

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

Media Bureau Seeks Comment on Interpretation
of the Terms “Multichannel Video
Programming Distributor” and “Channel” as
Raised in Pending Program Access Complaint
Proceeding

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) MB Docket No. 12-83
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COMMENTS OF CABLEVISION SYSTEM CORPORATION

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Cablevision Systems Corporation (“Cablevision”) submits these comments in response to the Public Notice in the above-captioned proceeding,^{1/} regarding the appropriate interpretation of the statutory terms “multichannel video programming distributor” (“MVPD”) and “channel.” As demonstrated below, an online video distributor (“OVD”) does not meet the statutory definition of an MVPD.

The *Notice* observes that the definitional matters raised in the *Notice* have arisen in a pending program access complaint but have “legal and policy implications that extend beyond the parties to this complaint.”^{2/} That is a considerable understatement. Under the statutory language, legislative history, and the Commission’s own precedent, the answer to the immediate question of whether OVDs are MVPDs for purposes of program access rules and other regulatory rights and obligations is “No.” But the questions of whether and how OVDs fit into the statutory and regulatory scheme cannot be fully addressed without considering more

^{1/} *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) (“*Notice*”).

^{2/} *Id.* ¶ 1.

fundamental issues about the continued relevance and vitality of the framework embodied in the 1984 and 1992 Cable Acts.

For instance, broadcasters and programmers frequently require MVPDs to buy must-have broadcast stations and programming services in a bundle, driving up costs and reducing MVPDs' ability to tailor a service to the needs and interests of their subscribers. By contrast, OVDs can combine movies, popular programming series, and other hand-picked content into service offerings tailored to the needs and interests of their customers. In addition, OVDs operate free of the many rules that further limit cable operator discretion: none of the must-carry, must buy, leased access, public access, or program carriage rules apply to OVDs.

If OVDs were granted MVPD status, they would still be largely free to design their own product offerings – but they would also have the right under program access to cherry-pick desirable cable-affiliated programming networks to supplement their offerings and create a service that cable operators, saddled with legacy rules and business practices, could find difficult to match.

As demonstrated below, the Media Bureau should reaffirm its earlier conclusion that OVDs are not MVPDs. In the unlikely event that it is inclined toward a different outcome, however, it should refrain from such a decision *unless and until* the significant, unfair and government-granted competitive advantages OVDs would enjoy over traditional MVPDs are fully addressed. In particular, that means addressing bundling practices that may restrict cable operators' ability to compete with government-empowered OVDs in the offering of tailored and low cost programming options.

Reasoned resolution of such fundamental issues requires full, careful consideration of the myriad legal, policy, and business implications of classifying OVDs as MVPDs – and whether

the public would be better served by a framework that reflects the realities of *today's* video marketplace rather than the marketplace of 1984 or 1992. That requires a deeper, more developed examination of the many important issues raised directly and indirectly by the *Notice* than is possible in the context of a public notice associated with a single fact-specific program access complaint proceeding can provide the necessary record to allow the Commission to reach rational conclusions about these issues. Ultimately, determinations of this magnitude must be made by Congress rather than the Commission.

In resolving the Sky Angel complaint, therefore, the Bureau should take care to avoid straying beyond the limits of its authority and prejudicing any conclusions about what a more thorough consideration – by Congress, the Commission, industry and interested stakeholders – of a fairer and more rational video distribution regulatory scheme might yield.

INTRODUCTION AND SUMMARY

By definition, an MVPD must “make[] available” “multiple channels” of “video programming.”^{3/} The Bureau was correct in concluding that an OVD does not meet these criteria, and the Commission lacks the authority to disregard these statutory requirements and extend the MVPD classification in any manner that would encompass OVDs. To conclude otherwise would violate the statutory language and be inconsistent with Congress’s explicitly stated goal of promoting facilities-based competition.

First, an OVD does not “make available” any “channels” to subscribers. Both “make available” and “channels” for these purposes must take their meaning from the statutory text. Under Title VI of the Act, a “channel” means a transmission pathway. By incorporating the defined term “channel” as part of the definition of MVPD, Congress indicated that a hallmark of all MVPDs is the offering of transmission pathways akin to those offered by a cable system.

^{3/} 47 U.S.C. § 522(13).

Indeed, each of the MVPDs identified in the definition of that term – cable operator, Multichannel Multipoint Distribution Service (“MMDS”), Direct Broadcast Satellite Service (“DBS”), and television receive-only satellite program distributor – offers such pathways.

An entity can “make available” a transmission pathway only if it owns or controls that facility. Congress has historically viewed ownership or control of facilities as a key aspect of an entity being an MVPD, and legislative history confirms that encouraging facilities-based competition was Congress’s goal in creating the MVPD category. The Commission’s rules adopted after the enactment of the definition likewise assume that the covered entities own or control a transmission path to the subscriber, confirming that the Commission shared Congress’s understanding of an MVPD. OVDs, however, rely on the public Internet to deliver programming to their subscribers, and do not own or control any transmission pathways to the subscriber.

De-coupling MVPD status from facilities ownership or control would effectively enable anyone to leverage the offering of a handful of amateur video clips into a right to demand access to high quality programming networks, a change of such far-reaching consequences for the video distribution and programming industries that it cannot be the correct interpretation of the term. Purported ambiguities in the definition of MVPD are insufficient to authorize such a profound expansion of the program access scheme. As the Supreme Court has taught, Congress “does not . . . hide elephants in mouseholes.”

Second, “channel” is not interchangeable with “programming network.” The statute itself differentiates between a channel as a means to carry programming and the programming that is carried over a channel. Indeed, the Commission’s regulations have long acknowledged this distinction. Even common dictionary definitions of “channel” identify it as a transmission pathway.

Third, the exclusion of OVDs from the compulsory license under the Copyright Act – which Congress intended to work in conjunction with its carriage rules – also strongly suggests that Congress did not intend OVDs to be MVPDs under the Communications Act.

Finally, a broad FCC interpretation of the definitions that would allow OVDs to become MVPDs would impermissibly burden the First Amendment free speech rights of existing MVPDs and programmers by expanding the class of entities entitled to government-mandated access to programming in the absence of any evidence that such infringement is necessary to promote video competition or serve any other substantial governmental interest.

I. OVDs DO NOT “MAKE AVAILABLE” ANY “CHANNELS” OF VIDEO PROGRAMMING BECAUSE THEY DO NOT OWN OR CONTROL THE TRANSMISSION PATH

A. OVDs Do Not “Make Available” Any “Channels” Of Video Programming.

An MVPD must not simply offer “channels of video programming,” it must “make[] available” those channels “for purchase, by subscribers or customers.”^{4/} OVDs do neither, because a channel is a transmission path and OVDs neither own nor control the transmission pathways used to deliver video programming to subscribers or customers. OVDs therefore cannot be MVPDs. The Media Bureau correctly concluded that the definition of MVPD requires an entity to “provide its subscribers with a transmission path.”^{5/} There is no reason to deviate from that conclusion here.

1. A “channel” is a transmission path.

The Act clearly defines “channel” by reference to a transmission path – “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of

^{4/} 47 U.S.C. § 522(13).

^{5/} *Sky Angel U.S., LLC, Emergency Petition for Temporary Standstill*, Order, 25 FCC Rcd 3879, ¶ 7 (2010).

delivering a television channel.” While literally applicable only to channels on a cable system,^{6/} that definition must also inform the meaning of the term as it is used in the definition of “MVPD.” Congress is presumed to have been aware of the definition of “channel” when it used that term in defining MVPD,^{7/} and the Commission’s job is to read the statute in the manner that gives effect to each provision in accordance with its sense and purpose.^{8/}

Here, it is not necessary to imagine how Congress might have meant the two terms (“channel” and “MVPD”) to work together because Congress provided guidance in the definition of MVPD itself. By defining MVPD to include distributors “such as” a cable operator, Congress signaled that the definition of channel should be carried forward and applied to all MVPDs. Since cable “channels” are the pathways by which cable operators make programming available, the reference to “channels” in the definition of MVPD likewise must mean transmission paths. This conclusion is borne out by the fact that each of the other MVPDs identified in the statutory definition of MVPD – MMDS, DBS, and “television receive-only satellite program distributor” – provides facilities-based transmission pathways for the delivery of video programming.^{9/}

2. OVDs do not “make available” channels of video programming because they do not own or control transmission paths.

The phrase “make[] available” also takes meaning from a definition applicable to cable

^{6/} See Notice ¶ 11.

^{7/} *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (“We assume that Congress is aware of existing law when it passes legislation.”).

^{8/} *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *United States v. Turkette*, 452 U.S. 576, 580 (1981).

^{9/} Similarly, satellite master antenna systems (“SMATVs”), which the FCC later determined to be MVPDs based in part on legislative history of adoption of the MVPD definition, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, ¶ 132 (1993), also transmit programming to subscribers using cable-like transmission pathways. OVS operators, similarly designated by the Commission as MVPDs for some purposes, see generally *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, Second Report and Order, 11 FCC Rcd 18223 (1996), are defined by FCC regulations as a “facility consisting of a set of transmission paths” 47 C.F.R. § 76.1500(a).

operators – in fact, from the definition of “cable operator” itself – since cable operators are among the entities classified as MVPDs. An entity qualifies as a cable operator only if it either owns “a significant interest” or “otherwise controls or is responsible for . . . the management and operation” of the cable system.^{10/} Entities that did not own or control the transmission path were held not to be cable operators.^{11/}

It is logical to conclude that Congress carried forward the element of some domain over the transmission path in the definition of MVPD, through the “make[] available” prong. This conclusion is reinforced by the fact that each of the three non-cable systems identified in the statutory definition of MVPD – MMDS, DBS, and “television receive-only satellite program distributor” – also includes facilities ownership or control as an essential aspect of being such a distributor.

For instance, the Commission has described MMDS (now redesignated as part of the Broadband Radio Service) as “consisting basically of a fixed station transmitting . . . to numerous fixed receivers with directive antennas”^{12/} MMDS operators were required to obtain a license for a spectrum channel,^{13/} and the Commission required the MMDS operator to maintain control over both the transmitting antenna and the receiving equipment at the customer’s location.^{14/}

^{10/} 47 U.S.C. § 522(5).

^{11/} See *City of Chicago v. FCC*, 199 F.3d 424, 431 (7th Cir. 1999); *City of Austin v. Southwestern Bell Video*, 193 F.3d 309, 312 (5th Cir. 1999). It is worth noting that the entities in those cases did acquire the right to use transmission paths for the delivery of video programming to subscribers. In that critical regard, they are readily distinguishable from OVDs.

^{12/} *Amendment of Parts 1, 2, 21, and 43 of the Commission’s Rules and Regulations to Provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service*, Report and Order, 45 FCC 2d 616, ¶ 5 (1974).

^{13/} *Id.* ¶ 26.

^{14/} *Id.* ¶ 22.

Similarly, DBS was defined in the Cable Act of 1992 – the same Act that introduced the definition of MVPD – as either “a licensee for a Ku-band satellite system” (*i.e.*, the owner of a satellite distribution system) or a “distributor who *controls* a minimum number of channels (as specified by Commission regulation) using a Ku-band fixed service satellite system.”^{15/}

Discussing the statutory definition of MVPD, the Commission explained that a “television receive-only satellite program distributor” is a “satellite carrier,” defined as “an entity that uplinks a broadcast signal and retransmits it over satellite facilities that the carrier may own or lease.”^{16/}

The Commission similarly has observed that the operation of a SMATV, which it determined to be an MVPD based in part on the legislative history of the MVPD definition,^{17/} “largely resembles that of a cable system – a satellite dish receives the programming signals, equipment processes the signals, and wires distribute the programming to individual dwelling units.”^{18/} The Commission also has found it meaningful that SMATV operators serve subscribers “either through their own facilities or through partnership arrangements with DBS operators”^{19/} – either case involving ownership or control of delivery facilities.^{20/}

^{15/} Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 25 (1992) (codified as 47 U.S.C. § 335(b)(5)) (emphasis added).

^{16/} *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, ¶ 131 (1993).

^{17/} *Id.* ¶ 132.

^{18/} *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions*, Memorandum Opinion and Order on Reconsideration of The First Report and Order, 10 FCC Rcd 4654, ¶ 11 (1995).

^{19/} *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 24 FCC Rcd 750, ¶ 73 (2009).

^{20/} Similarly, as noted above, *see* n.9, *supra*, OVS operators are MVPDs for some purposes and are defined as an entity that “owns a significant interest in . . . or otherwise controls” an OVS, defined as “a set of transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service.” 47 C.F.R. § 76.1500.

When Congress grouped these entities together under the umbrella term “MVPD,” the key attributes of their similarity were also folded into the meaning of that term. While the list of what type of distributors might be considered an MVPD is not exhaustive, Congress did specify that the list was intended to be exemplary, through use of the term “such as.” In interpreting the term MVPD, the Commission cannot discard the fundamental characteristics of a distributor that Congress imparted, including ownership or control of delivery facilities.^{21/} Because OVDs do not own or control the transmission path to subscribers,^{22/} instead relying on their subscribers to select and obtain broadband Internet service from another provider,^{23/} an OVD is not an MVPD.

^{21/} *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”); *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 861 (1984) (“[T]he meaning of a word [in a statute] must be ascertained in the context of achieving particular objectives, and the words associated with it may indicate that the true meaning of the series is to convey a common idea.”). *Cf. Begay v. United States*, 128 S. Ct. 1581, 1585 (2008) (“[T]o give effect ... to every clause and word of this statute, we should read the examples as limiting the crimes that [the] clause . . . covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves.”) (internal quotes omitted).

The *Notice* observes that the Commission has previously declared 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.” *Notice* ¶ 9. But in the same order where the Commission made that statement, it also reaffirmed its finding that OVS operators are MVPDs and that they, or their affiliates, must own or control a significant interest in the open video system. *I/M/O Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, ¶ 12 (1996). *See also* 47 C.F.R. § 76.1500(b) (defining an OVS Operator as an entity that “provides cable service over an open video system and directly or through one or more affiliates owns a significant interest in such open video system, *or otherwise controls* or is responsible for the management and operation of such an open video system.”). OVDs do not even obtain access to third party facilities via lease or tariff.

^{22/} Nor can they demand such control. Cable modem service is an information service with no severable transport component over which an OVD could demand control. *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005).

^{23/} Even if transmission paths established on the public Internet were considered “channels,” OVDs do not establish those paths. Rather, it is the end user who makes the request for online content and thereby initiates the establishment of that pathway.

3. Classifying OVDs as MVPDs would be inconsistent with legislative history and would fundamentally alter the regulatory landscape without the necessary clear statutory authority to do so.

That Congress intended the term “MVPD” to encompass distributors that own or control a transmission path is further confirmed both by the legislative history and the Commission’s history of implementing the regulatory scheme applicable to MVPDs. As the *Notice* observes, the 1992 Cable Act that introduced the definition of an MVPD was intended to promote facilities-based competition.^{24/} In particular, Congress dictated that in interpreting the program access provisions in the Act, “the Commission shall encourage arrangements which promote the development of new technologies providing *facilities-based* competition to cable.”^{25/} The Commission is not free to interpret the Act in a manner inconsistent with this intent.^{26/}

The Commission itself has recognized the facilities-based nature of the MVPD definition, by creating MVPD regulatory requirements that apply to entities that own or control the transmission path to the subscriber. The vast majority of current MVPD regulatory requirements – from home wiring requirements^{27/} to competitive availability of system navigation devices,^{28/} aeronautical frequency notification,^{29/} and correction of harmful radiocommunication interference^{30/} – are requirements designed to regulate facilities-based distributors, confirming

^{24/} *Notice* ¶ 8.

^{25/} *See Notice* n.33 (emphasis added).

^{26/} *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994) (“[A]n agency’s interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear.”); *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979) (“Although an agency’s interpretation of the statute under which it operates is entitled to some deference, this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history.”) (internal quotes omitted).

^{27/} 47 C.F.R. §§ 76.800-806.

^{28/} 47 C.F.R. §§ 76.1200-04.

^{29/} 47 C.F.R. § 76.1804.

^{30/} 47 C.F.R. § 76.613.

the Commission’s understanding of the term. This regulatory scheme would be unworkable if MVPDs were construed to include OVDs – further evidence that such an interpretation is not the correct one.^{31/}

OVDs are not akin to cable operators or other MVPDs in either of the critical aspects identified by Congress. OVDs by definition provide their services over the public Internet and therefore neither own nor control the transmission path over which they provide their services.^{32/} OVDs, therefore, do not “make available” any “channels” of video programming, and cannot come under the statutory definition of an MVPD.^{33/}

Finally, de-coupling MVPD status from facilities ownership or control would enable OVDs to qualify as MVPDs by offering of a handful of amateur video clips and leveraging that into a right to demand access to high quality programming networks. Such a result would undermine the substantial investments current MVPDs have made in their distribution networks and degrade the value of established cable programming. The purported ambiguities in the definition of MVPD are not sufficient to authorize a change of such economic significance. Congress “does not . . . hide elephants in mouseholes,”^{34/} and an agency is not entitled to deference when it interprets allegedly ambiguous statutory terms in such a manner.^{35/} Any

^{31/} *Southwest Software, Inc. v. Harlequin Inc.*, 226 F. 3d 1280, 1295 (Fed. Cir. 2000) (construction of a statute that “could produce an illogical and unworkable result” cannot be correct).

^{32/} See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Further Notice of Inquiry, 26 FCC Rcd 14091, ¶ 52 (2011).

^{33/} Compare 47 C.F.R. § 76.1901 (a) & (b) (selectable output control rules apply to MVPDs, but not to “distribution of any content over the Internet” or to “an MVPD’s operations via cable modem”) (emphasis added).

^{34/} *American Lib. Assn. v. FCC*, 406 F.3d 689, 704 (D.C. Cir. 2005) (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)).

^{35/} *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-61 (2000) (“Deference under *Chevron* to an agency’s construction of a statute that it administers is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress

changes to the regulatory scheme to incorporate the emerging online video industry must be made by Congress. In the absence of Congressional action, the Commission is bound to the interpretation that does not effect such a result.

B. OVD Transmissions Over The Internet Do Not Meet The Definition Of A Channel Even In The “More Common, Less Technical Sense.”

The *Notice* asks if there is “any basis in the statute to interpret the phrase ‘multiple channels of video programming’ in the more common, less technical everyday sense to mean ‘multiple video programming networks.’”^{36/} In the context of the definition of MVPD, there is not.

First, the idea that the word “channel” in the statutory definition of MVPD should have a different meaning than it does in the statutory definition of the word “channel” itself, in the same section of the statute, strains established principles of statutory construction beyond the breaking point. Generally, where a term is defined in a statute, the Commission is not free to ignore that defined term, even when it appears in other provisions of the statute.^{37/} Even if the Commission cannot apply the “channel” definition in a literal manner to the “MVPD” definition, the Commission must select an interpretation of the term that allows both provisions of the statute to work together in harmony.

has intended such an implicit delegation. . . . [W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”) (internal citation omitted).

^{36/} *Notice* ¶ 11.

^{37/} *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986) (“The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning [and] . . . an explicit definition . . . in the same subchapter strengthens the presumption.”) (internal quotes and citations omitted); *United States v. Altamirano-Quintero*, 511 F. 3d 1087, 1101 (10th Cir. 2007) (explaining that where a term is defined in the statute, “we typically apply the same meaning to the term each time it appears in the statute”).

Second, equating “channel” with “video programming network” in the phrase “channels of video programming” would render the word “channel” superfluous – effectively rewriting the phrase as “video programming network of video programming.” It is axiomatic in statutory construction that every word in a statute must be given meaning.^{38/} Given that the definition itself already uses the term “video programming,” it is not plausible that “channel” would mean the same thing.

Third, even in the “everyday sense,” the word “channel” does not equate to “video programming network.” Standard dictionary definitions of “channel” all define the term as a pathway. Among definitions of “channel” in the Merriam-Webster Dictionary are “the bed where a natural stream of water runs”; “a path along which information (as data or music) in the form of an electrical signal passes”; “a usually tubular enclosed passage”; and “a long gutter, groove, or furrow.”^{39/} Consistent with the foregoing, “channel” is also defined as “a band of frequencies of sufficient width for a single radio or television communication”^{40/} – an electronic pathway.

Similarly, the definitions of “channel” in the American Heritage Dictionary of the English Language include “the bed of a stream or river”; “a broad strait, especially one that connects two seas”; “a trench, furrow, or groove”; “a tubular passage for liquids”; “a course or pathway through which information is transmitted”; and “a specified frequency band for the

^{38/} See, e.g., *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) (“[W]e must give effect to every word a statute wherever possible.”); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute.’”) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)); see also *id.* (“We are thus ‘reluctant to treat statutory terms as surplusage’ in any setting”) (quoting *Babbitt v. Sweet Home Chapter, Communities for Great One*, 515 U.S. 687, 698 (1995)); *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (noting “the cardinal principal of statutory construction that courts must give effect, if possible, to every clause and word of a statute”).

^{39/} Merriam-Webster Dictionary, at <http://merriam-webster.com>.

^{40/} *Id.*

transmission and reception of electromagnetic signals, as for television signals.”^{41/}

Tellingly, *neither* dictionary includes a definition of a channel as a programming network. Thus, even to the extent that it may be appropriate to rely on a common definition for the term “channel” in defining an MVPD – a reliance on common meaning that is not appropriate here because the term has been defined in the statute and Congress instructed the Commission to use it by reference^{42/} – “channel” cannot be interpreted as “programming network.”

The Commission itself in its “common, everyday” discussions frequently differentiates channels from programming networks. For example, FCC rules define “origination cablecasting” as “[p]rogramming . . . carried on a cable television system over one or more *channels*”;^{43/} define “usable activated channels” as “those activated *channels* of a cable system, except those *channels* whose use for the *distribution of broadcast signals* would conflict with technical and safety regulations”;^{44/} and define a “digital cable system” as having “one or more *channels* utilizing QAM modulation for transporting *programs* and services from its headend to receiving devices.”^{45/} “Channel positioning”^{46/} likewise relates to a broadcaster’s selection of a transmission path on a cable system, not to the broadcaster’s programming.

^{41/} THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, Fourth Edition, 2006.

^{42/} *Smith v. United States*, 508 U.S. 223, 228 (1993) (“*When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.*”) (emphasis added); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (“A fundamental canon of statutory construction is that, *unless otherwise defined*, words will be interpreted as taking their ordinary, contemporary, common meaning.”) (emphasis added).

^{43/} 47 C.F.R. § 76.5(p) (emphasis added).

^{44/} 47 C.F.R. § 76.5(oo) (emphasis added).

^{45/} 47 C.F.R. § 76.640(a) (emphasis added).

^{46/} 47 C.F.R. § 76.57.

Other examples include the provision in leased access rules that “[c]able operators may accommodate part-time leased access requests by opening additional *channels* for part-time use or providing comparable time slots on *channels* currently carrying leased or non-leased access *programming*”;^{47/} video description rules requiring pass-through of description where “the *channel* on which the MVPD distributes the *programming* of the broadcast station has the technical capability necessary to pass through the video description”;^{48/} and use of “*channel* capacity for the provision of *programming* from a qualified minority programming source or from any qualified educational *programming* sources” in lieu of leased access capacity.^{49/} Thus, in Commission rules as well, the “everyday sense” of the term “channel” differs from the meaning of “video programming networks.”

C. Interpreting “MVPD” To Include OVDs Would Be Incompatible With The Compulsory Copyright Scheme Created By Congress.

As discussed above, under the language of the Communications Act, OVDs cannot be considered MVPDs. But even if the statute was not clear, the fact that OVDs do not qualify for the compulsory license under Section 111 of the Copyright Act^{50/} offers strong evidence that they cannot be considered MVPDs under the Communications Act. The Copyright Office has determined that OVDs are not “cable systems” for purposes of the compulsory license because, inter alia, an OVD “does not own any transmission facilities, but rather hosts and distributes video programming through software, servers, and computers connected to the Internet”^{51/} and that it is “inappropriate[] to bestow[] the benefits of a compulsory license on an [Internet video]

^{47/} 47 C.F.R. § 76.971(a)(4) (emphasis added).

^{48/} 47 C.F.R. § 79.3(i) (emphasis added).

^{49/} 47 C.F.R. § 76.977(a) (emphasis added).

^{50/} See *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594, 609-14 (S.D. N.Y. 2011).

^{51/} Copyright Office, Section 109 Report to Congress, Notice of Inquiry, 72 Fed. Reg. 19039, 19053 (Apr. 16, 2007).

industry so vastly different from the other retransmission industries now eligible for compulsory licensing.”^{52/}

A Federal court recently agreed that reading the definition of cable system in the Copyright law to encompass OVDs would “essentially mean[] that anyone with a computer, Internet connection, and TV antenna can become a ‘cable system’ for purposes of Section 111 [statutory copyright rights],” and concluded that “[i]t cannot be seriously argued that this is what Congress intended.”^{53/}

Thus, even if the Commission were to interpret the definition of MVPD to include OVDs – and OVDs were thereby authorized to obtain retransmission consent from broadcasters under the Communications Act – those OVDs would still lack the necessary permission from the rights holders to transmit the signals.^{54/} Since it is well established that Congress intended the compulsory copyright license and FCC rules to work in harmony,^{55/} Congress’s exclusion of OVDs from the compulsory license offers persuasive evidence that it also did not intend for “MVPD” to encompass non-facilities-based providers.

^{52/} Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* 97 (1997). While “cable system” under the Copyright Act has been found to encompass MVPDs other than cable operators, the Copyright Office has taken the position that the term refers to “localized transmission media.” Copyright Office, *Cable Compulsory Licenses: Definition of Cable Systems*, Final Rule, 62 Fed. Reg. 18705, 18707 (Apr. 17, 1997).

^{53/} *WPIX, Inc.*, 765 F. Supp. 2d at 617.

^{54/} In theory, OVDs could engage in cumbersome negotiations with the rights holders, but those negotiations would likely not succeed in clearing all of the programming on every broadcast channel – the rationale for the compulsory license in the first place.

^{55/} See Federal Communications Commission, *RETRANSMISSION CONSENT AND EXCLUSIVITY RULES: REPORT TO CONGRESS PURSUANT TO SECTION 208 OF THE SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT OF 2004*, ¶ 6 (2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf.

II. A BROAD INTERPRETATION OF “CHANNELS OF VIDEO PROGRAMMING” CANNOT SURVIVE FIRST AMENDMENT REVIEW IN LIGHT OF TODAY’S HIGHLY COMPETITIVE VIDEO MARKETS

Significantly expanding the definition of an MVPD to include OVDs would impermissibly burden the First Amendment free speech rights of existing MVPDs and programmers by expanding the class of entities entitled to government-mandated access to programming, in the absence of any evidence that such infringement is necessary to promote video competition or serve any other important governmental interest.^{56/} The Commission cannot impose such an increased burden on speech in the absence of a complete record demonstrating the need for such restrictions.^{57/} No such record exists – nor could one be assembled. In light of today’s highly competitive video marketplace, the increased burdens on the speech rights of MVPDs and cable programmers created by this expansion of the definition of MVPD cannot survive First Amendment judicial review.

Today, nearly every household has the choice of at least three video programming distributors – DIRECTV, DISH, and a local cable operator. In many areas consumers can also choose to obtain services from a fourth provider – either Verizon FiOS or AT&T U-verse.^{58/} And, of course, any household with a broadband Internet connection can avail itself of any of a

^{56/} It is well established that “[c]able 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.” *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994). A rule designating OVDs as MVPDs, as a content-neutral restriction on the First Amendment speech rights of current MVPDs, would be reviewed under First Amendment intermediate scrutiny, requiring the rule to advance an important governmental interest and not burden more speech than necessary to further that interest. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 186 (1997).

^{57/} *Turner Broadcasting*, 512 U.S. at 666-68 (requiring a “thorough factual record” of the harms alleged to justify a First Amendment speech restriction “before passing upon the constitutional validity of the challenged provisions”).

^{58/} DIRECTV is now the second largest MVPD in the country, while DISH is the third largest. Verizon is now the country’s eighth largest MVPD, and AT&T is the ninth largest. National Cable & Telecommunications Association, Top 25 Multichannel Video Programming Distributors as of Sept. 2011, at <http://www.ncta.com/Stats/TopMSOs.aspx>.

broad range of OVDs, which have not needed an MVPD designation from the Commission to dramatically expand the number of subscribers and viewers they serve.^{59/} The D.C. Circuit has noted this “evidence of ever increasing competition among video providers” and recognized its relevance to establishing limits on government regulation of the video business.^{60/}

When, as here, a market is competitive, direct interference with First Amendment free speech rights in the name of competition is unnecessary and constitutionally inappropriate. Designating OVDs as MVPDs would therefore impose unjustifiable harms on the speech rights of both cable operators and programmers. Operators would find their speech additionally burdened if they were forced to compete with OVDs armed with government-mandated access to programming, but without the same compliance obligations as facilities-based MVPDs. Government selection of winners and losers in the market of ideas, even where it is content neutral, is unlikely to withstand First Amendment scrutiny.^{61/}

For programmers, a ruling that significantly expands the number and character of MVPDs eligible for program access rights would dramatically change the circumstances that led the courts to hold that the burden on programmer speech from the program access law was no

^{59/} See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Comments of Google, Inc. (June 8, 2011) (“Recent data show that the total U.S. Internet audience engaged in more than 5.1 billion [online video] viewing sessions during April 2011, with 172 million U.S. Internet users watching online video content during the same period. Numerous online video services have launched, including Netflix, Amazon Instant Video, Hulu, iTunes, Vudu, Sezmi, Vimeo, Cinema Now, Blockbuster On Demand, and, of course, YouTube.”).

^{60/} *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).

^{61/} See *Citizens United v. Federal Election Com’n*, 130 S. Ct. 876, 899 (2010) (“Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers.”); *Arizona Free Enterprise Club v. Bennett*, 131 S. Ct. 2806, 2821 (2011) (“We have rejected government efforts to increase the speech of some at the expense of others.”); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (“the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”).

greater a restriction on First Amendment rights than necessary.^{62/} The restriction on cable-affiliated programmer First Amendment rights would no longer be “incidental.” Having to negotiate with potentially large numbers of entities newly qualified as MVPDs – many of whom may not be established businesses with any reputable brand, or who may target a type of niche audience not in line with the programmer’s image (*e.g.*, a service comprised mainly of programming rated R or X) – would burden programmer speech in a manner never before examined by the courts.^{63/}

In the face of the substantial and growing competition in the video marketplace, these additional First Amendment burdens cannot be justified. The Commission must construe the statutory definition of an MVPD so as to avoid raising Constitutional concerns when an alternate interpretation of the statute is available.^{64/} As demonstrated above, such an interpretation is not only available, it also comports with the well-established understanding of that term.

^{62/} *Time Warner Entertainment Co. v. FCC*, 93 F. 3d 957, 978 (D.C. Cir. 1996); *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010).

^{63/} It is well-established that the First Amendment also protects the right *not* to speak. *See Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 524, 559 (1985) (“The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.”) (quoting *Estate of Hemingway v. Random House*, 23 N. Y. 2d 341, 348 (1968)) (emphasis in original).

^{64/} *Jones v. United States*, 529 U.S. 848, 857 (2000).

CONCLUSION

For the reasons described above and consistent with the text and intent of the statute, the Commission should find that an entity meets the definition of MVPD only if it owns or controls the transmission path it uses to deliver video programming. But a decision on a single program access complaint filed by a single OVD is not the appropriate vehicle for considering what the *Notice* acknowledges are more significant legal and policy questions. If the Bureau is inclined to reverse its prior determination and grant OVDs MVPD status, with the accompanying government-granted right to obtain access to programming, there must be a comprehensive assessment of the need to curb the bundling practices of broadcasters and other programmers that limit cable operators' ability to respond to OVD competition.

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