant a standstill to Sky Angel last year. Granting a standstill now would help correct that mistake, which was based upon clearly misleading claims by Discovery.

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To: Media Bureau

RENEWED PETITION OF SKY ANGEL U.S., LLC
FOR TEMPORARY STANDSTILL
(or *Justice Delayed is Justice Denied*[1])

Pursuant to Section 76.1003(l) of the Commission's rules, 47 C.F.R. §76.1003(l), Sky Angel U.S., LLC ("Sky Angel"), by its attorneys, hereby requests that the Commission immediately examine the more complete record in this proceeding being provided here and impose a temporary standstill of the programming contract (the "Affiliation Agreement"), entered into by and between Sky Angel and Discovery Communications, LLC and its affiliate, Animal Planet, L.L.C. (collectively, "Discovery"), pending the resolution of Sky Angel's program access complaint (the "Complaint").[2] Sky Angel filed the Complaint against Discovery because of Discovery's threatened and, as of April 22, 2010, actual withholding of its programming from Sky Angel in violation of the Commission's program access rules and the legally binding Affiliation Agreement, which has a term extending through December 31, 2014.

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[1] This quote is attributed to William E. Gladstone, 19th Century British Prime Minister and statesman. *See http://thinkexist.com/quotation/justice_delayed_is_justice_denied/227920.html.*

[2] *See* Sky Angel U.S., LLC, *Program Access Complaint* (filed Mar. 24, 2010). Sky Angel notes the Commission's stated goal of resolving program access complaints within five months from the submission of a complaint related to a denial of programming. *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order, 22 FCC Rcd 17791, 17856 (2007) ("*2007 Program Access Order*"); *see also Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3422 (1993) ("*First Program Access Order*") ("The staff is expected to issue a ruling on the merits expeditiously.").

I. BACKGROUND.

More than a year ago, Sky Angel petitioned the FCC to protect it from Discovery's unlawful discrimination but, to date, the FCC has not resolved this proceeding. As shown then, Sky Angel provides a subscription-based service of approximately eighty linear channels of exclusively 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 linear channel lineup subscribed to, 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.

On October 3, 2007, Sky Angel and Discovery entered into the Affiliation Agreement, under which Discovery agreed to provide several of its programming channels to Sky Angel, through December 31, 2014, and expressly agreed that IPTV would be the distribution technology used by Sky Angel. More than two years later, without explanation, let alone justification, Discovery unilaterally decided to terminate the Affiliation Agreement, even though it had never expressed any dissatisfaction with respect to the agreement or Sky Angel's service, and despite the fact that Sky Angel had timely paid all per-subscriber fees owed to Discovery under the agreement at the rates required by Discovery.

On March 24, 2010, after Discovery repeatedly refused to either retract its termination threat or provide a justification for it, Sky Angel filed the Complaint. At the same time, Sky Angel filed an *Emergency Petition for Temporary Standstill*[3] requesting that the Media Bureau (the "Bureau") order a standstill to prevent Discovery's withholding pending the outcome of the program access proceeding. On April 12, 2010, Discovery filed an *Opposition to Emergency*

[3] *See* Sky Angel U.S., LLC, *Emergency Petition for Temporary Standstill* (filed Mar. 24, 2010) ("*Standstill Petition*").

Petition for Temporary Standstill in which it set forth arguments regarding the merits of Sky Angel's Complaint.[4] Then, on April 21, 2010, Discovery filed an *Answer to Program Access Complaint.*[5] On May 6, 2010, Sky Angel timely filed its *Reply to Answer to Program Access Complaint.*[6]

On April 21, 2010, the Bureau adopted an order in response to Sky Angel's Standstill Petition.[7] The Bureau issued its order on April 21, before Sky Angel could respond to Discovery's claimed defenses, including that Sky Angel fails to qualify as a multichannel video programming distributor ("MVPD"), because Discovery was threatening to, and subsequently did, turn off Sky Angel's receivers, and thus withhold its programming, on April 22 – fourteen days prior to Sky Angel's deadline to file its Reply.

Although the Bureau declined to grant Sky Angel's request for a temporary standstill, it expressly did not rule on the merits of Sky Angel's Complaint, including whether Sky Angel qualifies as 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.[8] Significantly, the Bureau issued its standstill decision before Sky Angel timely filed its Reply, and therefore prior to a complete record in this proceeding.[9] The Bureau noted the limited record before it and clearly stated that its *Preliminary Standstill Order* had no bearing on the ultimate determination of the underlying Complaint.

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[4] *See* Discovery Communications, LLC, *Opposition to Emergency Petition for Temporary Standstill* (Apr. 12, 2010) ("*Standstill Opposition*").

[5] *See* Discovery Communications, LLC, *Answer to Program Access Complaint* (Apr. 21, 2010) ("*Answer*").

[6] *See* Sky Angel U.S., LLC, *Reply to Answer to Program Access Complaint* (filed May 6, 2010) ("*Reply*").

[7] *See Sky Angel U.S., LLC Emergency Petition for Temporary Standstill*, Order, 25 FCC Rcd 3879 (MB 2010) ("*Preliminary Standstill Order*").

[8] *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.").

[9] *Id.* at 3883, n. 34 ("We note that the pleading cycle has not yet ended . . .").

> 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.[10]

Accordingly, 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.

The pleading cycle in this program access proceeding did not conclude until after the Bureau adopted the *Preliminary Standstill Order*. Specifically, Sky Angel had not filed its Reply, which was due May 6, 2010 and which provided Sky Angel its first opportunity to address the unexpected legal and factual issues that caused the Bureau hesitation in granting "the extraordinary relief of a Standstill Order."[11] Also since the *Preliminary Standstill Order*, there have been decisive legal, regulatory and factual developments, all of which provide further support for the grant of a temporary standstill and subsequent grant of Sky Angel's Complaint. Because of these changed circumstances, Sky Angel hereby updates the record in this proceeding and renews its request for a temporary standstill pending the proceeding's outcome.[12]

II. TEMPORARY STANDSTILL PROVISION HAS GONE INTO EFFECT.

On January 20, 2010, the Commission revised its program access rules to permit the filing of a petition for temporary standstill.[13] However, because the Office of Management and Budget had not yet granted its approval, the revised rule still had not gone into effect when Sky

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[10] *Id.* at 3884 (emphasis added).

[11] *Id.*

[12] In addition to this *Renewed Petition*, Sky Angel is concurrently filing a *Motion of Sky Angel U.S., LLC for Imposition of Sanctions Against Discovery Communications, LLC for Lack of Candor and for Possible Misrepresentation* ("*Motion for Sanctions*"), which seeks additional Commission action with respect to this proceeding.

[13] *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 (2010) ("*2010 Program Access Order*").

Angel filed its Standstill Petition more than three months later. On June 21, 2010, the temporary standstill provision went into effect.[14]

Although Discovery argued that the new standstill provision was not in effect when Sky Angel filed its Standstill Petition, the Bureau nevertheless agreed with Sky Angel that it already possessed the requisite "statutory authority to act on a standstill petition in program access cases pursuant to the authority granted to the Commission under Section 4(i) of the Act."[15] The Bureau therefore made its standstill determination pursuant to Commission and judicial precedent with respect to staying the effective date of a Commission order.

In previously challenging Sky Angel's right to seek a temporary standstill, Discovery incorrectly focused upon the provision's reference to a "program access complainant seeking renewal of an existing programming contract."[16] But the need for a temporary standstill is even stronger here than in the typical case the Commission intended to address in drafting the language of the new standstill provision. Rather than seeking to extend the termination date of an existing contract pending the resolution of a program access complaint, Sky Angel simply asks that the Bureau prohibit Discovery from unreasonably and unjustifiably withholding its programming in violation of the program access rules and the Affiliation Agreement, the term of which extends through December 31, 2014. In other words, Sky Angel is not seeking an extension or other revision of the mutually beneficial Affiliation Agreement; it simply asks that the Bureau order that the terms of the Affiliation Agreement continue, as Sky Angel and Discovery contractually agreed to, pending its determination with respect to Discovery's impermissible withholding of programming from Sky Angel's current and potential subscribers.

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[14] *See Notice of Effective Date of Program Access Complaint Rules: 47 C.F.R. §§ 76.1001(b)(2), 76.1003(c)(3), and 76.1003(l)*, Public Notice, DA 10-1099 (June 21, 2010).

[15] *Preliminary Standstill Order*, 25 FCC Rcd at 3882, n. 31.

[16] *See* 47 C.F.R. §76.1003(l)(1).

Clearly, the Commission has continuing jurisdiction to order this standstill during the pendency of this complaint proceeding.

In evaluating a request for a temporary standstill, the Commission primarily considers the following factors: (1) whether the complainant is likely to prevail on the merits of its complaint; (2) whether the complainant will suffer irreparable harm absent a stay; (3) whether grant of a stay will not substantially harm other interested parties; and (4) whether the public interest favors grant of a stay.[17] As noted, when the Bureau previously considered these factors, the record in the proceeding was incomplete and one-sided. As detailed below, a more complete legal and factual record, as well as continuing developments in the industry and changed circumstances, clearly demonstrate that a standstill is warranted.

III. SKY ANGEL IS LIKELY TO PREVAIL ON THE MERITS OF ITS COMPLAINT

A. Sky Angel Is An MVPD Entitled to Relief Under the Program Access Rules.

In the *Preliminary Standstill Order*, the Bureau simply stated that it could not conclude "based on the record before [it] at this stage in the complaint proceeding that Sky Angel has demonstrated a likelihood of success on the merits of its complaint."[18] Specifically, the Bureau found that Sky Angel had not carried its heavy burden of demonstrating that it is likely to succeed in demonstrating that it is an MVPD entitled to seek relief under the program access rules.[19]

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 qualifies as an MVPD under the statutory and regulatory definitions. The Communications Act broadly defines an MVPD as:

> [A] person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-

[17] *See id.*

[18] *Preliminary Standstill Order*, 25 FCC Rcd at 3882 (emphasis added).

[19] *Id.*

> only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.[20]

Consistent with the sweeping intent of the program access provisions, Section 76.1000(e) of the Commission's Rules offers an even broader definition of an MVPD:

> 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, <u>but are not limited to</u>, 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.[21]

Had Congress intended to limit the program access protections only to some multichannel distributors, but not others, it would have enacted a specific, limiting definition. Instead, it simply provided a non-exhaustive list of several types of video programming distributors that existed at the time – *i.e.*, twenty years ago.[22] Based on the plain language and any reasonable interpretation of these definitions, Sky Angel is an MVPD for purposes of the Commission's program access rules.

1. <u>Congress Intended for the Term "Multichannel Video Programming Distributor" to be Interpreted Broadly</u>.

Classifying Sky Angel as an MVPD, and therefore entitled to the protection of the program access rules, is consistent with Congress' intent when it created the program access regime. Congress enacted a statutory definition of MVPD open-ended in scope[23] and broad in its

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[20] 47 U.S.C. §522(13) (emphasis added).

[21] 47 C.F.R. §76.1000(e) (emphasis added).

[22] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, 2997 (1993) ("*1993 Program Access Order*") "[T]he list of multichannel distributors in the definition is not meant to be exhaustive . . .").

[23] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rulemaking, 8 FCC Rcd 194, fn. 13 (1992).

coverage[24] to provide the Commission the "flexibility"[25] necessary to encourage and protect new and emerging competition in the video programming market. Moreover, a broad interpretation of Congress' MVPD definition is in accord with the generally "broad and sweeping" terms of the Act's program access provisions[26] and the broad authority granted the Commission to enforce those provisions.[27]

Legislative history also supports a broad interpretation. For instance, the program access rules were created to ban vertically-integrated programmers "from unreasonably refusing to deal with <u>any</u> multichannel video distributor . . ."[28] In addition, the purpose of program access – ensuring competition[29] – is best served by a definition that does not pick and choose among MVPD competitors at the public's expense. Communications policy should avoid, whenever possible, giving some competitors special privileges not provided to other distributors, and parity in treatment among competing MVPDs furthers the goal of fostering a competitive marketplace.

A broad interpretation also properly anticipates and encourages the entry of new multichannel distributors into the marketplace. Because Congress' primary purpose in enacting the program access provisions was to open the video distribution market to new competitors,[30] it

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[24] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Notice of Proposed Rule Making, 7 FCC Rcd 8055, ¶ 42 (1992) ("*Program Carriage NPRM*") ("[T]he literal language of the 'multichannel video program distributor' definition is broad in its coverage . . .").

[25] *Id.*

[26] *NCTA v.* FCC, 567 F.3d 659, 664 (D.C. Cir. 2009) (concluding that the program access provisions were written in "broad and sweeping terms" and "should be given broad, sweeping application").

[27] *See, e.g., id.* at 665 ("Congress had a particular manifestation of a problem in mind, but in no way expressed an unambiguous intent to limit the Commission's power solely to that version of the problem.").

[28] S. Rep. No. 102-92, 1992 U.S.C.C.A.N. 1133, 1161 (1991) (emphasis added).

[29] *See id.* at 1160 (noting that Congress, in drafting the program access requirements, "focus[ed] on ensuring competitive dealings . . . between programmers and competing video distributors.").

[30] *See Implementation of Section 302 of the Telecommunications Act of 1996*, Second Report and Order, 11 FCC Rcd 18223, 18321 (1996) ("*Section 302 Order*") ("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."); Edward J. Markey, *Cable Television Regulation: Promoting Competition in a Rapidly Changing World*, 46 Fed. Comm. L.J. 1, 1-2 (1993-94) ("*Markey Law Journal Article*") ("The primary purpose of the 1992 Act is to promote the development of new competition in the delivery of video programming."). Rep. Markey was the "Chairman of the House Subcommittee on Telecommunications

would be unreasonable to "believe that Congress intended to create a competitive video marketplace by giving one competitor a regulatory option that would be unavailable to all others."[31] In fact, the wording of the program access law expressly "authorizes the Commission to adopt additional rules to accomplish the program access statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming."[32]

Significantly, the statutory provision which required the Commission to adopt program access rules is entitled "Minimum Contents of Regulations," which the Commission has inferred "to mean that Congress did not intend to limit the Commission to adopting rules only as set forth in that statutory provision."[33] As it has done in the past, the Commission must decline Discovery's request to narrow the program access rules' prohibition on discriminatory conduct by vertically-integrated programmers "by precluding certain competitive MVPDs from benefiting from the prohibition."[34] As is undisputed in this proceeding, Discovery is part of a large, vertically-integrated media conglomerate subject to the program access rules.[35]

2. The Non-Exhaustive List of Examples Does Not Limit the Definition of an MVPD.

Although the MVPD definition does not specifically list an "IPTV system" that requires a subscriber to use proprietary hardware to access the service's encrypted video programming as an example of an MVPD, the intentionally broad definition expressly notes that the list of

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and Finance and a principal author of the Cable Television Consumer Protection and Competition Act of 1992." *Id.* at 1.

[31] *Section 302 Order* at 18238 ("Indeed, it is because of the 1996 Act's expressed goal of promoting competition in all telecommunications markets, including the video market, that we believe Congress intended qualifying LECs and others to have the ability to offer open video services. Moreover, if one of the objectives of the open video option is to encourage new entrants, it should be available to all new entrants . . .").

[32] *Id.* at 18320 (internal quotations and citations omitted).

[33] *Id.*

[34] *2007 Program Access Order*, 22 FCC Rcd at 17841.

[35] *See In the Matter of News Corporation and The DIRECTV Group, Inc.*, 23 FCC Rcd 3265, 3300-01 (2008).

examples is "non-exclusive"[36] because the definition encompasses any entity that otherwise fits within the flexible definition of an MVPD.[37] In fact, the definition fails to specifically reference several types of video programming distributors now considered to be "traditional" MVPDs.[38] Moreover, the Commission has previously looked to congressional intent in finding that Congress' express reference to certain entities did not indicate an intent to exclude unnamed entities.[39] Congress' purpose in creating the program access regime was to increase competition and diversity in programming, increase the availability of programming, and spur the development of communications technologies in order to promote the public interest, convenience and necessity.[40] Because of this stated purpose, including its focus on new competition and technologies, Congress certainly did not intend for its non-exhaustive list of examples to restrict the class of entities entitled to the protection of the program access rules.

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[36] *See Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20301 (1996) ("*Section 302 Recon Order*") (agreeing "that the list of entities enumerated in [Section 602(13)] is expressly a non-exclusive list. Section 602(13) states that the term MVPD 'means a person such as, *but not limited to*, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service . . .") (emphasis in original); *1993 Program Access Order*, 8 FCC Rcd at 2997 ("[T]he list of multichannel distributors in the definition is not meant to be exhaustive . . .").

[37] *See* S. Rep. No. 102-92, 1992 U.S.C.C.A.N. at 1161 ("To encourage competition to cable, the bill bars vertically integrated . . . programmers from unreasonably refusing to deal with any multichannel video distributor . . .") (emphasis added). In the National Broadband Plan, the Commission defined MVPD without any reference to specific examples. *See Connecting America: The National Broadband Plan*, Appendix C (rel. Mar. 16, 2010). Moreover, in his law journal article, Rep. Markey did not recite the non-exhaustive list of MVPD examples in repeatedly referring to Congress' goal of increasing competition to cable operators. In fact, Rep. Markey never once used the term MVPD. *See Markey Law Journal Article*, 46 Fed. Comm. L.J. 1.

[38] *See* Department of Justice, *U.S., et al. v. Comcast Corp., et al.*, Competitive Impact Statement, Case 1:11-cv-00106, p. 10 (filed Jan. 18, 2011) ("*DOJ Competitive Impact Statement*") (noting that "traditional video programming distributors" include "cable overbuilders, also known as broadband service providers," and "telcos," neither of which are enumerated in the MVPD definition).

[39] *See Section 302 Order*, 11 FCC Rcd at 18235-36 (finding insignificant the fact that several revisions to the Act, as well as the legislative history, referred to common carriers or telephone companies but not non-LECs because, "given the 1996 Act's overall intent to open all telecommunications markets to competition, [the Commission did] not read the legislative history's focus on telephone companies to mean that Congress intended to deny all others the opportunity to use this new model for delivering video programming.").

[40] *See* 47 U.S.C. §548(a); *Markey Law Journal Article*, 46 Fed. Comm. L.J. at 2 ("In the face of such dramatic change, a fundamental goal of cable regulation must be to continue to foster competitive markets and combat monopolistic tendencies that have characterized cable television distribution as it has matured over the last ten to fifteen years. Only through competition will consumers realize the benefits of lower prices, innovation, and improved service.").

Regardless, any comparison of the enumerated services demonstrates that Sky Angel, for purposes of the program access rules, is no less an MVPD than one or more of the listed services, including a multichannel multipoint distribution service ("MMDS"), a direct broadcast satellite ("DBS") service, or a satellite master antenna television ("SMATV") system operator. Like these long-recognized MVPDs, Sky Angel relies on several common steps to aggregate and distribute programming. Programming is delivered to Sky Angel through multiple satellite uplinks and downlinks, which are controlled by Sky Angel. Sky Angel then encodes, bundles, and encrypts the programming, which it transmits by fiber it controls to its "headends" in New York City and Palo Alto, from which the programming is sent via IP technology through broadband Internet connections – not via the World Wide Web – to subscribers. Sky Angel subscribers cannot receive the programming without a proprietary set-top box provided and controlled by Sky Angel that they connect to a single television set. At all times, Sky Angel directly and remotely controls the set-top box for purposes ranging from periodic service and software updates to service termination. Sky Angel thus controls origination, distribution, and termination of all video programming offered by it, including through the set-top box.

Several MVPDs enumerated in the program access rules use similar transmission models, or otherwise have open transmission links accessible to any party that has specific end-user equipment. For example, a DBS system broadly distributes programming throughout the United States that is received, as with Sky Angel's channels, by any party that has the appropriate home equipment – in the case of DBS, a small satellite dish and the associated set-top box. In other words, DBS operators do not own or control a closed transmission path for the distribution of programming. Moreover, DBS systems do not provide the necessary return path, which is a telephone line owned and controlled by a carrier.[41]

[41] *See, e.g.*, http://support.directv.com/app/answers/detail/a_id/269/session/L3NpZC9yQnphTzFfag%3D%3D/p/447%2C992/r_id/104513/sno/0 (last viewed May 4, 2010).

Similarly, many SMATV systems receive video programming by one or more satellites, over-the-air, or by microwave antennas and then redistribute these signals to the various units of a housing complex or hotel. SMATV operators simply provide the final path in their services' distribution chains. As noted, Sky Angel provides and controls a unique transmission path for multiple aspects of its distribution chain, including the final path contained in the set-top box.

3. A Step-by-Step Analysis of the MVPD Definition Demonstrates Its Inclusion of Sky Angel.

The Bureau previously determined that the first standstill factor weighed against granting a temporary standstill because it found that Sky Angel had failed to analyze whether and how it meets the key elements of the "MVPD" definition.[42] In its Reply, which provided Sky Angel its first opportunity to address Discovery's unreasonably narrow interpretation of an MVPD, Sky Angel provided a detailed analysis regarding how it meets every element of the MVPD definition. An entity qualifies as an MVPD and its subscribers are protected under the program access rules so long as the entity (1) makes available for purchase, by subscribers or customers (2) multiple channels (3) of video programming.[43]

a. "Make Available for Purchase, by Subscribers or Customers."

Sky Angel is solely responsible for acquiring its programming and for every direct consumer contact aspect of its service. Sky Angel enters into contracts with programmers whereby it obtains the right to distribute their programming in return for payments made on a per-subscriber basis, it distributes this programming to subscribers based upon subscriber agreements with subscription fees, and Sky Angel directly handles all customer service aspects of its business. Because the critical factor in determining whether an entity makes video

[42] *Preliminary Standstill Order*, 25 FCC Rcd at 3882.

[43] As the Commission recently noted, "MVPDs include all entities that make available for purchase multiple channels of video programming." *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Further Notice of Inquiry, MB Docket No. 07-269, FCC 11-65, ¶ 10 (2011) ("*2011 Competition NOI*") (emphasis added).

programming "available" is direct contact with consumers,[44] Sky Angel clearly satisfies this element of the MVPD definition.

In attempting to read more into the "make available" portion of the MVPD definition than intended by Congress, Discovery has incorrectly asserted that Sky Angel "has no control over the quality or any other aspect of delivery" to its subscribers.[45] On the contrary, Sky Angel exercises total control – including quality control – over various transmission paths prior to its service connecting to the Internet, and also controls the final transmission path, which passes through the set-top box. Sky Angel has the ability, at all times, to interact directly with the set-top box from a remote location. Because its programming is securely encrypted, Sky Angel fully controls access to its service. Finally, as detailed below, total control over every portion of an entire transmission system is unnecessary to qualify as an MVPD, as evidenced by the fact that few long-recognized MVPDs own and exclusively control every transmission path within their distribution systems.

b. "Multiple Channels."

In the *Preliminary Standstill Order*, the Bureau appeared to question Sky Angel's "non-technical" interpretation of the term "multiple channels" to mean multiple programming networks. However, Sky Angel's interpretation of "multiple channels" is consistent with congressional intent and the Commission's own rules and precedent.[46] Congress never provided, either explicitly or by reference, a definition, let alone a technical definition, for any of the terms

[44] *See World Satellite Network, Inc. v. Tele-Communications, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 13242, ¶ 24 (1999); *Wizard Programming, Inc. v. Superstar/Netlink Group, L.L.C.*, Memorandum Opinion and Order, 12 FCC Rcd 22102, 22111 (1997).

[45] *See Standstill Opposition*, p. 15-16.

[46] *See Reply*, pp. 10-16.

in the MVPD definition, including "channels." Rather, Congress used the term "channels" in an everyday sense,[47] as it does with other potentially technical terms.[48]

Likewise, the Commission has consistently used the term "channels" in a non-technical sense to refer to multiple programming networks. For instance, in the Commission's recent annual video competition report, which discusses the program access rules at length,[49] Discovery Kids and other programming networks are commonly and repeatedly denoted as "channels":

> There are nearly 30 premium channels available, including National Geographic Channel, Disney Channel, Animal Planet, Discovery Channel, Cartoon Network, CNN, and HBO.[50]

Similarly, in adopting Section 79.1 of its rules – which expressly applies the same definition of MVPD as does the program access rules – the Commission consistently referred to channel to mean a source of video programming, independent of any transmission path or technical details, including:

> Under our rules, compliance is measured on a channel-by-channel basis, and thus the captioned programs will reflect the overall diversity of the many channels of programming now available. . . .[51]

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[47] *See* 47 U.S.C. §534(b)(6) ("CHANNEL POSITIONING. Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the local commercial television station is broadcast over the air . . . or on such other channel number as is mutually agreed upon by the station and the cable operator.") (emphasis added); 47 U.S.C. §543(b)(8)(A) ("A cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis.") (emphasis added); S. Rep. No. 102-92, 1992 U.S.C.C.A.N. at 1157 ("[T]here are certain major programmers that are more able to fend for themselves. It is difficult to believe a cable system would not carry the sports channel, ESPN, or the news channel, CNN.") (emphasis added); *id.* at 1158 (In concluding that vertical integration gives cable operators the incentive and ability to favor affiliated programmers, the Committee noted that an operator might give an affiliated programmer a "more desirable channel position") (emphasis added).

[48] *See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5298, 5356 (1999) ("'Transmission technology' is not a defined term in the Communications Act nor does the legislative history help to define its breadth. Rather, Congress appears to have used the phrase in the everyday sense in which it has been used in discussions of communications policy issues.") (emphasis added).

[49] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 47 C.R. 1, FCC 07-206, ¶¶ 195-201 (2009) ("*13th Annual Assessment*").

[50] *Id.* at ¶ 285. In addition, footnotes 746 and 748, among others, cite to MVPDs that refer to a programming network as a channel. ("Comcast reports that its family tier package includes the basic tier plus selected additional channels such as PBS Kids Sprout, Disney Channel, Toon Disney, Nickelodeon, and Discovery Kids.") (citations omitted.).

> Compliance with our closed captioning requirements will be measured on a channel-by-channel basis . . . [B]y measuring compliance on a channel-by-channel basis, a network will be able to set budgets and hire staff based on the requirements applicable for its own programming, without having to factor in the efforts of others . . . We believe that it is important to increase the availability of closed captioning on each channel of video programming over the transition period to provide persons with hearing disabilities a wide range of programming choices.[52]

The express language of Section 79.1 also uses "channel" in a non-technical sense in creating exemptions for video programming providers, who are not distributors at all and clearly do not offer any sort of transmission path to a residence or consumer:

> No video programming provider shall be required to expend any money to caption any video programming if such expenditure would exceed 2% of the gross revenues received from that channel . . .[53]

> No video programming provider shall be required to expend any money to caption any channel of video programming producing annual gross revenues of less than $3,000,000 during the previous calendar year . . .[54]

In the *Preliminary Standstill Order*, the Bureau also noted that the definitions of "channel" contained in the Act and the Commission's rules "appear" to include a transmission path as a necessary element.[55] However, 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 . . ."[56] In other words, the sole statutory definition of "channel" expressly limits its application to a cable system. Similarly, as noted by the Bureau in the *Preliminary Standstill*

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[51] *Closed Captioning and Video Description of Video Programming*, Report and Order, 12 FCC Rcd 3272, 3278 (1997).

[52] *Id.* at 3309; *see id.* at 3276-77 ("[A]s the number of channels of video programming continues to increase . . ."); *id.* at 3391 ("[Public, educational and governmental] channels generally operate on very limited budgets . . .").

[53] 47 C.F.R. §79.1(d)(11).

[54] 47 C.F.R. §79.1(d)(12); *see* 47 C.F.R. §79.1(f)(1) ("A video programming provider, video programming producer or video programming owner may petition the Commission for a full or partial exemption from the closed captioning requirements. Exemptions may be granted, in whole or in part, for a channel of video programming . . .") (emphasis added).

[55] *Preliminary Standstill Order*, 25 FCC Rcd at 3883.

[56] 47 U.S.C. §522(4) (emphasis added).

Order, the Commission's rules define each cable channel class as a "signaling path provided by a cable television system . . ."[57] The only other regulatory definitions of "channel" cited by the Bureau relate solely to over-the-air broadcast television channels.[58] Because various types of video programming distributors, each with its own unique hardware and distribution methods, are both specifically and traditionally classified as MVPDs, and because a broadcast television station is not an MVPD, no definition of channel expressly limited to a cable system or a broadcast television signal can (or should) rationally be used to limit what constitutes an MVPD.

In fact, "channels" cannot be defined by any reference that is expressly technology-specific. Congress did not intend for the program access protections to be limited to a specific type of technology, so it "did not differentiate among the technologies used by competitors in the program access provisions . . ."[59] Rather, 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."[60] Further, if Congress considered any type of technology in creating the program access requirements, it was simply non-cable technology because its intent was to encourage competition to monopolistic cable operators from alternate video distribution

[57] 47 C.F.R. §76.5(r)-(u) (emphasis added).

[58] *See Preliminary Standstill Order*, 25 FCC Rcd at 3883, n. 40 (citing to 47 C.F.R. §§73.603, 73.606, 73.681 and 73.682(a)(1)).

[59] *Implementation of Cable Television Consumer Protection and Competition Act*, 9 FCC Rcd 1902, 1950 (1994); *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.") (emphasis added); Telecommunications Act of 1996 Conference Report, S. Rep. 104-230 at 172 (Feb. 1, 1996) ("Recognizing that there can be different strategies, services and technologies for entering video markets, the conferees agree to multiple entry options to promote competition, to encourage investment in new technologies and to maximize consumer choice of services that best meet their information and entertainment needs.").

[60] 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 2010 Program Access Order*, 25 FCC Rcd at 754.

services.[61] Accordingly, interpreting "channels" in a way that narrows the definition to include only cable systems, or to apply to only certain technologies, would impermissibly restrict the intended breadth of the MVPD definition and, in effect, exclude new entrants in favor of incumbents.

Instead, because Congress did not define "channel" as it was used in the MVPD definition, the only reasonable and non-arbitrary way to interpret the term for purposes of the program access rules is to use the term in a manner consistent with the purpose of the specific legislative provision. The clear intent of the program access regime is to increase competition and encourage new communications technologies in order to protect a consumer's ability to access one or more programming networks – in other words, The Discovery Channel or other programming "channels" – from its preferred distributor.[62]

Moreover, interpreting the term "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."[63] In other words, from a state-of-the-art technical perspective, many cable operators now transmit only a single "channel" to subscribers rather than simultaneously

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[61] *Section 302 Order*, 11 FCC Rcd at 18321 ("The legislative history of Section 628 demonstrates Congress' deep concern with the cable industry's 'stranglehold' over programming through exclusivity and the market power abuses exercised by cable operators and their affiliated programming suppliers that deny programming to non-cable technologies."); *id.* at 18322 ("As Congress recognized in enacting the program access provisions of the 1992 Cable Act, cable operators have the incentive to impede the development of other technologies into a robust competitor.").

[62] *See* 47 U.S.C. §548(a) ("The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas no currently able to receive such programming, and to spur the development of communications technologies.").

[63] *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).

transmitting "multiple channels" to every viewer.[64] The subscriber selects which programming channel to view, but only a single channel of "electromagnetic frequency spectrum" is being transmitted at any one time.

Clearly, the sole statutory and limited number of regulatory definitions that "appear" to require a transmission path as a necessary element of a "channel" are irrelevant to interpreting the definition of an MVPD. Moreover, Commission precedent unequivocally establishes that an entity need not operate the entire distribution system, or even a portion of it, to quality as an MVPD for purposes of the program access rules. Specifically, in concluding that an open video system ("OVS") video programming provider "clearly constitutes" an MVPD, the Commission rejected the argument that programming providers cannot qualify as MVPDs because they do not operate a distribution vehicle, finding such an argument "to be unsupported by the plain language of Section 602(13), which imposes no such requirement."[65] The Commission confirmed its prior holding in this respect in response to a petition requesting reconsideration of an order which defined OVS video programming providers as MVPDs subject to the obligations and benefits of the program access rules. In seeking reconsideration, the petitioner had argued that the Commission's decision was unsupported by the Act and prior policy because "the statutory examples of MVPDs all differ from VPPs in at least one material respect: The listed MVPDs all operate the vehicle for distribution (cable, MMDS, DBS, etc.) of their programming, whereas OVS video programmers distribute their product on a common platform . . ."[66]

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[64] *See 13th Annual Assessment*, 47 C.R. 1, FCC 07-206, ¶ 276 ("Rather than transmitting all available channels to viewers at once . . .") (emphasis added).

[65] *Section 302 Recon Order*, 11 FCC Rcd at 20301-02 (citing with approval a comment stating that "**the fact that most open video system programming providers will use another party's network has no relevance under Section 602(13)**") (emphasis added).

[66] Rainbow Programming Holdings, Inc., *Petition for Reconsideration of Rainbow Programming Holdings, Inc.*, CS Docket No. 96-46, p. 18 (filed Jul. 3, 1996); *see Telephone Company-Cable Television Cross-Ownership Rules*, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 5069, ¶¶ 15-16 (1992) ("The term 'transmission' is not defined in the Cable Act and the intended scope of the definition is ambiguous . . . We believe that it is more consistent with Congressional intent to interpret the term 'transmission' as requiring active participation in the

c. "Video Programming."

Finally, it is beyond dispute that the multiple programming channels that Discovery continues to deny Sky Angel's customers constitute "video programming" subject to the program access rules. The Act defines video programming as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."[67] Not only does Sky Angel's service distribute programming of a higher quality than a typical over-the-air standard definition television station,[68] it delivers picture and sound quality as good as or better than satellite and analog or digital cable.[69]

Discovery has argued that video delivered via a broadband Internet connection does not qualify as "video programming." Sky Angel already has demonstrated the faulty logic behind this assertion,[70] and the *Preliminary Standstill Order* in no way questioned whether the video content distributed by Sky Angel qualifies as video programming. Moreover, both the FCC and the Department of Justice ("DOJ") have recently defined "video programming" as:

> [P]rogramming provided by, or generally considered comparable to programming provided by, a television broadcast station or cable network, <u>regardless of the medium or method used for distribution</u> . . .[71]

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selection and distribution of video programming."); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4834 (2002) ("The Commission has previously interpreted the term 'transmission' in the cable services definition 'as requiring active participation in the selection and distribution of video programming,' an interpretation that the D.C. Circuit has upheld.").

[67] 47 U.S.C. §522(20).

[68] Sky Angel subscribers need a broadband connection speed of at least 900 kbps, with 1.5 Mbps recommended, while "[t]elevision-quality Internet video service requires a high-speed broadband connection of about 300 kbps." *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd 6005, 6054 (2001). Even a year ago, 95% of Americans had broadband access capable of supporting download speeds of at least 4 Mbps, and, by 2013, it is likely that 90% of the country will have access to peak download speeds of more than 50 Mbps. *See Broadband Plan*, p. 20-21.

[69] *See* www.skyangel.com/About/faq/general_faq.aspx?aid=&DNIS=&rpid=#

[70] *See Reply*, pp. 17-18 (explaining that Discovery relied upon decisions from 10 or more years ago, when broadband Internet was in its infancy, and that Discovery's cited precedent refers to "web-based" video, not IP-formatted video delivered in part through the use of a broadband Internet connection).

[71] *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 25 FCC Rcd 4328, 4358 (2011) ("*Comcast Order*") and Department of Justice, *U.S. v. Comcast Corp., et al.*, [Proposed] Final Judgment, Case 1:11-cv-00106, p. 7 (Jan. 18, 2011) ("*DOJ [Proposed] Final Judgment*") (emphasis added).