

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**REPLY COMMENTS OF THE  
ALLIANCE FOR COMMUNICATIONS  
DEMOCRACY**

James N. Horwood  
Tillman L. Lay  
SPIEGEL & MCDIARMID LLP  
1333 New Hampshire Avenue, NW  
Washington, DC 20036  
(202) 879-4000

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The Alliance for Communications Democracy (“ACD”) files these reply comments in response to Media Bureau’s Public Notice<sup>1</sup> and the opening comments filed in this proceeding.

**INTRODUCTION**

ACD is a national membership organization of nonprofit public, educational and governmental (PEG) access corporations that supports efforts to protect the rights of the public to speak via cable television, and promotes the availability of the widest possible diversity of information sources and services to the public. The organizations represented by ACD have helped thousands of members of the public, educational institutions, and local governments make use of PEG channel capacity that has been established in their communities pursuant to cable franchise agreements and Section 611 of the Communications Act of 1934, as amended, 47 U.S.C. § 531.

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<sup>1</sup> *Media Bureau Seeks Comment on Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding*, Public Notice, DA 12-507, MB Docket No. 12-83 (Mar. 30, 2012) (“Notice”).

In January 2009, ACD, along with the Alliance for Community Media (“ACM”) and several other PEG and local governmental organizations and interests, filed a Petition for Declaratory Ruling seeking a ruling that the manner in which AT&T’s U-Verse video system treats PEG programming violates the Act and FCC rules in several ways.<sup>2</sup> Among those ways is that AT&T’s U-Verse system fails to provide PEG access with “channel capacity” within the meaning of Section 611.<sup>3</sup> In opposing the ACM *et al.* petition, AT&T claimed (among other things) that the multichannel video service offered over its U-Verse system is not a “cable service,” and thus AT&T is not a “cable operator” and its system is not a “cable system”<sup>4</sup> — a claim that ACM *et al.* vigorously disputed and rebutted.<sup>5</sup>

ACD files these reply comments out of concern that any Bureau action here not adversely affect the rights of PEG users and the PEG obligations of cable operators under the Cable Act. In particular, ACD urges the Bureau to refrain from construing “channel” or any other Cable Act definition at issue here in a way that undermines or prejudices the important PEG-related issues that remain pending in the ACM *et al.* Petition proceeding, Docket No. 09-13.

**I. ACD AGREES WITH COMMENTERS URGING THE COMMISSION NOT TO RESOLVE THE BROADER ISSUES POSED IN THE NOTICE IN THIS CLOSED ADJUDICATORY PROCEEDING.**

Several commenters correctly observed that the issues presented in the *Notice*— interpretation of the terms “multichannel video programming distributor” (“MVPD”) and

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<sup>2</sup> *Petition for Declaratory Ruling of ACM et al.*, CSR-8126, MB Docket No. 09-13 (filed Jan. 30, 2009) (“ACM *et al.* Petition”). *See also* Public Notice, “Entities File Petitions for Declaratory Ruling Regarding Public, Educational and Government Programming,” DA 09-203 (Feb. 6, 2009).

<sup>3</sup> ACM *et al.* Petition at 31-33. *See also* Reply Comments of ACM *et al.*, CSR-8126, MB Docket No. 09-13 (“ACM *et al.* Reply Comments”) at 19 & 21-23 (filed April 1, 2009).

<sup>4</sup> Comments of AT&T Opposing Petitions for Declaratory Ruling, MB Docket No. 09-13, at 14-21 (filed March 9, 2009).

<sup>5</sup> ACM *et al.* Reply Comments, MB Docket No. 09-13, at 5-14.

“channel” under the Act—could have wide-ranging implications that go far beyond the narrow dispute between Sky Angel and Discovery.<sup>6</sup> They consequently urged the Commission to proceed cautiously and to reach the broader questions, if at all, only through an open, permit-but-disclose, rulemaking proceeding.<sup>7</sup>

We agree, but for somewhat different reasons. Almost all opening commenters addressed—or expressed concern about the Commission prematurely addressing—the implications of construing the term “channel” in a way that would extend MVPD status to various kinds of online video distributors (“OVDs”). We have a different concern about any general Bureau or Commission pronouncement here about the meaning of “channel.” ACD is concerned about the potential implications of construing the term “channel” here on cable operators’ obligations to set aside “channel capacity” for PEG use under Section 611, and on the ACM *et al.* pending petition seeking a ruling that AT&T’s U-verse system fails to provide such “channel capacity” to PEG programmers.

Those PEG-related issues are not matters that the Commission can or should resolve in this proceeding. They are, however, long overdue to be addressed in the ACD *et al.* pending petition in Docket No. 09-13—which has been pending since January 2009, *more than a year longer* than the Sky Angel petition at issue here. But if the Bureau were to act in this proceeding before it acts on the much longer-pending ACM *et al.* petition, it should do so in a way that does not pre-judge, or otherwise adversely impact, the PEG-related issues presented in that petition in Docket No. 09-13.

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<sup>6</sup> See Comments filed in Docket No. 12-83 by AT&T at 2-3; Open Internet Coalition at 1; Comcast Corp. at 14; Computer & Communications Industry Assoc. at 5-6; Amer. Cable Assoc. at 31; Motion Picture Assoc. of America at 2-4 (May 14, 2012).

<sup>7</sup> See Comments cited in note 6 *supra*.

**II. “CHANNEL” MUST BE READ IN CONTEXT, AND “CHANNELS OF VIDEO PROGRAMMING” IN THE MVPD DEFINITION IS NOT THE SAME AS “CHANNEL CAPACITY” IN SECTION 611.**

We agree with Public Knowledge that the meaning of the term “channel” depends to a degree on context.<sup>8</sup> We take no position as to whether Sky Angel is, or is not, an MVPD within the meaning of Section 602(13). But we do not believe that resolution of that issue should necessarily have any bearing at all on the meaning of the “channel capacity” that franchising authorities can require cable operators to make available for PEG use under Section 611. As we have elsewhere argued, the “channel capacity” that Section 611 authorizes to be set aside for PEG use must be the linear channel equivalent to that which the cable operator furnishes to local broadcast channels. PEG channel capacity must be equivalent not merely in terms of signal quality, but also in terms of subscriber functionality and accessibility as well.<sup>9</sup>

**III. THE CABLE ACT IS TRANSMISSION PROTOCOL AGNOSTIC.**

As ACD has elsewhere pointed out,<sup>10</sup> the Act’s definitions of “cable operator,” “cable service,” and “cable system” are transmission protocol agnostic.<sup>11</sup> The fact that video programming may be transmitted in IP rather than some other digital protocol, or in analog form, does not determine whether or not an entity is, or is not, a “cable operator” providing “cable service” over a “cable system.” As TDI noted,<sup>12</sup> the Commission has already ruled that IP-based video systems such as AT&T’s U-Verse are MVPDs.

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<sup>8</sup> Public Knowledge Comments, Docket No. 12-83, at 4-7 (filed May 14, 2012).

<sup>9</sup> ACM *et al.* Petition, Docket No. 09-13, at 23-25 & 31-33; ACM *et al.* Reply Comments, Docket No. 09-13, at 21-23.

<sup>10</sup> ACM *et al.* Reply Comments, Docket No. 09-13, at 7-14.

<sup>11</sup> 47 U.S.C. §§ 522(5), 522(6), & 522(7).

<sup>12</sup> Comments of Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDF”), *et al.*, Docket No. 12-83, at 10 (citing *Closed Captioning of Internet Protocol-Delivered Programming*, Report and Order, 27 FCC Rcd 787, 796 & n.64 (2012)).

Our point is that, however the Bureau may rule on whether Sky Angel is an MVPD, its ruling must not suggest that a cable operator can escape that regulatory classification by converting to all-IP transmission of video programming to its subscribers. Nor should any Bureau ruling suggest that, to the extent a cable operator provides video programming to subscribers through both IP and non-IP technologies, the IP-based portion of the operator's program offering is not a "cable service."

### CONCLUSION

For the foregoing reasons, we urge the Bureau not to address in this closed, adjudicatory proceeding the broader issues raised in the *Notice*. To the extent that the Bureau reaches those issues at all, it should make clear that (1) it is *not* addressing the meaning of the phrase "channel capacity" in Section 611, and (2) determining whether an entity is a "cable operator" or some other form of MVPD does not turn on whether or not it delivers video programming to subscribers in IP.

Respectfully submitted,

*/s/ James N. Horwood*

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James N. Horwood  
Tillman L. Lay  
SPIEGEL & MCDIARMID LLP  
1333 New Hampshire Avenue, NW  
Washington, DC 20036  
(202) 879-4000

*Counsel for the Alliance For  
Communications Democracy*

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