

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Interpretation of the Terms “Multichannel Video) MB Docket No. 12-83
Programming Distributor” and “Channel” as)
Raised in Pending Program Access Complaint)
Proceeding)

COMMENTS OF TIME WARNER CABLE INC.

Time Warner Cable Inc. (“TWC”) hereby submits the following comments in response to the Public Notice issued in the above-captioned docket.¹

INTRODUCTION AND SUMMARY

As the Public Notice recognizes, online video distributors (“OVDs”) have become significant players in the entertainment marketplace, offering important new outlets for programming vendors and expanded viewing options for consumers. The Public Notice appropriately seeks comment on how OVDs fit within the framework established by the Communications Act of 1934, as amended (the “Act”)—including in particular how to apply the statutory terms “multichannel video programming distributor” (“MVPD”) and “channel”—as “[t]he interpretation of these terms has legal and policy implications that extend beyond the parties to th[e] [Sky Angel] complaint.”²

TWC is a strong supporter of regulatory parity and thus is sympathetic to the proposition that all video distributors should have the same rights and responsibilities, regardless of the

¹ 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*, MB Docket No. 12-83, DA 12-507 (rel. Mar. 30, 2012) (“Public Notice”).

² *Id.* ¶ 1.

particular technology they employ. As a textual matter, however, the Act does not support classification of OVDs as “MVPDs.” Rather, as the Media Bureau has recognized, a video distributor must provide a transmission path along with video programming to be considered an MVPD under the Act.³

Moreover, the best way to pursue regulatory parity is to eliminate unnecessary regulatory obligations (*i.e.*, regulate incumbents “down” to the level of the unclassified new entrant), not to reflexively extend legacy provisions to new classes of providers (*i.e.*, regulate “up” to the level of incumbent providers). In particular, now that the “bottleneck” concerns that animated adoption of the program access rules (among other requirements) have evaporated, there is no continuing justification for maintaining such requirements at all, much less for *expanding* them by authorizing additional types of competitors to pursue complaints. Indeed, such an expansion would raise serious questions under the First Amendment, especially because any governmental interest in alleviating bottlenecks has been fulfilled through market forces, without resort to regulating speech. Accordingly, the Commission should pursue regulatory parity primarily by *eliminating* traditional mandates relating to program access (among other monopoly-era requirements) and by working with Congress to develop a uniform set of consumer protection requirements with which all video distributors must comply, to the extent regulation remains necessary at all.

At the same time, the interest in regulatory parity does require that “over the top” video programming be treated the same regardless of what other services an OVD may provide, whether directly or through an affiliate. In particular, if the Commission determines as a general

³ See *Sky Angel U.S., LLC*, Order, 25 FCC Rcd 3879 ¶ 7 (MB 2010) (denying Sky Angel’s request for a standstill based on the finding that Sky Angel “fail[ed] to address the definitions of th[e] term [“channel”] in the Act and the Commission’s rules, which appear to include a transmission path as a necessary element of a ‘channel’”); Public Notice ¶ 5.

matter that OVDs that do not provide an integrated transmission path fail to qualify as MVPDs, it should confirm that a company that offers a comparable “over the top” video service would not become an MVPD simply because it or an affiliated provider separately offers broadband Internet access service to the same customer base. There is no statutory or public policy basis to vary the classification of a provider’s “over the top” video offerings depending on other non-video services it or its affiliates happen to provide.

DISCUSSION

I. **THE MOST REASONABLE READING OF THE ACT REQUIRES AN ENTITY TO PROVIDE AN INTEGRATED OFFERING OF A TRANSMISSION PATH AND VIDEO PROGRAMMING CONTENT TO QUALIFY AS AN “MVPD”**

The Media Bureau correctly concluded that an entity must provide a transmission path along with video programming to fit within the statutory definition of “MVPD.” The core question presented by the Public Notice is what Congress intended when it defined an MVPD as an entity that provides “multiple *channels* of video programming.”⁴ Because Congress defined the term “channel” as a physical “portion of the electromagnetic frequency spectrum” in 1984, years before it established the “MVPD” classification in the 1992 Cable Act,⁵ the most readily apparent construction of the Act—and quite possibly the only permissible construction—is one that adheres to the settled meaning of “channels” as physical transmission pathways used to deliver video programming by wire or radio.

Congress’s decision to define the term “channel” reflects its judgment that it should be treated as a term of art, despite any “more common,” “less technical,” or “everyday” meanings of

⁴ 47 U.S.C. § 522(13) (emphasis added).

⁵ *Id.* § 522(4).

the word.⁶ And Congress’s subsequent decision not to repeal or otherwise alter the definition of “channel” when it enacted the 1992 Cable Act “indicate[s] that Congress intended for the pre-existing definition of ‘channel’ to apply in interpreting the term ‘MVPD.’”⁷ To be sure, the 1984 definition of “channel” includes cable-specific language that does not apply literally to the transmission pathways employed by non-cable MVPDs.⁸ But it makes perfect sense that, in expanding its regulatory framework to cover new video distribution platforms in 1992, Congress intended its reference to “channels” in the definition of MVPD to conform to the understanding of “channel” grounded in the text and history of the Act. In contrast, there is no sound basis to posit that Congress sought to abandon the established meaning of “channel” *sub silentio*. As the Public Notice recognizes, the fact that all of the entities included in “the illustrative list in the Act’s definition of an MVPD ... provide a transmission path for the delivery of video programming” confirms Congress’s intent to build on, rather than supplant, the established definition of “channel.”⁹

Nothing in the text or legislative history of the Act supports redefining the term “channels” to mean “video programming networks.” If Congress had intended such a radical departure from its previous understanding of “channel,” it would have stated as much.¹⁰ For example, when Congress enacted the program carriage provision of the Act—also in the 1992

⁶ Public Notice ¶ 11.

⁷ *Id.* ¶ 7.

⁸ 47 U.S.C. § 522(4) (defining “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)”).

⁹ Public Notice ¶ 6.

¹⁰ *See Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001) (“Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”).

Cable Act—it made clear that “the term ‘discrimination’ [as used in Section 616] is to be *distinguished* from how that term is used in connection with actions by common carriers subject to title II of the Communications Act.”¹¹ Unlike the circumstances present here, Congress directed the Commission to interpret and apply that term more generally, drawing from the “extensive body of law ... addressing discrimination in normal business practices.”¹²

Redefining “channels” to mean “video programming networks” also would render a critical part of the definition of “MVPD” superfluous, violating a fundamental tenet of statutory construction. If the term “channel” were construed to mean “video programming network,” then the “video programming” element of the MVPD classification would become entirely redundant. It simply makes no sense to require an entity to “make[] available for purchase ... multiple [video programming networks] of video programming.”¹³ Yet that is precisely the result that would occur if the Commission were to ignore the statutory definition of “channel” in favor of a purportedly more “common” understanding of the term. Moreover, Congress repeatedly referred to “networks” in the 1992 Cable Act and legislative history,¹⁴ further undermining any suggestion that Congress would have used the defined term “channel” when it actually intended to refer to a “network.”¹⁵ The rules of statutory construction require the Commission to avoid

¹¹ H.R. REP. NO. 102-628, at 110 (1992).

¹² *Id.*

¹³ 47 U.S.C. § 522(4). Similarly, the term “MVPD” itself would translate into “multi-[video programming network] video programming distributor” if “channel” were understood to mean a “video programming network.”

¹⁴ *See, e.g., id.* §§ 534(b)(2)(B), (b)(5); 535(b)(3)(C), (f); 548(c)(3)(B); H.R. REP. NO. 102-628, at 28, 31, 40-41, (1992); S. REP. NO. 102-92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1144, 1158, 1162, 1168.

¹⁵ *See BedRoc v. United States*, 541 U.S. 176, 183 (2004) (“The preeminent canon of statutory interpretation requires us to ‘presume that [the] legislature says in a statute what

such interpretations when they would render parts of the text a nullity and a more straightforward interpretation gives effect to all of Congress's words.¹⁶

II. THE COMMISSION SHOULD NOT EXPAND THE SCOPE OF OUTDATED MVPD REGULATION BY CLASSIFYING OVDs AS MVPDs

Reading the statutory term “channel” to mean “video programming network” is not only at odds with basic principles of statutory construction, but also would constitute bad policy and further exacerbate First Amendment concerns relating to obligations imposed on cable operators. As relevant Commission findings and other data show, today's video distribution marketplace is radically different from the media landscape that existed in 1992 and is now vigorously competitive.¹⁷ In light of these significant competitive developments, the Commission should

it means and means in a statute what it says there.” (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

¹⁶ See *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961) (Where “[t]he statute admits a reasonable construction which gives effect to all of its provisions[,] ... we will not adopt a strained reading which renders one part a mere redundancy.”).

¹⁷ See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 ¶¶ 76, 78 (2009) (“13th MVPD Competition Report”) (finding that direct broadcast satellite providers DIRECTV and DISH Network are the nation's second and third largest MVPDs, respectively, surpassed only by Comcast); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Supplemental Notice of Inquiry, 24 FCC Rcd 4401 ¶ 33 (2009) (noting that Verizon FiOS and AT&T U-verse more than doubled their subscribership in 2008 and were “continu[ing] to expand their service areas”); *13th MVPD Competition Report* ¶ 153 (explaining the impact of the rise of Internet video distribution by stating that “established models for the distribution of video programming are being challenged by ... technological advancements and consumers' ability to receive video programming via alternative means, not just from traditional linear networks”); Steven Waldman, FCC, *The Information Needs of Communities—The Changing Media Landscape in a Broadband Age*, at 113 (2011), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-307406A1.pdf (“DBS has grown to become a significant provider of video services and a vibrant competitor to cable.”); *Revision of the Commission's Program Access Rules*, Notice of Proposed Rulemaking, MB Docket No. 12-68 *et al.*, FCC 12-30, at App. B, Table 1 (rel. Mar. 20, 2012) (“2012 Program Access NPRM”) (documenting the significant decline in vertical integration of satellite-delivered national programming networks with cable operators since 1992).

not pursue any regulatory changes that would impose unwarranted burdens on traditional cable operators. Rather, TWC urges the Commission to identify ways to scale back its rules to eliminate outdated regulatory burdens that already raise significant First Amendment concerns.

In particular, robust competition among video distributors of all stripes obviates the justification for continuing program access mandates that single out cable operators for disparate treatment. In the absence of market power by cable operators, government does not have even an arguable justification for interfering in the editorial and business decisions of solely that one group of speakers. In addition, such tilting of the playing field to ban exclusive arrangements by only some participants in a vibrantly competitive marketplace distorts, rather than promotes, competition, and thereby diminishes consumer welfare. And there can be no doubt that program access mandates implicate the speech rights of vertically integrated programming vendors and cable operators.¹⁸ Today's marketplace conditions thus call into question the constitutionality of retaining program access requirements *at all*.¹⁹ Accordingly, the last thing the Commission should do is *broaden* the program access regime to further impose burdens solely on one group of speakers. The Public Notice, however, fails to recognize or grapple with the significant constitutional concerns at stake.

¹⁸ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”); *see also Time Warner Entm’t Co., L.P. v. FCC*, 93 F.3d 957, 978-79 (D.C. Cir. 1996) (analyzing the impact of the exclusive contract ban on cable operators’ First Amendment rights).

¹⁹ *See, e.g., Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1325 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (“Th[e] radically changed and highly competitive marketplace – where no cable operator exercises market power in the downstream or upstream markets and no national video programming network is so powerful as to dominate the programming market – completely eviscerates the justification we relied on in *Time Warner* for [upholding] the [program access] ban on exclusive contracts.”).

TWC urges the Commission to pursue regulatory parity by identifying and implementing strategies to eliminate unnecessary regulatory provisions, rather than by reflexively extending such provisions to OVDs. For example, TWC applauds the Commission’s recent notices of proposed rulemaking seeking comment on the sunset of the exclusive contract prohibition and viewability rule, respectively.²⁰ Ultimately, however, a legislative solution likely will be necessary to fully achieve the goal of regulatory parity. TWC therefore encourages the Commission to work with Congress to develop legislation that would eliminate outdated and artificial regulatory distinctions in the video distribution marketplace.

In the near term, regardless of their ultimate classification, the Commission must ensure that it treats similarly situated providers of “over the top” video service the same. If the Commission determines that an OVD that fails to provide an integrated transmission path is not an MVPD, as TWC believes appropriate, it should apply the same reasoning to hold that facilities-based providers of broadband Internet access do not become MVPDs when they or their affiliates offer a comparable “over the top” video service to their Internet access subscribers (alongside other online content offerings). As explained above, the statutory definition of “channel” expressly refers to “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).”²¹ The subsequent expansion of the statutory scheme in the 1992 Cable Act to include other types of MVPDs makes the term “channel” applicable to other types of transmission pathways dedicated to *subscription video services* regulated under

²⁰ See generally 2012 Program Access NPRM; *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Fourth Further Notice of Proposed Rulemaking and Declaratory Order, CS Docket No. 98-120, FCC 12-18 (rel. Feb. 10, 2012).

²¹ 47 U.S.C. § 522(4).

Title VI (and not just to “cable systems”). But there is nothing in the statute or legislative history that supports the notion that the term “channel” was intended to encompass *Internet access services*. To the contrary, Congress has drawn clear distinctions between MVPD services and Internet access services.²² The Commission likewise has recognized that Internet access providers are not MVPDs simply because their customers stream video over the Internet.²³ It would be arbitrary and capricious to treat an “over the top” video service differently where it is offered by an entity that is similarly situated in all relevant respects to non-facilities based OVDs simply because it *independently* offers a broadband Internet access service.²⁴

²² For example, Title VI of the Act establishes a comprehensive and exclusive regulatory scheme for the provision of cable service that the Commission has determined does not apply to broadband Internet access service. *See Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905 (2010) (asserting jurisdiction to adopt “open Internet” requirements primarily based on Title I); 47 U.S.C. § 544(f) (prohibiting the imposition of requirements “regarding the provision or content of cable services” except as expressly provided in Title VI). In addition, Congress enacted different statutory definitions for “cable service,” on the one hand, and “information service,” on the other. *Compare* 47 U.S.C. § 153(7) *with id.* § 153(20).

²³ *Cf. Internet Ventures, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 3247 ¶¶ 12-13 (2000) (making clear that Internet access service is not video programming, even though Internet access can be used to obtain streaming video over the Internet); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 ¶ 60 (2002), *aff’d*, *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (finding that “cable modem service is not a ‘cable service’ under the definition prescribed by the Act” and noting that “a ‘cable operator’ provides cable service over a ‘cable system’ it owns or manages”).

²⁴ *See, e.g., Burlington N. & Santa Fe Ry. V. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) (“Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.”).

CONCLUSION

TWC is sympathetic to the argument that OVDs should have the same rights and responsibilities as the MVPDs with which they increasingly compete, but the existing statutory definitions of “channel” and “MVPD” cannot reasonably be interpreted to include OVDs that distribute video programming without providing an integrated transmission pathway. The Commission should pursue alternative means of achieving regulatory parity among all types of distributors in the robustly competitive video distribution marketplace, including by eliminating outdated regulatory regimes and working with Congress to develop a unified framework for all video distributors. In all events, the Commission should apply the same regulatory treatment to all over-the-top OVDs, regardless of whether the OVD or its affiliate also offers a separate broadband Internet access service.

Respectfully submitted,

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