

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

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

COMMENTS



Matthew M. Polka
President and Chief Executive Officer
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Ross J. Lieberman
Vice President of Government Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

Barbara S. Esbin
James N. Moskowitz
Andrea N. Person
Cinnamon Mueller
1333 New Hampshire Ave, N.W.
2nd Floor
Washington, DC 20036
(202) 872-6881

Attorneys for the American Cable
Association

May 14, 2012

Table of Contents

I.	INTRODUCTION AND BACKGROUND	1
II.	THE MOST REASONABLE INTERPRETATION OF THE TERM “MVPD” REQUIRES THAT AN ENTITY MAKE AVAILABLE A TRANSMISSION PATH TO SUBSCRIBERS	5
A.	An “MVPD” is an Entity that “Makes Available” the Delivery of “Multiple “Channels of Video Programming” Over Last Mile Facilities that It Owns or Controls.	6
1.	The Text of the Statute and Commission Precedent Support an Interpretation of the Definition of “MVPD” as a Requiring the Provision of a Transmission Path for Delivery of Video Programming to Subscribers.....	7
2.	The Legislative History of the 1992 Act Supports the Interpretation of “Channels of Video Programming” and “MVPD” as Requiring the Provision of a Transmission Path for Delivery of Video Programming to the Subscriber ..	11
B.	The Most Reasonable Interpretation of the Phrase “Channels of Video Programming” as Used in the Definition of “MVPD” Includes the Provision of a Last-Mile Transmission Path to Subscribers.	13
C.	The Media Bureau Need Not Address the Further Issues it Identifies With Respect to the Types of Contractual Arrangements Needed to Qualify a Non-Facilities Operator as an MVPD to Resolve the Sky Angel Complaint.	17
D.	The Alternative Non-Facilities Based Interpretation of “Channel” Referenced in the Public Notice Is Unsupported by the Text of the Statute, Legislative History and Commission Precedent.....	19
III.	CONGRESS AND THE COMMISSION TO DATE HAVE ACCORDED SEPARATE STATUS TO VIDEO PROGRAMMING DISTRIBUTED OVER THE INTERNET	20
IV.	FAR REACHING AND DISRUPTIVE CONSEQUENCES WOULD FLOW FROM A RE-INTERPRETATION OF THE STAUTORY DEFINITION OF AN MVPD TO INCLUDE NON-FACILITIES BASED ONLINE VIDEO PROGRAMMING DISTRIBUTORS.....	28
V.	CONCLUSION	30

Executive Summary

ACA supports the Media Bureau's interpretation of the term "multichannel video programming distributor" ("MVPD") as meaning an entity that owns or controls distribution facilities and uses them to make available multiple channels of video programming to subscribers. This is not only the most natural reading of the relevant statutory definitions and provisions, it is also demonstrably consistent with the text, purpose, legislative history, and the context in which the terms are used in the Act. Moreover, this interpretation is consistent with legislation passed by Congress as well as longstanding policy and precedent adopted by the Commission since the term was first defined in the Act. In contrast, the alternative interpretation of the terms "channel" and "MVPD" suggested in the Public Notice ("PN"), that an entity would be considered an MVPD if it makes available for purchase multiple "video programming networks" without regard to whether it offers a transmission path, fails on all counts.

Statutory purpose of "MVPD." The term "MVPD" was adopted in 1992 when new competitors to cable were emerging and was designed to include both cable operators and non-cable entities similar to cable operators that Congress anticipated would enter the multichannel video distribution market. The term is of critical importance for application of the program access rules, as well as for several other statutory provisions, including cable effective competition determinations. Because MVPD status is key to several statutory benefits and obligations, any interpretation of the definition of "MVPD" and of the terms that are integral to this definition, "channels of video programming," must be done with an eye toward determining which entities Congress intended to bring within the Commission's regulatory authority for purposes of applying these specific regulatory benefits and obligations. To put it simply, the overarching question becomes: would it make sense to interpret the provisions of the Act applicable to MVPDs as applicable to online content, applications, and service providers who distribute multiple streams of video programming over last

mile broadband Internet connections that they do not provide themselves. ACA submits that the answer is clearly no.

Multichannel video programming distributor. The question of who may be deemed by the Commission to be an MVPD under the Act is governed, first and foremost, by the text of the statutory definitions. An examination of the relevant statutory definitions demonstrates that Congress intended to limit the sweep of Title VI regulation of MVPDs to entities similar to cable operators who make available to subscribers both the conduit and content – the transmission path and multiple channels of video programming that ride over the last mile facilities. This facilities-based interpretation of an “MVPD” is also supported by the context in which the term MVPD is used in the Act, as well as by legislative history.

The statutory definition of an “MVPD” contains two key elements: The first is illustrative: the entity must be similar to (“such as”) a cable operator, direct broadcast satellite (“DBS”) provider, wireless cable or television receive-only satellite program distributor. The second is descriptive: the entity must make available to subscribers multiple channels of video programming. Accordingly, covered entities must be similar to those listed, and all of the entities listed in the definition are engaged in last-mile video programming delivery over facilities it owns or operates that were designed for this purpose. An online video programming distributor (“OVD”), in contrast, delivers video programming streams over the so-called “public” Internet for routing to subscribers over last-mile connections obtained by the subscriber to access the Internet.

The Commission has long employed a facilities-based understanding of the term “MVPD.” The Commission has recognized as MVPDs video programming providers using local exchange carrier supplied “video dialtone” transport and satellite master antenna television (“SMATV”) providers, but has not accorded that status to programmers leasing capacity on cable operators’ facilities. This interpretation is fully supported by the legislative history of the 1992 Cable Act, where Congressional desire to assist the development of facilities-based competition to cable is fully in evidence.

Channels of video programming. A key element required for an entity to meet the definition of an MVPD is that the entity must make available for subscription multiple “channels” of video programming. The Act defines “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 Commission regulation).” These statutory definitions by their terms strongly suggest that “channel” is a physical transmission path, whether that be a portion of spectrum within a closed transmission path provided by the operator or delivered over-the-air using licensed broadcast spectrum, through which video programming is distributed to customers and subscribers by an MVPD. The alternative interpretation of “channel” as synonymous with “programming network” offered by the PN is unsupported by either text or legislative history.

OVDs have been properly accorded separate status from MVPDs. To date Congress and the Commission each has accorded separate status to video programming distributed over the Internet. Significantly, when Congress enacted the Twenty-First Century Video Accessibility Act, it distinguished programming covered by the existing television closed captioning rules applicable to MVPDs from that distributed using Internet-protocol and Internet distribution, evidencing an understanding that online video distributors are not MVPDs as that term is currently defined. The Commission has also repeatedly recognized that video provided “over-the-top” via the Internet is sufficiently different from the video programming delivered by MVPDs. For that reason, it has accorded Internet video separate treatment and has refrained from subjecting “over-the-top” Internet video to regulations designed for MVPDs. Instead, the Commission has required MVPD ownership or involvement with the provision of a transmission path for delivery of linear channels of video programming to subscribers and has refrained from extending the rights or imposing the obligations of an MVPD on non-facilities based providers of multichannel video programming.

Separate status for OVDs remains appropriate in this proceeding. The Media Bureau acting on delegated authority in resolving program access complaints is constrained to follow these precedents that stop well short of extending the definition of MVPD to include non-facilities based

providers of Internet video services. It has been the Commission's practice to distinguish between MVPDs, which are involved in the last-mile distribution of video programming to subscribers, from video distributors that provide various packages of video programming over the Internet. The PN questions how the Commission's policy of refraining from reflexively extending statutory requirements applicable to established categories of service providers to Internet-based services should impact the regulatory classification of OVDs. ACA submits that the Commission's practice of refusing to extend regulations designed for well-established categories of service providers to providers of Internet video services is not only a matter of communications policy, but is strongly tied to the limits on Commission authority evidenced by the text and structure of the Act.

The Bureau has not been presented with any reason sufficient to warrant it to now diverge from established Commission precedents concerning the terms contained with the definition of "MVPD" by re-interpreting "channel" and "MVPD" so as to extend the reach of Title VI regulation to non-facilities based online video programming distributors. Such a wide-sweeping decision to reverse settled interpretations, if warranted by the terms of the Act, is properly left to the Commission through an industry-wide rulemaking. If after conducting such an examination, inclusion of OVDs under the ambit of the term "MVPD" is unsupported by the language of the Act and its legislative history, as appears to be the case, then the matter properly becomes one for decision by Congress.

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

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

COMMENTS



I. INTRODUCTION AND BACKGROUND

The American Cable Association ("ACA") files these comments in response to the Public Notice in the above-referenced docket ("PN").¹ In the PN, the Media Bureau ("Bureau") seeks comment on the threshold legal question presented in a pending program access adjudication of how to interpret the term "multichannel video programming distributor" ("MVPD"), as defined in the Communications Act of 1934, as amended ("Communications Act" or "the Act").² ACA submits that the best interpretation of the term "MVPD" is the one already given by the Bureau, acting on delegated authority, in the *Sky Angel Standstill Denial* – namely that an MVPD is an entity that

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, MB Docket No. 12-83, DA 12-507 (rel. Mar. 30, 2012) ("Public Notice" or "PN").

² Public Notice, ¶ 1; The Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, Sec. 522(13) (codified as amended at 47 U.S.C. § 151 *et seq.*).

provides a transmission path over which it makes available multiple channels of video programming to subscribers.³

The interpretation of “MVPD” as an entity that makes available multiple channels of video programming over transmission facilities that it owns or operates is not only the most natural reading of the relevant statutory definitions and provisions, it is also demonstrably consistent with the text, purpose, legislative history, and the context in which the terms are used in the Act. Moreover, this interpretation is, consistent with legislation passed by Congress as well as longstanding policy and precedent adopted by the Commission since the term was first defined in the Act. In contrast, the alternative interpretation of the terms “channel” and “MVPD” suggested in the PN, that an entity would be considered an MVPD if it makes available for purchase multiple “video programming networks” without regard to whether it offers a transmission path, fails on all counts.

The term “MVPD” was adopted in 1992 when new competitors to cable were emerging and was designed to include both cable operators and non-cable entities similar to cable operators that Congress anticipated would enter the multichannel video distribution market.⁴ As evidenced by the Sky Angel program access complaint, the term is of critical importance for application of the program access rules,⁵ as well as for several other statutory provisions.⁶ The Act and the Commission’s rules allow an MVPD to file a program access complaint if it believes it has been aggrieved by prohibited conduct.⁷ In addition, under the Act and the Commission’s rules, cable operators are permitted to seek relief from basic tier rate regulation in franchise areas served by competing MVPDs under set

³ *In the Matter of Sky Angel U.S., LLC; Emergency Petition for Temporary Standstill*, Order, 25 FCC Rcd 3879, ¶ 7 (2010) (“*Sky Angel Standstill Denial*”).

⁴ Public Notice, ¶ 11.

⁵ 47 U.S.C. § 548; 47 U.S.C. § 543(l)(1).

⁶ 47 U.S.C. § 325(b)(retransmission consent); 47 U.S.C. § 543(a)(2) (cable effective competition); 47 U.S.C. § 59 (commercial availability of navigation devices).

⁷ Public Notice, ¶ 2; 47 U.S.C. § 548; 47 C.F.R. §§ 76.1000-1004 (program access).

parameters. Another regulatory benefit that accrues to MVPDs is the right to seek relief under the retransmission consent good faith rules.⁸ The obligations of MVPDs include statutory and regulatory requirements relating to program carriage, the competitive availability of navigation devices (including the integration ban), the requirement to negotiate in good faith with broadcasters for retransmission consent, Equal Opportunity (“EEO”) requirements, closed captioning and emergency information requirements (Emergency Alert), and various technical requirements (such as signal leakage restrictions, and cable inside wiring requirements.)⁹ Because MVPD status is key to several statutory benefits and obligations, any interpretation of the definition of “MVPD” and of the terms that are integral to this definition, “channels of video programming,” must be done with an eye toward determining which entities Congress intended to bring within the Commission’s regulatory authority for purposes of applying these specific regulatory benefits and obligations.¹⁰ To put it simply, the overarching question becomes, would it make sense to interpret the provisions of the Act applicable to MVPDs as applicable to online content, applications, and service providers using last mile broadband Internet connections that they do not provide themselves? ACA submits that the answer is clearly no.

The question who may be deemed by the Commission to be an MVPD under the Act is governed, first and foremost, by the text of the statutory definitions. An examination of the relevant

⁸ Public Notice ¶ 2; see 47 U.S.C. § 325(b)(3)(C)(ii); 47 C.F.R. § 76.65(b)(retransmission consent; good faith).

⁹ Public Notice ¶ 2; 47 U.S.C. § 549; 47 C.F.R. §§ 76.1200-1210 (navigation devices); 47 U.S.C. § 325(b)(3)(C)(iii); 47 C.F.R. § 76.65(b)(retransmission consent; good faith); 47 C.F.R. § 76.71-79, 76.1792, 76.1802 (EEO); 47 C.F.R. § 79.1-2 (television closed captioning); 47 C.F.R. § 76.610 (signal leakage); 47 C.F.R. § 76.800-806 (cable inside wiring). The Public Notice also notes that a non-MVPD that makes video programming available directly to the end user through a distribution method that uses Internet protocol (“IP”) would be subject to the Commission’s new IP closed captioning requirements. Public Notice, ¶ 2 n. 11; *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787 (2012)(“IP Closed Captioning Order”); 47 U.S.C. § 613; 47 C.F.R. § 79.4.

¹⁰ In interpreting which entities fall within the ambit particular regulation, a regulatory agency “must take into account ‘the provisions of the whole law, and . . . its object and policy.’” *National Cable Television Association, Inc. v. F.C.C.*, 33 F.3d 66, 75 (D.C. Cir. 1994); *United States Nat’l Bank v. Independent Ins. Agents, Inc.*, 508 U.S. 439, 455 (1993).

statutory definitions demonstrates that Congress intended to limit the sweep of Title VI regulation of MVPDs to entities similar to cable operators who make available to subscribers both the conduit and content– the transmission path and multiple channels of video programming over the last mile facilities. As demonstrated below, this facilities-based interpretation of an “MVPD” is supported by the words of the statutory definitions, the context in which the term MVPD is used in the Act, as well as by legislative history.

Congress and the Commission to date each have accorded separate status to video programming distributed over the Internet since the term was first defined in the Act. Significantly, when Congress enacted the Twenty-First Century Video Accessibility Act,¹¹ it distinguished programming covered by the existing television closed captioning rules applicable to MVPDs from that distributed using Internet-protocol and Internet distribution, evidencing an understanding that online video distributors are not MVPDs as that term is currently defined. The Commission has also repeatedly recognized that video provided “over-the-top” via the Internet is sufficiently different from the video programming delivered by MVPDs. For that reason, it accorded Internet video separate treatment, and has consistently refrained from subjecting “over-the-top” Internet video to regulations designed for MVPDs.

Rather, as demonstrated below, the Commission has required MVPD ownership or involvement with the provision of a transmission path for delivery of linear channels of video programming to subscribers and has refrained from extending the rights or imposing the obligations of an MVPD on non-facilities based providers of multichannel video programming. The Media Bureau acting on delegated authority in resolving program access complaints is constrained to follow

¹¹ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. 111-260, 124 Stat. 2751 (2010)(“CVAA”).

these precedents which stop well short of extending the definition of MVPD to include non-facilities based providers of Internet video services.¹²

ACA sees no good reason for the Media Bureau to now diverge from established Commission precedents concerning the terms contained within the definition of “MVPD” by re-interpreting “channels of video programming” and “MVPD” so as to extend the reach of Title VI regulation to non-facilities based online video programming distributors. Such a wide-sweeping decision to reverse settled interpretations, if warranted by the terms of the Act, is properly left to the Commission in an industry-wide rulemaking. If after conducting such an industry-wide rulemaking, inclusion of OVDs under the ambit of the term “MVPD” is unsupported by the language of the Act and its legislative history, as appears to be the case, then the matter properly becomes one for decision by Congress.

II. THE MOST REASONABLE INTERPRETATION OF THE TERM “MVPD” REQUIRES THAT AN ENTITY MAKE AVAILABLE A TRANSMISSION PATH TO SUBSCRIBERS

An understanding of the meaning of the term “MVPD” must begin with the statutory definition of an MVPD as well as the regulatory framework in which it was intended to be operative. The Act defines 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.¹³

Thus, there are key two elements of the definition. The entity (i) must be similar to (i.e., “such as”) a cable operator, direct broadcast satellite (“DBS”) provider, wireless cable or television receive-only satellite program distributor and (ii) must make available to subscribers multiple channels of video

¹² 47 C.F.R. § 0.283(c) (Media Bureau Chief shall refer to the full Commission “[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines.”).

¹³ 47 U.S.C. § 522(13); 47 C.F.R. § 76.1000(e)(MVPD - program access); 47 C.F.R. § 76.64(d)(MVPD - retransmission consent); 47 C.F.R. § 76.71(a)(MVPD - EEO); 47 C.F.R. § 76.1200(b)(MVPD - navigation devices); 47 C.F.R. § 76.1300(d)(MVPD - program carriage).

programming. Each element of the definition of MVPD must be met before the regulatory benefits and obligations attendant to that classification can apply. An examination of these elements supports the Media Bureau's interpretation that, to qualify as an MVPD, an entity must make available for purchase "multiple channels of video programming" over a transmission path it provides for the delivery of video programming to subscribers.¹⁴

A. An "MVPD" is an Entity that "Makes Available" the Delivery of "Multiple "Channels of Video Programming" Over Last Mile Facilities that It Owns or Controls.

The Media Bureau's Sky Angel analysis turned on the key concept that to qualify as an MVPD under the Act, an entity must make available not only video programming, but the transmission facilities over which the multiple channels of this programming are provided.¹⁵ The PN questions whether Congress intended to limit MVPD status to facilities-based providers such that entities that do not make available "multiple channels of video programming" for purchase without also making available a transmission path would be ineligible for the statutory benefits and burdens associated with that status.¹⁶ Further, it questions whether the fact that many of the legal requirements applicable to MVPDs presume that the MVPD provides facilities lends support for interpreting "MVPD" and "channel" as requiring that an entity make available a transmission path.¹⁷

ACA submits that the text of the definitions, context in which they are used, and Commission precedent support the Media Bureau's interpretation of "MVPD" as requiring the provision of a transmission path for delivery of video programming to the subscriber and the legislative history supports the interpretation of the terms "channel" and "MVPD" as referencing facilities-based providers of video programming.

¹⁴ Public Notice, ¶ 6; Sky Angel Standstill Denial, ¶ 7.

¹⁵ Sky Angel Standstill Denial, ¶ 7.

¹⁶ Public Notice, ¶ 8.

¹⁷ *Id.*

Section 602(13) limits the category of “MVPD” to entities providing video programming in a particular way: the entity must “mak[e] available for purchase, by subscribers or customers, multiple channels of programming.”¹⁸ The Commission has construed “this term according to the plain meaning of the statute as applying to entities that distribute (*i.e.*, make available to customers or subscribers) more than one channel of video programming in a franchise area.¹⁹ Consistent with the foregoing, as discussed below, the Commission has traditionally interpreted the definition of “MVPD” as used in Title VI as requiring that the entity be involved in last-mile delivery.²⁰ This interpretation is dictated by the text, structure and legislative history of the term “MVPD” contained in the Act.

1. The Text of the Statute and Commission Precedent Support an Interpretation of the Definition of “MVPD” as a Requiring the Provision of a Transmission Path for Delivery of Video Programming to Subscribers

Congress structured the definition of “MVPD” in two parts. The first part is a non-exclusive, illustrative list of a specific class of entity: an MVPD is “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”²¹ The second part is descriptive: an MVPD is an entity “who makes available for purchase, by subscribers or customers, multiple channels of video programming.”²²

In its *Sky Angel Standstill Denial*,²³ the Media Bureau reasoned that although the list is preceded by the phrase “not limited to,” indicating that the list is illustrative rather than exclusive, it is

¹⁸ 47 U.S.C. § 522(13).

¹⁹ *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, ¶ 20 (1993) (“1993 Rate Regulation Order”).

²⁰ See *infra*, p. 14-17.

²¹ 47 U.S.C. § 522(13).

²² *Id.*

²³ Public Notice, ¶ 6; *Sky Angel Standstill Denial*, ¶ 7.

also preceded by the phrase “such as,” which indicates that other covered entities should be similar to those listed. This is undoubtedly the correct interpretation of the term “MVPD.”

Each of the four examples of MVPDs listed in Section 602(13) is an entity engaged in last-mile video programming delivery over facilities it owns or operates, whether those facilities are wireline, wireless or satellite. Each entity listed in the definition -- “a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service or a television receive-only satellite program distributor – owns or controls, either directly or indirectly, the mode of delivery by which the programming reaches the subscriber. What these distribution platforms have in common is that each was designed for the purpose of delivering multiple channels of video programming. Similarly, it is the operator of each such platform that maintains control over the management, operation or selection of the facilities used to deliver its video offerings to end users, as well as other aspects of signal delivery. In contrast, an online video programming distributor that delivers its video programming streams to the so-called “public” Internet for routing to its subscriber is not thereby making video programming available over an MVPD facility.²⁴ In this case, it is the online video programming distributor’s subscriber who obtains the transmission path by which the programming is delivered.

This strongly suggests that the term “such as” in the definition of MVPD should be construed to include only an entity who similarly makes available to subscribers through facilities that it owns or controls multiple portions of the electromagnetic frequency spectrum for the delivery of video programming.²⁵ The fact that the list is prefaced by the word “but not limited to” does not suggest an

²⁴ See, e.g., *Sky Angel Standstill Denial*, ¶ 2 (Sky Angel makes available a subscription-based service of approximately eighty channels of video and audio programming “to anyone nationwide with a wired or wireless broadband Internet connection.”).

²⁵ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (“where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words”).

alternative reading, as Congress likely understood that facilities-based providers using other technological platforms might well develop in the future.

The Commission has accordingly, when confronted with the question who is an MVPD for statutory purposes, employed a facilities-based understanding of the term. For example, the Commission has recognized that video programming service providers using local exchange carrier-supplied video dialtone (“VDT”) transport and satellite master antenna television (“SMATV”) providers qualify as MVPDs for purposes of determining “effective competition” under Section 623 because they function much like traditional cable operators in making video programming “available for purchase” by subscribers.²⁶ In contrast, the Commission concluded that leased access providers offering compressed multiplexed multichannel video programming are not MVPDs because they use the facilities of the cable operator itself.²⁷ The Commission explained that a lessee of multiple channels on cable system pursuant to leased access rules does not qualify as an MVPD because the “channels” that are being “made available” are channels of the cable system itself, such that the grant of MVPD status would not advance the goal of facilities-based competition with cable.²⁸

Consistent with Commission precedent extending MVPD status only to facilities-based providers, when Congress added Section 629 to the Act in 1996 to foster a competitive commercial market for the navigation devices used by MVPDs in the provision of their services to subscribers, it repeatedly used the term “multichannel video programming distributor systems.”²⁹ Yet, no new statutory definition was added to define what was meant by an MVPD *system*. This suggests a Congressional understanding that “MVPD” as used in the Act already references an entity using a

²⁶ 1993 Rate Regulation Order, ¶¶ 20-23; *Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 5389 ¶ 46 (1993) (“1993 EEO Implementation Order”) (the entity that utilizes video dialtone transport service to “make available channels” of video programming to subscribers will be treated as an MVPD subject to EEO requirements).

²⁷ 1993 Rate Regulation Order, ¶ 23.

²⁸ *Id.*

²⁹ 47 U.S.C. § 549 (a),(b),(c), & (d).

system that it owns or operates that is optimized for the delivery of multiple channels of video programming in making their services available to consumer or subscribers.

In addition, the fact that in the same order the Commission held that an entity need not own the basic transmission and distribution facilities that it uses to distribute video programming to subscribers in order to qualify as an MVPD is not inconsistent with an interpretation of the definition of an MVPD that requires the entity at a minimum to be involved with last-mile delivery.³⁰ In each case where the Commission found an entity not owning facilities to be an MVPD, such as OVS or video dialtone programmers, those entities were at least in privity of contract (or otherwise acting in concert with, and with the approval of) the platform providers that did own the transmission facilities under a multichannel video distribution regulatory framework created by either Congress (OVDS) or the Commission (VDT).³¹

³⁰ Public Notice, ¶ 9; *Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, ¶ 171 (1996) (“*OVS Second Order on Record*”)(Section 603(13) does not require an entity to operate the vehicle for distribution to subscribers); see also 47 U.S.C. § 543(l)(1)(D)(for purposes of determining effective competition, referring to video programming provided by “a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate)”).

³¹ *Implementation of Section 302 of the Telecommunications Act of 1996; Open Video Systems*, Second Report and Order, 11 FCC Rcd 18233, ¶ 196 (1996)(extending program access protections to any “video programming provide that provides more than one channel of video programming on an open video system” (“OVS”) even though the OVS video programming provider held no ownership interest in the OVS distribution plant, where the OVS video programming provider had a contract with the OVS operator to deliver an integrated package of content and transmission); 1993 EEO Implementation Order, ¶ 46 (video dialtone programming providers can be MVPDs for purposes of EEO rules; video programming providers have contractual relationship with video dialtone platform provider to “make available channels” of video programming to customers); *Turner Vision, Inc. v. Cable News Network, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 12610, n.5 (1998) (program access rules apply to C-Band distributors, but not to C-Band retail agents; C-Band distributors enter into agreements with both programming networks and the satellite carrier that enable it to “make available channels” of programming to subscribers); *Wizard Programming, Inc. v. Superstar/Netlink Group, LLC and Telecommunications, Inc.*, 12 FCC Rcd 22102, ¶¶ 17-22 (1997) (program access rules are premised on the assumption that a complainant MVPD has purchased or tried to purchase video programming for sale to its subscribers either by itself or through an agent or buying group; an entity that obtained rights to “resell” video programming that had been packaged by a C-Band distributor to customers did not “make available channels” for that programming to be transmitted to customers – the electronic transmission path was provided by a third party; Wizard was neither an MVPD nor a buying agent of an MVPD).

2. The Legislative History of the 1992 Act Supports the Interpretation of “Channels of Video Programming” and “MVPD” as Requiring the Provision of a Transmission Path for Delivery of Video Programming to the Subscriber

The PN notes “that the legislative history of the 1992 Cable Act includes a statement that Congress intended to promote ‘facilities-based’ competition, and questions whether this indicates that ‘Congress’ concern was limited to facilities-based competition in the video distribution market and did not intend to cover other potential sources of competition.”³² ACA suggests that the simple answer to this question is, yes. The evident concern of Congress in 1992 was with facilities-based competition and there is no indication that Congress intended to regulate other distributors of video programming under Title VI by bringing them under the definition of an MVPD. As discussed above, Congress created the category for very specific reasons, and cabined its reach very carefully to achieve its paramount goal of facilities-based competition to cable.

First, as noted in the PN, the legislative history of the 1992 Cable Act specifically states that Congress intended to promote facilities-based competition.³³ The Conference Report passage cited in the PN that mentions “facilities-based competition” states:

In adopting rules under this section, the conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies. The 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.³⁴

In its order implementing the program access provision, the Commission noted that “facilities-based competition,” as that term is used in the legislative history emphasizes, “that program competition can only become possible if alternative facilities to deliver programming to subscribers

³² Public Notice, ¶ 8.

³³ *Id.* ¶ 8, citing H.R. Rep. No. 102-862 (1992), at 93 *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275 (“*Conference Report*”) (discussing the program access provision of the 1992 Cable Act and stating that the “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”).

³⁴ Conference Report at 93 (emphasis added).

are first created. The focus in the 1992 Cable Act was clearly on assuring that facilities-based competition develops.”³⁵

The “Findings” section of the 1992 Act also contains language that can be interpreted as demonstrating intent by Congress to promote facilities-based competition to cable systems.

Specifically, Finding number 2 states:

For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers.³⁶

In addition, the discussion of “effective competition” in the Senate Report further demonstrates Congress’ focus on promoting effective facilities-based competition to cable by other technology platforms. Action to re-regulate the cable industry was considered necessary in light of findings that existing facilities-based competitors to cable systems, such as home satellite dish, wireless cable, broadcasting via satellite, and telephone facilities, could not provide effective competition to cable under the current rules.³⁷ As a consequence, in adopting the effective competition standard, Congress specifically described the types of MVPDs – all facilities-based – that would be required to be serving subscribers before a cable system could seek rate relief.³⁸

Second, the legislative history contains many references to other video distribution technology platforms that Congress hoped would benefit from the pro-competitive provisions it was

³⁵ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, ¶ 63, n. 79 (1993).

³⁶ 1992 Cable Act § 2(a)(2).

³⁷ See S. Rep. 102-92, at 13-18 (1992) (discussing the viability of competition from overbuilders, wireless cable, broadcasting via satellite, and telephone) (“Senate Report”).

³⁸ *Id.* at 8-9.

adding to Title VI, most especially the program access provision. For example, the floor debate over the program access provision is replete with references to other technology platforms like cable systems that could benefit from access to programming.³⁹ Each example cited is that of a system engineered or optimized for the delivery of multiple channels of video programming. Given the strong congressional interest expressed in facilities-based competition, this is also the only plausible interpretation of the term “MVPD.” Nowhere in the legislative history does Congress indicate an interest in applying Title VI regulation to non-facilities based video programming distributors.

In summary, the legislative history of the 1992 Act supports the view that Congress intended to limit application of the term “MVPD” to entities providing service in a manner comparable to that provided by cable operators. That is, the provision of multiple channels of linear video programming, including video-on-demand, to subscribers over a last mile transmission path that is owned or operated by the MVPD for that purpose.

B. The Most Reasonable Interpretation of the Phrase “Channels of Video Programming” as Used in the Definition of “MVPD” Includes the Provision of a Last-Mile Transmission Path to Subscribers.

A key element required for an entity to meet the definition of an MVPD is that the entity must make available for subscription multiple “channels of video programming.”⁴⁰ Congress added the term “video programming” to the Act in 1984 as part of the description of “cable service,” and the term is defined through illustration as “programming provided by, or generally considered comparable to

³⁹ See, e.g., 102 Cong. Rec. H 6535 (daily ed. July 23, 1992) (statement of Rep. Manton referring to statements of Rep. Tauzin concerning “the growth of alternative multichannel video technologies, specifically high power direct broadcast satellites.”); 102 Cong. Rec. H 6538-6539 (daily ed. July 23, 1992) (statement of Rep. Markey discussing how the home satellite dish industry would provide “the competition to the cable industry” as well as new technologies “such as wireless cable and direct broadcast satellite,” “competing technologies” that want to offer similar channel selections at competitive prices); 102 Cong. Rec. H 6542 (daily ed. July 23, 1992) (statement of Rep. Cooper discussing “new technologies” that would compete with cable); 102 Cong. Rec. H 6543 (daily ed. July 23, 1992) (statement of Rep. Thomas citing the need for “these emerging technologies” such as satellite dish to access programming).

⁴⁰ 47 C.F.R. § 522(20).

programming provided by, a television broadcast station.”⁴¹ As the PN observes, the Commission’s longstanding interpretation of “video programming” is programming comparable to that provided by broadcast television stations in 1984.⁴² The definition of “channel” was added in 1984, prior to the addition of the term “MVPD” and is defined 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

⁴¹ When it implemented the 1984 Cable Act, the Commission concluded that the term “video programming” encompassed “broadcast stations, superstations, satellite delivered cable networks and pay cable” and was “sufficiently expansive to include such video programming as that provided by ESPN, HBO, and other satellite-delivered cable network programming.” See 47 U.S.C. § 522(6)(A) (“cable service” means the one-way transmission to subscribers of (i) video programming, or (ii) other programming service . . .); 47 U.S.C. § 522(20) (“video programming” means “programming provided by, or generally considered comparable to programming provided by, a television broadcast station”); *Amendment of Parts 1, 63, and 76 of the Commission’s Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, 58 Rad. Reg.2d 1 n. 33 (1985) (“1984 Act Order”). Later, in its 1992 and 1994 Video Dialtone Orders, the Commission held that “Congress intended to include within ‘video programming’ only that which is comparable to programming provided by broadcasters in 1984.” See Second Video Dial Tone Order, ¶ 74; *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63-54-63.58 and Amendments of Parts 32, 36, 61, 64 and 69 of the Commission’s Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service*, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244 (1994) (“*Video Dialtone Recon Order*”). The Commission concluded that one of the “key characteristics of the programming offered in 1984 by broadcast stations, superstations, cable networks and pay cable was that it was ‘one-way’ – *i.e.*, it provided no opportunity for viewer interaction, manipulation or customization.” Second Video Dialtone Order, ¶ 75. As the PN notes, the Commission explained that video-on-demand “images” constitute “video programming” as the term is used in a section of the 1984 Cable Act which made it “unlawful for any common carrier . . . to provide video programming directly to subscribers in its telephone service . . .” 1984 Cable Act, § 2 (adding Section 613(b)(1) to the Act). “The Commission concluded that “to the extent a service contains severable video images capable of being provided as independent video programs comparable to those provided by broadcast stations in 1984, that portion of the programming service will be deemed to constitute ‘video programming’ for purposes of the statutory prohibition.” *In the Matter of Telephone Company-Cable Television Cross-Ownership Rules*, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, , 7 FCC Rcd 5781, ¶ 75. The Commission further found that “video-on-demand images can be severed from the interactive functionalities and thereby constitute video programming.” *In the Matter of Telephone Company-Cable Television Cross-Ownership Rules*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 244, ¶ 109 (1994).

⁴² Public Notice, ¶ 13. The Public Notice also questions whether, by requiring that the programming be comparable to that provided by a television broadcast station in 1984, the Commission is limited to interpreting the term “video programming” in the definition of MVPD “to only those entities making available for purchase pre-scheduled, real-time linear streams of programming, as television stations provide in 1984”. *Id.* The Commission remains free to re-examine its prior interpretation of what is meant by “comparable to programming provided by, a television broadcast station” in light of changing circumstances, and, upon proper record evidence, come to a contrary conclusion as to congressional intent. ACA suggests that this is better done in an industry-wide proceeding, rather than an adjudication.

channel is defined by Commission regulation).⁴³ “Television channel” is defined in the Commission’s regulations 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.”⁴⁴ The regulations also define “cable television channel” as a “signaling path provided by a cable television system” for the purpose of relaying, delivering, or transmitting programming to the subscriber.⁴⁵ By their terms, these definitions strongly suggest that a “channel” is a physical transmission path over which video programming is made available to customer and subscribers by an MVPD.

The PN asks a number of questions regarding whether the Media Bureau’s interpretation of the term “channel” as incorporating a transmission path is consistent with the text, purpose, legislative history, and structure of the statutory definitions.⁴⁶ Further, the PN asks whether the fact that Congress did not alter the pre-existing definition of “channel” when adopting the definition of “MVPD” in the 1992 Act indicates a congressional intent for the pre-existing definition of “channel” to apply in interpreting the term “MVPD.”

The simple and obvious answer to these queries is that the Media Bureau’s use of the pre-existing definition of “channel,” which incorporates a transmission path, when interpreting the separate definition of MVPD is correct as a matter of law. The statutory definition of “channel” in Title

⁴³ 47 U.S.C. § 522(4); The Cable Communications Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (codified at 47 U.S.C. § 521 *et seq.*) (amending the Communications Act of 1934 to include Title VI). Related definitions added in 1992 are “activated channels” and “usable activated channels.” “Activated channels” are defined as “those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational or governmental use”). 47 U.S.C. § 522(1) (“Usable activated channels” are defined as “activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations as determined by the Commission”); 47 U.S.C. § 522(19).

⁴⁴ 47 C.F.R. § 73.681; *see also* 47 C.F.R. §§ 73.603, 73.606, 73.682(a)(1).

⁴⁵ 47 C.F.R. § 76.5(r)-(u)(describing four classes of cable television channels).

⁴⁶ Public Notice, ¶ 7. The Public Notice also notes that the statutory definition of “channel” was adopted eight years prior to the 1992 Act and that it refers specifically to “a portion of the electromagnetic frequency spectrum which is used in a cable system,” and asks whether it the Commission could reasonably read the definition of “MVPD” that includes the term “channels” without incorporating by reference the pre-existing Title VI definition of channel. *Id.*

VI cannot and should not be ignored when determining who is an MVPD under the Act.⁴⁷ The fact that Congress did not amend the statutory definition of “channel” in subsequent amendments to Title VI to encompass video provided over the Internet is a strong indication that Congress intended the Commission to continue to use that term consistent with the way it is defined in the Act and has been interpreted by the Commission over the years. Had Congress wished to depart from the established definitions and interpretations, it stands to reason that it would have done so when it amended Title VI in 1992 by broadening the Act’s reach from solely cable operators to encompass other platforms that provide multiple channels of video programming. That Congress did not do so indicates that the existing definition of “channel,” which requires the provision of a transmission path for the delivery of video programming, was advancing its objectives as intended.

Most recently, the Commission’s rulemaking implementing legislation granting it authority to conduct broadcast incentive auctions refers to spectrum occupied by television broadcast stations as a physical medium – 6 MHz “channels” – that can be re-purposed for other uses if two or more broadcasters agree to share a single 6 MHz channel to deliver their programming to viewers.⁴⁸ Such “channel sharing” reinforces Congress’ and the Commission’s long-standing view that a “channel” as used in the Act is the physical transmission path used by a broadcast station, such as a CBS network affiliate, rather than a broadcasting “network,” such as the CBS Television Network.

Although the statutory definition of “channel” specifically references cable systems, a permissible interpretation of that term within the definition of an MVPD may be that a “channel” as provided by another type of MVPD must similarly be defined as a physical transmission path

⁴⁷ *Fowler v. U.S.*, 131 S. Ct. 2045, 2052 (2011) (stating “normally we must give effect ‘to every clause and word of a statute’”); Scalia, J., dissent, *Regions Hospital v. Shalala*, 522 U.S. 448, 467 (1997) quoting *Market Co. v. Hoffman*, 101 U.S. 112, 115-116 (1879) (“We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon’s Abridgment, sect. 2, it was said that “a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” This rule has been repeated innumerable times.”).

⁴⁸ *In the Matter of Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, Report and Order, ET Docket No. 10-235, FCC 12-45 (rel. April 27, 2012).

engineered or controlled by the operator that is specific to that technology platform. For example, the statute explicitly treats wireless cable (multichannel multipoint distributor) and DBS systems as “MVPDs.”⁴⁹ Accordingly, a “channel” on a non-cable MVPD system such as wireless cable or DBS must refer to the portion of the electromagnetic spectrum used to deliver video programming on that system. For similar reasons, bandwidth reserved for video distribution within a telephone company’s wireline network would qualify as a “channel” such that a local exchange carrier could qualify as a cable operator, that is, an “MVPD” under the Act.⁵⁰ If this were not the case, Congress would have been required to amend the statutory definition of “channel” in order to bring these non-cable entities within the definition of “MVPDs” when it broadened the class of entities brought within the scope of Title VI as MVPDs in 1992. Accordingly, an examination of the statutory text and Commission precedent supports the Media Bureau’s interpretation of “channel” as including a transmission path supplied by the video programming distributor for the delivery of video programming to subscribers.

C. The Media Bureau Need Not Address the Further Issues it Identifies With Respect to the Types of Contractual Arrangements Needed to Qualify a Non-Facilities Operator as an MVPD to Resolve the Sky Angel Complaint.

In view of the ability of a non-facilities-based entity to qualify as a MVPD through contractual arrangement with a platform owner, the PN seeks comment on a wide range of questions concerning what types of arrangement should suffice.⁵¹ Specifically, the PN asks whether joint marketing, joint ventures or a common ownership or controlling interest should be required to demonstrate MVPD status, and questions the practical and regulatory implications of allowing online distributors of video programming to either self-select or avoid MVPD status by choosing to enter into or avoid certain

⁴⁹ 47 U.S.C. § 522(13)(an MVPD “means a person such as, but not limited to . . . a multichannel multipoint distribution service, a direct broadcast satellite service . . .”).

⁵⁰ 47 U.S.C. § 522(13)(an MVPD “means a person such as, but not limited to, a cable operator”). *See also* 47 U.S.C. § 571 (video programming services provided by telephone companies – distinguishing radio-based systems, common carriage of video traffic, and telephone companies providing cable services vs. operating open video systems); 47 U.S.C. § 573 (describing the requirements of open video systems).

⁵¹ Public Notice, ¶ 9.

relationships with third-party broadband Internet service providers.⁵² The PN also questions whether such a regulatory framework would be admirably flexible or unduly confusing.⁵³

There is no need for the Media Bureau to decide these further issues in order to resolve the Sky Angel complaint. If, however, it deems resolution of these additional issues necessary on an industry-wide basis, the better course of action is for the Commission to consider whether, in specific arrangements brought before it, the type of arrangement between a video programming distributor and a third-party facilities provider, it may properly deem the entity to be an MVPD under the Act. The online video programming market is only a few years old and rapidly evolving. It would be premature for either the Media Bureau or the Commission to now issue a broad ruling categorizing all current and future contractual arrangements between online video programming providers and distribution facilities-providers as either an MVPD or non-MVPD. Such an approach could inadvertently foreclose the development of new and innovative business models that are unimaginable today. In any event, this issue is not relevant to the current Sky Angel case, and there is no reason to make any determination at this point. It is apparent that Sky Angel is not alleging that it is an MVPD because it has a contractual or other arrangement for the delivery of its video programming to subscribers. Rather, it is acting purely as an online video programming distributor relying on broadband Internet connectivity purchased separately by its subscribers from another supplier. Accordingly, the Media Bureau may resolve the Sky Angel complaint under its original rationale that Sky Angel does not qualify as an MVPD because it does not make available a transmission path to the subscriber for delivery of its video programming under any form of arrangement with a broadband Internet service provider.

⁵² *Id.*

⁵³ *Id.*

D. The Alternative Non-Facilities Based Interpretation of “Channel” Referenced in the Public Notice Is Unsupported by the Text of the Statute, Legislative History and Commission Precedent

The Public Notice seeks comment on whether, as an alternative to interpreting “channel” as incorporating a transmission path: (i) it is appropriate to interpret the term “channel” in the definition of “MVPD” by using “the more common, less technical, everyday sense” of the term “channel” to mean an entity that makes available for purchase multiple “video programming networks;” (ii) it is consistent with the purposes of the program access statute to increase competition and diversity in the multichannel video programming market and to spur the development of communications technologies; and (iii) whether it is also consistent with other provisions of the Act and the Commission’s rules to impose regulatory burdens on MVPDs.⁵⁴ Under the interpretation of “channel” as synonymous with “video programming network,” an entity would be considered an MVPD if it makes available for purchase multiple “video programming networks” without regard to whether it offers a transmission path, in order to qualify as an MVPD.⁵⁵ The PN also questions whether imposing MVPD status on previously unregulated online video programming distributors would deter investment and drive some current online distributors of video programming from the market, as well as unduly burden cable-affiliated programmers and broadcast stations with the requirement to negotiate with a large number of entities pursuant to the program access and good faith retransmission consent rules.⁵⁶

Congress enacted Section 628 to promote “competition and diversity in the multichannel video programming market” long before the rise of the Internet as a medium for distribution of video programming.⁵⁷ Although Internet-based video distribution has the potential to increase competition

⁵⁴ *Id.* ¶ 11.

⁵⁵ *Id.*

⁵⁶ *See id.* ¶ 12.

⁵⁷ 47 U.S.C. § 548(a).

in the video programming market, that does not, standing alone, provide a basis for bringing online video distributors under the regulatory authority of the Commission as a “MVPD.” To qualify as an MVPD, the entity must meet the elements of the definition. Moreover, there is scant evidence that any Internet-based video distribution is a close substitute for the services that are offered by MVPDs today, or is likely to become one in the near future, for a variety of reasons.⁵⁸ In fact, one of the largest online video providers today, Netflix, views itself more as a competitor to a premium movie channel service like HBO than as a competitor to the multichannel services offered by MVPDs.⁵⁹

As discussed above, the text of the definition and its use in the Act, as well as the legislative history, all point to an interpretation of the terms “channel” and “MVPD” that includes the entity’s provision of a last mile transmission path for delivery of video programming to subscribers. The PN points to a single reference in the legislative history of the 1992 Act that “appears to refer to a ‘channel’ as a programming network.”⁶⁰ Little interpretive weight should be accorded this single reference in the Senate Report given the fact that Congress did not amend the definition of “channel” in the Act from one referencing “a portion of the electromagnetic frequency spectrum” to a “programming network” in the sense of ESPN or CNN.

III. CONGRESS AND THE COMMISSION TO DATE HAVE ACCORDED SEPARATE STATUS TO VIDEO PROGRAMMING DISTRIBUTED OVER THE INTERNET

As ACA and others have noted, “the online video programming distribution environment is nascent, evolving and complex, involving multiple participants, not all of whom are subject to the

⁵⁸ See, e.g., Craig Moffett, *Why Haven’t We Seen a Virtual MSO Yet?*, Bernstein Research (Jan. 27, 2012) (analyzing the multiple factors preventing the Internet-based multiple system operator business model from being viable).

⁵⁹ Peter Kafka, *Netflix Doesn’t Want to Compete With Cable, Hulu, iTunes or GameFly. But HBO . . .*, All Things D (Jan. 26, 2012), available at: <http://allthingsd.com/20120126/netflix-doesnt-want-to-compete-with-cable-hulu-itunes-or-gamefly-but-hbo/> (last visited May 14, 2012)(reporting on Netflix CEO Reed Hastings speech stating Netflix is attempting to create web version of HBO or Showtime).

⁶⁰ Public Notice, ¶ 11 n. 42, citing Senate Report at 24 (“[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.”).

Commission's jurisdiction.⁶¹ Since the time that the term "MVPD" was first added to the Act, Congress and the Commission have wrestled with the question of whether online video distributors qualify as MVPDs under the Act, and it is instructive that when faced with the question whether existing rules apply to Internet-delivered video programming, it has been the practice of both bodies to treat such programming differently from video programming distributed over conventional MVPD systems and networks.

It is significant that when Congress determined that certain video programming distributed over the Internet and using Internet protocol should contain video descriptions and closed captions, it enacted the 21st Century Communications and Video Accessibility Act ("CVAA") to bring such online video programming under the Commission's jurisdiction for video description and closed captioning purposes *only*.⁶² Once again, the definition of "video programming" used by Congress to describe programming covered by the CVAA is "programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media . . ." ⁶³ This strongly suggests that Congress did not believe that online video programming was already encompassed within the term "video programming" as used in the definition of

⁶¹ *In the Matter of Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Communications and Video Accessibility Act of 2010*, Reply Comments of the American Cable Association, MB Doc. No. 11-154, at 4-7 (filed Nov. 1, 2011); *In the Matter of Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Communications and Video Accessibility Act of 2010*, Comments of the National Association of Broadcasters, MB Doc. No. 11-154, at 3 (filed October 18, 2011) ("the instant proceeding presents novel questions about an extremely complex programming distribution ecosystem that is still very much evolving"); *In the Matter of Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Communications and Video Accessibility Act of 2010*, Comments of NCTA, MB Doc. No. 11-154, at 2 (filed October 18, 2011) ("There are multiple entities involved in providing television programming to viewers via the Internet either through streaming or downloading," online distribution chain is still emerging).

⁶² CVAA, §§ 202(a)(3)(A)-(B) & 202 (b)(directing the Commission, respectively, to examine the costs and benefits of imposing video description requirements on "video programming distributed on the Internet" and imposing closed captioning requirements on "video programming providers" using, respectively, the Internet and the Internet protocol to distribute programming previously aired on television with captions).

⁶³ *Id.* § 202(h)(2)("Video programming").

“MVPD.”⁶⁴ If it were, enactment of the CVAA would have been unnecessary with respect to closed captioning as the existing television closed captioning rules, already applicable to MVPDs, would require that the online video programming contain and be passed through with captioning included.

Similarly, Commission precedent has consistently distinguished between Internet content, applications and services providers and MVPD services and has refrained from imposing regulations designed to apply to traditional video programming and MVPDs to video programming distributed over the Internet.⁶⁵ In several early cases, the Commission concluded that video delivered via the Internet, including “streaming video,” is not “video programming” as defined in the Act in the technological sense, citing qualitative differences between Internet-delivered video programming and

⁶⁴ See *Id.* § 202(b) & (c) (requiring Commission to adopt rules for video programming delivered using Internet-Protocol); see also H.R. 3101, *Twenty-first Century Communications and Video Accessibility Act of 2009* (proposing new definition of “video programming that would include programming that “is distributed over the Internet or by some other means”), available at <http://www.thomas.gov/cgi-bin/query/z?c111:H.R.3101> (last visited, May 14, 2012).

⁶⁵ See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 19 FCC Rcd 10909, ¶¶ 74, 75 (2004) (asking how “currently available real-time Internet video compares to traditional MVPD and broadcast programming”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 20 FCC Rcd 14117, ¶ 62 (2005) (seeking comment on “what criteria should be used to compare picture quality of Internet-based video programming distributed by traditional broadcasters and MVPDs.”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report*, 24 FCC Rcd 542, Table B-1, Appendix B (excluding Internet video from list of competitive MVPD technologies) (2009); *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885, ¶¶ 46, 57 (2003) (“*Digital Cable Compatibility Order and FNPRM*”) (copy protection encoding rules would apply to all MVPDs; such rules do not apply to “distribution of any content over the Internet” thereby implicitly recognizing that a provider of streaming video over the Internet is not an MVPD); 47 C.F.R. § 76.1901(b) (specifying that encoding rules “shall not apply to distribution of any content over the Internet”); *Closed Captioning and Video Description of Video Programming Implementation of Section 305 of the Telecommunications Act of 1996 Video Programming Accessibility*, Report and Order, 13 FCC Rcd 3272, ¶ 33 (1998) (declining to extend programming regulations such as closed captioning and v-chip to Internet video; distinguishing between services offered by MVPDs and services providing streaming video over the Internet, finding that closed captioning regulations that specifically apply to MVPDs should not apply to Internet video); *Technical Requirements to Enable Blocking of Video Programming based on Program Ratings; Implementation of Sections 551(c), (d,) and (e) of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 11248, ¶ 33 (1998) (declining to apply V-Chip requirement to streaming Internet video; limiting applicability to signals received over the air or through cable television, MMDS or DBS, i.e., recognized MVPDs).

programming provided by a broadcast station.⁶⁶ Although reflective of technology and the marketplace as it existed at the time, it remains instructive as to the Commission's hesitation to treat Internet video as "video programming" under the Act. Similarly, the Commission has declined to extend to Internet-delivered video and Internet services regulations applicable to "video programming," such as rules concerning over-the-air reception devices ("OTARD") and Emergency Alerts.⁶⁷ The Commission has also declined in the past to impose requirements on providers of video programming over the Internet for copy protection encoding⁶⁸ and the "V-Chip."⁶⁹ Nor has the

⁶⁶ See, e.g., *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Treatment for Broadband Access to Internet Over Cable Facilities, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd 6005, ¶ 107, n. 379 (2001) ("Television-quality Internet video service requires a high-speed connection of about 300 kbps or higher, which most current broadband providers cannot yet guarantee;" "Internet video is also known as 'streaming video,' because data are 'streamed' over the Internet to provide continuous motion video"); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798, ¶ 63, n. 236 (2002) ("Cable Modem Order") ("Streaming video . . . is not consistent with the definition of video programming. Even if streaming video does achieve television quality, it would not be treated as a cable service unless it otherwise falls within the definition of 'cable service.'").

⁶⁷ *In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices; Television Broadcast Service and Multichannel Multipoint Distribution Service, Order on Reconsideration*, 13 FCC Rcd 18962, ¶¶ 55-56 (1998) ("OTARD Reconsideration Order") (FCC rejected contention that "video programming" includes information received over the Internet that is viewable on computer monitors, because the record did not contain evidence demonstrating that Internet-delivered video services "are comparable to that provided by a television broadcast station."); *In the Matter of Amendment of Part 73, Subpart G, of the Commission's Rules Regarding the Emergency Broadcast System*, Second Report and Order, 12 FCC Rcd 15503, ¶ 38 (1997) ("Second Emergency Alert Order") (Goal of emergency alert system is to provide emergency alerts to receivers of video programming; both visual and aural emergency alerts must be provided to subscribers on all "programmed channels." "Programmed channel means a channel carrying video programming." "Programmed channels do not include channels used primarily for the transmission of data services such as Internet services."). *But see Internet Ventures, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 3247 (2000) (FCC denied an ISP's request for commercial leased access under Section 612, finding that leased access rules were limited to providers of "video programming" and did not extend to ISPs, while recognizing the answer might be different for an entity packing multiple channels of video programming online).

⁶⁸ *Digital Cable Compatibility Order and FNPRM*, ¶¶ 46, Appendix B ¶ 7 (FCC implicitly excluded providers of streaming Internet video as MVPDs when it found that copy protection encoding rules apply to all MVPDs but adopted rules expressly excluding Internet content); see also 47 C.F.R. § 76.1901(b) (specifying that encoding rules "shall not apply to distribution of any content over the Internet").

⁶⁹ *In the Matter of Technical Requirements to Enable Blocking of Video Programming based on Program Ratings; Implementation of Sections 551(c), (d,) and (e) of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 11248, ¶¶ 33-34 (1998) (declining to apply V-Chip requirement to streaming Internet video

Commission included Internet video distribution in its total subscriber counts in determining total subscriber counts for purposes of computing its horizontal cable ownership limits.⁷⁰ This history demonstrates that the Commission has a long record of treating video distributed over the Internet differently from traditional video programming distributed by MVPDs.

It is particularly noteworthy that, when first faced with the issue, the Commission also declined to include Internet-delivered video as “video programming” subject to the television closed captioning rules.⁷¹ In this instance, the Commission considered whether to extend the television closed captioning rules to video programming delivered over the Internet and declined to do so, stating that “there are issues that need to be addressed relating to the convergence of television receivers and computers and the growth of Internet video like programming that may need to be addressed in the future.”⁷² Recognizing this, the Commission adopted television closed captioning rules that excluded Internet delivered video, but applied to all “video programming distributors” – which by definition include MVPDs.⁷³ Thus, the very structure of the Commission’s rules recognizes

because v-chip technology is not compatible with Internet signal formats; limiting applicability to signals received using recognized MVPD formats).

⁷⁰ *In the Matter of The Commission’s Cable Horizontal and Vertical Ownership Limits; Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Fourth Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, ¶ 44 (2008) (declining to include “mobile phones, the Internet, home video rentals or international distribution in . . . total [MVPD] subscriber count[s]” because there “is scant evidence in the record whether and how these alternative outlets affect the viability of the cable programmer. Moreover, many of these alternative outlets operate based on the existing popularity of the content, which is gained only through widespread counting or triple-counting the same consumers.”).

⁷¹ *In the Matter of Closed Captioning and Video Description of Video Programming Implementation of Section 305 of the Telecommunications Act of 1996 Video Programming Accessibility*, Report and Order, 13 FCC Rcd 3272, ¶ 249 (1998) (“Closed Captioning Order”) (declining to extend programming regulations such as closed captioning to Internet video; distinguishing between services offered by MVPDs and services providing streaming video over the Internet, finding that closed captioning regulations that specifically apply to MVPDs should not apply to Internet video).

⁷² *Id.* at ¶¶ 248-249.

⁷³ *Id.* at Appendix B (adopting 47 C.F.R. § 79.1(a)(2). Section 47 C.F.R. § 79.1(a)(2) defines “video programming distributor” as “Any television broadcast station licensed by the Commission and any multichannel video programming distributor as defined in §76.1000(e) of this chapter, and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission. An entity contracting for program distribution over a video programming

that an entity distributing video programming over the Internet is not included within the category of an MVPD under the Act.⁷⁴

This distinction between traditional and online video programming distribution was most recently maintained by the Commission in its order approving the license transfers associated with Comcast Corp.'s acquisition of NBC Universal.⁷⁵ In that case, the Commission conducted separate analyses and imposed distinct remedies for the competitive harms posed by the transaction to rival MVPDs and to "non-MVPD OVDs (such as Hulu, Netflix, GoogleTV, and iTunes)."⁷⁶ The Commission found that today, most consumers do not see online video distribution as a substitute for their MVPD service, but as an additional method of viewing video programming.⁷⁷ Nonetheless, in recognition, *inter alia*, of the tempering effect online distribution nonetheless may have on Comcast and the prices it charges consumers, the Commission imposed a set of remedial conditions for the

distributor that is itself exempt from captioning that programming pursuant to paragraph (e)(9) of this section shall itself be treated as a video programming distributor for purposes of this section." 47 C.F.R. § 79.1(a)(2).

⁷⁴ This is but one example of the Commission declining to apply the term MVPD to video provided over the Internet. In its Open Internet Order, the Commission coined the term "online video aggregators" to describe companies such as Netflix, Hulu, YouTube, and iTunes "that are unaffiliated with traditional MVPDs." *In the Matter of Preserving the Open Internet Broadband Industry Practices*, Report and Order, 25 FCC Rcd. 17905, ¶ 22 (2010) ("Open Internet Order").

⁷⁵ *In the Matter of Applications of Comcast Corp., General Electric Co., and NBC Universal Inc., Memorandum Opinion and Order*, 26 FCC Rcd 4238 (2011) ("Comcast-NBCU Order"). ACA notes that while the Comcast-NBCU Order states that it is not to be construed as a Commission statement concerning the regulatory status of OVDs and is not a binding precedent controlling the Sky Angel case, it clearly illustrates the Commission's pattern of treating OVDs differently than facilities-based MVPDs. *Id.* ¶ 87 n. 197.

⁷⁶ *Id.* ¶¶ 67-73 (addressing the incentive and ability of Comcast-NBCU to discriminate in the sale of video programming to traditional MVPDs for online distribution); *id.*, ¶¶ 74-90 (addressing the incentive and ability of Comcast-NBCU to discriminate in the sale of video programming to non-MVPD online video distributors).

⁷⁷ *Id.* ¶ 79; *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Comments of the American Cable Association at 4, 35 (filed June 21, 2010) (stating that online video is today a complement rather than competitor to MVPD offerings); *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licenses*, MB Docket No. 10-56, Ex Parte Letter from the American Cable Association to Media Bureau Chief Bill Lake (filed Feb. 24, 2011) (noting error in the *Comcast-NBCU Order's* characterization of ACA's position as advocating the view that OVDs today are competitors to cable).

benefit of OVDs.⁷⁸ Although the Commission did not definitively settle the question of MVPD status for OVDs in the Comcast-NBCU Order, its definition of the class of OVDs who would benefit from the special conditions is nonetheless instructive.⁷⁹

In reviewing the potential competitive harms of the Comcast-NBCU combination, the Commission recognized that video programming can be distributed online by either MVPDs in their capacity as MVPDs, or by non-MVPDs (such as Hulu, Netflix, Google TV and iTunes), but that Comcast-NBCU's incentives to disadvantage these two types of distributors were similar.⁸⁰ Although MVPDs distributing video programming online and OVDs both may be considered "online video distributors," MVPDs have existing program access rights that OVDs do not possess under the Communications Act, giving rise to the need to craft somewhat different remedial conditions for the two types of online distributor.⁸¹ For this purpose, the Commission defined the online video distributors – OVDs – who would be able to take advantage of special program access license conditions designed for their benefit by explicitly excluding from the category of OVDs an MVPD acting in its capacity as an MVPD in certain circumstances. Specifically, the Commission stated that:

"OVD" means any entity that provides Video Programming by means of (i) the Internet or [(ii)] other IP-based transmission path provided by a Person other than the OVD. *An OVD does not include an MVPD inside its MVPD footprint or an MVPD to the extent it is offering Online Video Programming as a component of an MVPD subscription to customers whose homes are inside its MVPD footprint.*⁸²

⁷⁸ Comcast-NBCU Order, ¶¶ 81, 87-90.

⁷⁹ *Id.* ¶¶ 61 n. 131, 87 n. 197 (nothing in the order is to be construed as a Commission statement concerning regulatory status of OVDs as MVPDs; conditions imposed should not be construed as imposing specific requirements or procedures on an industry-wide basis).

⁸⁰ *Id.* ¶¶ 75-90.

⁸¹ Although the *Comcast-NBCU Order* suggests that an online component of an MVPD service will be treated by the Commission as part of the MVPD service offering, the Commission has not yet addressed this question on an industry-wide basis.

⁸² *Comcast-NBCU Order*, ¶¶ 67-90 (discussion the provision of online content to MVPDs and to non-MVPDs); Appendix A, Conditions, I. Definitions (emphasis supplied).

Use of the term “footprint” appropriately references the physical footprint of the MVPD’s network or system, again confirming the Commission’s settled interpretation of an MVPD as a facilities-based provider of multiple channels of video programming. By way of explanation, ACA notes that the language referring to an “other IP-based transmission path provided by a Person other than the OVD” in the Comcast-NBCU conditions is similar but not identical to the definition of an “OVD” in the antitrust Complaint filed by the U.S. Department of Justice against the Comcast-NBCU transaction. There, the term appears to relate, *inter alia*, to the conditions imposed on Comcast-NBCU concerning Comcast’s offering of “specialized services” in its capacity as a broadband Internet service provider in DOJ’s Proposed Final Judgment (“PFJ”).⁸³ In the Complaint, DOJ defines an “OVD” as follows:

“OVD” means any Person that distributes Video Programming in the United States by means of the Internet or another IP-based transmission path provided by a Person other than the OVD. This definition (1) includes an MVPD that offers Video Programming by means of the Internet or another IP-based transmission path outside its MVPD footprint as a service separate and independent of an MVPD subscription; and (2) excludes an MVPD that offers Video Programming by means of the Internet or another IP-based

⁸³ See *U.S. v. Comcast Corp*, Case No. 1:11-cv-00106, Complaint (D.C. Cir., filed Jan. 18, 2011) (“Complaint”); see also *U.S. v. Comcast Corp*, Case No. 1:11-cv-00106, Proposed Final Judgment (D.C. Cir., filed Jan. 18, 2011) (“Proposed Final Judgment”). OVDs are also discussed in the Competitive Impact Statement accompanying the Complaint at 11, 37-39 (“*Unlike MVPDs, OVDs do not own distribution facilities and are dependent upon ISPs for the delivery of their content to viewers;*” “Specialized Services are offered to consumers over the same last-mile facilities as Internet access services, but are separate from the public Internet,” and these can include online video programming) (emphasis added). Taken together these statements indicate a recognition that (i) an OVD that does not own distribution facilities can utilize Internet distribution or specialized services provided over a managed broadband ISP network to deliver video programming to an end user and (ii) that an MVPD can also act as an OVD by utilizing its own managed broadband ISP network to deliver online video programming using a specialized service offering that is not part of its MVPD subscription service. The Complaint’s definition of an OVD appears to suggest that the term is intended to include MVPDs who also offer video programming online *outside their MVPD service areas* either by means of the Internet or a specialized Internet service offering, but to exclude an MVPD *within its* “MVPD footprint” offering video programming by means of the Internet or a specialized Internet service as part of an MVPD subscription service. Although it would seem that an OVD would more likely use a combination of Internet and specialized service distribution to reach an end user, an OVD could also reach an end user by wholly by means of common or private carrier distribution plant owned by third-party providers, coupled with the specialized services offered by a third-party broadband ISP. An MVPD choosing to provide online video programming services outside its MVPD footprint by similar means would, under this definitional framework, be considered solely an OVD rather than a traditional MVPD.

transmission path to homes inside its MVPD footprint as a component of an MVPD subscription.⁸⁴

The approach of the Commission and the DOJ to OVDs in reviewing the Comcast-NBCU transaction represents a common sense response to entities that distribute video programming online using the networks of others to deliver their video programming. MVPDs and OVDs are each assigned a different status, and each receives a different set of rights and obligations. Thus, the Commission and the DOJ, like Congress in enacting the CVAA, have recognized that online video distribution deserves separate treatment from video programming distributed by MVPDs over distribution facilities that they maintain for this purpose. What all of the examples discussed above illustrate is that, when faced with the question whether existing categories and rules apply to video programming distributed online, Congress and the Commission have consistently afforded different treatment to video programming distributed by MVPDs and video programming distributed online by OVDs.

IV. FAR REACHING AND DISRUPTIVE CONSEQUENCES WOULD FLOW FROM A RE-INTERPRETATION OF THE STATUTORY DEFINITION OF AN MVPD TO INCLUDE NON-FACILITIES BASED ONLINE VIDEO PROGRAMMING DISTRIBUTORS

The PN correctly observes that the non-facilities based view of “MVPD” would “necessarily encompass a large number of entities, such as online distributors of video programming” that are today operating without regard for the rules concerning MVPDs.⁸⁵ The PN questions whether subjecting new and emerging online video distributors to regulation as MVPDs would deter investment in new ventures and drive some current online video distributors from the market, and whether this expansion of MVPD status would unreasonably burden cable-affiliated programmers and broadcasters with the requirement to negotiate with a large number of entities pursuant to the program access and good faith retransmission consent rules.⁸⁶

⁸⁴ Complaint at 5-6.

⁸⁵ Public Notice, ¶ 11.

⁸⁶ *Id.*

Far reaching and disruptive consequences would result from imposing MVPD status on online video distributors, as regulatory requirements applicable to MVPDs that were crafted with wholly different business models and network configurations in mind would, by their terms, apply to OVDs. For example, as MVPDs, online distributors would automatically become obligated to comport their business in compliance with statutory and regulatory requirements relating to program carriage, the competitive availability of navigation devices (including the integration ban), and the requirement to negotiate in good faith with broadcasters for retransmission consent.⁸⁷

The Commission's prior determinations not to include Internet video under the Equal Opportunity ("EEO") requirements, OTARD, and Emergency Alert rules would either be effectively overruled by recognizing OVDs as MVPDs, or at the very least, need to be revisited.⁸⁸ Various technical requirements under the Commission's rules (such as signal leakage restrictions, and cable inside wiring requirements) that apply to MVPDs would also apply by their terms absent further Commission action to the contrary.⁸⁹ The illogic of this result would be most obvious with respect to closed captioning, as, if there is no difference between Internet-delivered and traditional "video programming," two sets of closed captioning rules – television closed captioning and IP closed captioning rules – would appear automatically to apply, thus creating potentially conflicting and

⁸⁷ 47 C.F.R. §§ 1300-1302; 47 C.F.R. § 76.1204(a)(1); 47 C.F.R. § 76.65.

⁸⁸ See 1993 EEO Implementation Order; OTARD Reconsideration Order, ¶56 ; Second Emergency Alert Order, ¶38.

⁸⁹ Public Notice, ¶ 2; see 47 U.S.C. § 548; 47 C.F.R. §§ 76.1000-1004 (program access); 47 U.S.C. § 325(b)(3)(C)(ii); 47 C.F.R. § 76.65(b)(retransmission consent; good faith); 47 U.S.C. § 536; 47 C.F.R. §§ 76.1300-1303 (program carriage); 47 U.S.C. § 549; 47 C.F.R. §§ 76.1200-1210 (navigation devices); 47 U.S.C. § 325(b)(3)(C)(iii); 47 C.F.R. § 76.71-79, 76.1792, 76.1802 (EEO); 47 C.F.R. § 79.1-2 (television closed captioning); 47 C.F.R. § 76.610 (signal leakage); 47 C.F.R. § 76.800-806 (cable inside wiring). The Public Notice also notes that a non-MVPD that makes video programming available directly to the end user through a distribution method that uses Internet protocol ("IP") would be subject to the Commission's new IP closed captioning requirements. Public Notice, ¶ 2 n. 11; See *IP Closed Captioning Order*, 47 U.S.C. § 613; 47 C.F.R. § 79.4.

inconsistent obligations with respect to application of the new IP closed captioning mandates that the Commission would be required to resolve.⁹⁰

Similarly, the Commission would have to consider the impact of Internet video distribution in the cable effective competition proceedings,⁹¹ as well as quantify Internet video subscribers in the denominator of any revised cable horizontal ownership cap.⁹² In addition, the Commission would have to consider the applicability of must-carry, network non-duplication, syndicated exclusivity, sports blackout and similar requirements.⁹³ In the absence of express Congressional intent to confer MVPD status on non-facilities based distributors of video programming, or any indication of Congressional interest in imposing on Internet-delivered video programming any regulation beyond disabilities access requirements, such a radical restructuring of the scope and reach of MVPD regulation becomes highly problematic.⁹⁴

V. CONCLUSION

It has been the Commission's traditional practice to distinguish between MVPDs that are involved in the last-mile distribution of video programming to subscribers, either through ownership, control or contract from video distributors who provide various packages of video programming over the Internet. In its final paragraph, the PN questions how the Commission's policy of refraining from reflexively extending statutory requirements applicable to established categories of service providers to Internet-based services should impact the definitional and policy issues raised with respect to

⁹⁰ 47 C.F.R. §§ 79.1 & 79.4.

⁹¹ See 1993 Rate Regulation Order, ¶¶ 19-25.

⁹² 47 U.S.C. § 533; *In the Matter of the Commission's Cable Horizontal and Vertical Ownership Limits*, Third Report and Order, 14 FCC Rcd 19098, ¶ 5 (1999) (revising horizontal cap to express concentration as a percentage of all MVPD subscribers nationwide).

⁹³ 47 C.F.R. §§ 76.55 & 76.56; 47 C.F.R. §§ 76.92 – 76.95; 47 C.F.R. §§ 101-106; 47 C.F.R. § 76.111.

⁹⁴ Significantly, there is no indication in either the Act or the legislative history that Congress intended the Commission to recognize a class of limited purpose MVPDs that would be permitted to benefit from MVPD status without being burdened by MVPD obligations.

online video distributors.⁹⁵ ACA suggests that this posture is not merely a result of Commission “policy,” but is largely made mandatory by the limits on its authority imposed by Congress through the definitions of the Communications Act. Accordingly, the Commission’s practice of refraining from extending to Internet video rules and regulations designed for established categories of service providers is not only a matter of communications policy, it is strongly suggested by the text and structure of the Act.

Caution must be exercised if the Media Bureau is to diverge from established Commission precedents concerning the terms contained with the definition of “MVPD” by re-interpreting “channels of video programming” and “MVPD” so as to extend the reach of Title VI regulation to non-facilities based online video programming distributors. Such a wide-sweeping decision to reverse settled interpretations, if warranted by the terms of the Act, is properly left to the Commission in an industry-wide rulemaking. If after conducting such an industry-wide rulemaking, inclusion of OVDs under the ambit of the term “MVPD” is unsupported by the language of the Act and its legislative history, as appears to be the case, then the matter properly becomes one for decision by Congress.

⁹⁵ Public Notice, ¶ 15.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

By: 

Matthew M. Polka
President and CEO
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220

(412) 922-8300

Ross J. Lieberman
Vice President of Government Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007

(202) 494-5661

May 14, 2012

Barbara S. Esbin
James N. Moskowitz
Andrea N. Person
Cinnamon Mueller
1333 New Hampshire Ave,
2nd Floor
Washington, DC 20036

(202) 872-6881

Attorneys for American Cable Association