

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

INTERPRETATION OF THE TERMS
“MULTICHANNEL VIDEO PROGRAMMING
DISTRIBUTOR” AND “CHANNEL” AS RAISED IN
PENDING PROGRAM ACCESS COMPLAINT
PROCEEDING

MB Docket No. 12-83

COMMENTS OF DIRECTV, LLC

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SUMMARY

DIRECTV welcomes the opportunity to respond to the Commission's request for comment on the appropriate interpretation of the terms "multichannel video programming distributor" ("MVPD") and "channel" in the context of online video distribution. The definitions of these two terms in the Communications Act are not internally consistent. Indeed, Congress uses the term "channel" in other parts of the Communications Act in ways plainly inconsistent with its putative definition as a physical transmission path on a cable system. As the Supreme Court has repeatedly held, there is no reason why a term defined for one purpose must be given exactly the same meaning in a different context. Accordingly, the application of these terms in the rapidly evolving and highly competitive market for delivery of video programming is open to reasonable interpretation by the Commission.

The Commission has proposed two potential interpretations. The first, which was used by the Media Bureau in a recent program access decision, would restrict the category of MVPD to only those entities that make available for purchase multiple streams of video programming as well as the transmission path over which such programming travels. Unfortunately, this interpretation would directly conflict with the statutory definition of "MVPD." That definition provides a non-exclusive list of MVPDs, which includes a "television receive-only satellite programming distributor," often referred to as home satellite dish ("HSD") providers. Such entities are independent distributors who aggregate programming rights for resale to subscribers, but are neither satellite operators nor program producers. If a transmission path were a necessary component of an MVPD service, HSD providers would not qualify, in direct contradiction to the statutory definition. Clearly, such an interpretation would not be reasonable.

As an alternative, the Commission has proposed a second interpretation under which an entity that makes multiple “video programming networks” available for purchase qualifies as an MVPD without regard to whether it makes available a transmission path for purchase. Such an interpretation would not only be consistent with common usage of the term “channel,” but would also establish a level playing field where competitors operate under a core set of common rights, protections, and obligations, and be consistent with recent Congressional mandates that apply to video programming regardless of the facilities used for delivery. Adopting this approach would bring certain OVDs and other new entrants within the ambit of the “MVPD” definition, but only those that (1) provide multiple linear video programming networks (2) for purchase (3) by subscribers. In their new status, such entities would enjoy the protection of the Commission’s program access rules and the right to demand good faith negotiation for retransmission consent rights. They would also have certain core regulatory obligations, such as equal employment opportunities, program carriage, and preventing loud commercials.

Thus, those entities newly defined as MVPDs would be expected to operate within the basic framework of rights and obligations applicable to all other entities vying to sell multiple channels of video programming to subscribers. Conversely, the relatively small number of new MVPDs would not impose an undue burden upon those obligated by rule to deal with them, such as cable-affiliated programmers and broadcasters. DIRECTV submits that this regime strikes an appropriate balance and is a reasonable interpretation of the terms at issue. Accordingly, it supports the second proposed interpretation under which any entity that makes multiple video programming networks available for purchase by subscribers is considered an “MVPD” without regard to whether it makes available a transmission path for purchase.

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DIRECTV, LLC (“DIRECTV”) submits these comments in response to the Public Notice issued by the Media Bureau seeking comment on the appropriate interpretation of the terms “multichannel video programming distributor” (“MVPD”) and “channel” as raised in a pending program access complaint proceeding.¹ As outlined in the Public Notice, the statutory definitions of these terms were adopted twenty or more years ago and were not internally consistent even at that time. Accordingly, their application in the rapidly evolving and highly competitive market for delivery of video programming is open to reasonable interpretation by the Commission.

In the interests of fairness, the Commission should exercise that discretion in a way that will establish a level playing field where competitors operate under a core set of common rights, protections, and obligations. Such an approach would be consistent with recent statutory

¹ See Public Notice, “Media Bureau Seeks Comment on Interpretation of the Terms ‘Multichannel Video Programming Distributor’ and ‘Channel’ as Raised in Pending Program Access Complaint Proceeding,” DA 12-507 (rel. Mar. 30, 2012) (“Public Notice”).

mandates, such as the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”), which imposes closed captioning and other requirements for programming delivered by any video programming distributor via Internet protocol. Accordingly, DIRECTV urges the Commission to interpret the terms “MVPD” and “channel” broadly and flexibly, to capture the full spectrum of entities competing to provide video programming networks to subscribers. The Media Bureau’s interpretation, which would require an MVPD to supply a “transmission path,” is foreclosed as it would conflict directly with the statutory definition. By contrast, the proposal in the Public Notice to consider an entity an “MVPD” if it makes available for purchase multiple video programming networks would qualify as such a reasonable and flexible approach.

Adopting this approach will bring certain emerging categories of entities, including some online video distributors (“OVDs”), within the ambit of the MVPD definition. As a result, those entities newly defined as MVPDs would be expected to operate within the basic framework of core rights and obligations applicable to all other competitors in the multichannel video services market. However, because this interpretation will create a relatively small number of new MVPDs, it would not impose an undue burden upon those obligated by rule to deal with them, such as cable-affiliated programmers and broadcasters.

Accordingly, DIRECTV supports the Commission proposed alternative interpretation of the terms at issue, such that any entity that makes multiple video programming networks available for purchase is considered an “MVPD” without regard to whether it makes available a transmission path for purchase.

BACKGROUND

The Communications Act defines both terms at issue in this proceeding. As part of the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”), Congress defined 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-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.²

In the Cable Communications Policy Act of 1984 (“1984 Cable Act”), Congress had previously defined “channel” as “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation).”³ The Commission, in turn, has defined a “television channel” as “[a] band of frequencies 6 MHz wide in the television broadcast band and designated either by number or by the extreme lower and upper frequencies.”⁴ The 1984 Cable Act also defined the term “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”⁵

These statutory definitions were most recently placed at issue in the program access complaint filed by Sky Angel U.S., LLC (“Sky Angel”) against Discovery Communications and its affiliate, Animal Planet, L.L.C. (collectively, “Discovery”).⁶ Sky Angel describes itself as a subscription-based service offering approximately eighty channels of video and audio programming, which its subscribers receive through a set-top box that has a broadband Internet

² 47 U.S.C. § 522(13).

³ *Id.* at § 522(4).

⁴ 47 C.F.R. § 73.681.

⁵ 47 U.S.C. § 522(20).

⁶ *See Sky Angel U.S., LLC v. Discovery Commc’ns LLC, et al., Program Access Complaint*, MB Docket No. 12-80, File No. CSR-8605-P (Mar. 24, 2010) (“Sky Angel Complaint”).

input and video outputs that connect directly to a television set.⁷ After receiving notice that Discovery intended to terminate its carriage agreement, Sky Angel filed its complaint along with a petition for a standstill.

The Media Bureau denied Sky Angel's petition on the grounds that Sky Angel had failed to carry its burden of demonstrating that it is likely to succeed on the merits of its claim that it is an MVPD entitled to seek relief under the program access rules.⁸ The Bureau determined that the definitions of the term "channel" in the Communications Act and the Commission's rules "appear to include a transmission path as a necessary element," and that the illustrative list of entities included in the statutory definition of an "MVPD" "all provide transmission paths for the delivery of video programming."⁹ Since the available evidence showed that Sky Angel relies upon the subscriber's broadband provider to provide the transmission path, the Bureau held that Sky Angel likely could not demonstrate that it was an MVPD entitled to the protections of the program access rules.

As noted in the Public Notice, the interpretation of these statutory terms has legal and policy implications that extend well beyond the parties to the Sky Angel proceeding. Accordingly, the Bureau has sought comment on the most appropriate interpretation of these terms, including two possibilities raised in the complaint proceeding: (1) interpreting "channel" as used in the definition of "MVPD" to include the provision of a transmission path, or (2) interpreting "channel" as used in the definition of MVPD in the manner it is commonly used,

⁷ See *id.* at 1.

⁸ See *Sky Angel U.S., LLC*, 25 FCC Rcd. 3879 (Med. Bur. 2010) ("*Sky Angel Standstill Denial*").

⁹ *Id.*, ¶ 7.

such that any entity that makes multiple “video programming networks” available for purchase is considered an MVPD regardless of who provides the transmission path.¹⁰

DISCUSSION

I. ALTHOUGH THE COMMISSION HAS THE DISCRETION TO ADOPT A REASONABLE INTERPRETATION, PROVIDING A “TRANSMISSION PATH” TO SUBSCRIBERS CANNOT BE A PREREQUISITE TO QUALIFYING AS AN MVPD

The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular matter at issue; if “the statutory scheme is coherent and consistent,” there is generally no need to inquire beyond the plain language of the statute.¹¹ In this case, there is no such coherence or consistency, as the defined terms at issue are patently inconsistent. The statute defines “channel” solely with reference to spectrum used in a cable system, yet uses the phrase “channels of video programming” with explicit reference to a list that includes non-cable MVPD systems – none of which share the network infrastructure referenced in the definition, and one of which includes no transmission path at all. There is simply no way that the cable-centric definition of “channel” can be squared with the list of non-cable providers listed in the definition of “MVPD.”

A. The Term “Channel” as Used in the Definition of MVPD Is Not Bound By the Definition of “Channel” in Section 602 of the Act

In discussing options to resolve the inconsistency in statutory definitions, the Public Notice asks, “On what basis can the Commission ignore a statutorily defined term?”¹² That is not quite the right question to ask, however. As the Supreme Court has recognized, although a term used in one part of a statute can be expected to have the same meaning when it is used in

¹⁰ See Public Notice at 1.

¹¹ See *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989).

¹² Public Notice at 4.

another part of that statute, that is not always the case. “It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the Legislature intended it should have in each instance.”¹³ In other words: “There is . . . no effectively irrebuttable presumption that the same defined term in different provisions of the same statute must be interpreted identically. Context counts.”¹⁴ Where, as here, that context indicates a reason for a term’s meaning to vary, the Court has held that such variance is appropriate.

Most words have different shades of meaning, and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section. Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. Where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed.¹⁵

Thus, it is not a matter of “ignoring” the statutory definition of “channel,” but rather of recognizing from the context that its meaning as used in the definition of “MVPD” can be something different than its meaning in other contexts.¹⁶

¹³ *Atlantic Cleaners & Dyers, Inc. v. U.S.*, 286 U.S. 427, 434 (1932) (“*Atlantic Cleaners*”).

¹⁴ *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 575-76 (2007) (“*Environmental Defense*”) (citation and internal quotations omitted).

¹⁵ *Atlantic Cleaners*, 286 U.S. at 433 (citation omitted).

¹⁶ This is true even where one statutory provision explicitly incorporates the definition of a term used in another statutory provision. See *Environmental Defense*, 549 U.S. at 576 (upholding EPA’s different definitions even though “the Clean Air Act did not merely repeat the term ‘modification’ or the same definition of that word in its NSPS and PSD sections; the PSD language referred back to the section defining ‘modification’ for NSPS purposes”).

In the Communications Act, Congress uses the term “channel” in several different ways. Some references to “channel,” including the definition in Section 602, refer to the physical transmission path on a cable system. Elsewhere, however, Congress refers to “channels” in a manner that makes clear that it is talking about “programming networks,” not “channels of communication.” For example, Section 624 addresses the scrambling of “premium channels,” defined as “any pay service offered on a per channel or per program basis, which offers movies rated by [MPAA] as X, NC-17, or R.”¹⁷ By referencing “programs” and “movies,” Congress made clear that the “channels” it sought to define was a particular aggregation of programming, not a particular physical transmission path.¹⁸

In this case, Section 602 provides a cable-centric, analog-based definition of “channel” that is inconsistent with the list of non-cable, and in some cases all-digital, programming distributors listed in the definition of “MVPD.” Given this ambiguity in a statute it is trusted to administer, the Commission is not required to apply the Section 602 definition of “channel” reflexively in all contexts. Rather, it has the discretion under *Chevron* to adopt a reasonable interpretation of the language at issue that fits the context in which it is applied.¹⁹

¹⁷ 47 U.S.C. § 544(d)(3)(B). *See also* S. Rep. No. 102-92 (1991), at 24, reprinted in 1992 U.S.C.C.A.N. 1133, 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.”).

¹⁸ For example, the very first Congressional finding in the 1992 Cable Act’s preamble is that “[a]lthough the average number of basic channels has increased from about 24 to 30, average monthly rates have increased by 29 percent during the same period.” 1992 Cable Act § 2(a)(1). Although subscribers are unlikely to know the particulars of the distribution channels used to deliver their programming, they are very likely to know (and care) quite a bit about are the particular “channels” – *i.e.*, content – they receive.

¹⁹ *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984) (“*Chevron*”).

B. Requiring the Provision of Transmission Facilities Would Conflict With the Statutory Definition of MVPD

Although the Commission has the discretion to adopt a reasonable interpretation of “channel” in this proceeding, it cannot reasonably adopt an interpretation that would directly conflict with other parts of the defined term “MVPD.” In the *Sky Angel Standstill Denial*, the Media Bureau concluded that in order to qualify as an MVPD, an entity must provide a transmission path for delivery of its programming, noting that “the entities in the illustrative list in the Act’s definition of an MVPD all provide transmission paths for the delivery of video programming.”²⁰ Yet a closer examination of the statute’s illustrative list of MVPDs demonstrates that the predicate of the Bureau’s decision is simply not true.

Among the entities on the illustrative list is a “television receive-only satellite program distributor.”²¹ In its annual reports on competition in the market for delivery of video programming, the Commission has traditionally referred to such entities as home satellite dish (“HSD”) service providers.²² As the Commission has recognized, HSD providers “were generally independent distributors who were neither satellite operators nor program producers.”²³ The Commission described the structure of this service in the very first video competition report mandated by the 1992 Cable Act:

HSD owners can watch without payment approximately 150 unscrambled signals, and another 103 scrambled channels can be ordered through program packagers.

²⁰ *Sky Angel Standstill Denial*, ¶ 7.

²¹ 47 U.S.C. § 522(13). Congress has authorized the Commission to include new technologies in the MVPD category without updating the list itself. *See, e.g., Implementation of Section 302 of the Telecommunications Act of 1996 – Open Video Systems*, 11 FCC Rcd. 20227, ¶ 171 (1996) (rejecting argument that OVS operators could not be MVPDs because Congress did not amend the statutory definition of MVPD to add OVS to the list).

²² *See, e.g., Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd. 7442, ¶¶ 61, 71-75 (1994) (discussing home satellite dish service) (“*First Video Competition Report*”).

²³ *Policies and Rules for the Direct Broadcast Satellite Service*, 13 FCC Rcd. 6907, ¶ 4 n.13 (1998).

Generally, HSD owners have access to the same programming services that are available on cable, although the most popular cable programming services are scrambled. In order to receive one or more scrambled channels, an HSD owner must purchase an integrated receiver-decoder (“IRD”) from an equipment dealer and then pay a monthly or annual subscription fee to one of the thirty or so national packagers of HSD programming. . . .

The HSD industry's primary competitive strength vis-a-vis cable is programming variety and flexibility. An HSD owner may choose from a variety of program packages offered by the approximately thirty program packagers nationwide. Those program packagers compete with each other to offer owners the most desirable combinations of programming services at attractive prices. One commenter states that the average HSD subscriber purchases programming from 2.5 different outlets.²⁴

As this passage makes clear, HSD providers – which Congress specifically listed as an example of an MVPD – *do not provide any transmission path for the delivery of video programming.*

As a matter of law, then, the Bureau’s conclusion that a transmission path is a necessary element for an MVPD service is simply untenable. Were a transmission path a necessary component of an MVPD service, a “television receive-only satellite programming distributor” could not be an MVPD. Since, however, Congress specifically provided that such satellite programming distributors *are* MVPDs, it simply cannot be the case that a transmission path is a necessary element to the definition.²⁵

Indeed, while the structure of HSD service is unlike many other MVPDs,²⁶ it bears an uncanny resemblance to the OVD service provided by Sky Angel. As described above, HSDs are program aggregators that provide approximately one hundred channels of video

²⁴ *First Video Competition Report*, ¶¶ 71, 75.

²⁵ *See also Implementation of Section 302 of the Telecommunications Act of 1996*, 11 FCC Rcd. 20227, ¶ 171 (1996) (rejecting argument “that video programming providers cannot qualify as MVPDs because they may not operate the vehicle for distribution” as “unsupported by the plain language of Section 602(13), which imposes no such requirement”).

²⁶ *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd. 15822, App. C, ¶ 12 (1998) (noting that “the [HSD] service itself bears little resemblance to other MVPDs”).

programming, which are delivered via satellite transmission facilities they do not own, control, or arrange in any way, to be decoded by subscribers' set-top boxes. Similarly, Sky Angel is a subscription-based service offering approximately eighty channels of video and audio programming, which are delivered via broadband Internet facilities it does not own, control, or arrange in any way, to be decoded by subscribers' set-top boxes.²⁷ The two are virtually indistinguishable in all material respects. In these circumstances, it would be difficult to craft a reasonable interpretation of the term "MVPD" that would include the former but exclude the latter.

II. INTERPRETING "CHANNEL" AS USED IN THE TERM "MVPD" AS REQUIRING AN ENTITY TO MAKE AVAILABLE MULTIPLE "VIDEO PROGRAMMING NETWORKS" TO SUBSCRIBERS WOULD BE A REASONABLE CONSTRUCTION OF THE STATUTORY TERMS AND SOUND POLICY

Having determined that "channel" as used in the definition of "MVPD" (1) does not have to mean spectrum used by a cable system, and (2) cannot refer only to a transmission path provided by the distributor, the Commission has the discretion to adopt a reasonable interpretation of the language at issue.²⁸ In the Public Notice, it has sought comment on an alternative interpretation under which an entity would be considered an MVPD if it makes available for purchase by subscribers multiple "video programming networks," without regard to whether it offers a transmission path.²⁹ Below we discuss the reasonableness of this approach, as well as its practical and public policy implications.

²⁷ See Sky Angel Complaint at 1.

²⁸ See, e.g., *Chevron*, 467 U.S. at 843-45.

²⁹ See Public Notice at 6.

A. Interpreting “Channel” to Mean “Programming Network” Would Be a Reasonable Construction of the Statutory Term

The proposal to interpret “channels of video programming” as essentially equivalent to “video programming networks” would be well within the bounds of the Commission’s authority under *Chevron*. It would, first of all, accord with common usage. Moreover, as discussed above, there is evidence that Congress contemporaneously understood and used the term in the same manner.³⁰

This interpretation would also comport with prior Commission construction of the term. For example, in the rulemaking implementing the section of the 1992 Cable Act that imposed public interest carriage obligations on DBS operators, the Commission recognized the difference between a “channel” used to define a transmission medium and a “channel” of video programming. Specifically, it noted that a DBS transponder “channel” is defined as a 24 MHz portion of radio spectrum, but that with digital compression this spectrum can be used to transmit several video programming networks using a single transponder. Accordingly, and the Commission sought comment on the question of “whether ‘channel’ should refer to the whole transponder or to a single one of the program services contained in the compressed signal.”³¹ Ultimately, the Commission adopted the latter approach, such that the set-aside obligation is measured by the number of “channels” of video programming networks, reevaluated on a quarterly basis to account for improvements in compression technology, rather than the number of satellite transponders.³²

³⁰ See nn. 17 and 18, above.

³¹ See *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 1589, ¶ 13 (1993).

³² See *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd. 23254, ¶¶ 69-71 (1998) (“*DBS Set-Aside Order*”). The Commission adopted several other implementing rules that equate “channels” with programming networks. Thus, for

As noted in the Public Notice, the Commission has previously held that video-on-demand images can constitute “video programming.”³³ That determination arose in the context of a provision of the 1984 Cable Act which made it unlawful for a common carrier to provide “video programming directly to subscribers in its telephone service,” in which the Commission concluded that “video-on-demand images” could be separated from interactive functionalities and thereby constitute “video programming.”³⁴ This does not, however, preclude the alternative interpretation proposed in this proceeding. The definition of MVPD is written in terms of *channels* of video programming, not just video programming standing alone. Video-on-demand services allow consumers to access specific programs; they are not carried on “channels” but rather are offered individually from a user interface menu. In common parlance, the term “channel” suggests a pre-scheduled, real-time, linear stream of programming.³⁵ Thus, it would not be inconsistent for the Commission to interpret “channels of video programming” as used in the term “MVPD” with reference to the provision of multiple video programming networks, and not to include purely video-on-demand services.

B. Interpreting “Channel” to Mean “Programming Network” Would Result in More Evenhanded Regulation

As discussed above, interpreting the term “channel” in the manner of common usage, such that any entity that makes multiple video programming networks available for purchase is

example, the set-aside requirements apply to a DBS operator only if it has “sufficient channels of programming to require set aside of at least one channel of video programming under our four percent reservation,” and also limit each qualified programmer to an initial allocation of only one “channel.” *Id.*, ¶¶ 28, 116.

³³ See Public Notice at 8.

³⁴ See *Telephone Company-Cable Television Cross-Ownership Rules*, 10 FCC Rcd. 244, ¶¶ 73, 109 (1994).

³⁵ See, e.g., *DBS Set-Aside Order*, ¶ 68 (determining that DBS operators must set aside discrete channels for use by programmers, rather than just blocks of time scattered across channels); *Implementation of Section 304 of the Telecommunications Act of 1996*, 25 FCC Rcd. 4303, ¶ 14 and n.43 (2010) (discussing characteristics of linear channels).

deemed to be an MVPD, is a permissible construction of the term. DIRECTV also believes it would be an appropriate construction from a policy perspective, because it would ensure similar treatment of similarly situated entities. It would ensure that all entities (and only entities) truly comparable with traditional cable and satellite carriers would be treated similarly. It would *not* shackle “new” MVPDs with inappropriate or onerous regulation. Rather, it would accurately reflect the phenomenal growth of non-traditional distributors.

1. Relatively Few Additional Entities Would Qualify as MVPDs

As set forth above, the Communications Act defines an MVPD as an entity that “makes available for purchase, by subscribers or customers, multiple channels of video programming.”³⁶ This definition identifies at least three important qualifications for an MVPD.

- First, it must offer programming “for purchase.” Accordingly, web sites and other sources that offer programming for free would not qualify.
- Second, it must offer programming for purchase “by subscribers or customers.” Accordingly, wholesalers and resellers would not qualify.
- Third, it must offer multiple “channels of video programming,” which means that entities that do not provide multiple video programming networks (as opposed to a single network or individual programs or movies) would not qualify.

These characteristics are shared among all of the “traditional” MVPDs. Moreover, they ensure that the class of entities that qualify as MVPDs will remain appropriately limited. As a result, third parties against which MVPDs have certain rights (such as cable-affiliated programmers and broadcasters) will not be inundated with new demands. Moreover, because these new MVPDs would provide the same sort of linear programming provided by traditional MVPDs, these third

³⁶ 47 U.S.C. § 522(13).

parties would not be required to offer their programming in different packages or as disaggregated parts. Indeed, to the extent a programmer did not have rights to distribute its network over a particular medium (*e.g.*, online), it would be under no obligation to negotiate with MVPDs for such distribution.³⁷ Conversely, adopting this interpretation will ensure that non-traditional MVPDs will be sufficiently like traditional MVPDs to justify application of the core regulatory provisions discussed below.

2. MVPD Status Would Confer Basic Rights and Core Responsibilities

If the Commission were to adopt its proposed alternative interpretation, non-traditional MVPDs would become subject to certain basic core rules designed to safeguard a competitive MVPD market, such as the right to seek relief under the program access rules and good faith negotiation rules for retransmission consent.³⁸ They would also be subject to core rules designed to protect consumers and unaffiliated programmers and avoid harmful interference, such as the requirements relating to program carriage, the competitive availability of navigation devices, closed captioning and video description, and various technical operations.³⁹

To the extent an entity actually operates as an MVPD (*i.e.*, it sells multiple, full-time, linear channels of programming to subscribers), this regime establishes basic regulatory parity. It would thus create a more level playing field for all those attempting to attract subscribers to linear programming services. Were the Commission instead, for example, to adopt a regime that

³⁷ In this regard, it is worth noting that regional sports networks typically do not have the online distribution rights for the games of the professional sports teams they feature. *See, e.g.*, Eric Fisher, “Ten years later, MLBAM still evolving,” *SPORTS BUSINESS JOURNAL* (Mar. 21, 2011) (discussing Major League Baseball’s control of out-of-market distribution rights, and in-market distribution option accepted only by RSNs for the Yankees and Padres) (available at <http://www.sportsbusinessdaily.com/Journal/Issues/2011/03/21/Media/MLBAM.aspx>).

³⁸ *See* 47 U.S.C. §§ 548, 325(b)(3)(C)(ii); 47 C.F.R. §§ 76.1000-04, 76.65(b). However, the statutory licenses that enable cable and satellite providers to retransmit broadcast signals would not be available to this new class of MVPDs. *See* 17 U.S.C. §§ 111(c), 119.

³⁹ *See* 47 U.S.C. §§ 536, 549; 47 C.F.R. §§ 76.1300-02, 76.1200-10, 79.1-2, 76.610.

allowed new entrants to enjoy MVPD prerogatives without also complying with core MVPD obligations, the result would be an unlevel playing field that inappropriately favors some competitors over others. There is no logical basis for establishing such a differential on core issues.

3. MVPD Status Would Reflect the Significant Development of New Entrants

In assessing the public interest implications of the proposed interpretation of “MVPD,” the Commission must recognize the rapidly developing capabilities of OVDs and other new-entrant MVPDs which are becoming true competitors to traditional MVPDs. Sixteen months ago, in the Comcast-NBCU proceeding, the Commission noted that “[t]he growing popularity of online video, combined with the burgeoning technological options for viewing online video on televisions sets, is likely to heighten consumer interest in cord-cutting,”⁴⁰ and found that “OVDs pose a potential competitive threat to Comcast’s MVPD service.”⁴¹ Since that time, developments have continued to accelerate. For example, according to a report by Nielsen Media, 1.5 million fewer U.S. households subscribed to a traditional MVPD at the end of 2011 than a year earlier.⁴² According to another recent report, at least twenty-one percent of U.S. households (approximately twenty-seven million) have connected their TVs to the Internet, through game consoles, Blu-Ray players, Internet-ready TVs, or set-top boxes.⁴³ Indeed, the Xbox gaming console is now the most popular non-PC device through which to watch online

⁴⁰ See *Comcast Corp., General Electric Co., and NBC Universal, Inc.*, 26 FCC Rcd. 4238, ¶ 80 (2011).

⁴¹ *Id.*, ¶ 86. The Commission also found that “the fact that most OVD services do not currently offer consumers all popular linear channels does not mean that they cannot and will not do so in the near future.” *Id.*, ¶ 80.

⁴² See Daniel Frankel, “Nielsen: 1.5M U.S. households cut the cord in 2011,” Paid Content (May 4, 2012) (available at <http://paidcontent.org/2012/05/04/nielsen-1-5-m-u-s-households-cut-the-cord-in-2011/>).

⁴³ See “Study: 21% Have a TV Connected to Web,” NETNEWSCHECK.COM (Apr. 30, 2012) (discussing study by ABI Research) (available at <http://www.netnewscheck.com/article/2012/04/30/18442/study-21-have-a-tv-connected-to-web>).

video.⁴⁴ Advertisers have begun to shift their budgets toward OVDs, finding that “[o]nline-video sites are becoming a legitimate alternative to cable and network TV options for reaching consumers.”⁴⁵ Congress has also recognized that the convergence of technologies requires the application of rules across platforms, as evidenced by the accessibility requirements imposed by CVAA with respect to all video delivered via Internet protocol.⁴⁶

Non-traditional MVPDs have gone from mere curiosities to emerging competitors in a very short period of time, and continue to develop rapidly as the speed and ubiquity of broadband infrastructure improves. In these circumstances, it is appropriate to apply core regulatory rights and responsibilities to both traditional and non-traditional MVPDs.

CONCLUSION

The statutory provisions at issue in this proceeding are patently inconsistent, and the Commission must adopt a reasonable interpretation to clear up the resulting ambiguity. The “transmission facility” requirement proffered by the Media Bureau, however, cannot be squared with the illustrative list of entities defined by Congress to be “MVPDs.” The proposed alternative formulation, equating “channels of video programming” with “video programming networks,” would be a reasonable interpretation, as it comports with the common usage of these terms and results in appropriate regulatory implications. Accordingly, DIRECTV supports this alternative interpretation.

⁴⁴ See Peter Kafka, “Microsoft’s Sneaky Success: The Xbox Is the Most Popular Video Player in the U.S.,” ALLTHINGS.D.COM (May 10, 2012) (available at <http://allthingsd.com/20120510/microsofts-sneaky-success-the-xbox-is-the-most-popular-video-player-in-the-u-s/>).

⁴⁵ Suzanne Vranica and Sam Schechner, “Online Video Turns Up Heat,” WALL STREET JOURNAL (Apr. 23, 2012) (quoting Craig Atkinson, chief digital officer of PHD, a media-buying unit of Omnicom Group, Inc.) (available at <http://online.wsj.com/article/SB10001424052702304331204577356340949615260.html>).

⁴⁶ See 47 U.S.C. §§ 613(c)(2)(A), 303(u)(1), 303(z)(1).

