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

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

REPLY COMMENTS OF OVATION LLC

Ovation LLC ("Ovation") submits these reply comments in response to the Public Notice issued by the Media Bureau of the Federal Communications Commission (the "Commission") in the above-captioned proceeding.[1]

INTRODUCTION

In the Notice, the Media Bureau sought comment on a legal issue that has been raised in a pending program access complaint filed by Sky Angel U.S., LLC ("Sky Angel") against Discovery Communications, LLC and its affiliate, Animal Planet, L.L.C. (collectively, "Discovery"). As a threshold matter in the proceeding, the Media Bureau decided to determine whether Sky Angel, which offers a subscription-based service of video and audio programming over the Internet, is a multichannel video programming distributor ("MVPD") that is entitled to relief under the Commission's program access rules. Specifically, the Media Bureau sought comment on the proper interpretation of the term "MVPD" as defined in the Communications Act of 1934, as amended (the "Act"), and the term "channel" as used in the definition of MVPD.

[1] Public Notice – Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding, MB Docket No. 12-83, DA 12-507 (March 30, 2012) ("Notice").

Like Discovery, Ovation licenses a 24/7 linear cable television network to MVPDs throughout the country. The Ovation programming service is the only independent network dedicated to the arts and contemporary culture, and is currently received by over 50 million US households. Ovation concurs with the position of Discovery and several other commenters, including the American Cable Association, Cablevision Systems Corporation, Comcast Corporation, the National Cable & Telecommunications Association, and Verizon, that the Media Bureau should not expand the interpretation of "channel" or, in turn, "MVPD" to encompass distribution systems such as that of Sky Angel and other online video distributors ("OVDs").[2] Nonetheless, Ovation supports the position of many of the respondents that the Commission should evaluate these important issues in the context of a broader public proceeding, and not solely as part of the Sky Angel matter.[3]

COMMENTS

I. THE DEFINITION OF "MVPD" NECESSARILY INCLUDES CONTROL OF THE TRANSMISSION PATH.

In the Sky Angel program access complaint proceeding, as well as in initial comments filed in this docket, Discovery has maintained that Sky Angel does not qualify as a MVPD and, therefore, has no standing to file a program access complaint. Ovation supports Discovery's conclusion that the correct interpretation of the definition of "MVPD" is a programming distributor that "make[s] available transmission paths for programming over facilities [it] own[s]

---

[2] See American Cable Association ("ACA") Comments, at 5-20; Cablevision System Corporation Comments, at 5-15; Comcast Corporation Comments, at 4-10; Discovery Comments, at 3-8; National Cable & Telecommunications Association Comments, at 2-5; Verizon Comments, at 3-8.

[3] See ACA Comments, at 5; AT&T Comments, at 2-3; Computer & Communications Industry Association ("CCIA") Comments, at 5-6; National Association of Broadcasters ("NAB") Comments, at 1-2; Open Internet Coalition ("OIC") Comments, at 2-3.

or control[s] akin to the manner in which cable operators do so."[4] As Discovery points out, the Act and the Commission's rules, along with common usage and other extrinsic evidence, appear to include a transmission path as a necessary element of "channel" and, in turn, of "MVPD."[5] OVDs, unlike facilities-based MVPDs, have not invested in distribution facilities or transmission infrastructure to any extent remotely comparable to the level of investment made by cable operators or direct broadcast satellite providers, and, indeed, use the public Internet, a transmission infrastructure that they neither own nor control, to distribute video programming. Accordingly, OVDs should not be considered MVPDs or be entitled to enjoy the associated regulatory benefits, such as program access rights.

II. EXPANDING THE DEFINITION OF "MVPD" TO INCLUDE OVDs COULD RADICALLY, AND POTENTIALLY ADVERSELY, AFFECT THE VIDEO PROGRAMMING DISTRIBUTION BUSINESS.

Ovation also supports the position of Discovery that the Media Bureau should consider how its decision in this proceeding will impact the video programming market, including existing programming distribution agreements.[6] In its initial comments, Discovery cautions the Media Bureau that classifying OVDs as MVPDs would dramatically alter the video programming business model, with potentially adverse consequences for networks, content creators and consumers.

Discovery raises a valid concern that treating OVDs as MVPDs, and thereby giving OVDs the protection of the Commission's program access and other rules, would effectively

---

[4] Discovery Comments, at 5.

[5] See id., at 3-8.

[6] Id., at 8-9; see also Motion Picture Association of America ("MPAA") Comments, at 1-2. ("[c]hanging the scope of a well-established term, such as 'MVPD,' could impact existing programming agreements and the content industry more broadly ....").

force vertically integrated video programmers to license their networks online and, accordingly, to obtain online distribution rights from content suppliers.[7] In such circumstances, marketplace pressures would foreseeably require other networks to do the same. As Discovery correctly notes, content creators do not always want to distribute content online, in light of concerns over security and the ability to appropriately monetize such distribution, and, thus, will likely seek greater compensation if a network seeks to expand distribution rights to include OVDs.[8] Likewise and for similar reasons, video programmers themselves, especially those that produce original programming, have an interest in maintaining control over where their programs are distributed. Consequently, a change in the definition of "MVPD" may result in materially increased costs for content creation and acquisition by cable networks.

In addition, an expansion of the interpretation of "MVPD" that would require a network to offer its programming to OVDs would decrease the value of that programming to traditional MVPDs. As stated by Discovery, video programmers' agreements with MVPDs are based in part on a MVPD's determination that having certain programming on its system will attract subscribers.[9] However, if that same programming is available to numerous and unknown OVDs, the value of the programming to a MVPD will decline. Thus, at the same time as network content costs increase, license fees may decrease, ultimately leading to the creation and distribution of lower quality content to consumers.

---

[7] See Discovery Comments, at 8-9.

[8] Id. at 10-11.

[9] Id. at 13.

As noted by the MPAA, "even small changes to video programming regulations can have a far-reaching impact" on the video content and distribution industry.[10] When developing business models and negotiating agreements for video programming distribution, Ovation, as well as others in the industry, have relied on a common understanding that MVPDs were limited to facilities-based programming distributors, such as cable operators and satellite service providers, and did not include the virtually unlimited number of entities, with substantially dissimilar content offerings, that could distribute video programming over the Internet. As such, any changes to the current regulatory structure should be carefully examined in light of the larger market considerations. Ovation echoes the comments of other respondents in urging the Media Bureau to proceed cautiously as it evaluates whether and how to apply the definition of MVPD to OVDs.[11]

III. THE COMMISSION SHOULD NOT EXAMINE THIS FAR-REACHING ISSUE IN A LIMITED PROCEEDING.

Given the fact that any changes to the definition of MVPD could significantly impact the industry and its various participants, including content providers, video programmers, broadcasters, cable operators and other MVPDs, and OVDs, the Media Bureau should ensure that it fully considers the perspectives of all interested parties. Ovation agrees with the NAB that the nature of this proceeding should, at a minimum, be changed from "restricted" to "permit but disclose" for ex parte purposes so that interested parties can engage in discussions with the Media Bureau regarding the potential impact of revisions to the current regulatory structure.[12] Indeed, Ovation, like many other commenters, believes that the importance of the issues set forth

---

[10] MPAA Comments, at 1.

[11] See id.; NAB Comments, at 1.

[12] See NAB Comments, at 1 n.3.

in the Notice warrants the Commission's initiation of a separate proceeding open to public comment regarding the applicability of the Commission's rules to OVDs, rather than an examination solely in the context of the Sky Angel program access complaint proceeding.[13]

CONCLUSION

Based on the foregoing, Ovation urges the Media Bureau to undertake a more thorough, unrestricted evaluation of the definitions of "MVPD" and "channel" in the context of the statutory and regulatory history and the potential impact on the media marketplace, and, ultimately, to refrain from expanding such definitions so that "MVPD" will not include OVDs.

Respectfully submitted,

OVATION LLC

Charles Segars
Chief Executive Officer
Ovation LLC
2850 Ocean Park Blvd., Suite 225
Santa Monica, California 90405
(310) 430-7539

June 13, 2012

[13] See ACA Comments, at 5 (suggesting that the Commission conduct an industry-wide rulemaking to address the issues in the Notice); AT&T Comments, at 2-3 (same as ACA); CCIA Comments, at 6 (indicating that the current proceeding "is not the most appropriate vehicle to address" the issues in the Notice); OIC Comments, at 2 (asserting that the Commission needs a more complete record than a restricted proceeding to address the issues).