

**Before the  
Federal Communications Commission  
Washington, DC 20554**

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

**REPLY COMMENTS OF  
ABC TELEVISION AFFILIATES ASSOCIATION,  
CBS TELEVISION NETWORK AFFILIATES ASSOCIATION, AND  
NBC TELEVISION AFFILIATES**

“[B]roadcasters [must be allowed] to control the use of their signals by  
*anyone engaged in retransmission by whatever means.*”

—S. REP. NO. 92-102, 1992 U.S.C.C.A.N. 1133, 1167 (1991)

Jennifer A. Johnson  
Jonathan D. Blake  
COVINGTON & BURLING LLP  
1201 Pennsylvania Ave., N.W.  
Washington, D.C. 20004  
Telephone: (202) 662-6000

*Counsel for CBS Television Network  
Affiliates Association and  
NBC Television Affiliates*

Wade H. Hargrove  
Mark J. Prak  
David Kushner  
Julia Ambrose  
BROOKS, PIERCE, MCLENDON,  
HUMPHREY & LEONARD, L.L.P.  
Wells Fargo Capitol Center, Suite 1600  
150 Fayetteville Street (27601)  
Post Office Box 1800  
Raleigh, North Carolina 27602  
Telephone: (919) 839-0300

*Counsel for ABC Television  
Affiliates Association*

June 13, 2012

## Table of Contents

Summary .....	iii
I. The Broad, Technology-Neutral Definition of MVPD Readily Encompasses Online Providers of Linear Streams of Video Programming .....	2
II. The Statute Does Not Condition MVPD Status on the Use of a Particular Transmission Method.....	5
A. The Statutory Definition Does Not Require That an Entity Provide a Transmission Path for the Delivery of Programming to Be Considered an MVPD .....	5
B. The Definition of MVPD Cannot Be Read to Incorporate the Cable-Specific Definition of “Channel” That Appears Elsewhere in the Act.....	15
C. Dictionary Definitions of “Channel” Do Not Compel an Interpretation of Section 602(13) That Includes a Transmission Path Requirement.....	19
III. The Commission’s Internet Protocol Closed Captioning Rules Do Not Suggest That OVDs Cannot Be MVPDs .....	22
IV. U.S. Free Trade Agreements Require That Distributors of Television Signals Over the Internet Obtain Retransmission Consent.....	26
Conclusion .....	27

## Summary

Definitional gymnastics should not and cannot be employed to condone or justify theft of broadcast signals. A misconstruction of the straightforward definition of MVPD to allow OVDs to retransmit a television broadcast signal without the consent of the station licensee would undermine the congressionally-mandated statutory retransmission consent requirement. Such a construction would allow programming distributors of all stripes, including incumbent MVPDs, to circumvent the retransmission consent requirement (and other MVPD regulatory obligations) altogether simply by creating affiliated entities or entering into contractual relationships with third-party service providers to deliver (the same) “video programming” via an Internet connection. Indeed, the comments of several cable system commenters frankly admit their desire for a ruling that OVDs are not MVPDs, as they intend to enter the online video distribution market themselves and hope to avoid the retransmission consent regime and other regulatory burdens attendant to MVPD status. Those admissions underscore the need for evenhanded regulation of *all* entities that distribute multiple linear streams of video programming to subscribers, regardless of the *method* of transmission.

As the Affiliates Associations’ opening comments noted, the statutory definition of “multichannel video programming distributor” (“MVPD”) is broad, open-ended, and flexible. The function-based definition specifies no particular technological *method* by which video programming is delivered to subscribers or customers, and nothing—nothing at all—in the statute states or implies that furnishing a transmission path along with multiple channels of video programming is a prerequisite to MVPD status. The Affiliates Associations, therefore, respectfully urge the Bureau to adopt the second of its proposed definitions of MVPD and conclude that all entities that distribute multiple streams or networks of linear video

programming to subscribers, without regard to whether they also own or furnish a transmission path for the delivery of programming, are MVPDs.

Arguments to the contrary made by various commenters are without legal or factual support.

*First*, the statutory definition of MVPD, by its terms, does not require that an MVPD own or provide a transmission path for the delivery of video programming. Commenters who argue to the contrary suggest that the statutory definition *implicitly* imposes a transmission path requirement because all of the entities enumerated in the statute provide a transmission path. The argument is factually and legally mistaken. At least one of the entities specified as an MVPD in the statute—a “television receive-only satellite program distributor,” also referred to as a “home satellite dish” or “HSD” program distributor—is, plainly, not a facility-based entity at all and provides no transmission path for delivery of video programming to subscribers.<sup>1</sup> Other long-recognized, but not enumerated, MVPDs, such as open video system providers (“OVSS”), are likewise not facilities-based.

*Second*, a single, isolated reference in the legislative history of the 1992 Act to a congressional desire to promote “facilities-based” competition to incumbent cable providers does not compel a contrary conclusion. That solitary reference cannot support the incorporation of a

---

<sup>1</sup> See, e.g., *Implementation of Sections 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, 5652, ¶ 23 (1993) (“We agree . . . that a qualifying [television receive-only satellite programming] distributor need not own its own basic transmission and distribution facilities.”); *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd 7442, ¶ 183 (1994) (“HSD distributors . . . do not provide a complete distribution path to individual subscribers.” (footnote and quotation omitted)).

“transmission path” requirement into the statutory definition of MVPD, which on its face contains no such restriction. And the absence of any reference in the legislative history to *non-facilities-based* competition is unsurprising: Apart from HSD program distributors, only facilities-based MVPD competitors to cable existed as of the 1992 enactment.

*Third*, Commission precedent belies arguments that a transmission path is a necessary element of MVPD status. *Turner Vision*<sup>2</sup> establishes that *no* transmission path is required because HSD program distributors, clearly enumerated in the statute as MVPDs, provide none. Indeed, the very basis on which the *Turner* rate discrimination complaint was presented and resolved turned on the distinction between clearly *non-facilities-based* HSD programming distributors and *facilities-based* MVPDs. *Wizard Programming*,<sup>3</sup> cited by commenters for a contrary proposition, in fact determined only that the complainant in that matter was not an HSD program distributor at all but merely a *marketer* of programming. And the Commission’s Effective Competition Order made plain that an MVPD “need not own its own basic transmission and distribution facilities.”<sup>4</sup>

*Finally*, the statutory phrase “such as, but not limited to” suggests only that non-enumerated MVPDs must be similar to the entities enumerated in Section 602(13), but OVDs *are* similar to traditional MVPDs in the key way: They deliver multiple streams or

---

<sup>2</sup> *Turner Vision, Inc. v. Cable News Network, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 12610 (Cable Servs. Bureau 1998).

<sup>3</sup> *Wizard Programming, Inc. v. Superstar/Netlink Group, LLC and Telecommunications, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 22102 (Cable Servs. Bureau 1997).

<sup>4</sup> *Implementation of Sections 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, 5652, ¶ 23 (1993).

networks of linear video programming to subscribers. Nothing in the statute requires further “similarity” in the *means* by which that programming reaches a subscriber.

Nor can the cable-specific definition of “channel”/“cable channel” in Section 602(4) of the Act be read as a limitation on the definition of MVPD. The definition of MVPD does not expressly incorporate or refer to the cable-specific definition, but it does expressly include *non-cable* entities among the group of MVPDs. If the Section 602(4) definition of “channel” were read as a limitation upon the definition of MVPD, then the non-cable entities that Congress expressly defined as MVPDs could not be MVPDs, because they cannot deliver multiple “channels” of video programming via “a portion of the electromagnetic frequency spectrum which is used in a cable system.” Contrary arguments for incorporation of the cable-specific definition of channel (and *cable* channel) into the emphatically *not*-cable-specific definition of MVPD both ignore the actual language of Section 602(4) and would produce absurd and irreconcilable results. Settled rules of statutory construction are not so rigid. *See, e.g., Barber v. Thomas*, 130 S. Ct. 2499, 2506 (2010) (the presumption that a term has the same meaning throughout a statute “is not absolute” but instead “yields readily to indications that the same phrase used in different parts of the same statute means different things, particularly where the phrase is one that speakers can easily use in different ways without risk of confusion” (citing cases)).

Dictionary definitions of “channel” do not compel an interpretation of the MVPD definition that includes a transmission path requirement. Although “channel” is sometimes defined as a physical transmission path rather than a stream of programming, several commenters point to more colloquial definitions of the term to mean an aggregation or network of video programming. As one commenter helpfully explains, “channel” can be used in both a

“container” sense and a “content” sense. The “everyday” meaning of channel, particularly from the perspective of a viewer, is the latter, and only that meaning comports with the statutory text and legislative history and avoids incongruent results. Clearly, when a viewer says that her favorite *channel* is “Channel 5,” she certainly does not mean that her favorite swath of spectrum is 76 MHz to 82 MHz. In short, the meaning of the term as it is used in Section 602(13) must take account of *context*, rather than assuming a technology-specific definition that the statutory language does not support on its face and that cannot, by its terms, be read into the statute without absurd results.

Nor do the Commission’s Internet Protocol (“IP”) closed captioning rules suggest that entities which deliver multiple streams of video programming via the Internet cannot be MVPDs. The Twenty-First Century Communications and Video Accessibility Act simply filled a gap in prior law, ensuring that *all* online video programming distributors, including distributors of *non-linear* programming, pass through closed captions for programming originally aired on television. *Linear* programming distributors such as broadcast stations and MVPDs already are subject to the separate closed captioning rules governed by Section 79.1 of the Commission’s rules. And the Commission itself has rejected the argument that the separate closed captioning rules could impose potentially conflicting and inconsistent obligations on MVPDs.<sup>5</sup> In short, nothing in the IP closed captioning rules establishes that OVDs cannot be considered MVPDs even when they meet every element of the statutory definition.

Lastly, numerous trade agreements that the United States has entered into with various countries require that entities that distribute television signals over the Internet not only obtain

---

<sup>5</sup> See *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, ¶¶ 11-12 (2012).

authorization from the copyright owners of the programming contained within the television signal but also obtain authorization—retransmission consent—from the rights holder of the signal itself. Because only cable systems and other MVPDs are required to obtain retransmission consent under Section 325(b) of the Communications Act, entities that distribute television signals over the Internet must be classified as MVPDs in order for the United States to honor these free trade commitments.

For the reasons set forth herein, as well as those in their opening comments, the Affiliates Associations respectfully request that the Media Bureau interpret the term “multichannel video programming distributor” as it is defined in Section 602(13) of the Act to encompass all entities that distribute multiple streams or networks of linear video programming to subscribers, including those that distribute that programming via the Internet.

\* \* \*

**Before the  
Federal Communications Commission  
Washington, DC 20554**

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

**REPLY COMMENTS OF  
ABC TELEVISION AFFILIATES ASSOCIATION,  
CBS TELEVISION NETWORK AFFILIATES ASSOCIATION, AND  
NBC TELEVISION AFFILIATES**

“[B]roadcasters [must be allowed] to control the use of their signals by  
*anyone engaged in retransmission by whatever means.*”

—S. REP. NO. 92-102, 1992 U.S.C.C.A.N. 1133, 1167 (1991)

The ABC Television Affiliates Association, CBS Television Network Affiliates Association, and NBC Television Affiliates (collectively, the “Affiliates Associations”)<sup>1</sup> submit these reply comments in response to the Public Notice (“*Notice*”) in the captioned proceeding released March 30, 2012, in which the Bureau sought comment on the meaning of the terms “multichannel video programming distributor” (“MVPD”) and “channel” as set forth in the Communications Act of 1934, as amended, (“the Act”) and the Commission’s rules.<sup>2</sup>

---

<sup>1</sup> Each of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, and NBC Television Affiliates is a non-profit trade association whose members consist of local television broadcast stations throughout the country that are each affiliated with its respective broadcast television network.

<sup>2</sup> See *Media Bureau Seeks Comment on Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint* (continued . . .)

**I. The Broad, Technology-Neutral Definition of MVPD Readily Encompasses Online Providers of Linear Streams of Video Programming**

Definitional gymnastics should not and cannot be employed to condone or justify theft of broadcast signals. A misconstruction of the straightforward definition of MVPD to allow OVDs to retransmit a television broadcast signal without the consent of the station licensee would undermine the congressionally-mandated statutory retransmission consent requirement. This is tantamount to (mis)construing the regulatory definition of “beef” so that McDonald’s need not pay for hamburger meat. Such a construction would allow programming distributors of all stripes, including incumbent MVPDs, to circumvent the retransmission consent requirement (and other MVPD regulatory obligations) altogether simply by creating affiliated entities or entering into contractual relationships with third-party service providers to deliver (the same) “video programming” via an Internet connection.<sup>3</sup> Indeed, the comments of several cable system commenters frankly admit their desire for a ruling that OVDs are not MVPDs, as they intend to enter the online video distribution market themselves and hope to avoid the retransmission consent regime and other regulatory burdens attendant to MVPD status.<sup>4</sup> Those admissions

---

(. . . continued)

*Proceeding*, Public Notice, DA 12-507 (March 30, 2012).

<sup>3</sup> Regulation of OVDs such as Sky Angel, on the other hand, would ensure an evenhanded regulatory regime in which all similarly situated entities that provide multiple linear streams of video programming to subscribers would be subject to the same regulatory requirements and benefits. *See, e.g.*, Comments of DIRECTV, LLC at 14-15 (regulatory regime that treats OVDs as MVPDs would “establish[] basic regulatory parity”).

<sup>4</sup> *See, e.g.*, Comments of Time Warner Cable Inc. at 2-3, 8-9; Comments of Verizon at 2, 13-15. In similar fashion, Time Warner Cable argues that “regulatory parity” should be achieved not by subjecting OVDs to the regulatory regime that governs traditional MVPDs but by eliminating “unnecessary” or “outdated” regulation of incumbent MVPDs. *See* Comments of  
(continued . . .)

underscore the need for evenhanded regulation of *all* entities that distribute multiple linear streams of video programming to subscribers, regardless of the *method* of transmission.<sup>5</sup> If OVDs are not subject to the regulatory regimes that govern MVPDs, then traditional MVPDs will do exactly what the *Notice* anticipates: They will begin distributing the same video programming to the same subscribers via the Internet so as to avoid regulation as MVPDs.<sup>6</sup> But such a lopsided, inequitable regulatory regime would be flatly intolerable. “Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.”<sup>7</sup>

As stated in the Affiliates Associations’ opening comments, the statutory interpretation questions posed by the *Notice* are not complex in light of the flexible and open-ended definition

---

(. . . continued)

Time Warner Cable Inc. at 1-2, 6-8; *see also* Comments of Verizon at 2, 13 & n.19 (advocating removal of “outdated” regulation of incumbent MVPDs).

Similarly, the *Notice*’s prediction that a “transmission path” requirement would invite a regulatory regime in which “an entity’s regulatory status could vary from market to market (or even customer to customer) based on its contractual arrangements with third parties,” *Notice*, ¶ 9, is equally plausible and troubling.

<sup>5</sup> *See also* Comments of National Association of Broadcasters at 4 (noting that “it is important that new services not be permitted to expropriate broadcast signals at will”); *id.* at 5 (declaring that “[i]f new technologies can evade retransmission consent and erode local viewership by overriding program exclusivity rights of local stations and offering the same programs on stations imported from other markets, the viability of local TV stations—and their ability to serve their local communities with high quality programming—could well be lost”).

<sup>6</sup> *See also* Comments of Public Knowledge at 16 (noting that “any MVPD would simply be able to spin off its facilities into a separate affiliate and then lease them back in order to avoid MVPD regulation”).

<sup>7</sup> *Burlington Northern and Santa Fe Railway Co. v. Surface Transportation Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) (citation omitted).

of “multichannel video programming distributor” contained in Section 602(13) of the Act.<sup>8</sup> The plain language of the statute describes as MVPDs all entities that “make[] available for purchase, by subscribers or customers, multiple channels of video programming.”<sup>9</sup> The statute contains no express limitation predicated on the technological *method* by which video programming is delivered to subscribers or customers, and nowhere in the statute is MVPD status conditioned upon ownership or control of the transmission path. That forward-looking, technology-neutral, statutory definition allows the Act to accommodate and adapt to new technological developments for delivery of video programming. That definition, enacted by Congress, was intentional, not inadvertent, and it cannot be ignored or brushed aside. *See, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73 (1968) (“[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to those factors.” (alteration in original) (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940))). As one commenter put it, the statutory definition is concerned with *what* an MVPD does, not *how* it does it.<sup>10</sup>

This open-ended, function-based language is amply broad enough to encompass entities that distribute multiple streams of linear video programming via the public Internet. Because

---

<sup>8</sup> *See* Comments of the Affiliates Associations at 2.

<sup>9</sup> The Communications Act broadly defines a “multichannel video programming distributor” or 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.” 47 U.S.C. § 522(13).

<sup>10</sup> *See* Comments of Public Knowledge at 8.

nothing in the statute states or implies that a transmission path is a further prerequisite to MVPD status, the Bureau should adopt the second of its proposed definitions of “MVPD” to conclude that online video distributors (“OVDs”) such as Sky Angel are MVPDs when they make available to subscribers multiple networks or streams of linear video programming, without regard to whether they also furnish a transmission path for purchase along with the programming.<sup>11</sup>

None of the arguments made by various commenters urging a narrow construction of the statutory definition have merit.

## **II. The Statute Does Not Condition MVPD Status on the Use of a Particular Transmission Method**

### **A. The Statutory Definition Does Not Require That an Entity Provide a Transmission Path for the Delivery of Programming to Be Considered an MVPD**

Section 602(13) does not, by its plain language, require that an MVPD own or provide a “transmission path” for delivery of video programming to subscribers. Several commenters nevertheless urge that the statutory definition of MVPD *implicitly* requires that an entity provide both video programming and the transmission path by which the programming reaches the subscriber, because, these commenters assert, the enumerated entities all provide a transmission

---

<sup>11</sup> As noted in the Affiliates Associations’ opening comments, it is unnecessary for the Bureau to decide in this proceeding whether the definition of MVPD should encompass Internet-based distributors of *non-linear* programming, such as the joint venture described in the Comments of Verizon at 11. *See* Comments of the Affiliates Associations at 4 n.8. Other commenters also agree that the group of OVD MVPDs should be limited by the requirement, rooted in the statute, that the entity provide multiple *linear* channels or streams of (as opposed to on-demand) programming to paying subscribers. *See, e.g.*, Comments of DIRECTV, LLC at 13-14 (noting that these characteristics are common to traditional MVPDs).

path.<sup>12</sup> The argument is wrong, both factually and legally.<sup>13</sup>

---

<sup>12</sup> *See, e.g.*, Comments of Comcast Corporation at 5 n.10 (“Each of the examples cited in the definition of MVPD share this characteristic—they deliver to the end user an integrated service that includes transmission of video programming over “a portion of the electromagnetic frequency spectrum.”); Comments of Cablevision System Corporation at 4 (“[E]ach of the MVPDs identified in the definition of that term—cable operator, Multichannel Multipoint Distribution System (‘MMDS’), Direct Broadcast Satellite Service (‘DBS’), and television receive-only satellite program distributor—offers such [transmission] pathways.”); Comments of Time Warner Cable Inc. at 4 (“[T]he fact that all of the entities included in ‘the illustrative list in the Act’s definition of MVPD . . . provide a transmission path for the delivery of video programming’ confirms Congress’s intent to build on, rather than supplant, the established definition of ‘channel.’” (quoting *Notice*, ¶ 6)); Comments of National Cable & Telecommunications Association at 3 (“[A]ll of the examples in the definition . . . are facilities-based entities that include transmission paths and video programming in their service offerings.” (footnote omitted)); Comments of American Cable Association at 8 (“Each entity listed in the definition [of MVPD] . . . owns or controls, either directly or indirectly, the mode of delivery by which the programming reaches the subscriber.”). *See also* Comments of Discovery Communications, LLC at 5; Comments of Verizon at 3-5; Comments of Computer & Communications Industry Association at 2-4; Comments of Open Internet Coalition at 5.

<sup>13</sup> A number of commenters urged, consistent with the opening comments of the Affiliates Associations, that the definition of “channel” should not be read as a limitation upon the definition of MVPD and that an entity need not provide a transmission path in order to come within the definition of an MVPD. *See* Comments of Public Knowledge at 2-8 (“channel” can refer to either a “container” by which programming is transmitted or the programming “content” being transmitted; urging that “channel” be interpreted for purposes of Section 602(13) to mean a “stream o[r] signal of prescheduled video programming”); Comments of AT&T at 3-5 (definition of “MVPD” is not limited by narrow statutory definition of “channel”); Comments of Writers Guild of America, West, Inc. at 1, 3-5 (MVPDs need not provide a transmission path by which programming is delivered); Comments of Saga Communications, Inc. at 2-3 (the “transmission path” by which programming is delivered is irrelevant to consumers and thus irrelevant to the definition of “MVPD”); Comments of M3X Media, Inc. at 5-7 (MVPD definition should not be limited by a technology-specific statutory definition of “channel”); Comments of Telecommunications for the Deaf and Hard of Hearing, Inc., National Association of the Deaf, American Foundation for the Blind, Deaf and Hard of Hearing Consumer Advocacy Network, Hearing Loss Association of America, and Association of Late-Deafened Adults at 3, 15 (urging a “common sense” definition of MVPDs not limited by the statutory definition of “channel”); Comments of Sky Angel U.S., LLC at 14-18, 20-32 (no transmission path is required; “channel” should be interpreted as a video programming network). At least one commenter explained that, even though a transmission path is not a required element for MVPD status, it is possible for an OVD to provide a “transmission path” consisting of Internet links rather than “a physical or channelized radiofrequency connection.” *See* Comments of Sincbak, Inc. at 7-11.

*First*, the argument is based on a flawed premise: The entities enumerated in Section 602(13) are *not* all facilities-based. The statute plainly lists among the entities considered MVPDs at least one entity that provides no such transmission path: “television receive-only satellite program distributors.” It is clear from longstanding Commission precedent that such entities, which are commonly referred to as home satellite dish or “HSD” program distributors and which “distribute programming to owners of large-diameter home satellite dishes (‘HSDs’),”<sup>14</sup> are not “facilities-based” entities at all and provide no “transmission path” for the delivery of programming to their subscribers. As the full Commission acknowledged in one of its initial orders following the enactment of the 1992 Act:

TCI asserts that, by including television receive-only satellite programming distributors in the definition of a multichannel video programming distributor, Congress showed that a distributor need not be facilities-based in order to come within the scope of the effective competition test. *We agree with TCI that a qualifying distributor need not own its own basic transmission and distribution facilities.*<sup>15</sup>

And one year later, the Commission reiterated that “‘HSD distributors . . . *do not provide a complete distribution path to individual subscribers.*’”<sup>16</sup> Because HSD program distributors are

---

<sup>14</sup> *Wizard Programming, Inc. v. Superstar/Netlink Group, LLC and Telecommunications, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 22102, 22106, ¶ 8 (Cable Servs. Bureau 1997).

<sup>15</sup> *Implementation of Sections 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, 5652, ¶ 23 (1993) (emphasis added).

<sup>16</sup> *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd 7442, ¶ 183 (1994) (emphasis added; footnote omitted) (quoting *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, (continued . . .)

among the entities expressly enumerated as MVPDs in the statute, it is clear that Congress intended to regulate them as MVPDs. Just as clearly, those entities are *not* facilities-based.<sup>17</sup>

---

(. . . continued)

¶ 106 (1993)). See also Comments of DIRECTV at 8-10 (citing *Policies and Rules for the Direct Broadcast Satellite Service*, Notice of Proposed Rulemaking, 13 FCC Rcd 6907, ¶ 4 n.13 (1998), and *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 7442, ¶¶ 71, 75 (1994)). But see Comments of Cablevision System Corporation at 8 (insisting that HSD providers are facilities-based).

<sup>17</sup> Cablevision claims that a “television receive-only satellite program distributor” is a “satellite carrier.” Comments of Cablevision System Corporation at 8 (citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, ¶ 131 (1993) (“*Must Carry Order*”). Cablevision, however, plainly misconstrues the Commission Must Carry Order. The Commission observed that satellite carriers and television receive-only satellite program distributors are both MVPDs, but that, “[i]n order to resolve any potential ambiguity regarding responsibility for securing retransmission consent, and in view of the fact that the satellite carrier is the entity entitled to the compulsory license granted by 17 U.S.C. § 119, we find that, with respect to HSD sales, the satellite carrier is the multichannel distributor and must secure retransmission consent.” *Must Carry Order*, ¶ 131. The Commission plainly distinguished satellite carriers and television receive-only satellite program distributors, so that the latter are not the former, as Cablevision mistakenly assumes. But, to be clear, the Commission was not suggesting in the last phrase that television receive-only satellite program distributors are not MVPDs. This is made plain by the Commission’s footnote, which explained that “[s]atellite carriers generally also retransmit television signals to cable systems. With respect to cable subscribers, it is the cable operator rather than the satellite carrier that is the multichannel distributor.” *Id.*, ¶ 131 n.367.

This passage also demonstrates the Commission’s recognition that just because an entity is an MVPD does not necessarily mean the entity qualifies for a statutory copyright license, a matter of law with which the Affiliates Associations agree and which Congress itself recognizes, as demonstrated by its amendments to the Copyright Act to grant particular statutory copyright licenses to certain MVPDs that otherwise did not previously qualify for one. See PUB. L. NO. 103-369, § 3(a), 108 Stat. 3477 (Oct. 18, 1994) (amending definition of “cable system” in 17 U.S.C. § 111(f) to include “microwave” so that wireless cable/MMDS operators qualify for the statutory copyright license to retransmit the transmissions of television stations); PUB. L. NO. 106-113, Div. B, § 1000(a)(9) [App. I, Tit. I, § 1002(a)], 113 Stat. 1536, 1501A-523 (Nov. 29, 1999) (adopting 17 U.S.C. § 122 to provide a statutory copyright license for satellite carriers to retransmit the transmissions of local television stations). Thus, Cablevision and others are correct that OVDs would not qualify for a statutory copyright license as such licenses currently exist, but they are wrong that this exclusion evidences congressional intent to exclude such entities from MVPD status. See Comments of Cablevision System Corporation at 5, 16;

(continued . . .)

The argument that provision of a transmission path is a prerequisite to MVPD status because the entities enumerated in the statute uniformly provide a transmission path is not based on fact.

Additional Commission precedent further undermines these assertions, as other long-recognized, but not enumerated, MVPDs likewise are not facilities-based. Open video system programmers (“OVSs”) have long been considered MVPDs,<sup>18</sup> notwithstanding the fact that they do not necessarily own or provide a transmission path by which programming is delivered to subscribers.<sup>19</sup> The Commission *rejected* an argument that OVDs cannot be MVPDs because the entities listed in Section 602(13) “all operate the vehicle for distribution (e.g., cable, MMDS, DBS), whereas open video system video programming providers distribute their product on a common platform in direct competition with other programming providers.”<sup>20</sup> Instead, it concluded that the fact that OVSs “may not operate the vehicle for distribution” does not

---

(. . . continued)

Comments of the Motion Picture Association of America at 3 (“The Copyright Office has correctly ruled that online video distributors are not eligible to retransmit broadcast programming pursuant to the compulsory license in Section 111 of the Copyright Act. By expanding the FCC’s regulatory regime to encompass online video providers, the Commission would risk creating a conflict between the two regimes.”).

<sup>18</sup> See, e.g., *Implementation of Section 302 of the Telecommunications Act of 1996*, Second Report and Order, 11 FCC Rcd 18223, 18324-25, ¶ 196 (1996) (“[O]pen video system operators and video programming providers that provide more than one channel of programming on an open video system are MVPDs. We will not create an exception to our rules that would exclude open video system operators or open video system programming providers from the benefits of our program access rules.” (footnote omitted)); see also *id.* at 18311, ¶ 167 (concluding that the “retransmission consent rules will apply to any video programming provider on an open video system that provides more than one channel of video programming” (footnote omitted)).

<sup>19</sup> Arguments to the contrary (see, e.g., Comments of Cablevision System Corporation at 6 n.9) are misplaced.

<sup>20</sup> *Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20298, 20301, ¶¶ 164, 171 (1996).

foreclose their status as MVPDs.<sup>21</sup> “[T]he plain language of Section 602(13),” the Commission observed, “imposes no such requirement.”<sup>22</sup>

*Second*, various commenters urge the incorporation of a transmission path requirement into the statutory definition based on an isolated reference in the legislative history of the 1992 Act to a legislative desire to promote “facilities-based competition” to incumbent cable providers.<sup>23</sup> To be perfectly clear, there is but *one* reference to “facilities-based competition” in the lengthy House Report.<sup>24</sup> Certain commenters ascribe enormous significance to that solitary reference, suggesting, for example, that the enacting Congress had a “single-minded focus” on facilities-based competition.<sup>25</sup> If by “single-minded focus” it is meant that Congress had its collective mind focused on the issue a single time, then that would be an accurate description. But nothing more can be read into that sole mention. Certainly, that single reference cannot

---

<sup>21</sup> *Id.* at 20301, ¶ 171.

<sup>22</sup> *Id.*

<sup>23</sup> *See, e.g.*, Comments of Discovery Communications, LLC at 6; Comments of Cablevision System Corporation at 10; Comments of the National Cable & Telecommunications Association at 3; Comments of American Cable Association at 11-12 (“The focus in the 1992 Cable Act was clearly on assuring that facilities-based competition develops.”).

<sup>24</sup> *See* H.R. REP. NO. 102-862 (1992), at 93, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275. *See also* Comments of Sky Angel U.S., LLC at 16 n.76 (“a single reference in one congressional report does not indicate that Congress sought to promote this goal [of ‘facilities-based’ competition] above the broad pro-consumer, pro-competition goals” underlying the program access provisions, which “make[] no mention of promoting facilities-based competition”). *Cf. American Council on Educ. v. FCC*, 451 F.3d 226, 235 (D.C. Cir. 2006) (rejecting an appellant’s argument that “focuses on a single word in a single sentence in a single footnote from [an FCC] Order”), *aff’g Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 (2005).

<sup>25</sup> *See* Comments of Comcast Corporation at 6.

support the incorporation of a “transmission path” requirement into a statutory definition that does not, on its face, contain any such restriction. In any event, the absence of any mention in the legislative history of *non*-facilities-based competition<sup>26</sup> is unsurprising: Other than HSD program distributors, only facilities-based MVPD competitors existed as of the 1992 enactment, which preceded widespread availability of broadband Internet as a vehicle for video programming distribution by many years.

*Third*, arguments that the Commission previously has recognized a transmission path requirement simply mischaracterize Commission precedent.<sup>27</sup> Some commenters, for example, cite *Wizard Programming*<sup>28</sup> for the proposition that “entities [that] simply entered into arrangements with cable networks to sell C-Band customers the right to receive and view the same encrypted satellite transmission of their programming that the networks provided to cable systems” were held not to be MVPDs *because* they “provided no transport component.”<sup>29</sup> In fact, the order finding Wizard not to be an MVPD did not turn on a determination that Wizard

---

<sup>26</sup> See Comments of Comcast Corporation at 6.

<sup>27</sup> It is noteworthy that the Commission previously has declined to foreclose the argument that OVDs might be MVPDs. In a proceeding brought by an OVD seeking access to a cable operator’s broadband facilities pursuant to the commercial leased access rules, the Commission concluded that ISP internet access service does not constitute “video programming” for purposes of the leased access rules. See *Internet Ventures, Inc., Internet On-Ramp, Inc.*, 15 FCC Rcd 3427, 3253-54 (2000). In so holding, the Commission expressly noted that it “might face a different set of issues if [the petitioner], or another ISP, proposed to utilize leased access capacity for the provision of a service comprised *wholly of video programming available via the Internet.*” *Id.* at 3254, ¶ 13 (emphasis added).

<sup>28</sup> *Wizard Programming, Inc. v. Superstar/Netlink Group, LLC and Telecommunications, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 22102 (Cable Servs. Bureau 1997) (“*Wizard Programming*”).

<sup>29</sup> Comments of National Cable & Telecommunications Association at 4-5; see also Comments of American Cable Association at 10 & n.31.

failed to provide a transmission path. Instead, the entity was merely a *marketer* of programming, not a provider at all (and thus not, in fact, an HSD program distributor):

Wizard does not purchase programming from SNG, and it does not sell programming to consumers. Rather, Wizard is a mass-marketer. It advertises and markets programming that SNG sells to consumers under Wizard's name. SNG, not Wizard, packages and establishes the retail price of the programming Wizard markets.<sup>30</sup>

Similarly, in *Turner Vision*,<sup>31</sup> four “C-Band programming retailers”—that is, HSD program distributors<sup>32</sup>—filed program access complaints against CNN alleging price discrimination. Contrary to the characterization of the decision by certain cable industry commenters,<sup>33</sup> *Turner Vision* emphatically establishes that HSD program distributors are *not* facilities-based. Indeed, the distinction between HSD program distributors and *facilities-based* MVPDs was the very basis on which CNN attempted to justify its price differential. References to that distinction permeate the Bureau's decision: More than a dozen times in the Order, the

---

<sup>30</sup> *Wizard Programming*, 12 FCC Rcd at 22111, ¶ 20 (footnotes omitted); *see also id.* at 22111, ¶ 21 (“Even without reference to the question of whether Wizard purchases and sells programming, it is clear that Wizard is not ‘making [programming] available’ to subscribers. The programming Wizard markets is acquired by SNG from programming vendors, and SNG assembles the various programming packages.” (footnotes omitted; alterations in original)).

<sup>31</sup> *Turner Vision, Inc. v. Cable News Network, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 12610 (Cable Servs. Bureau 1998) (“*Turner Vision*”).

<sup>32</sup> “C-Band programming retailers are engaged in the business of packaging and marketing multiple channels of video programming to C-Band satellite television home satellite (‘HSD’) subscribers and retail agents.” *Turner Vision*, 13 FCC Rcd at 12611, ¶ 1 & n.5.

<sup>33</sup> *See* Comments of National Cable & Telecommunications Association at 4-5; Comments of American Cable Association at 10 & n.31.

Bureau notes a contrast between HSD-MVPDs and those MVPDs that are facilities-based.<sup>34</sup> Most critically, CNN argued that its price differential was justified because “facilities-based . . . distributors, as opposed to C-Band retailers, provide CNN with a programming delivery system which CNN describes as a network infrastructure and distribution path into CNN subscribers’ homes that CNN itself could not construct or duplicate” but that “C-Band retailers provide no delivery system and, therefore, CNN’s programming signals never travel over facilities controlled by the Complainants.”<sup>35</sup> The Bureau emphatically *rejected* that admitted distinction as a justification for CNN’s price differential: “CNN argues that C-Band retailers do not provide a delivery system to subscribers and that Complainants’ program access protection is somehow dependent upon their ownership of transmission facilities. We reject this contention.”<sup>36</sup>

Other comments suggest that the Commission recognized a transmission path requirement when it applied the “effective competition” rules enacted in 1992.<sup>37</sup> In fact, the cited Order concluded only that leased access providers are not MVPDs because they do not “effectively compete” with cable operators when they use the cable operator’s own facilities to

---

<sup>34</sup> See, e.g., *Turner Vision*, 13 FCC Rcd at 12616, ¶ 16 (“The complainants state that their competitors include cable operators, multichannel multipoint distribution systems (‘MMDS’ or wireless cable), direct broadcast satellite operators (‘DBS’), and master antenna television systems (‘SMATV’) *collectively known as facilities-based operators.*” (emphasis added)); see also *id.* ¶¶ 17, 21, 23, 25, 29, 31, 33, 38, 41, 45, 48, 49, 55 (all *distinguishing* the HSD program distributor complainants from “facilities-based” MVPDs). The Commission has noted elsewhere that HSD “service itself bears little resemblance to other MVPDs,” *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 15 FCC Rcd 15822, App. C, ¶ 12 (1998), yet unequivocally regulates them as MVPDs.

<sup>35</sup> *Turner Vision*, 13 FCC Rcd at 12632-33, ¶ 55 (footnotes omitted).

<sup>36</sup> *Id.* at 12635, ¶ 60.

<sup>37</sup> See Comments of Comcast Corporation at 7; Comments of American Cable Association at 9.

distribute programming. As noted above, the Order expressly stated that an MVPD “need not own its own basic transmission and distribution facilities.”<sup>38</sup>

*Fourth*, and finally, as the Affiliates Associations pointed out in their opening comments,<sup>39</sup> the statutory phrase “such as, but not limited to” suggests only that non-enumerated MVPDs must be similar to the entities enumerated in the statute. But programming distributors that utilize the Internet for video delivery *are* similar to traditional MVPDs in the key way: They deliver multiple streams of linear video programming to subscribers or consumers.<sup>40</sup> The suggestion that the statutorily-mandated similarity must come in the form of the provision of a transmission path finds no support in the statutory language,<sup>41</sup> which makes no reference at all to

---

<sup>38</sup> *Implementation of Sections 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, 5652, ¶ 23 (1993).

<sup>39</sup> See Comments of the Affiliates Associations at 13-14.

<sup>40</sup> See *Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20301, ¶ 171 (1996) (concluding that “open video system video programming providers fit the definition of MVPD because they make ‘available for purchase, by subscribers or customers, multiple channels of video programming.’” (footnote omitted)); *Implementation of Sections 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, 5648, ¶ 19 (1993) (declaring that the Commission construes the statutory term “MVPD” “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”). See also Comments of Public Knowledge at 9 (stating that all MVPDs “must, like the listed MVPDs and consistent with the definition, provide multiple channels of video programming to subscribers. This provides the necessary commonality between the listed services.”). A definition of MVPD that tracks the statutory requirements will not, contrary to the alarmist predictions of some commenters, result in a tidal wave of new entities demanding program access and good-faith retransmission consent negotiations. Cf. *id.* at 21-22.

<sup>41</sup> Verizon similarly argues that all of the enumerated entities provide “‘multiple channels of video programming’ via a multipoint distribution service. That is, the programming is simultaneously broadcast to all subscribers, whether or not any individual subscriber is choosing  
(continued . . .)

the means by which video programming reaches a subscriber.

**B. The Definition of MVPD Cannot Be Read to Incorporate the Cable-Specific Definition of “Channel” That Appears Elsewhere in the Act**

The Affiliates Associations’ opening comments explained why the definition of “channel” and “cable channel” in Section 602(4) of the Act cannot be read as a limitation upon the definition of MVPD.<sup>42</sup> That definition—“a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation)”<sup>43</sup>—is patently specific and limited to *cable systems*, a fact entirely in keeping with its enactment as part of the 1984 Cable Act, which “focused exclusively on the regulation of cable television.”<sup>44</sup> The definition of MVPD, by contrast, expressly includes *non-cable* entities (and does *not* expressly incorporate or otherwise refer to the cable-specific definition in Section 602(4)). If Section 602(4)’s definition of “channel” were read as a limitation on the definition of “MVPD,” then the non-cable entities that Congress explicitly defined as MVPDs (such as DBS and MMDS) *could not* be MVPDs,

---

( . . . continued)

to watch the programming at that moment.” Comments of Verizon at 4. But in the case of most IPTV MVPDs as well as a growing number of cable operators that utilize switched digital video technology, that is simply not true. Bandwidth is preserved in IPTV and switched video systems by only providing the programming to a subscriber upon request for that channel. *See Carriage of Digital Television Broadcast Signals*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064, 21095 (2007). Verizon’s argument demonstrates why the definition of MVPD should be read as technology-neutral and the Affiliates Associations’ interpretation is the correct, natural one for the Bureau and Commission to adopt.

<sup>42</sup> See Comments of the Affiliates Associations at 6-10.

<sup>43</sup> 47 U.S.C. § 522(4).

<sup>44</sup> Notice, ¶ 7.

because they are incapable of delivering multiple “channels” of video programming via “a portion of the electromagnetic frequency spectrum which is used in a cable system.” Incorporation of the statutory definition of “channel”/“cable channel” into the definition of MVPD would produce absurd and hopelessly irreconcilable results.<sup>45</sup> No canon of statutory construction directs or allows such an outcome. *See, e.g., Southwest Software, Inc. v. Harlequin Inc.*, 226 F.3d 1280, 1295 (Fed. Cir. 2000) (interpretation of statutory language that “could produce an illogical and unworkable result” must be rejected).

Commenters who advance contrary arguments glibly ignore that Section 602(4), which treats “channel” and “cable channel” as equivalent, interchangeable terms, is emphatically cable-specific.<sup>46</sup> They instead urge the Bureau to discern from the “channel” definition a “transmission path” element, while blithely ignoring the *actual language* of the statutory provision. *See, e.g.,* Comments of Comcast Corporation at 5 n.10 (“that only cable operators use a ‘cable system’ as that term is used in the definition of ‘channel’ should not distract from th[e] fact” that the entities listed in Section 602(13) all supposedly provide a transmission path); *id.* at 9 (describing reference to “cable system” in the definition of channel as “untidiness”); Comments of American Cable Association at 16-17 (“Although the statutory definition of ‘channel’ specifically references cable systems, a permissible interpretation of that term within the definition of an MVPD may be” *something else.*); Comments of Cablevision System

---

<sup>45</sup> Other commenters agree that the statutory provisions are irreconcilable. *See, e.g.,* Comments of DIRECTV, LLC at 1-2, 5-6.

<sup>46</sup> *See, e.g.,* Comments of Cablevision System Corporation at 6; Comments of Time Warner Cable Inc. at 4; Comments of Discovery Communications, LLC at 4; Comments of American Cable Association at 16-17 (arguing that the statutory definition of “channel” “should not be ignored when determining who is an MVPD under the Act” (footnote omitted)).

Corporation at 6 (“While literally applicable only to channels on a cable system, . . .”). It is ironic, then, that those commenters invoke principles of statutory construction that decree that identical terms in a single statute be interpreted identically. As the Affiliates Associations’ opening comments pointed out,<sup>47</sup> an “*identical*” definition of “channel” would render much of Section 602(13) entirely superfluous, contrary to long-settled principles of statutory interpretation.<sup>48</sup>

In any event, “principles of statutory construction are not so rigid.”<sup>49</sup> The *presumption* that a term has the same meaning throughout a single statute is not insurmountable:

Although we presume that the same term has the same meaning when it occurs here and there in a single statute, the Court of Appeals mischaracterized that presumption as “effectively irrebuttable.” We also understand that “[m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.” Thus, the “natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.” A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.<sup>50</sup>

---

<sup>47</sup> See Comments of the Affiliates Associations at 7-8.

<sup>48</sup> See, e.g., *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 724 (2011) (“each word in a statute should” “carr[y] meaning”); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (“In construing a statute we are obliged to give effect, if possible, to every word Congress used.”).

<sup>49</sup> *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007).

<sup>50</sup> *Id.* (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (internal citations omitted)). See also *Barber v. Thomas*, 130 S. Ct. 2499, 2506 (2010) (the presumption that a term has the same meaning throughout a statute “is not absolute” but instead “yields readily to indications that the same phrase used in different parts of the same statute  
(continued . . .)

Contrary to the suggestion of various commenters,<sup>51</sup> then, “[t]here is . . . no ‘effectively irrebuttable’ presumption that the same defined term in different provisions of the same statute must be interpreted identically . . . . Context counts.”<sup>52</sup> And interpretive “presumptions” cannot carry the day when their application would produce a manifestly illogical result.

Certain commenters counter that “channel” cannot be interpreted to mean a “video programming network” because some of the statutory language would thereby be rendered redundant.<sup>53</sup> Public Knowledge points out, however, that a contrary, technical reading of “channel” would likewise produce an absurd result, because one “portion of the electromagnetic frequency spectrum cannot be used to ‘deliver’ another portion of the electromagnetic frequency spectrum. A channel can only deliver programming.”<sup>54</sup> Given these competing illogicalities, the

---

(. . . continued)

means different things, particularly where the phrase is one that speakers can easily use in different ways without risk of confusion”) (citing cases).

<sup>51</sup> See, e.g., Comments of Cablevision System Corporation at 12 (arguing that “[g]enerally, where a term is defined in a statute, the Commission is not free to ignore that defined term, even when it appears in other provisions of the statute” (footnote omitted)).

<sup>52</sup> *Environmental Defense*, 549 U.S. at 575-76 (citation omitted); see also *Atlantic Cleaners*, 286 U.S. at 433 (“It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the Legislature intended it should have in each instance.”).

<sup>53</sup> See, e.g., Comments of Cablevision System Corporation at 13; Comments of Time Warner Cable Inc. at 5-6. Those arguments about “redundancy” pay no heed to the importance of *context*.

<sup>54</sup> Comments of Public Knowledge at 5. Indeed, if the Section 602(4) definition of “channel” were incorporated into the statutory definition of MVPD, the result would be facially absurd and unintelligible: MVPDs would be defined as all entities “who make[] available for purchase, by subscribers or customers, multiple” “portion[s] of the electromagnetic frequency spectrum which [are] used in a cable system and which [are] capable of delivering a television”

(continued . . .)

agency can and should exercise its discretion to interpret the statutory language in a way that gives meaning to all of the language of the definition and furthers the legislative purposes underlying the 1992 Act. For the reasons explained in the Affiliates Associations’ opening comments, the only interpretation that satisfies all of those interpretive principles is the second one proposed by the Bureau: An MVPD is any entity that delivers multiple streams of linear video programming to subscribers, including those that deliver programming via the Internet.

**C. Dictionary Definitions of “Channel” Do Not Compel an Interpretation of Section 602(13) That Includes a Transmission Path Requirement**

Several commenters urge a construction of the term “channel” in Section 602(13) that includes a transmission path requirement based on dictionary definitions of the word “channel.”<sup>55</sup> In some instances, “channel” is indeed defined as a physical transmission path rather than a stream of programming. In others, however, channel is defined more colloquially as an aggregation or network of video programming.<sup>56</sup> Public Knowledge helpfully explains that the term “channel” can be used in both a “container” sense and a “content” sense, as it is, for

---

(. . . continued)

“portion of the electromagnetic frequency spectrum.” That hopelessly circular definition—and one that is clearly wrong, since no MVPD makes available for purchase multiple portions of the spectrum—can be avoided by taking account of the *context* in which the term “channel” is used in Section 602(13), rather than reflexively incorporating a technology-specific definition that cannot, by its terms, sensibly be read into the statute.

<sup>55</sup> See, e.g., Comments of Cablevision System Corporation at 13-14; Comments of Discovery Communications, LLC at 7.

<sup>56</sup> Both Congress and the Commission frequently have used the term in the latter, more commonplace, less technical sense. See Comments of the Affiliates Associations at 9-10 & n.16; Comments of DIRECTV, LLC at 7 & nn.17-18 (citing statutory examples); Comments of Sky Angel U.S., LLC at 25-32 (citing numerous legislative and regulatory examples of the use of “channel” to mean stream or network of video programming).

example, in the definition of “channel” that appears in the Oxford English Dictionary.<sup>57</sup> Consumers of video programming certainly understand and use the term in its everyday, non-technical “content” sense.<sup>58</sup> As DIRECTV puts it, “[i]n common parlance, the term ‘channel’ suggests a pre-scheduled, real-time, linear stream of programming.”<sup>59</sup> When a viewer says that her favorite *channel* is “Channel 5,” she certainly does not mean that her favorite swath of spectrum is 76 MHz to 82 MHz.

Discovery Communications attempts to reinforce the definitional argument by insisting that the term “channel” as used elsewhere in the United States Code invariably has a “transmission path” (or “container”) connotation. In support, Discovery cites two statutes that use the term outside the communications context.<sup>60</sup> But neither statute supports the argument. The Department of Homeland Security Appropriations Act of 2007, in 6 U.S.C. § 321i(1),

---

<sup>57</sup> See Comments of Public Knowledge at 2-3; *id.* at 8 (quoting Oxford English Dictionary definition of channel as “[a] band of frequencies of sufficient width for the transmission of a radio or television signal, *spec.* a television service using such a band”); Oxford English Dictionary Online Edition, *available at* <<http://www.oed.com>>. See also “Channel (broadcasting),” Wikipedia, *available at* <[http://en.wikipedia.org/wiki/Channel\\_\(broadcasting\)](http://en.wikipedia.org/wiki/Channel_(broadcasting))> (“In broadcasting, a **channel** is a range of frequencies (or, equivalently, wavelengths) assigned by a government for the operation of a particular radio station, television station or television channel. In common usage, the term also may be used to refer to the station operating on a particular frequency.” (hyperlinks omitted)).

<sup>58</sup> What matters to a subscriber is the content being delivered by his or her chosen MVPD. Subscribers care about the basic and premium “channels” they receive—such as their local channel 5 or channel 11, or ABC, CBS, or NBC, or HBO, ESPN, or MTV—not which portion of the electromagnetic frequency spectrum is used to deliver that content to their homes. See also Comments of Public Knowledge at 10-11.

<sup>59</sup> Comments of DIRECTV, LLC at 12; see also Comments of Public Knowledge at 12 (“channel” for purposes of Section 602(13) should be defined to mean “prescheduled video programming”).

<sup>60</sup> See Comments of Discovery Communications, LLC at 7-8.

directs the Secretary of Homeland Security to use commercially developed information technology systems to ensure the collection, management, and dissemination of information “over multiple *channels* of communications.” The Agricultural Fair Practices Act of 1967 declares that agricultural products produced throughout the United States “move in large part in the channels of interstate and foreign commerce.” 7 U.S.C. § 2301. But neither provision uses the term “channel” to indicate the sort of fixed and definite “transmission” pathway described in Section 602(4) of the Communications Act with respect to cable systems. The term “channels of interstate and foreign commerce” refers to the vast array of connections between and among geographic endpoints by which goods are delivered; transatlantic shipping, for example, is a “channel” of commerce but, quite obviously, is far from the discrete and definite “transmission path” described in Section 602(4). Similarly, “channels of communication” refers to the vast array of *methods* of communication by which information can be disseminated throughout the country. In fact, both statutes use “channel” in precisely the fashion that, according to Discovery itself, video programming is provided via “channels” over the Internet: The term “channel” in the cited statutes does not refer to or ““establish a *permanent or exclusive* path between the points.””<sup>61</sup>

But even if Discovery’s reading of the term “channel” in other statutory provisions were persuasive, the argument says nothing about how the term is used in Section 602(13). Because the term “channel” can be used in both “content” and “container” senses, it is unsurprising that

---

<sup>61</sup> *Id.* at 5 n.14 (quoting *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶ 8 (2004)) (emphasis altered).

*some* statutory provisions and *some* Commission regulations use it to refer to a “container.”<sup>62</sup> What matters for the present proceeding, though, is that the definition of MVPD uses “channel” in the *content* sense, because such a reading, and only such a reading, is consistent with the statutory text, the legislative history, and the structure of the Act—and because a contrary reading would produce the incongruous results outlined above.

### **III. The Commission’s Internet Protocol Closed Captioning Rules Do Not Suggest That OVDs Cannot Be MVPDs**

The American Cable Association (“ACA”) argues that the Twenty-First Century Communications and Video Accessibility Act (“CVAA”)<sup>63</sup> and the Commission’s adoption of Internet Protocol closed captioning (“IP Closed Captioning”) rules<sup>64</sup> signify that *no* IP-delivered video programming could have been “already encompassed within the term ‘video programming’ as used in the definition of ‘MVPD,’” for otherwise, “[i]f 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.”<sup>65</sup>

ACA’s assertions, however, are belied by its own comments in the IP Closed Captioning

---

<sup>62</sup> See, e.g., Comments of Cablevision System Corporation at 14-15 (citing examples); Comments of Discovery Communications, LLC at 6-7 (same); Comments of American Cable Association at 16. *But see* n.56, *supra* (various comments citing multiple examples of the use of “channel” in an everyday sense to mean stream or network of video programming).

<sup>63</sup> PUB. L. NO. 111-260, 124 Stat. 2751 (2010).

<sup>64</sup> See 47 C.F.R. § 79.4.

<sup>65</sup> Comments of American Cable Association at 21-22 (footnote omitted). See also Comments of Comcast Corporation at 6 n.18.

proceeding. Only eight months ago, ACA correctly observed that “in the CVAA Congress was simply filling in a gap that was not addressed in the prior law.”<sup>66</sup> ACA is correct that Congress was “filling in a gap” with the enactment of the CVAA: The new law and rules were intended to ensure that *all* online video programming distributors—especially *non-linear* distributors such as Hulu, YouTube, and television stations posting program material on the Internet—pass through closed captions for programming originally shown on television.<sup>67</sup> *Linear programming distributors such as broadcast stations and MVPDs were already subject to the closed captioning rules governed by Rule Section 79.1.*

ACA also argues that, “when first faced with the issue”—15 years ago—“the Commission also declined to include Internet-delivered video as ‘video programming’ subject to the television closed captioning rules.”<sup>68</sup> But the fact that the Commission hesitated in 1997—only a few years after Internet access became widely available and at a time when, to the Affiliates Associations’ knowledge, no entity was providing multiple streams of linear broadcast or cable network programming via Internet Protocol, let alone the public Internet—to address closed captioning on the Internet hardly supports ACA’s claims. In fact, the Commission’s reticence in making a decision on the subject in 1997 stands only for the (correct) proposition that the subject was simply not yet ripe to be determined. The Commission prudently exercised restraint and tabled the issue for another day.

Of course, as ACA recognizes, the closed captioning rules adopted in 1997 required all

---

<sup>66</sup> Comments of American Cable Association, MB Docket No. 11-54 (filed Oct. 18, 2011), at 11.

<sup>67</sup> Subject, of course, to the definitions and limitations set forth in the CVAA.

<sup>68</sup> Comments of the American Cable Association at 24-25 (footnotes omitted).

MVPDs to satisfy certain closed captioning obligations, but the Commission’s decision not to address online video programming at that stage in that proceeding does not establish that the Commission definitively concluded that all entities providing video programming via the Internet are not “MVPDs” for purposes of the closed captioning (or any other) rules. ACA is correct that all MVPDs are already required to pass through closed captioning, but its argument that either the traditional rules (i.e., Section 79.1) or the IP Closed Captioning rules (i.e., Section 79.4) somehow determine which entities using which delivery mechanisms qualify as MVPDs for purposes of those rules is flatly wrong.<sup>69</sup>

Finally, ACA argues that “if there is no difference between Internet-delivered and traditional ‘video programming,’” then the two sets of closed captioning rules—television closed captioning and IP closed captioning rules—could create potentially conflicting and inconsistent obligations.<sup>70</sup> But the Commission has already directly addressed and rejected this assertion. In the *IP Closed Captioning Order*, the Commission plainly stated that MVPDs would not be subject to two sets of closed captioning requirements in any manner that would create a conflict

---

<sup>69</sup> Cf. Comments of American Cable Association, MB Docket No. 11-54 (filed Oct. 18, 2011), at 10-11 (“The existing requirements in Section 713 and the Commission’s rules already extend to MVPDs *regardless of the transmission technology (analog, digital, IP)* they employ to distribute covered video programming to their subscribers.” (emphasis added)). Compare Comments of American Cable Association, MB Docket No. 11-54 (filed Oct. 18, 2011), at 10 (“ACA submits that the Commission should interpret Congress’s use of ‘Internet protocol’ as shorthand for ‘the Internet.’”) with *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, ¶ 12 (2012) (“*IP Closed Captioning Order*”) (“We . . . decline to limit application of the IP closed captioning requirements to programming that [video programming distributors] deliver over the Internet. . . . We note that, as technology evolves, a decision to limit the application of the new IP closed captioning rules to ‘Internet’ or ‘online’ video programming could have unforeseen consequences.”).

<sup>70</sup> Comments of the American Cable Association at 29-30.

in their obligations. Instead,

Congress did not give any indication that it intended the new IP closed captioning rules to override the existing closed captioning rules where an MVPD provides its service via IP. Thus, we clarify that the new IP closed captioning rules do not apply to traditional managed video services that MVPDs provide to their MVPD customers within their service footprint, regardless of the transmission protocol used; rather such services are already subject to Section 79.1 of the Commission's rules. . . .

An MVPD that distributes video programming online within its MVPD footprint, but not as part of its MVPD service subject to Section 79.1, will be subject to new Section 79.4. In general, an MVPD will be subject to the new IP closed captioning rules if it is distributing IP-delivered video programming that is not part of the traditional managed video services that it provides its MVPD customers within its service footprint.<sup>71</sup>

That is, an MVPD may be subject to both sets of closed captioning rules (*i.e.*, Sections 79.1 and 79.4) but never at the same time, and no video programming delivered to viewers via Internet Protocol would be required to comply simultaneously with both rules. All MVPDs are subject to Section 79.1 when providing MVPD services and, consistent with the gap-filling nature of the IP Closed Captioning rules, MVPDs would be subject to Section 79.4 when providing non-MVPD services using IP, such as Hulu.

In short, ACA's argument based on the Commission's new IP Closed Captioning rules simply does not establish that a provider of multiple streams of linear video programming via the Internet cannot be considered an MVPD even when it meets every element of the statutory definition.

---

<sup>71</sup> *IP Closed Captioning Order*, ¶¶ 11-12.

#### **IV. U.S. Free Trade Agreements Require That Distributors of Television Signals Over the Internet Obtain Retransmission Consent**

Numerous trade agreements that the United States has entered into with various countries require that entities that distribute television signals over the Internet not only obtain authorization from the copyright owners of the programming contained within the television signal but also obtain authorization—retransmission consent—from the rights holder of the signal itself. Thus, for example, the Dominican Republic-Central America-United States Free Trade Agreement states that

no Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal and, if any, of the signal.<sup>72</sup>

Virtually identical language appears in the United States’ free trade agreements with several other nations.<sup>73</sup>

---

<sup>72</sup> Dominican Republic-Central America-United States Free Trade Agreement, Art.15.5, § 10(b).

<sup>73</sup> *See, e.g.*, United States-Australia Free Trade Agreement, Art. 17.4, §10(b) (“neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorisation of the right holder or right holders, if any, of the content of the signal and of the signal”); United States-Bahrain Free Trade Agreement, Art. 14.4, § 10(b) “neither Party shall permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal and, if any, of the signal”); United States-Korea Free Trade Agreement, Art. 18.4, § 10(b) (“neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal and, if any, of the signal”); United States-Morocco Free Trade Agreement, Art. 15.5, § 11(b) (“neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal, if any, and of the signal”); United States-Panama Free Trade Agreement, Art. 15.5, § 10(b) (“neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal and, if any, of the signal”); United States-Peru Trade Promotion Agreement, Art. 16.7, § 9 (“no Party may permit  
(continued . . .)

Because only cable systems and other MVPDs are required to obtain retransmission consent under Section 325(b) of the Communications Act, entities that distribute television signals over the Internet must be classified as MVPDs in order for the United States to honor these free trade commitments. Moreover, various administrations and various Congresses must have believed that these provisions were consistent with existing law at the time the agreements were negotiated and approved. Both these factors strongly support the view that the Bureau should interpret the definition of MVPD to include those entities that distribute multiple channels of video programming over the Internet.

### **Conclusion**

For the foregoing reasons, as well as those set forth in their opening comments, the Affiliates Associations respectfully request that the Media Bureau interpret the term “multichannel video programming distributor” as it is defined in Section 602(13) of the Act to encompass all entities that distribute multiple streams or networks of linear video programming to subscribers, including those that distribute that programming via the Internet.

---

( . . . continued)

the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal and, if any, of the signal”). The Free Trade Agreements are available at <http://www.ustr.gov/trade-agreements/free-trade-agreements>.

One recent agreement provides that “retransmission within a Party’s territory over a closed, defined, subscriber network that is not accessible from outside the Party’s territory does not constitute retransmission on the Internet.” *See* United States-Korea Free Trade Agreement, Art. 18.4, § 10(b). However, the Media Bureau need not parse the details of these agreements in order to resolve the issue before it in the instant proceeding.

Respectfully submitted,

**ABC TELEVISION AFFILIATES  
ASSOCIATION  
CBS TELEVISION NETWORK  
AFFILIATES ASSOCIATION  
NBC TELEVISION AFFILIATES**

/s/

---

Jennifer A. Johnson  
Jonathan D. Blake

COVINGTON & BURLING LLP  
1201 Pennsylvania Ave., N.W.  
Washington, D.C. 20004  
Telephone: (202) 662-6000

*Counsel for CBS Television Network  
Affiliates Association and  
NBC Television Affiliates*

/s/

---

Wade H. Hargrove  
Mark J. Prak  
David Kushner  
Julia Ambrose

BROOKS, PIERCE, MCLENDON,  
HUMPHREY & LEONARD, L.L.P.  
Wells Fargo Capitol Center, Suite 1600  
150 Fayetteville Street (27601)  
Post Office Box 1800  
Raleigh, North Carolina 27602  
Telephone: (919) 839-0300

*Counsel for ABC Television Affiliates  
Association*

June 13, 2012