

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

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

**REPLY COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (NCTA) hereby submits these reply comments on the Media Bureau’s Public Notice (“*Notice*”) in the above-captioned proceeding.

I. CONGRESS INTENDED AND ESTABLISHED THAT ONLY ENTITIES THAT PROVIDE MULTIPLE VIDEO PROGRAMMING STREAMS AND A TRANSMISSION PATH BE DEEMED MVPDs.

All the commenting parties in this proceeding acknowledge that the interpretation of the term “multichannel video programming distributor,” as used in Title VI of the Communications Act of 1934, as amended, must be based on the statutory definition of that term in Section 602(13):

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.¹

All parties also appear to agree that the meaning of that definition depends on the meaning of the term “channel.” That term is specifically defined in Section 602(4) to mean “*a portion of the electromagnetic frequency spectrum which is used in a cable system and which is*

¹ 47 U.S.C. § 522(13).

capable of delivering a television channel (as television channel is defined by the Commission by regulation).”² As NCTA noted, that definition “makes clear that a ‘channel’ of video programming is not the programming itself but the physical transmission path used to deliver that programming.”³ This means that only entities that provide their customers with both multiple video programming streams *and* the transmission paths for delivering such programming qualify as MVPDs under the statute.

While many parties agree that this is the case,⁴ some parties maintain that the definition of “channel” in Section 602(4) somehow does not apply to the use of that term in Section 602(13). They argue that because the definition includes the phrase “which is used in a cable system,” and because the term MVPD obviously applies to entities other than cable systems, the definition can be completely ignored in construing the meaning of a channel for purposes of the definition of an MVPD.⁵ This notion is completely at odds with the well-established (and Supreme Court-endorsed) canon of statutory construction that “[a]s a rule, ‘[a] definition which declares what a term ‘means’ . . . excludes any meaning that is not stated.’” *Colautti v. Franklin*, 439 U.S. 379, 393 (1979) (*quoting* 2A C. Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. Supp. 1978)).

Some proponents of this view argue that a word that appears in different places in a statute may have different meanings, depending on the context. DIRECTV, for example, points to the Supreme Court’s statement in *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S.

² 47 U.S.C. § 522(4) (emphasis added).

³ NCTA Comments at 2.

⁴ See ACA Comments at 15; Cablevision Comments at 5-6; Comcast Comments at 4-6; Computer & Communications Industry Association Comments at 1; Discovery Comments at 3-4; Open Internet Coalition Comments at 5; Time Warner Cable Comments at 2; and Verizon Comments at 3.

⁵ See ABC Television Affiliates Association et al. Joint Comments at 7; AT&T Comments at 5; DIRECTV Comments at 8; Public Knowledge Comments at 2; Saga Communications Comments at 2-3; Sky Angel Comments at 9; Sincbak Comments at 11; and TDI et al. Joint Comments at 3.

427, 434 (1932), 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.”⁶ But when one of the multiple places where the word is used is in a provision *defining* the word, no such variation in meanings is permissible. Indeed, the point of a statutory definition is to preclude such case-by-case and provision-by-provision interpretations.

Where Congress intended the term “channel” to have a meaning different from the definition in Section 602(4), it specifically said so. Thus, Section 624(d)(3), which mandates that cable operators provide subscribers with advance notice of any intention to provide free previews of “premium channels,” specifically provides that “*for the purpose of this section*, the term ‘premium channel’ shall mean any pay *service* offered on a per channel or per program basis, which offers movies rated by the Motion Picture Association of America as X, NC-17, or R.” DIRECTV correctly notes that this definition of a “channel” is different from the general definition in Section 602(4) – but that is precisely why a separate definition was necessary. In the absence of such a specific, overriding definition, the general definitions in Section 602 prevail.

The fact that the definition of a channel in Section 602 refers to transmission paths which are “used in a cable system” does not, as some commenting parties contend, warrant ignoring the definition altogether and simply making up a new one. The proper approach is to recognize that when the definition was adopted in the Cable Communications Policy Act of 1984, which enacted Title VI, cable systems were the only entities whose “channels” were referred to in that title of the Act. When Congress adopted provisions eight years later to promote competition

⁶ DIRECTV Comments at 6.

from new facilities-based entities such as the nascent DBS services, it used for the first time the term “multichannel video programming distributor” – and defined it to include entities that, like cable operators, deliver to customers a transmission service over which they provide multiple streams of video programming. Indeed, all the examples it included in that definition were entities that, like cable, provide such transmission paths as part of their service.

DIRECTV and Sky Angel erroneously contend that one of the statutory examples – a “television receive-only satellite program distributor” – does *not* provide a transmission path as part of its service.⁷ But DIRECTV and Sky Angel confuse television receive-only (“TVRO”) distributors, who actually sell *and transmit* satellite-delivered programming to consumers, with other home satellite dish (“HSD”) providers who simply serve as marketing agents for satellite-delivered program services and enable home satellite dish customers to unscramble and view the programmers’ encrypted transmissions. For example, DIRECTV states that “As the Commission has recognized, *HSD* providers ‘were generally independent distributors who were neither satellite operators nor program producers.’”⁸

But the Commission has previously explained that

[a] satellite carrier, as defined in the Satellite Home Viewer Act of 1988, is an entity that uplinks a broadcast signal and retransmits it over satellite facilities that the carrier may own or lease. See 17 U.S.C. § 119(d). Satellite carriers’ customers are home satellite dish (HSD) households. The carriers themselves sell retransmitted broadcast signals directly to HSD households, but they also license a variety of agents (e.g., program packagers, equipment distributors, and satellite equipment retailers) to sell the signals on their behalf. As noted above, *the definition [of an MVPD] applies to a “television receive-only satellite program distributor.”* In 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. §

⁷ See DIRECTV Comments at 8-9; Sky Angel Comments at 17-18.

⁸ DIRECTV Comments at 8 (quoting *Policies and Rules for the Direct Broadcast Satellite Service*, 13 FCC Rcd 6907, ¶ 4 n.13 (1998)) (emphasis added).

119, we find that, with respect to HSD sales, *the satellite carrier is the multichannel distributor* and must secure retransmission consent.⁹

Thus, the “television receive-only satellite program distributor” that Congress identified as an example of an MVPD *does*, like all the other examples, provide a transmission path as well as video programming directly to its customers’ homes.¹⁰

Although Congress did not amend the definition of a “channel” to specifically refer to spectrum and frequencies “such as” those used in a cable system, it makes most sense to presume that this is what Congress intended – certainly more sense than presuming that Congress intended that its definition not apply at all, and that the provisions referring to MVPDs in the 1992 Act should apply to any entity that sells consumers authorization to view multiple streams of online video programming that are delivered via the facilities of their Internet service providers.

II. CLASSIFYING ONLINE VIDEO DISTRIBUTORS AS MVPDs WOULD RESULT IN EXPANSIVE REGULATION OF INTERNET SERVICES.

While some commenting parties suggest that the definition of an MVPD is “open-ended,”¹¹ the notion that Congress, had it foreseen the evolution and proliferation of online video, would have extended the scope of the 1992 Act’s provisions to online video providers is hard to imagine. To the contrary, when Congress first acknowledged the emergence of broadband Internet service in the Telecommunications Act of 1996, it pronounced that it was the

⁹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues*, Report & Order, 8 FCC Rcd 2965, 2997 (1993).

¹⁰ Sky Angel cites a Commission statement that an MVPD “need not own its own basic transmission and distribution facilities.” Sky Angel Comments at 17 (quoting *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1982, Rate Regulation*, Report & Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5652 (1993)). But, as NCTA discussed in its initial comments, the decisive question is not whether an entity *owns* the transmission facilities but whether the transmission path that is used by the entity – whether leased, owned or otherwise acquired – is included in the service that the entity sells to consumers. See NCTA Comments at 4.

¹¹ Public Knowledge Comments at 9; Saga Communications Comments at 3; Sky Angel Comments at 10.

policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*”¹²

In this regard, the proponents of extending MVPD status to online entities – even those who would limit such status to those that provide “programming *networks*” or “*linear*” programming services¹³ – severely understate the regulatory impact of such an interpretation. DIRECTV, for example, asserts that by interpreting the term channel “such that any entity that makes multiple video programming networks available for purchase is deemed to be an MVPD,” the Commission could “ensure that all entities (and only entities) truly comparable with traditional cable and satellite carriers would be treated similarly,” and that “relatively few additional entities would qualify as MVPDs.”¹⁴ But it is easy to imagine how all sorts of entities that bear little resemblance to traditional cable operators and satellite carriers would qualify as MVPDs under this definition.

As anyone who has searched for videos on YouTube or Google knows, virtually anyone can – and does – distribute video programming online. While much of this material consists of individual clips available for on-demand viewing, it is increasingly the case that longer-form programs are being assembled as “networks.”¹⁵ And while the programming on most of these networks has, so far, been offered on an on-demand basis, new online linear programming networks are beginning to appear. For example, the Huffington Post has announced its intention to launch the Huffington Post Streaming Network “with 12 hours of daily programming this

¹² 47 U.S.C. § 230(b) (emphasis added).

¹³ See Public Knowledge Comments at 21; Sky Angel Comments at 20-21; Syncbak Comments at 5-6.

¹⁴ DIRECTV Comments at 13.

¹⁵ See, e.g., Mike Masnick, “The Rise Of Geek-Focused Online Video Networks,” techdirt, Apr. 13, 2012, at <http://www.techdirt.com/blog/casestudies/articles/20120411/20501318459/rise-geek-focused-online-video-networks.shtml>.

summer, eventually going to 24 hours.”¹⁶ Other news media are planning similar online ventures.¹⁷ Meanwhile, Google has embarked on a plan to foster the offering of premium-quality linear program services on YouTube,¹⁸ while other services make it easy for potential online network providers with limited resources to assemble whatever content they wish to offer and to upload and stream it online.¹⁹

Thus, there is no reason to think that MVPD status would be limited to “relatively few” online entities if the transmission path requirement were eliminated, even if the rights and obligations of MVPDs were conferred only on providers of linear programming. The Commission would, in the first instance, inevitably be drawn into difficult line-drawing disputes about what constitutes an online “network” or “linear programming.” But as complicated as these definitional issues would be, they would pale in comparison to the real difficulties – how to apply and enforce the rights and obligations²⁰ that go along with applying MVPD status to a set of online entities that the Commission neither tracks nor licenses, which may or may not even possess any physical facilities in the United States, and which were never intended to be the subjects of such regulations.

¹⁶ A. Plessner, Arianna Huffington's Vision of Interactive Video Journalism, *Huffington Post*, Feb. 3, 2012, at http://www.huffingtonpost.com/andy-plessner/arianna-huffingtons-visio_b_1252613.html.

¹⁷ See, e.g., Print News Media Go Live With Video Programming, *New York Times*, Feb. 5, 2012, available at http://www.nytimes.com/2012/02/06/business/media/news-organizations-plunge-into-video-production.html?_r=1&smid=tw-NYTimesAd&seid=auto.

¹⁸ Brian Stelter & Claire Cain Miller, *YouTube Plans to Make Big Bet on New Online Channels*, *N.Y. Times*, October 28, 2011, B6.

¹⁹ See, e.g., “‘Micro Linear Channels’ -- An Important New Development in Online Video,” Beet TV, Dec. 15, 2008, <http://www.blinkx.com/watch-video/micro-linear-channels-an-important-new-development-in-online-video-discoverability-ibm-goes-24-7-on-mogulus/wu9rkVcZcqyVMzWwihdvjw>.

²⁰ The Commission would, of course, be required – not only by statute but also as a matter of fundamental fairness and regulatory parity – to enforce both the rights *and* the obligations that accompany MVPD status.

CONCLUSION

For the foregoing reasons and the reasons set forth in NCTA's initial comments, the Commission should confirm that an MVPD is an entity that makes available for purchase multiple streams of video programming *and* a transmission path.

Respectfully submitted,

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June 13, 2012