

Discovery also has implied that any programming that is “streamed” cannot fit within the definition of “video programming.” Streaming video, however, is a technological innovation increasingly being used to solve current bandwidth constraints. For example, the Commission has noted that, in order to address capacity problems, cable operators are turning to Switched Digital Video, which “combines the bandwidth efficiency of compressed digital content with switching technology to enable content to be streamed to viewers only upon request.”⁷²

4. The Public Interest Requires That Sky Angel Subscribers and Potential Subscribers Be Protected by the Program Access Rules.

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 broadband technology (consistent with the FCC’s National Broadband Plan) 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. As the Commission has recognized, permitting new types of video programming distributors to obtain the benefits of the program access rules “can provide the competitive benefits that Congress sought to achieve: market entry by new service providers, enhanced competition, streamlined regulation, investment in infrastructure and technology, diversity of programming choices and increased consumer choice.”⁷³

Importantly, new and emerging competitors are those most in need of the protections afforded by the program access rules.⁷⁴ If cable operators, incumbent MVPDs and their affiliates, such as Discovery, are permitted to withhold programming from new entrants in the

⁷² *13th Annual Assessment*, 47 C.R. 1, FCC 07-206, ¶ 276 (emphasis added) (adding that “[t]he availability of open, IP-based architecture has catalyzed the development of reliable, cost-effective, and scalable solutions to this inefficiency.”).

⁷³ *Section 302 Order*, 11 FCC Rcd at 18227.

⁷⁴ *Markey Law Journal Article*, 46 Fed. Comm. L.J. at 3 (“By obstruction and, in some cases, denying access to programming, no new transmission technology could effectively compete with cable.”).

video distribution market, who likely have a small or no customer base, “they can significantly impede the ability of new entrants to compete effectively in the marketplace.”⁷⁵ This result would be in stark contrast to that intended by Congress.⁷⁶

The emergence of competition from distributors such as Sky Angel is particularly important because “[e]ntry into traditional video programming distribution is expensive, and new entry is unlikely in most areas.”⁷⁷ As a result, “Internet-based offerings are likely the best hope for additional video programming distribution competition.”⁷⁸ Without this new competition, traditional video distributors will continue to benefit from an “industry with limited competition and increasing prices.”⁷⁹ As a consequence, imposing unreasonable and unintended restrictions on a new entity such as Sky Angel “that can benefit from the prohibition will limit competition in the video distribution market and will result in no discernible public interest benefits.”⁸⁰

Sky Angel recognizes the practical limitations that may prevent the Commission from providing the full benefits of its program access rules to every new video programming distributor. For instance, the Commission may justifiably hesitate to apply the program access protections to the operator of a website that offers unencrypted video programming via a publicly

⁷⁵ *2007 Program Access Order*, 22 FCC Rcd at 17820; see Department of Justice, *U.S., et al. v. Comcast Corp., et al.*, Complaint, Case 1:11-cv-00106, ¶ 52 (filed Jan. 18, 2011) (“*DOJ Complaint*”) (“The impact of the JV on emerging competition from the OVDs is extremely troubling given the nascent stage of OVDs’ development and the potential of these distributors to significantly increase competition through the introduction of new and innovative features, packaging, pricing, and delivery methods.”).

⁷⁶ See *Markey Law Journal Article*, 46 Fed. Comm. L.J. at 4 (“The Cable Act ensures that competitors have access to popular cable programming that they had been denied in the past.”); *Terrestrial Rules Order*, 25 FCC Rcd at 153-54, ¶ 13 and nn. 33-34 (noting that the program access rules are intended to combat the “imbalance of power between incumbent cable operators and their multichannel competitors” and that “vertically integrated cable programmers have the incentive and ability to favor cable operators over other video distribution technologies”) (emphasis added).

⁷⁷ *DOJ Complaint*, ¶ 9.

⁷⁸ *Id.*

⁷⁹ *DOJ Competitive Impact Statement*, p. 28 (“Over the last decade, Comcast and other traditional video distributors benefited from an industry with limited competition and increasing prices, in part because successful entry into the traditional video programming distribution business is difficult and requires an enormous investment to create a distribution infrastructure such as building out wireline facilities or obtaining spectrum and launching satellites. Accordingly, additional entry into wireline or DBS distribution is not likely in the foreseeable future.”).

⁸⁰ *2007 Program Access Order*, 22 FCC Rcd at 17842.

accessible website. The extremely limited investment required for this type of service, as well as the lack of proprietary equipment and control by the distributor, could unleash a flood of regulatory consequences. This potential consequence must not, however, permit a vertically-integrated programmer such as Discovery to impermissibly withhold its programming from a service such as Sky Angel, which simply uses a broadband Internet connection as one component of its distribution system. As previously detailed to the Commission,⁸¹ Sky Angel's system requires an extensive amount of hardware and technology to capture, prepare, and distribute programming to its subscribers. In addition, in order to receive the service, a proprietary set-top box must be connected to each television set intended to receive Sky Angel's service. This system is in stark contrast to a web-based video provider, which simply needs to access a server and create a publicly available website. Accordingly, a Commission finding that Sky Angel is an MVPD for purposes of the program access rules would only permit a limited number of additional entities to claim similar rights while still advancing Congress' goal of increased competition.

The Commission also must take into account the potential detrimental effects to the public interest that could arise if Sky Angel is prohibited from obtaining the benefits of the program access rules. Sky Angel is just one of many innovators seeking to deliver video programming to viewers through means not expressly identified in the Communications Act,⁸² and Sky Angel's distribution methodology is nearly identical to "traditional" MVPDs, particularly from the perspective of a consumer. Any ruling that denies the Commission authority with respect to Sky Angel also will deny the Commission authority as to many other innovative video programming distributors – or traditional cable systems – that may use a

⁸¹ See *Complaint*, Attachment A.

⁸² See, e.g., David Hatch, *Panel Explores Overhaul of Video Program Access Rules*, Congress Daily (Apr. 28, 2010); Harold Feld, *Bad News For Over-The-Top Video Providers Last Week*, Public Knowledge (Apr. 25, 2010) (available at www.publicknowledge.org/node/3022).

broadband Internet connection as a link in their distribution chains.⁸³ In turn, this would undermine the Commission's recent efforts to "facilitate competition in the video distribution market" by eliminating other alleged loopholes to application of the program access rules.⁸⁴

Finally, 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, Congress clearly intended for the program access provisions to apply to all present and future MVPDs.⁸⁵ Otherwise, vertically-integrated 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.⁸⁶

B. Discovery Unlawfully Discriminated Against Sky Angel.

A vertically-integrated programmer's "unreasonable refusal to sell" constitutes non-price discrimination in violation of the program access rules.⁸⁷ By unjustifiably withholding its programming in contravention of the program access rules and the parties' Affiliation Agreement, Discovery unreasonably refused to sell its programming to Sky Angel. Such a

⁸³ For instance, a cable system that offers Internet access to its cable subscribers may be able to sidestep various Commission rules designed to protect consumers that apply to programming on cable systems or even to MVPDs, but not as clearly to other types of video distributors. Assuming the system has the necessary copyright licenses and programming agreements, what had been deemed a cable system may choose instead to distribute its programming to a subscriber's home via the Internet or simply "re-classify" its last-mile connection as a broadband connection.

⁸⁴ See *Terrestrial Rules Order*, 25 FCC Rcd at 749-750.

⁸⁵ See *First Program Access Order*, 8 FCC Rcd at 3365 ("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.").

⁸⁶ See *Markey Law Journal Article*, 46 Fed. Comm. L.J. at 1-2 ("The convergence of the computer chip, the laser and fiber optics, digitization, and satellites are revolutionizing the telephone, cable, and broadcasting industries and driving our society towards a multimedia future that most of us can dimly imagine.") (emphasis added).

⁸⁷ See *First Program Access Order*, 8 FCC Rcd at 3412 ("[W]e believe that one form of non-price discrimination could occur through a vendor's 'unreasonable refusal to sell,' including refusing to sell programming to a class of distributors . . .").

discriminatory act, by itself, also constitutes an unfair method of competition or unfair or deceptive act.⁸⁸

Sky Angel clearly competes with cable operators, DBS providers, and other MVPDs that distribute Discovery programming. Sky Angel's nationwide service makes available for purchase approximately 80 linear channels of programming, including many channels identical to those being carried by national DBS providers and the myriad cable systems carrying Discovery programming. As noted, subscribers access Sky Angel's service by connecting a set-top box directly to their television sets. Accordingly, to a consumer, Sky Angel is functionally identical to traditional satellite and cable video distribution services. Moreover, both the Commission and DOJ have recently concluded that even services dissimilar to Sky Angel, which simply deliver non-linear, web-based video content to consumers' television sets, also directly compete with cable and satellite operators.⁸⁹ In doing so, the Commission and DOJ noted that cable operators have recognized this direct competition and the threat posed by it,⁹⁰ and therefore

⁸⁸ See *id.* at 3372 (“The provisions of Section 628(c) that follow this general prohibition make it clear that certain types of exclusive contracting, undue influence among affiliates, and discriminatory sales practices are to be treated as unfair methods of competition or unfair or deceptive acts.”) (emphasis added); *id.* at 3373 (“Neither the record of this proceeding nor the legislative history offer much insight into the types of practices that might constitute a violation . . . beyond those more specifically referenced in Section 628(c).”).

⁸⁹ See *DOJ Competitive Impact Statement*, p. 12 (“The relevant product market affected by this transaction is the market for timely distribution of professional, full-length video programming to residential customers (‘video programming distribution’) . . . The market for video programming distribution includes both MVPDs and OVDs.”); *id.* at 20 (“Because OVDs today affect MVPDs’ decisions, they are appropriately treated as participants in the market.”); *Comcast Order*, FCC 11-4, ¶ 86 (“[W]e find that OVDs pose a potential competitive threat to Comcast’s MVPD service, and that the Applicants therefore will have an incentive to take actions to hinder that competition.”); *id.* at ¶ 41 (“[W]e will include online video distributors as potential competitors into the MVPD services markets.”).

⁹⁰ See *Comcast Order*, ¶ 85 (“[T]he Applicants’ internal documents and public statements demonstrate that they consider OVDs to be at least a potential competitive threat . . . The record also contains NBCU e-mails and documents showing that many of the other cable companies are similarly concerned about the OVD threat and that NBCU feels pressure to avoid upsetting those companies with respect to any actions it might take regarding the online distribution of its content.”); *DOJ Competitive Impact Statement*, p. 19 (“Many internal documents reflect Comcast’s assessment that OVDs are growing quickly and pose a competitive threat to traditional forms of video programming distribution.”); *id.* at 20 (“Comcast’s and other MVPDs’ reactions to the emergence of OVDs demonstrate that they view OVDs as a future competitive threat . . .”); *DOJ Complaint*, ¶ 36 (“Comcast and other MVPDs recognize the impact of OVDs. Their documents consistently portray the emergence of OVDs as a significant competitive threat.”).

have an economic incentive to inhibit newly emerging forms of competition through the withholding of programming.⁹¹

Although Sky Angel believes it is well-settled that a claim of unlawful non-price discrimination need not be based upon differential treatment of “similarly-situated” competing distributors, it will briefly address this issue because of Discovery’s contention to the contrary. Commission precedent makes clear that the similarly-situated comparison only applies to allegedly discriminatory rates or other terms set forth in programming agreements.⁹²

Significantly, the simple act of refusing to sell programming to an entire “class” of MVPDs is a form of non-price discrimination,⁹³ which clearly demonstrates that comparisons with “similarly-situated” competitors are unnecessary in proceedings involving a refusal to sell.

Discovery failed utterly to provide a reasonable justification for its withholding of programming from Sky Angel in violation of the Affiliation Agreement and the Commission’s

⁹¹ See *Comcast Order*, ¶ 84 (“[W]e are unpersuaded by the Applicants’ economic study that purports to show that they would have no economic incentive to withhold programming from OVDs after this transaction.”); *DOJ Competitive Impact Statement*, p. 23 (“Unlike a stand-alone programmer, Comcast’s pricing and distribution decisions will take into account the impact of those decisions on the competitiveness of rival MVPDs. As a result, Comcast will have a strong incentive to disadvantage its competitors by denying them access to valuable programming or raising their licensing fees above what a stand-alone NBCU would have found it profitable to charge.”); *id.* at 23-24 (“Comcast would benefit from weakening its MVPD rivals.”); *DOJ Complaint*, ¶ 46 (“[E]stablished distributors, such as Comcast, view OVDs as a growing competitive threat and have taken steps to respond to that threat.”); *id.* at ¶ 54 (“Comcast has an incentive to encumber, through its control of the JV, the development of nascent distribution technologies and the business models that underlie them by denying OVDs access to NBCU content or substantially increasing the cost of obtaining such content.”).

⁹² See *First Program Access Order*, 8 FCC Rcd at 3401 (“[I]n analyzing allegedly discriminatory conduct, we must consider not only whether the two distributors being compared are competitors, but also whether the differences in their programming contracts are justified under the statutory factors governing permissible price differentials.”) (emphasis added); *id.* (“First, we will compare the difference in programming prices (or terms or conditions) paid by (or offered to) the complainant and the competing distributor. Second, we will allow the programmer to justify the difference under the statutory factors by either (i) submitting a showing that one or more of the factors is involved and the price differential reflecting those factors is reasonable, or (ii) submitting an alternative contract for a more reasonably comparable, or more ‘similarly situated,’ distributor.”) (emphasis added); *id.* at 3402 (“We emphasize that an analysis of ‘similarly situated’ distributors may be useful in demonstrating that the vendor has offered comparable terms to distributors with similar attributes. However, additional evidence may be needed to establish that the magnitude of a price difference for a consistently applied term (such as a standard volume discount) is reasonably justified . . .”) (emphasis added). Similarly, *Turner Vision, Inc., et al. v. Cable News Network, Inc.* Memorandum Opinion and Order, 13 FCC Rcd 12610 (1998), which Discovery relies upon, concerned alleged price discrimination, not a refusal to sell programming.

⁹³ *First Program Access Order*, 8 FCC Rcd at 3412 (“[W]e believe that one form of non-price discrimination could occur through a vendor’s ‘unreasonable refusal to sell,’ including refusing to sell programming to a class of distributors . . .”) (emphasis added).

program access rules. In fact, prior to Sky Angel instituting a formal program access complaint proceeding before the Commission, Discovery did not even attempt to justify its threatened withholding. Discovery first threatened to withhold its programming from Sky Angel in December 2009. Over the next several months, the parties corresponded on various occasions by phone and in writing. During these communications, Discovery repeatedly refused to provide any justification for its threat beyond stating that it was “uncomfortable” with Sky Angel’s distribution methodology because it was “not satisfactory” and that the order to withhold its programming was “coming from on top.”⁹⁴ Despite Sky Angel’s repeated requests for additional information from Discovery, as well as its written offer to cooperate fully with Discovery to establish that its distribution methodology complied with the terms of the Affiliation Agreement, Discovery failed to offer any specific justification, reasonable or otherwise, until it filed pleadings in response to Sky Angel’s Complaint and Standstill Petition.

Significantly, Sky Angel had no reason to know the basis, if any, for Discovery’s threatened withholding, so Sky Angel had no opportunity to address these alleged concerns in a mutually satisfactory manner. In fact, as late as September 2009, Discovery asked Sky Angel to carry additional Discovery channels⁹⁵ (for additional compensation paid to Discovery, of course), which demonstrated Discovery’s continuing satisfaction with Sky Angel’s service. Moreover, the parties’ pre-contract interactions, as well as the express language of the Affiliation Agreement, prevented Sky Angel from speculating as to what aspect of its service could give Discovery grounds to suddenly terminate the Affiliation Agreement, more than four years before it expired. Discovery conducted extensive due diligence into Sky Angel’s system before entering into the Affiliation Agreement, including: having its technical personnel carefully examine the nature of Sky Angel’s system; requiring a detailed, four page technical

⁹⁴ See *Complaint*, pp. 4-6.

⁹⁵ See *Complaint*, p. 3.

questionnaire of Sky Angel; and communicating with NeuLion, the provider of the technology underlying Sky Angel's system. The Affiliation Agreement itself, which expressly permits the distribution of Discovery's programming via IPTV technology and which provides a detailed definition of an "IP System" that is identical to Sky Angel's service, represents indisputable proof of Discovery's knowledge and full understanding of Sky Angel's distribution system. Discovery's subsequent claim that "Sky Angel's manner of distribution, as compared to what it described to discovery during the course of negotiations, presented a legal and business risk to Discovery,"⁹⁶ therefore is without merit, and should be summarily dismissed by the Bureau.

Once Sky Angel initiated this formal program access proceeding, Discovery was forced to attempt to better justify its threatened, and now actual, withholding of programming. At that point, Discovery, apparently realizing it could not reasonably claim that Sky Angel had somehow breached the Affiliation Agreement, began to argue that it had the contractual right to terminate the agreement because it was nothing more than an "experiment."⁹⁷ This also came as a surprise to Sky Angel because at no time had Discovery informed Sky Angel that it considered the agreement an experiment,⁹⁸ and the Affiliation Agreement makes no reference to an "experiment" or anything similar. Moreover, Discovery cannot reasonably claim that a written contract with a term of over seven years was a mere experiment, something recently confirmed when both the Commission and DOJ defined an "experimental deal" as a programming agreement with a term of only six months or less.⁹⁹ The fact that the Affiliation Agreement contains a termination clause also lends no support to Discovery's contentions. Applicable law

⁹⁶ *Answer*, p. 24.

⁹⁷ *See Answer*, pp. 5, 21-22.

⁹⁸ *See Sky Angel U.S., LLC, Emergency Request for Immediate Grant of Petition*, Declaration of Thomas Scott (filed Apr. 14, 2010).

⁹⁹ *See Comcast Order*, Appendix A, at 4357; *DOJ [Proposed] Final Judgment*, p. 4.

requires that terminations only be made in good faith,¹⁰⁰ and this type of clause does not reduce the term of an agreement for purposes of the Commission’s definition of an “experimental deal.”¹⁰¹ Regardless, despite Discovery’s focus on the terms of the Affiliation Agreement and alleged understanding of the parties, Sky Angel’s Complaint before the Commission stems from Discovery’s unreasonable and unjustified withholding of its programming in violation of the program access rules, not from the terms of the agreement.

Discovery also attempts to justify the impermissible withholding of its programming by contending that it is “not unlawfully discriminatory for Discovery to decline to allow Sky Angel to distribute its programming services in a manner that is not permitted for any other distributor of those services.”¹⁰² Specifically, Discovery claims that “[n]o other distributor of Discovery’s programming networks uses the Internet as the distribution path to end users. And no other distributor of Discovery’s programming networks advertises, as Sky Angel does, that a subscriber may access its service wherever it can acquire a broadband Internet connection.”¹⁰³ As confirmed by recent developments, these statements by Discovery are false.¹⁰⁴

For instance, Discovery permits DISH Network to make ten of Discovery’s programming channels available to its millions of subscribers over the Internet. Last year, DISH launched the first “true TV Everywhere” offering, “giving DISH Network subscribers the ability to watch all of their live and recorded television programs on compatible smartphones, tablets and

¹⁰⁰ See *Complaint*, p. 7.

¹⁰¹ See *Comcast Order*, Appendix A, at 4357, n. 4 (“The fact that an agreement includes termination provisions, including termination for convenience, shall not be deemed to reduce the term of the agreement for purposes of this definition.”).

¹⁰² See *Answer*, p. 26.

¹⁰³ *Id.* at 27-28.

¹⁰⁴ Sky Angel’s concurrently filed *Motion for Sanctions* details additional assertions made by Discovery that, at a minimum, are no longer accurate, and perhaps were deliberately false when first made.

laptops.”¹⁰⁵ In other words, for no additional monthly fees, DISH customers may “enjoy their TV anywhere, anytime on a variety of popular devices”¹⁰⁶ so long as they “can connect to high-speed Internet or over a 3G cellular data plan.”¹⁰⁷ “Unlike mobile viewing from cable and telcos that limit access to select programs, [DISH’s] TV Everywhere service gives consumers 24 x 7 access to all of the live and recorded content included with their DISH Network programming subscription.”¹⁰⁸ Moreover, a DISH subscriber now has the added benefit of being able to watch one channel of programming from a remote location, via the Internet, while someone else watches different programming within the subscriber’s home.¹⁰⁹ DISH currently carries ten Discovery-owned networks, three of which – Discovery Channel, TLC, and HD Theater – are included in the “DISH America” package, DISH’s least expensive programming package.¹¹⁰

Other large MVPDs that carry Discovery programming also use the Internet to distribute programming to subscribers. For instance, Time Warner Cable (“TWC”) now offers a free iPad app that allows its subscribers to watch more than 70 channels of “live TV” (*i.e.*, linear channels), including ten Discovery channels, on their mobile iPad devices.¹¹¹ Similarly,

¹⁰⁵ *DISH Network Introduces America’s First True TV Everywhere Offering*, DISH Network L.L.C. (Nov. 18, 2010) (“*DISH Press Release*”) (available at <http://dishnetwork.mediaroom.com/index.php?s=8778&item=19745>).

¹⁰⁶ *Id.*

¹⁰⁷ See www.dishnetwork.com/tveverywhere/whatistveverywhere/.

¹⁰⁸ *DISH Press Release*.

¹⁰⁹ See www.dishnetwork.com/faq/default.aspx?Category=DISH%20Remote%20Access/.

¹¹⁰ See www.dishnetwork.com/packages/comparisonguide/default.aspx. DISH has even incorporated its Slingbox technology into its leased set-top boxes. See www.dishnetwork.com/tveverywhere/vip922/default.aspx; Joint Comments of DISH Network L.L.C. and EchoStar Technologies L.L.C., MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, p. 3 (filed Jul. 13, 2010) (“Using a subscriber’s broadband connections at home and away, Slingbox was the first to unshackle the viewer from the living room television, while still allowing her to get the full benefit of her MVPD subscription. EchoStar has also recently introduced the ViP® 922 – the first high definition digital video recorder (‘HD DVR’) that incorporates built-in place-shifting technology.”).

¹¹¹ See www.timewarnercable.com/neowpa/learn/cable/TWCableTV/TWCableTV_iPad.html. In addition, TWC plans to deliver its entire video programming lineup to customers with Sony’s Internet-connected Bravia HDTVs later this year, at which time TWC customers “will be able to access programming, delivered over Internet protocol . . .” Todd Spangler, *CES: Sony Plans IPTV Hookup With Time Warner Cable*, *Multichannel News* (Jan. 6, 2011) (available at www.multichannel.com/article/print/461932-CES_Sony_Plans_IPTV_Hookup_With_Time_Warner_Cable.php).

Cablevision's free iPad app allows its subscribers to access every channel in their cable TV package, including multiple channels of Discovery programming, on their mobile iPad devices.¹¹² These innovative new services have proved wildly popular. By late April, TWC's iPad app had already been downloaded 360,000 times, and Cablevision's iPad app was downloaded 50,000 times within five days after its introduction.¹¹³

Although these Internet-based services are designed to be restricted to subscribers' home WiFi networks, this does not necessarily mean that they are restricted to subscribers' homes. Particularly in urban areas and multi-dwelling housing units (*e.g.*, condo and apartment buildings), a WiFi signal is simultaneously available in numerous homes, and the reach of WiFi signals will only continue to grow. For instance, researchers at Rice University recently developed a technology that extends the range of WiFi signals from a few hundred feet to over a mile.¹¹⁴ Moreover, unlike Sky Angel, which restricts its service to proprietary set-top boxes and which charges subscribers (and pays programmers) on a per-set-top box basis, the iPad services allow the streaming of live programming to any number of mobile devices. Nevertheless, Discovery permits giant cable providers to distribute its programming over the Internet while denying program access to tiny Sky Angel.¹¹⁵

This trend of utilizing IPTV technology and broadband Internet connections for the distribution of video programming by MVPDs continues to expand at such a rate that this

¹¹² See http://optimum.custhelp.com/app/answers/detail/a_id/2698/kw/ipad/related/1. Comcast also has plans to stream live TV to iPads and other tablet computers. See Dawn C. Chmielewski, *CES: Comcast to Stream Live TV to Apple's iPad*, Los Angeles Times (Jan. 5, 2011) (available at <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/01/comcast-to-stream-live-tv-to-apples-ipad.html>).

¹¹³ See Darrell Etherington, *Cable Company iPad Apps Are Killing It*, GigaOM (Apr. 28, 2011) (available at <http://gigaom.com/apple/cable-company-ipad-apps-are-killing-it/>).

¹¹⁴ See Nate Anderson, *Extending WiFi to One Mile, Thanks to Empty TV Channels*, Ars Technica (Apr. 27, 2011) (available at <http://arstechnica.com/tech-policy/news/2011/04/extending-wifi-to-one-mile-thanks-to-empty-tv-channels.ars>).

¹¹⁵ See *2007 Program Access Order*, 22 FCC Rcd at 17832-33 ("We agree that vertically integrated cable programmers may have an even greater economic incentive to withhold programming from these recent entrants in the video marketplace. Because recent entrants have minimal subscriber bases at this time, the costs that a cable-affiliated programmer would incur from withholding programming from recent entrants are negligible.").

method of distribution likely will become the industry norm within a few years.¹¹⁶ As the Commission has recognized, local exchange carriers are increasingly utilizing IPTV technologies and Internet distribution.¹¹⁷ For instance, subscribers obtain AT&T's U-verse TV service by connecting a set-top box directly to a high speed Internet connection.¹¹⁸ As a result, the Bureau must not give any credence to Discovery's attempts to differentiate an IPTV service such as U-Verse TV from Sky Angel by incorrectly using the term "Internet" to imply that Sky Angel is a web-based video distributor when, in reality, Sky Angel simply uses a broadband Internet connection, not the World Wide Web, as one path in its distribution system.¹¹⁹

In addition, the major cable operators have started using DOCSIS 3.0 to develop a services overlay to put all IP services, including video, into a common provisioning and management system, and thereby distribute video programming over the "Internet."¹²⁰ Recently, Comcast announced that it will start testing a new video-delivery technology at the Massachusetts Institute of Technology which will allow students to watch live TV on any computer or TV that can connect to the Internet over the local campus network, without a cable connection.¹²¹ Moreover, major cable companies, including Comcast and TWC, are actively

¹¹⁶ Notably, the Commission recently proposed IP as the communication protocol between the AllVid adapter and navigation devices because "IP is the *de facto* standard protocol for data transmission, and current and next-generation audio-visual equipment is capable of handling IP communication." *Video Device Competition, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Notice of Inquiry, 25 FCC Rcd 4275, 4284 (2010).

¹¹⁷ See *13th Annual Assessment*, 47 C.R. 1, FCC 07-206, ¶¶ 131-34 (citing Verizon, AT&T, BellSouth and Qwest).

¹¹⁸ 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.").

¹¹⁹ An IPTV operator such as Sky Angel, which simply uses a broadband Internet connection as a conduit to distribute encrypted video programming to a set-top box, cannot be considered the functional equivalent of a web-based video provider, which uses a website to make video publicly available to any computer terminal able to access the World Wide Web. See *Reply*, pp. 26-27.

¹²⁰ See, e.g., Jeff Baumgartner, *Comcast Forges 'Excalibur' for IPTV* (Oct. 28, 2009) (available at http://www.lightreading.com/document.asp?doc_id=183740&site=lr_cable&print=yes).

¹²¹ See Jessica E. Vascellaro, *Comcast Tests Tech Overhaul*, *The Wall Street Journal* (May 26, 2011) ("The company will expand testing to Comcast employees later this year, allowing them to watch live programming via a small box or another device that can connect to the Internet like a computer, tablet or Microsoft Corp.'s Xbox

considering the possibility of using Internet video to sell programming to subscribers outside their cable footprint.¹²² Sky Angel will be interested to see if Discovery begins to withhold its programming from 20 million Comcast subscribers should Comcast pursue this strategy.¹²³ Discovery certainly has not withheld its programming from 13 million DISH subscribers.

Discovery also cannot reasonably differentiate Sky Angel's service by noting that it is portable. In attempting to differentiate Sky Angel due to its service's potentially portable design, Discovery variously describes Sky Angel's service as "multilocation,"¹²⁴ as being accessible from "multiple locations,"¹²⁵ and as allowing "the same subscriber [to use it] in multiple locations."¹²⁶ However, contrary to Discovery's implications, consumers cannot simultaneously access Sky Angel's service from various locations as they could with a web-based video distributor like Hulu or YouTube. Sky Angel subscribers can only access the service at one location at any single point in time. Sky Angel subscribers pay fees on a per-set-top box basis, and they cannot access Sky Angel without the set-top box.

Significantly, a DISH subscriber has the ability to receive Discovery programming over the Internet from any broadband connection anywhere within the United States. TWC and Cablevision subscribers may receive Discovery programming over the Internet anywhere within

gaming console in their homes.") (available at http://online.wsj.com/article/SB10001424052702304066504576345330554958642.html?mod=ITP_marketplace_0).

¹²² See *id.* ("The new technology could enable Comcast to deliver video service to any customer with an Internet connection, regardless of whether they live in an area covered by Comcast's cable system."); Steve Donohue, *Comcast's Over-the-Top Dilemma*, Light Reading Cable (Apr. 27, 2011) (available at www.lightreading.com/document.asp?doc_id=207211&site=lr_cable); Ryan Lawler, *Why Time Warner Cable Is Cutting Its Own Cord*, The Street (Jan. 7, 2011) (available at www.thestreet.com/print/story/10966875.html).

¹²³ Sky Angel also notes that Roku has been conducting trials with small cable operators that are testing its platform to market programming to subscribers outside the geographic reach of their networks. According to Roku CEO Anthony Wood, "[w]ithin 12 to 24 months we will see a traditional cable company go over the top." See Steve Donohue, *Boxee, Roku Predict Pay TV's Transformation*, Light Reading Cable (Apr. 26, 2011) (available at www.lightreading.com/document.asp?doc_id=207156&site=lr_cable&print=yes).

¹²⁴ See *Answer*, pp. 8, 10

¹²⁵ See *id.* at 11, 28.

¹²⁶ See *id.* at 7.

range of their WiFi signals.¹²⁷ Those large MVPDs offer true portability of Discovery programming to tens of millions of subscribers.¹²⁸ In addition, DirecTV, which is affiliated with Discovery and carries Discovery programming, provides portable systems for automobiles, recreational vehicles, and boats.¹²⁹

Sky Angel could provide additional examples of Discovery's discriminatory acts towards it, but believes that those mentioned above more than prove that Discovery permits the distribution of its programming via the Internet by various MVPDs, even though it continues to unlawfully withhold its programming from Sky Angel on the pretext that Sky Angel's limited use of a broadband Internet connection somehow presents legal and business risks and somehow violates the Affiliation Agreement, which expressly permits IPTV distribution. Clearly, Discovery no longer can validly claim (if it ever could): (1) that no other distributor of its programming uses an Internet-based service transportable among multiple locations; (2) that no other distributor advertises that its service may be accessed anywhere with a broadband Internet connection; or (3) that its networks are not a part of any TV Everywhere service.

¹²⁷ In addition, as Comcast's president of converged products Sam Schwartz recently stated, the company will begin testing a Internet distribution model because it "want[s] to deliver video everywhere people want to watch it." See Vascellaro, *Comcast Tests Tech Overhaul* ("Comcast executives say the purpose of the switch is to deliver live TV service to any device that can connect to the Internet, as they attempt to one-up online video services . . .").

¹²⁸ Further, contrary to Discovery's false assertion, Sky Angel never ran a "very aggressive marketing campaign" promoting the portable nature of its service. The only evidence Discovery ever attempted to provide to support this allegation are references to brief statements on Sky Angel's Frequently Asked Questions webpage. Moreover, even if true, this fact would be irrelevant. Whether or not Sky Angel promotes a particular feature does not alter the factual reality of its system, and nothing in the Affiliation Agreement restricts Sky Angel's marketing. In addition, Sky Angel would have remotely updated all of its set-top boxes to become location-specific, as its equipment and software allows it to do, had Discovery brought this *post hoc* "justification" to Sky Angel's attention instead of refusing to provide any information beyond the fact that it was "not comfortable" with Sky Angel's distribution methodology. The fact that Discovery failed to notify Sky Angel of this alleged concern until after Sky Angel had filed the Complaint and Discovery began to formulate reasons for its actions certainly further demonstrates the unreasonable nature of Discovery's withholding of programming based in any part on this new contention.

¹²⁹ See <http://www.directv.com/DTVAPP/global/contentPageNR.jsp?assetId=P4710096>.

IV. SKY ANGEL HAS SUFFERED, AND WILL CONTINUE TO SUFFER, IRREPARABLE HARM.

The Bureau previously found that this factor weighed in favor of granting a temporary standstill. Specifically, the Bureau concluded “that Sky Angel will be harmed absent grant of the standstill as a result of the loss of current and potential subscribers who might choose not to subscribe to Sky Angel’s service without the Discovery programming.”¹³⁰ Nevertheless, Sky Angel takes this opportunity to summarize and update the record with respect to this factor.

The impact on subscribers and the likelihood that subscribers will switch MVPDs to obtain withheld programming demonstrate the likelihood of irreparable harm to a program access complainant¹³¹ because “withholding can have a significant impact on subscribership to rival MVPDs.”¹³² The degree of this detrimental impact greatly increases when the affected distributor is a new or emerging competitor like Sky Angel, as the continued acquisition and retention of subscribers is essential for new entrants to effectively compete against established MVPDs.¹³³

The particular programming at issue here also exacerbates the impact of Discovery’s impermissible withholding. Discovery controls several of the nation’s most favored programming channels, both in terms of ratings¹³⁴ and desirability by consumers.¹³⁵ As the

¹³⁰ *Preliminary Standstill Order*, 25 FCC Rcd at 3883.

¹³¹ *2010 Program Access Order*, 25 FCC Rcd at 795.

¹³² *See 2007 Program Access Order*, 22 FCC Rcd at 17819 (“Such practices, in turn, predictably harm competition and diversity in the distribution of video programming, to the detriment of consumers.”); *DOJ Complaint*, ¶ 5 (“Attractive content is vital to video programming distribution . . . Distributors compete for viewers by marketing the rich array of programming and other features available on their services.”).

¹³³ *See 2007 Program Access Order*, 22 FCC Rcd at 17819 (“We find that access to vertically integrated programming is essential for new entrants in the video marketplace to compete effectively. If the programming offered by a competitive MVPD lacks ‘must have’ programming that is offered by the incumbent cable operator, subscribers will be less likely to switch to the competitive MVPD.”).

¹³⁴ On March 21, 2010, as Discovery geared up to begin withholding its programming from Sky Angel, the Discovery Channel launched a new series entitled *Life*. That evening, *Life* drew 11.8 million viewers for its first episode and 11.5 million for its second episode, which exceeded the ratings of three of the four national broadcasting networks. *See David Bauder, Viewers Discovery’s Life*, Associated Press (Mar. 24, 2010).

Commission has found, ratings provide “sufficient evidence to conclude that some nationally distributed networks are sufficiently valuable to viewers such that some viewers may switch to an alternative MVPD if the popular programming were not made available on their current MVPD.”¹³⁶ As a result, the popularity of the subject programming is a significant factor in the Commission’s analysis.¹³⁷ Here, not only is Discovery’s programming popular with the general public, but prior to Discovery’s unlawful withholding, its programming constituted four of the ten channels most watched by Sky Angel subscribers.¹³⁸

Therefore, according to consumers, for whose benefit Congress enacted the program access requirements, Discovery’s networks were an important part of Sky Angel’s service. Moreover, regardless of the amount of other programming distributed by Sky Angel that is highly valued by both the company and its subscribers, the loss of Discovery networks harms Sky Angel and hinders its continuing ability to distribute programming to the public.¹³⁹ The

¹³⁵ A recent study found that the Discovery Channel is America’s “favorite” cable network, and that Investigation Discovery is the fourth favorite. See Wayne Friedman, *Discovery, History Network Top Consumer Favorites*, MediaDailyNews (Apr. 26, 2011) (available at www.mediapost.com/publications/?fa=Articles.printFriendly&art_aid=149355); see also *2007 Program Access Order*, 22 FCC Rcd at 17815 (“The record thus reflects that popular national programming networks, such as CNN, TNT, TBS, and The Discovery Channel, among many others . . . are affiliated with the four largest vertically integrated cable MSOs and that such programming networks are demanded by MVPD subscribers. We thus find that cable-affiliated programming continues to represent some of the most popular and significant programming available today.”); *id.* at 17817, n. 193 (in referencing comments that specifically identified Discovery, the Commission noted that “[n]umerous competitive MVPDs cite certain national programming networks as ‘must have’ programming.”).

¹³⁶ *2007 Program Access Order*, 22 FCC Rcd at 17818; see *DOJ Complaint*, ¶ 6 (“The public outcry when certain programming is unavailable, even temporarily, underscores the damage that can occur when a video distributor loses access to valuable programming.”).

¹³⁷ See *2007 Program Access Order*, 22 FCC Rcd at 17814 (“What is most significant to our analysis is not the percentage of total available programming that is vertically integrated with cable operators, but rather the popularity of the programming that is vertically integrated . . .”).

¹³⁸ See *Emergency Request*, p. 4.

¹³⁹ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 17 FCC Rcd 12124, 12139 (2002) (“We agree with the competitive MVPDs’ assertion that if they were to be deprived of only some of this ‘must have’ programming, their ability to retain subscribers would be jeopardized.”).

popularity of Discovery programming, and thus its “must have” nature,¹⁴⁰ makes clear that Sky Angel’s continuing inability to carry this programming causes its programming packages to be less attractive to current and potential subscribers,¹⁴¹ and inhibits a new service like Sky Angel from becoming the truly effective competitor Congress intended.

More than a year has passed since the Bureau declined to grant a standstill and Discovery began to impermissibly withhold its programming. During this unreasonably long period of time, the harms to Sky Angel have continued to increase both in terms of lost subscribers and potential subscribers – something of utmost importance to an emerging competitor. In addition, the drawn-out nature of this dispute has hindered Sky Angel’s ability to obtain new programming channels, which further compounds the harm inflicted upon it by losing access to Discovery’s programming. Specifically, on several occasions over the past year, Sky Angel has entered into productive negotiations with programmers who appeared eager to use Sky Angel’s service as an additional outlet to increase the reach of their programming, and thereby increase their revenue. However, despite the fact that these programmers noted a desire to distribute their programming through Sky Angel’s service, they continue to hesitate to enter into programming agreements expressly because of this ongoing proceeding and the mistaken belief in the industry that the Commission already has concluded that Sky Angel does not qualify as an MVPD.

In addition, during this extended period, the competitive advantage Sky Angel had possessed by being the first to offer this type of IP-based service has been deteriorating as other MVPDs (including major cable operators) continue to introduce similar services. Sky Angel has lost a year of its “first to market” advantage. This ongoing delay not only continues to harm Sky

¹⁴⁰ *Id.* (“[A] considerable amount of vertically integrated programming in the marketplace today remains ‘must have’ programming to most MVPD subscribers . . . We further find that, given the unique nature of cable programming, there frequently are not good substitutes available for vertically integrated programming services . . .”).

¹⁴¹ *Id.* (“[A]n MVPD’s ability to provide a service that is competitive with the incumbent cable operator is significantly harmed if the MVPD is denied access to popular, vertically integrated programming for which no good substitute exists.”); *id.* (“[E]ven if an acceptable substitute is found, the competitive MVPD is still harmed because its competitor can likely offer to subscribers both the unavailable programming and its substitute.”).

Angel's competitive position, it permits Discovery, a vertically-integrated programmer, to abuse the Commission's processes to prevent emerging MVPDs from becoming true competitors to its MVPD affiliates.

V. RATHER THAN SUBSTANTIALLY HARM DISCOVERY, A STANDSTILL WOULD BENEFIT DISCOVERY IN THE FORM OF INCREASED DISTRIBUTION, AND THUS REVENUE.

Unfortunately, in the *Preliminary Standstill Order*, the Bureau relied on Discovery's claims, which Sky Angel had not yet had an opportunity to address, finding "that Discovery would be harmed from grant of the standstill as a result of 'damaged relationships' [REDACTED] and significant legal risks [REDACTED]."¹⁴² Discovery had argued that no other distributor of its programming uses the Internet as a distribution path or advertises the portability of its service. Even assuming such speculative¹⁴³ claims might have been correct a year ago, those claims are false now, as proven above in Section III.B. Major distributors of Discovery programming use an Internet transmission path and advertise the mobility of their services. Sky Angel doubts it was a coincidence that in April 2010 Discovery abruptly withheld its programming from Sky Angel and a few months later Discovery began to permit large MVPDs to distribute its programming via the Internet.

The Bureau also must remember that Sky Angel distributed Discovery's programming for more than 2.5 years in accordance with the terms of a binding contract executed by Discovery after substantial due diligence – an agreement that expressly permits Sky Angel's

¹⁴² *Preliminary Standstill Order*, 25 FCC Rcd at 3883.

¹⁴³ Discovery's own wording demonstrates that its claims are no more than speculation. *See, e.g., Answer*, p. 9 ("Discovery determined that distribution over Sky Angel presents a legal risk that licensors of such programming may assert . . . Moreover, if Discovery were viewed as having granted Sky Angel the right to Internet distribution of its services, that could potentially trigger an obligation . . .") (emphasis added); *id.* at 27 ("Once it became apparent that allowing Sky Angel to continue as a distributor would effectively mean countenancing practices that were proscribed for any other of Discovery's MVPD affiliates . . .") (emphasis added); *id.* at 30 ("If Discovery is forced to make its programming networks available in that manner, the end result could be . . .") (emphasis added).

particular distribution methodology. Discovery has not alleged any harm that occurred during that time or even that its business partners threatened any harm during that period.¹⁴⁴

In reality, the requested standstill would simply reinstate the parties' mutually beneficial arrangement. Sky Angel and Discovery would continue to perform in accordance with the Affiliation Agreement, the term of which is not set to expire until December 31, 2014. Sky Angel would distribute Discovery programming and Discovery would be compensated on a per-subscriber basis for the carriage of its programming at rates it required. Indeed, continuing the arrangement not only would be harmless to Discovery, it would be profitable. Because "[a] stand-alone programmer typically attempts to maximize the combined license fee and advertising revenues from its programming by making its content available in multiple ways,"¹⁴⁵ the Bureau must question the true motives behind Discovery's unjustified withholding of its programming.¹⁴⁶

VI. THE PUBLIC INTEREST STRONGLY FAVORS GRANT OF A STANDSTILL.

The public interest would be served by the distribution of Discovery programming to Sky Angel's subscribers. In the *Preliminary Standstill Order*, the Bureau appeared to agree that this factor weighs in favor of a standstill because it "would avoid disruption to Sky Angel's customers."¹⁴⁷ However, without elaborating, the Bureau also generally noted that the record was unclear as to "whether Sky Angel could, or has attempted to, obtain comparable programming from another source."¹⁴⁸ Unfortunately, current and potential subscribers, and therefore the public, cannot be made whole through access to different programming channels.

¹⁴⁴ See *supra* at n.143.

¹⁴⁵ DOJ *Competitive Impact Statement*, p. 23.

¹⁴⁶ See *id.* ("The JV would continue to value widespread distribution of NBCU content, but it also would likely consider how access to that content makes Comcast's MVPD rivals better competitors.").

¹⁴⁷ *Preliminary Standstill Order*, 25 FCC Red at 3883.

¹⁴⁸ *Id.*

Moreover, for the last year, Sky Angel's steadfast efforts to obtain additional programming have been thwarted primarily because of Discovery's unjustified withholding and the Bureau's continued inaction on the Complaint. Beyond directly benefitting Sky Angel's current and potential subscribers, and therefore the public, a standstill also would further the public interest by encouraging increased innovation and competition in the video distribution marketplace and the willingness of other programmers to license their content to Sky Angel.

On several occasions, the Commission has concluded that most programming networks lack competitively equal substitutes.¹⁴⁹ As a result, "foreclosed rivals cannot practically or inexpensively avoid the harm by substituting other programming."¹⁵⁰ Further, the Commission should not base its decisions upon the potential "substitutability" of programming because the Constitution severely restricts its ability to distinguish between types of programming.¹⁵¹ For these reasons, Sky Angel's efforts, or even success, in obtaining additional programming should have no bearing on any Bureau or Commission decisions in this proceeding.

Nevertheless, Sky Angel again notes that on several occasions since Discovery first threatened to withhold its programming, Sky Angel participated in productive conversations with several of the nation's largest programmers. Although these discussions appeared to be leading to formal agreements, the programmers continue to hesitate to finalize deals, expressly noting this ongoing proceeding and the mistaken belief in the industry that the Commission already has

¹⁴⁹ See, e.g., *2007 Program Access Order*, 22 FCC Rcd at 17816 ("We disagree with cable MSOs to the extent they argue that there is no programming that can be considered essential for viable competition and that all programming networks have one or more competitively equal substitutes."); *id.* ("Despite the increase in available programming over the past five years, we find that cable operators still own popular programming for which there are no close substitutes."); *id.* at 17820 ("[W]e conclude that there are no close substitutes for some satellite-delivered vertically integrated programming and that such programming is necessary for viable competition in the video distribution market.").

¹⁵⁰ *Comcast Order*, FCC 11-4, n. 90.

¹⁵¹ See *2007 Program Access Order*, 22 FCC Rcd at 17840 ("[T]he Commission recognized the difficulty of developing an objective process of general applicability to determine what programming may or may not be essential to preserve and protect competition and further noted that any attempt to distinguish between different types of cable-affiliated programming is likely to raise Constitutional concerns.") (internal citations omitted).

concluded that Sky Angel does not qualify as an MVPD. Sky Angel's ability to obtain the rights to distribute these additional must have channels of programming, in addition to Discovery's programming, is critical to Sky Angel's ability to fully implement its intended service, and thus to its ultimate success – or at least continued viability. A grant of the requested standstill therefore would advance the public interest by making programmers more likely to deal with Sky Angel and other innovative competitors like Sky Angel and, in turn, increase competition and the availability of diverse programming.¹⁵²

Public documents illustrate the confusion arising from the inaction on Sky Angel's long-pending Complaint. For instance, in reply comments filed in the Comcast/NBCU proceeding, TWC stated that the Bureau had concluded that Sky Angel does "not meet the statutory definition for an MVPD."¹⁵³ Likewise, Discovery has misinterpreted the *Preliminary Standstill Order* to imply that the Bureau already concluded that Sky Angel fails to meet the definition of an MVPD, and therefore cannot invoke the protections of the program access rules.¹⁵⁴ This uncertainty also has impaired the Commission in other rulemakings,¹⁵⁵ which further

¹⁵² See *CellularVision of New York, L.P. v. SportsChannel Associates*, 10 FCC Rcd 9273, 9276 (1995) ("The program access provisions were designed to ensure that competition to cable develops and to encourage nascent competition from emerging competitors.").

¹⁵³ Reply Comments of Time Warner Cable, Inc., MB Docket No. 10-56 (filed Aug. 19, 2010).

¹⁵⁴ Letter from Tara M. Corvo, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., counsel for Discovery, to Marlene Dortch, Secretary, FCC (Dec. 3, 2010); see Fleischman and Harding LLP, *Media Bureau Decision May Undercut IPTV Providers' Ability to Use Program Access Rules*, p. 2 (Apr. 23, 2010) (available at <http://www.fh-law.com/news/2010/04-23-10.pdf>) (Although the memo notes that the Bureau did not make a final determination as to whether Sky Angel is an MVPD, it states there was a Bureau "finding that a transmission path is necessary for a program provider to be deemed an MVPD.").

¹⁵⁵ See Letter from William M. Wiltshire, Wiltshire & Grannis LLP, counsel for DIRECTV, to Marlene Dortch, Secretary, FCC, MB Docket No. 10-91 (Feb. 2, 2011) (in citing to Sky Angel's Complaint, DIRECTV asks the Commission to resolve the question of who qualifies as an MVPD because the outcome of that decision could have "material consequences" in the AllVid proceeding); *2011 Competition NOI*, FCC 11-65, n.9, *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, 17975, n.407 (2010) (*Net Neutrality Order*) and *Comcast Order*, FCC 11-4, n.131 ("The issue of whether a certain type of OVD qualifies as an MVPD under the Act and our regulations has been raised in pending program access complaint proceedings. See, e.g., *VDC Corp. v. Turner Network Sales, Inc., et al.*, Program Access Complaint (Jan. 18, 2007); *Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Program Access Complaint (Mar. 24, 2010). Nothing in this Order should be read to state or imply our determination on this issue.").

demonstrates why the Bureau must expedite its consideration of Sky Angel's long-pending program access complaint.

In addition, permitting Discovery to continue to withhold its programming from current and potential Sky Angel subscribers for an indeterminate amount of time damages Sky Angel's ability to remain a viable competitor,¹⁵⁶ and thereby reduces competition in contravention of the public interest.¹⁵⁷ Allowing Discovery to continue to unjustifiably withhold its programming, whether during the pendency of Sky Angel's complaint or permanently, could signal to other vertically-integrated programmers intent on securing their current dominant market shares that they too can discriminate against new distribution technologies.¹⁵⁸ Clearly, this behavior would discourage innovation and competition in the video distribution marketplace.

For instance, the exclusion of video distribution rivals permits a dominant programming distributor to maintain market power,¹⁵⁹ and thereby be "less constrained in its pricing decisions and have a reduced incentive to innovate. As a result, consumers likely would be forced to pay higher prices to obtain their video content or receive fewer benefits of innovation. They also would have fewer choices in the types of content and providers to which they would have access, and there would be lower levels of investment, less experimentation with new models of delivering content, and less diversity in the types and range of product offerings."¹⁶⁰

¹⁵⁶ *2007 Program Access Order*, 22 FCC Rcd at 17817 ("An MVPD's ability to compete will be significantly harmed if denied access to popular vertically integrated programming for which no good substitute exists.").

¹⁵⁷ *See id.* at 17816 ("[V]ertically integrated programming, if denied to cable's competitors, would adversely affect competition in the video distribution market."); *id.* at 17817 ("[A]ccess to this non-substitutable programming is necessary for competition in the video distribution market to remain viable.").

¹⁵⁸ *Id.* at 17819 ("[W]ithholding programming from rivals can be a profitable strategy for a vertically integrated cable programmer and that such withholding can have a significant impact on subscribership to the rival MVPDs. Such practices, in turn, predictably harm competition and diversity in the distribution of video programming, to the detriment of consumers.").

¹⁵⁹ *See Comcast Order*, FCC 11-4, ¶ 39.

¹⁶⁰ *DOJ Competitive Impact Statement*, p. 27; *see id.* at 25 ("Lowering the profitability of . . . rivals also would weaken the incentives of some existing and future entrants to build out their systems . . . This weakened state of competition would allow Comcast, in turn, to decrease its investments and innovation to improve its own offerings.").

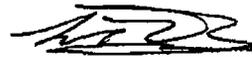
On the other hand, expanded competition from innovative new services “has the potential to increase consumers’ choice of video providers, enhance the mix and availability of content, drive innovation, and lower prices.”¹⁶¹ Further, increased competition from MVPDs that use a broadband connection as a link in their distribution systems “will encourage broadband adoption, consistent with the goals of the Commission’s National Broadband Plan.”¹⁶²

VII. CONCLUSION

Based on the foregoing, Sky Angel clearly has demonstrated how the grant of a standstill would meet the criteria set forth in §76.1003(l). Accordingly, Sky Angel respectfully requests that the Commission grant a temporary standstill of the Affiliation Agreement pending the resolution of Sky Angel’s program access complaint.

Respectfully submitted,

SKY ANGEL U.S., LLC



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

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Its Attorneys

¹⁶¹ *Comcast Order*, FCC 11-4, ¶ 62; *see Markey Law Journal Article*, 46 Fed. Comm. L.J. at 5 (“Congress must above all maximize competition as the only truly effective means simultaneously protecting consumers from unreasonable rates, poor service, and stifled innovation.”).

¹⁶² *Comcast Order*, FCC 11-4, ¶ 62; *see Net Neutrality Order*, 25 FCC Rcd at 17975-76 (“[A] cable or telephone company’s interference with the online transmission of programming by . . . stand-alone video programming aggregators that may function as competitive alternatives to traditional MVPDs would frustrate Congress’s stated goals in enacting Sec. 628 of the Act . . .”).

Certificate of Service

I, Marianne Trana, a legal secretary with the firm of Holland & Knight LLP, hereby certify that on the 27th day of May 2011, a copy of the foregoing *Renewed Petition of Sky Angel U.S., LLC for Temporary Standstill (or Justice Delayed is Justice Denied)* 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, D.C. 20004
Counsel for Discovery Communications, LLC

Chairman Julius Genachowski*
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Commissioner Michael Copps*
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Commissioner Robert M. McDowell*
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Commissioner Mignon Clyburn*
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Commissioner Meredith Atwell Baker*
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

William Lake, Chief*
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Nancy Murphy, Associate Chief*
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Mary Beth Murphy, Chief*
Policy Division, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

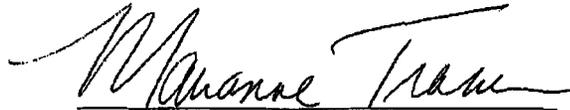
Michael S. Perko, Chief*
Office of Communications & Industry
Information, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Steven Broeckaert*
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Diana Sokolow*
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

David Konczal*
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

* via email



Marianne Trana