

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

In the Matter of

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

COMMENTS  
OF THE  
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION  
(CCIA)

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## **EXECUTIVE SUMMARY**

On March 30, 2012 the Media Bureau released a Public Notice seeking Comments on the interpretation of the terms “multichannel video programming distributor” (“MVPD”) and “channel,” as used in the definition of the term “MVPD.” Broadly, the Public Notice seeks input on whether it is necessary for an entity to provide a transmission path for video programming in order to be classified as an MVPD.

CCIA believes that the current definitions of the terms “MVPD” and “channel,” based on Commission precedent and legislative intent, do not support an interpretation of “MVPD” that includes entities that do not provide a transmission path for distribution of video programming. In addition to the definitional issues, CCIA believes that expanding the definition of MVPD to encompass over-the-top, online video distributors (“OVDs”) – at least under the existing rules and requirements that MVPDs must comply with – is unwarranted and unwise. Requiring OVDs to comply with MVPD regulations and requirements would be incongruent with statutory and regulatory intent, as well as expensive, complicated, and time consuming; it would hinder market entry and chill innovation by potential new market entrants and entrepreneurs in the over-the-top Internet video market. Finally, CCIA believes that the procedural posture of this proceeding is not an appropriate vehicle to address re-characterizing OVDs as MVPDs.

CCIA urges the Commission to continue to maintain that for an entity to be classified as an MVPD it must provide a transmission path for distribution of video programming. Unless and until Congress and the Commission act to revise statutes and regulations, this is the only way to sensibly allow over-the-top Internet video to continue to innovate and flourish while providing much-needed competition in the video distribution market.

The Computer & Communications Industry Association (“CCIA”),<sup>1</sup> pursuant to the Federal Communication Commission’s (“Commission”) March 30, 2012 Public Notice,<sup>2</sup> files these Comments regarding the Media Bureau’s (“Bureau”) request for input on the proper interpretation of the term “MVPD,” as well as the term “channel” as used in the definition of the term “MVPD.”<sup>3</sup> CCIA urges the Commission to continue to define the term “channel” in its definition of “MVPD” as including the provision of a transmission path to ensure that only entities that make available multiple streams of video programming, as well as a transmission path for video programming, are classified as MVPDs. This interpretation of the terms “channel” and “MVPD” is consistent with Commission precedent and with Congress’ legislative intent.

CCIA also urges the Commission to refrain from modifying its interpretation of these terms as to re-characterize over-the-top, OVDs as MVPDs. Such a decision will have a negative impact on the innovative and competitive OVD marketplace by requiring OVDs to comply with expensive and complicated regulatory burdens that were designed to address issues with the legacy, facilities-based multichannel television business model, not for the super-competitive, dynamic, and nascent world of online video.

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<sup>1</sup> CCIA is an international nonprofit membership organization representing companies in the computer, Internet, information technology, and telecommunications industries. Together, CCIA’s members employ nearly half a million workers and generate approximately a quarter of a trillion dollars in annual revenue. CCIA promotes open markets, open systems, open networks, and full, fair, and open competition in the computer, telecommunications, and Internet industries.

<sup>2</sup> MB Docket No. 12-83, *Media Bureau Seeks Comment on Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding*, Public Notice, DA 12-507 (Mar. 30, 2012) (“Public Notice”).

<sup>3</sup> *Id.* at 1.

In its Public Notice the Media Bureau requests comment on the most appropriate interpretation of the terms “channel” and “MVPD” as defined in the Communications Act.<sup>4</sup> CCIA believes that the Bureau’s current interpretation, as applied in the *Sky Angel Standstill Denial*, is correct in that MVPDs are only those entities that make available for purchase both multiple streams of video programming, as well as a transmission path capable of delivering video programming.<sup>5</sup>

**I. THE MEDIA BUREAU SHOULD CONTINUE TO DEFINE MVPDS AS ENTITIES THAT MAKE AVAILABLE FOR PURCHASE BOTH MULTIPLE STREAMS OF VIDEO PROGRAMMING AND A TRANSMISSION PATH THAT CAN DELIVER VIDEO PROGRAMMING**

As the Bureau observes, the definition for the term “MVPD” was adopted in the 1992 Cable Act,<sup>6</sup> and “the legislative history of the 1992 Cable Act includes a statement that Congress intended to promote ‘facilities-based’ competition.”<sup>7</sup> And in its Order implementing the 1992 Cable Act the Commission wrote that “[f]acilities-based competition’ is a term used in the legislative history of the Act to emphasize that program competition can only become possible if alternative facilities to deliver programming to subscribers are first created. The focus in the 1992

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<sup>4</sup> *Id.* at 3.

<sup>5</sup> *See Id.* at 4 (explaining that the Bureau’s decision appears to require an entity to include a transmission path in order to qualify as an MVPD) (citing *Sky Angel U.S., LLC*, Order, 25 FCC Rcd 3879, 3882-83 ¶ 7 (MB, 2010).).

<sup>6</sup> *See* Cable Television Consumer Protection Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (Oct. 5, 1992), *codified at various code sections of* 47 U.S.C.

<sup>7</sup> Public Notice, at 4-5 (citing H.R. Rep. No. 102-862 (1992) (Conf. Rep.), at 93, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275 (stating “conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable.”)).

Cable Act is on assuring that facilities-based competition develops.”<sup>8</sup> CCIA believes that the Commission’s own analysis of the relevant legislative history around the term “MVPD” illustrates that MVPDs were intended to be defined as facilities-based entities in the video programming market.

In addition, the Bureau notes that in previous proceedings the Commission has found that “an entity need not own or operate the facilities that it uses to distribute video programming to subscribers in order to qualify as an MVPD .... it may use a third party’s distribution facilities in order to make video programming available to subscribers,” and still be classified as an MVPD.<sup>9</sup> While this makes clear that MVPDs are not required to own the facilities they use to provide video programming to customers, it does not eliminate the requirement that an MVPD must make available for purchase to customers both the video programming and the path of transmission. That an MVPD may act as a reseller of that path for transmission does not eliminate the requirement that it offer the transmission path as is necessary of entities classified as MVPDs.

The legislative history is clear that Congress intended to encourage facilities-based competition in the video programming markets with its adoption of the 1992 Cable Act, and it is also obvious that the Commission has relied on this legislative intent in prior proceedings. CCIA believes the Bureau should rely on this precedent and find that an MVPD must make available to customers a transmission path capable of delivering video programming. The Congress and/or the

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<sup>8</sup> *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3384, n.79 (1993).

<sup>9</sup> Public Notice, at 5 (citing *Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order and Reconsideration, 11 FCC Rcd 20227, 20301 ¶ 171 (1996)).

Commission may at any time through legislation or rulemaking revisit the Act and its corresponding rules to comprehensively address the online video marketplace and the impact it has had on video programming distribution more generally.

## **II. RE-CHARACTERIZING OVDs AS MVPDs WILL STIFLE INNOVATION, INVESTMENT, AND GROWTH IN THE ONLINE VIDEO MARKET**

CCIA urges the Bureau to refrain from lifting the requirement that MVPDs make available for purchase a transmission path capable of delivering video programming because doing so may result in the default re-characterization of OVDs as MVPDs. Such an outcome would stifle innovation, investment, and growth in the online video space and lead to less competition from over-the-top services to traditional video distributors.

As the Bureau notes in its Public Notice, there are numerous statutory and regulatory requirements with which MVPDs must comply.<sup>10</sup> Given that many OVDs are small, start-up companies,<sup>11</sup> requiring compliance with MVPD rules, regulations, and requirements that were originally designed to address issues in legacy, facilities-based multichannel video distribution is incongruent with the intent of those statutes and regulations.

Further, requiring compliance with MVPD rules will likely make it difficult, if not impossible, for OVD startups to survive and continue to flourish. These companies are reliant on venture capital and other investments outside of the traditional credit markets that are available for

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<sup>10</sup> *See Id.* at 1-2 (citing requirements including those relating to program carriage, competitive availability of navigation devices, good faith negotiations for retransmission consent, Equal Employment Opportunity, closed captioning and emergency information, various technical matters, and cable inside wiring.).

<sup>11</sup> For example, YouTube was founded by three people in 2005. *See* Jim Hopkins, *Surprise! There's a third YouTube co-founder*, USA TODAY, Oct. 11, 2006, [http://www.usatoday.com/tech/news/2006-10-11-youtube-karim\\_x.htm](http://www.usatoday.com/tech/news/2006-10-11-youtube-karim_x.htm).

larger, well-established firms, and requiring these start-ups to invest their time and resources in unnecessary compliance, rather than innovation and development of new products and technologies, will chill investment and growth in this dynamic and vibrant sector of the economy.

CCIA believes that any action by the Bureau that forces OVDs to comply with MVPD requirements will only stifle the much-needed competition and increased consumer choice that OVDs have brought and continue to bring to the video distribution marketplace. Thus, CCIA urges the Media Bureau to maintain its position that entities must provide a transmission path for distribution of its video programming to be classified as an MVPD.

### **III. THE CURRENT PROCEEDING IS NOT WELL-SUITED FOR ADDRESSING AN ISSUE AS IMPORTANT AS WHETHER TO RE-CHARACTERIZE OVDs AS MVPDs**

CCIA believes that the pending proceeding to resolve a program access dispute between Sky Angel and Discovery Communications is not the appropriate vehicle to address the far-reaching matters on which the Public Notice seeks comment. As discussed above, re-characterizing OVDs as MVPDs would require their adherence to the current MVPD regulatory regime. This could have unintended and industry-shaping consequences for online video distribution.

The Media Bureau's Public Notice notes that the instant program access complaint is a "restricted" proceeding. As such, Commission rules prohibit *ex parte* representations that would typically assist the Bureau in understanding the likely impact of its decision on affected entities.<sup>12</sup> These procedural requirements fall short of those in a rulemaking proceeding. CCIA believes the Commission would benefit from a robust, public debate and discussion about the concerns expressed herein and that the current procedural posture is insufficient for such a dialogue.

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<sup>12</sup> Public Notice, at 9.

Due to the potentially wide-ranging impact of the Bureau's resolution of the issues presented in its Public Notice, CCIA believes that the current proceeding, with its limited opportunities for input from and dialogue with affected entities, is not the most appropriate vehicle to address whether MVPD requirements should be extended to apply to OVDs.

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Respectfully submitted,

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