

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

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

**REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS**

The National Association of Telecommunications Officers and Advisors (“NATOA”)¹ submits these reply comments in response to the Public Notice (“Notice”), released March 30, 2012, in the above-entitled proceeding.

I. INTRODUCTION

This proceeding arises from a program access complaint and petition for a standstill that Sky Angel U.S., LLC (“Sky Angel”) filed against Discovery Communications and its affiliate, Animal Planet, (collectively, “Discovery”) after receiving notice that Discovery intended to

¹ NATOA is a national trade association that promotes local government interests in communications, and serves as a resource for local officials as they seek to promote communications infrastructure development.

terminate its affiliation agreement with Sky Angel.² In its denial of the standstill petition, the Media Bureau found that “[b]ased on the limited record at the time, the Bureau was unable to find that Sky Angel provides its subscribers with a transmission path,” which the Bureau concluded appears to be a “necessary element” in the definition of an MVPD.³ As a result, in order for Sky Angel to prevail on its complaint and take advantage of the program access provision of the 1992 Cable Act, which requires that vertically-integrated cable networks be made available to all MVPDs, the Bureau would have to adopt a new, expansive definition of MVPD.

II. ARGUMENT

A. The Bureau Must Limit Any Decision to the Facts of this Case

A common thread running through the comments filed in this proceeding concur with the Commission’s admonition that the “interpretation of these terms [“multichannel video programming distributor” (“MVPD”) and “channel”] has legal and policy implications that extend beyond the parties to this complaint.”⁴ NATOA echoes this sentiment and we agree with those who have stated that this issue “requires a deeper, more developed examination of the many important issues raised directly and indirectly by the *Notice* than is possible in the context of a public notice associated with a single fact-specific program access complaint proceeding.”⁵

Indeed, “particularly with the restriction on *ex parte* meetings and the limited opportunities to

² 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 (rel. Mar. 30, 2012) (“Public Notice”).

³ *Id.* at ¶ 5.

⁴ *Id.* at ¶ 1.

⁵ See Comments of Cablevision System Corporation, MB Docket No. 12-83, at 3 (May 14, 2012).

respond to arguments raised in the comment and reply comment cycle,”⁶ we urge restraint. Like Sky Angel, we believe a “particularized finding”⁷ in this proceeding, limited to the specific facts and parties involved, is the Bureau’s most appropriate course of action. Any further action is best left to a formal rulemaking proceeding or Congressional action.⁸

B. Conflicting Claims of Increased Competition and Regulatory Oversight

NATOA agrees that increased competition and innovation in the delivery of video services is important. Consumers want choice and the ability to view content when they want, where they want, and on the device(s) they want. And it is probably correct to say, as Saga Communications does, that “the transmission path is completely immaterial to the consumer. The consumer is interested in the content of the programming, not the means of delivery.”⁹ But claims of increased competition and innovation as justification for a more expansive definition of “MVPD” – which would not require an integrated transmission path – must be balanced against competing claims that such a change would, in fact, stifle innovation, weaken consumer protections, and upend an established legacy regulatory scheme. Care must be taken to avoid “unintended consequences.”¹⁰

As Comcast points out, “any decision to expand the definition of MVPD would vastly expand the sphere of regulation, both in terms of expanding the scope of entities entitled to

⁶ See Comments of the Open Internet Coalition, MB Docket No. 12-83, at 3 (May 14, 2012).

⁷ See Comments of Sky Angel U.S., LLC, MB Docket No. 12-83, at 8 (May 14, 2012).

⁸ See Comments of AT&T, MB Docket No. 12-83, at 3 (May 14, 2012); Comments of Comcast Corporation, MB Docket No. 12-83, at 14-15 (May 14, 2012).

⁹ See Comments of Saga Communications, Inc., MB Docket No. 12-83, at 3 (May 14, 2012).

¹⁰ See Comments of the Motion Picture Association of America, MB Docket No. 12-83, at 1 (May 14, 2012); Comments of the Computer & Communications Industry Association, MB Docket No. 12-83, at 5 (May 14, 2012).

invoke the benefits the statute provides to MVPDs *and* in making OVDs [online video distributors] . . . subject to the various legal burdens associated with classification as MVPDs.”¹¹ Among those “various legal burdens” are closed captioning, video description, scrambling of sexually explicit content, and equal employment opportunity.¹²

The Computer & Communications Industry Association (“CCIA”) “believes that expanding the definition of MVPD to encompass over-the-top, online video distributors (“OVD”) – at least under the existing rules and requirements that MVPDs must comply with – is unwarranted and unwise.”¹³ In fact, CCIA claims that the imposition of MVPD requirements on OVDs would “hinder market entry and chill innovation by potential new market entrants and entrepreneurs in the over-the-top Internet video market.”¹⁴

However, some commenters believe the answer to these concerns is for the Commission to provide OVDs with the statutory benefits associated with MVPD classification without the imposition of any regulatory burdens or obligations. It appears Sky Angel agrees with this position, stating that the FCC “should not impose unreasonable and unintended restrictions on a new entity such as Sky Angel which requires the protections of the program access rules because doing so would limit competition without producing any discernible public interest benefits.”¹⁵

A fundamental flaw with this argument, however, is that these regulatory burdens or obligations do, in fact, provide real public interest benefits and are important to American

¹¹ See Comments of Comcast Corporation, MB Docket No. 12-83, at 10 (May 14, 2012).

¹² *Id.* at 12-13.

¹³ See Comments of the Computer & Communications Industry Association, MB Docket No. 12-83, at ii (May 14, 2012).

¹⁴ *Id.*

¹⁵ See Comments of Sky Angel U.S., LLC, MB Docket No. 12-83, at 39 (May 14, 2012).

consumers. In fact, a coalition of consumer groups for the hearing and visually impaired states “[b]ecause any changes to the Commission’s interpretation of MVPDs could affect compliance with the accessibility rules, we urge the Bureau to proceed carefully to avoid any unforeseen consequences that could impact the important civil right of all Americans to access video programming on equal terms, as required by Congress under section 305 of the Telecommunications Act of 1996 (“1996 Act”) and section 202 of Twenty-First Century Communications and Video Accessibility Act (“CVAA”).”¹⁶ One way the Bureau can avoid these unintended consequences is to ensure that any entity that qualifies for MVPS classification must be subject to both regulatory benefits *and* obligations.

C. Conflict with Copyright Law

In addressing the challenges of interpreting terms such as “MVPD” and “channel” in this age of “rapid technological evolution and convergence,” AT&T states that the “rapidly changing marketplace and technological developments increasingly strain, and in some cases may render arbitrary and obsolete, the distinctions drawn between those classifications and frameworks.”¹⁷ A similar collision of advanced technologies and an existing regulatory framework is occurring in the copyright arena, which is “closely “intertwined”” with the regulatory framework surrounding MVPD classification.¹⁸ “Given the increasingly important – and increasingly

¹⁶ See Comments of Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), National Association of the Deaf (NAD), American Foundation for the Blind (AFB), Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), Hearing Loss Association of America (HLAA), and Association of Late-Deafened Adults (ALDA), MB Docket No. 12-83, at 2 (May 14, 2012).

¹⁷ See Comments of AT&T, MB Docket No. 12-83, at 2 (May 14, 2012).

¹⁸ See Comments of Comcast Corporation, MB Docket No. 12-83, at 2 (May 14, 2012).

frequent – ways in which the communications laws are intersecting with copyright matters,” we agree that “the Commission should guard against the potential for unintended consequences.”¹⁹

For example, anti-piracy enforcement and international free trade agreements are just two of the copyright policy concerns the Commission must take into account in determining whether to expand the definition of MVPD to include services such as Sky Angel. Indeed, the Motion Picture Association of America even suggests that the Commission take into account the Copyright Office’s conclusion that the “current vibrant and competitive online video distribution market does not clamor for regulatory intervention.”²⁰

III. CONCLUSION

Many commenters argue that the “the existing statutory definitions of “channel” and “MVPD” cannot reasonably be interpreted to include OVDs that distribute video programming without providing an integrated transmission pathway.”²¹ “Unless and until Congress and the Commission act to revise statutes and regulations, this [requirement] is the only way to sensibly allow over-the-top Internet video to continue to innovate and flourish while providing much-needed competition in the video distribution market.”

At this juncture, and pursuant to the facts of this particular proceeding, NATOA agrees. The risk of unintended consequences that have the potential of adversely affecting consumers, “traditional” MVPDs, and new, innovative market entrants, is simply too great for the Commission to apply any broad brush regulatory changes. “Even small changes to video

¹⁹ See Comments of the Motion Picture Association of America, MB Docket No. 12-83, at 1 (May 14, 2012).

²⁰ *Id.* at 6.

²¹ See Comments of Time Warner Cable, MB Docket No. 12-83, at 10 (May 14, 2012).

programming regulations can have a far-reaching impact on the complex ecosystem that underpins the video content industry, especially in the Internet age.”²²

Therefore, we ask the Bureau to follow its earlier reasoning and conclude that Sky Angel is not an MVPD.²³ In the event the Bureau opts to expand the MVPD definition to encompass the service provided by Sky Angel, we urge the Bureau to limit such action to the facts and parties of this proceeding and that such a finding carries with it both the regulatory benefits and obligations of such a classification.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "S. Traylor".

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²² See Comments of the Motion Picture Association of America, MB Docket No. 12-83, at 1 (May 14, 2012).

²³ See Public Notice at ¶ 5.