BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
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

To: Chief, Media Bureau

REPLY COMMENTS OF
COMCAST CORPORATION AND NBCUNIVERSAL MEDIA, LLC

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Comcast Corporation and NBCUniversal Media, LLC (collectively, "Comcast"), hereby reply to the comments filed in the above-captioned proceeding.[1] The comments filed in response to the Public Notice ("*Notice*") seeking comment on the definition of the terms "multichannel video programming distributor" ("MVPD") and "channel" demonstrate that the questions raised in the *Notice* implicate numerous, wide-ranging legal and policy issues, and that the Bureau's only proper course is to affirm its prior conclusion and leave to Congress the issue of how online video distributors are regulated.

I. INTRODUCTION & SUMMARY

Commenters representing large and small MVPDs, cable programmers, computer and communications companies, and even open Internet advocacy groups confirmed that the Bureau

[1] *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, 27 FCC Rcd. 3079 (2012) ("*Notice*").

must adhere to the statutory definitions of the terms “multichannel video programming distributor” and “channel,” and cannot expand the definition of MVPD to include distributors of video online over the Internet (“online video distributors” or “OVDs”). Although certain parties urged the Bureau to reject the plain meaning of the Act and adopt novel interpretations of the term “MVPD,” the Bureau’s authority to do so is constrained by the plain meaning of the Communications Act and the clear intent of Congress.

Commenters also generally affirmed that the current regulatory regime, as constructed by Congress, is a carefully calibrated set of rights and responsibilities and, importantly, extends beyond the four corners of the Communications Act to the integrally-related provisions of the Copyright Act. As a matter of policy, defining OVDs as MVPDs would have significant implications for OVDs, MVPDs, and content creators and rights holders that would harm investment and innovation in this dynamic marketplace.

Every legitimate online video service available to consumers today – and their numbers are burgeoning – is the product of a successful commercial negotiation with one or more content owners. The fact that Discovery, just one content owner, chose for its own legitimate business reasons not to make its programming available to just one OVD, Sky Angel, does not warrant changing an approach that gives content rights holders ultimate control over the distribution of their content online. Indeed, virtually every commenter agreed that overturning any part of the Commission’s and marketplace’s current understanding of the relevant terms would extend beyond the confines of the particular program access complaint that led to the Bureau’s Public Notice and could have significant consequences across the industry.

II. THE STATUTE'S LANGUAGE AND UNDERLYING PURPOSES MAKE CLEAR THAT OVDS CANNOT BE MVPDS.

Commenters representing a broad variety of interests agreed with Comcast that Congress's definitions of "MVPD" and "channel" in the Communications Act require that an entity offer an integrated service – both "video programming" and the "channels" for transmitting that programming – in order to be an MVPD.[2] The definition of "channel" in the Act explicitly contemplates that an MVPD's service includes the *transmission* of the video programming to the customer – using "a portion of the electromagnetic frequency spectrum."[3] Arguments to the contrary rely on inaccurate facts, misapplication of canons of statutory construction, and selective reading of the statutory provisions and legislative history. The Bureau should reject these novel theories and reaffirm the current understanding of the statute.

Although the distribution mechanisms cited in the definition of MVPD all are very different, they do share one defining characteristic that is consistent with the statutory definitions of "MVPD" and "channel" – each provides an integrated service offering of both video programming and transmission. No MVPD in the history of the video programming marketplace has ever required customers to acquire a separate transmission service in order to obtain the MVPD's video programming. Whether a consumer is purchasing service from Comcast, AT&T, Verizon, DirecTV, Dish, RCN, etc., or even a C-band dish provider, the consumer does *not* have to separately purchase a transmission service. In contrast, and incontrovertibly, OVDs by

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[2] *See* American Cable Ass'n ("ACA") Comments at 1-2, 8; Cablevision Comments at 7-9; Computer & Communications Industry Ass'n ("CCIA") Comments at 2-3; Discovery Comments at 3-5; Nat'l Cable & Telecomm. Ass'n ("NCTA") Comments at 2-3; Open Internet Coalition Comments at 5; Time Warner Cable Comments at 2; Verizon Comments at 3.

[3] 47 U.S.C. § 522(4); *see* ACA Comments at 8; Comcast Comments at 5, 8; Verizon Comments at 6; Time Warner Cable Comments at 3; NCTA Comments at 2.

definition require that their customers acquire the transmission "channel"– in this case, by purchasing (or using someone else's) broadband Internet connection – separate and apart from the OVD service.[4] All of the OVD offerings described by Sky Angel, Syncbak, M3X, and others require the OVD's customers to procure a broadband Internet connection in order to have the OVD's video programming delivered to the customer.[5]

This does not necessarily mean that the MVPD must own the underlying facilities used to transmit the "channels" of programming or that the MVPD do the actual act of transmitting, as Sky Angel claims,[6] though this is the situation with the vast majority of MVPDs. It simply means that, when a customer purchases multiple channels of video programming from an MVPD, she need not separately purchase another service to deliver those channels to her home. It may well be true that Sky Angel, "like DBS, MMDS, or SMATV . . . owns or controls significant and essential transmission paths, including the originating and terminating points," but the salient fact is that, unlike DBS, MMDS, SMATV, or any other MVPD, Sky Angel's "programming *is sent via broadband Internet connections to subscribers' homes*."[7] In other words, unlike DBS, MMDS, SMATV, or any other MVPD, Sky Angel customers must purchase a separate transmission service in order to access Sky Angel's video programming.[8]

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[4] As the Open Internet Coalition explains, "The channel is not merely the video programming being transmitted to the user, but the facilities by which that programming can make it to its intended destination — the viewer or end user." Open Internet Coalition Comments at 5.

[5] Likewise, Syncbak's argument that it does, in fact, provide "transmission" of the video programming as part of the service, and that a customer's broadband Internet access service provider is just a passive medium, *see* Syncbak Comments at 8, misses the point. The pertinent fact is that the customer must separately purchase the broadband Internet service; without that, there is no way for the customer to access Syncbak's service.

[6] Sky Angel Comments at 17-18.

[7] *Id.* at 18-19 (emphasis added).

[8] Commenters that addressed the issue unanimously agreed that whether an OVD is an MVPD is in no way governed by whether the OVD is affiliated with an MVPD or a broadband Internet access service ("BIAS")

(footnote continued…)

Some commenters claim that distributors need not actually provide transmission of the video programming to customers or subscribers in order to be considered MVPDs. For example, DirecTV argues that reading the plain language of the statute to require an MVPD to offer a service that includes both the video programming and the transmission of that programming to the customer would conflict with the "statute's illustrative list of MVPDs," which includes "television receive-only satellite program distributors," i.e., home satellite/C-Band dish ("HSD") service providers.[9] More specifically, DirecTV claims that the Commission has said that HSD providers "*do not provide any transmission path for the delivery of video programming*" and that their inclusion in the illustrative list of MVPDs demonstrates that MVPDs do not need to provide a transmission path.[10]

DirecTV confuses the equipment vendor or the programming packager (which *is not* an MVPD) for the actual HSD provider (which *is* an MVPD and which does transmit the programming).[11] In determining which parties in the HSD distribution chain were MVPDs entitled to negotiate retransmission consent, the Commission made clear that only the satellite carrier – the "entity that *uplinks* a broadcast signal and retransmits it over satellite facilities that

(…footnote continued)

provider. *See, e.g.*, Verizon Comments at 13-14; Time Warner Cable Comments at 8-9; Comcast Comments at 5 n.11. What makes a service an OVD service is how it is distributed – i.e., over the Internet – not who is distributing it. Treating an MVPD's or a BIAS provider's OVD service differently than other OVD services would be arbitrary and capricious. *See* Time Warner Cable ("TWC") Comments at 9 (citing *Burlington N. & Santa Fe Ry. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005)).

[9] DirecTV Comments at 8; *see* Sky Angel Comments at 17.

[10] DirecTV Comments at 9 (citing *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*, 9 FCC Rcd. 7442 ¶ 71 (1994)) (emphasis in original).

[11] *See 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) ("*1993 Retrans Order*") (emphasis added). The Commission concluded that "the satellite carrier is the multichannel distributor," not the equipment retailer or the program packager. *Id.*

the carrier may own or lease" – was an MVPD but that the satellite carrier's agents – "e.g., program packagers, equipment distributors, and satellite equipment retailers" – were not.[12] Accordingly, the Commission already has spoken on this issue and confirmed that HSD providers *do* provide a transmission path for the delivery of video programming and that this characteristic is essential for classification as an MVPD under the Act.[13]

Commenters who support the proposition that MVPD service does not include transmission essentially urge the Commission to ignore the statutory language because the definition of "channel" in the Act references "cable systems."[14] They argue that the "absurd results" that would come from a strict reading of the language gives the Commission free rein to interpret the term howsoever it chooses.[15] This is incorrect. "[A]n agency cannot exploit some minor unclarity to put forth a reading that diverges from any realistic meaning of the statute lest the agency's action be held unreasonable."[16]

In all events, as Time Warner Cable explained, "it makes perfect sense that, in expanding its regulatory framework to cover new video distribution platforms in 1992, Congress intended its reference to 'channels' in the definition of MVPD to conform to the understanding of

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[12] *Id.* (emphasis added).

[13] *See id.* DirecTV cites to a 1998 Commission Notice of Proposed Rulemaking regarding rules governing the provision of direct broadcast satellite services for the proposition that "HSD providers 'were generally independent distributors who were neither satellite operators nor program producers.'" DirecTV Comments at 8 (quoting *Policies and Rules for the Direct Broadcast Satellite Service*, 13 FCC Rcd. 6907, ¶ 4 n.13 (1998)). But this offhand vague statement in a footnote of an NPRM about a completely different issue does not provide any insight into whether an HSD provider's offering included a transmission path for the delivery of video programming video programming. In contrast, when the Commission has had to decide which party in the HSD distribution chain is an MVPD, it could not have been clearer in its decision: "[W]e find that, with respect to HSD sales, the satellite carrier is the multichannel distributor." *1993 Retrans Order* ¶ 131.

[14] *See, e.g.*, AT&T Comments at 3; M3X Media Comments at 6; Public Knowledge Comments at 4; Sky Angel Comments at 21.

[15] *See, e.g.*, M3X Media Comments at 6.

[16] *Massachusetts v. United States DOT*, 93 F.3d 890, 893 (D.C. Cir. 1996).

'channel' grounded in the text and history of the Act."[17] Likewise, as Comcast pointed out, although this may not have been ideal legislative draftsmanship, Congress's intent was plain and universally understood, and any "unclarity" in this provision cannot reasonably be exploited to justify the proposition that an entity can qualify as an MVPD simply if it "make[s] available for purchase . . . video programming" without providing an integrated service that includes *both* the video programming *and* the delivery of the video programming to customers' homes.[18] "[T]here is no sound basis to posit that Congress sought to abandon the established meaning of 'channel' *sub silentio*."[19]

Some commenters try to reinforce their arguments by asserting that the word "channel" can mean different things in different contexts.[20] For example, Public Knowledge asserts that the word "channel" has both a "container" sense and a "content" sense in common usage, and even in certain other provisions of the Communications Act. Ultimately, however, these arguments do not withstand close scrutiny. Where, as here, Congress has defined the term in question – and in the very same section – the Commission must abide by that definition.[21]

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[17] TWC Comments at 4.

[18] Comcast Comments at 4.

[19] TWC Comments at 4. "As the Supreme Court has reminded us, Congress 'does not . . . hide elephants in mouseholes.'" *Am. Library Ass'n v. FCC*, 406 F.3d 689, 704 (D.C. Cir. 2005) (quoting *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001)).

[20] Public Knowledge Comments at 3; DirecTV Comments at 6.

[21] *See Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501 (1998) ("[An] established canon of construction [is that] similar language contained within the same section of a statute must be accorded a consistent meaning."); *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."). Although DirecTV correctly notes that the Supreme Court has made clear that "'[t]here is . . . no effectively irrebuttable presumption that the same defined term in different provisions of the same statute must be interpreted identically,'" DirecTV Comments at 6 (quoting *Envt'l Defense v. Duke Energy Corp.*, 549 U.S. 561, 575-76 (2007)), in this case, "channel" is not "defined in [a] different provision" of the Communications Act but is in precisely the same provision, and there is absolutely no indication that Congress intended to attribute a different meaning to the term "channel" than the one in Section 602(4).

The examples that some parties have put forward of contexts where "channel" is used to refer to video programming networks all reaffirm that "channel" does *not* mean video programming network in the definition of MVPD because, in those other cases, *Congress specifically defined "channel" for that particular context*.[22] "The preeminent canon of statutory interpretation requires [the Commission] to presume that [Congress] says in a statute what it means and means in a statute what it says there."[23] If Congress wanted "channel" in the definition of MVPD to be read as "content" or "video programming network" and *not* to be read as "channel" is defined nine provisions earlier in the same section, it would have said so.

Additionally, as AT&T acknowledges, "[u]nder well-established canons of statutory construction, the Commission cannot adopt an interpretation . . . that would read out of the Act [an] express limitation included by Congress."[24] Thus, the Commission cannot interpret the

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[22] For example, Public Knowledge notes that the definition of the term "channel" itself includes a reference to "television channel." Public Knowledge at 5. Importantly, however, Congress explicitly recognized that "television channel" was a separately defined term, and cross-referenced that definition. 47 U.S.C. § 522(4) ("as television channel is defined by the Commission by regulation"). Even while this example may confirm that the word "channel" may have different meanings in different contexts, it also affirms that Congress was perfectly capable of explaining, when it so desired, that it was using the term in a different way. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Another example, put forward by DirecTV, is that "Section 624 addresses the scrambling of 'premium channels.'" DirecTV Comments at 7. However, as DirecTV acknowledges, Congress explicitly defined the term "premium channel" in that section. DirecTV then undermines its own argument by concluding that "Congress made clear that the 'channels' it sought to define was a particular aggregation of programming." *Id.* Not only was Congress's intent "clear," it was *explicit*.

[23] *BedRoc v. United States*, 541 U.S. 176, 183 (2004) (internal quotations omitted).

[24] AT&T Comments at 4. AT&T asserts that extending the definition of "channel" under Section 602(4) to MVPDs other than "cable operators" would "read out of the Act" an express limitation that "channel" be limited to cable systems. AT&T, however, incorrectly assumes that Congress intended the term "cable system" in the definition to be a limitation. As AT&T acknowledges, the definition of "channel" was adopted originally in 1984 when cable systems were the only providers of multiple channels of video programming. *See id.* at 5. When Congress added the term MVPD in 1992, it added that term to Section 602 and expressly used the term "channel" without further defining it outside the context of Section 602(4). Thus, although the word "channel" may mean other things in other contexts and other provisions of the Act, for the purposes of Section 602 and absent a more specific definition in another context, the definition of "channel" in the term MVPD must be the same as Congress defined it earlier in that very same section. At a minimum, it is the definition of "channel" that creates an ambiguity

(footnote continued…)

word "channel" in the definition of MVPD in a way that renders other language in that definition redundant.[25] But that is exactly the effect of interpreting the word "channel" as some parties suggest in this proceeding.[26]

In particular, interpreting the word "channel" in the definition of an MVPD to mean a "video programming network" would make the subsequent term "video programming" *in that same provision* redundant and meaningless, i.e., an MVPD would be a distributor who makes available for purchase "multiple [video programming networks] of video programming."[27] This is truly an absurd result. The fact that Congress used both "channel" and "video programming" in the same phrase is evidence of the clear Congressional intent that the use of "channel" in the definition of MVPD was in the "container" sense. In other words, Congress wanted the definition of MVPD to reflect a single integrated service that included both "container" ("channel") and "content" ("video programming").

Finally, as reflected in the text, structure, history, and purpose of the relevant provisions, Congress left no doubt that MVPDs are *facilities-based* providers of multichannel video programming services that offer an *integrated combination* of content and transmission to consumers. As CCIA notes, the Commission has long recognized that "'"[f]acilities-based competition" is a term used in the legislative history of the Act to emphasize that program

(…footnote continued)

as to whether Congress intended it to only apply to "cable systems"; on that point, however, Congressional intent is clear that the term channel is not solely limited to cable systems.

[25] *See* Time Warner Cable comments at 5 ("Redefining 'channels' to mean 'video programming networks' also would render a critical part of the definition of 'MVPD' superfluous, violating a fundamental tenet of statutory construction.").

[26] *See, e.g.*, DirecTV Comments at ii; Public Knowledge Comments at 4.

[27] *See* Cablevision Comments at 12; TWC Comments at 6 (noting that "[w]here '[t]he statute admits a reasonable construction which gives effect to all of its provisions[,] . . . we will not adopt a strained reading which renders one part a mere redundancy'" (quoting *Jarecki v. G.D. Searle Co.*, 367 U.S. 303, 307-08 (1961))).

competition can only become possible if alternative facilities to deliver programming to subscribers are first created. The focus in the 1992 Cable Act is on assuring that facilities-based competition develops.'"[28] OVDs are not facilities-based providers of multichannel video programming services.

In short, commenters confirm that the Bureau's prior decision – that the requirement that MVPDs offer "multiple channels of video programming" requires an entity to offer an integrated service that delivers the "video programming" to consumers without the need to separately purchase a transmission path – is the correct decision. The Bureau should remain true to the language of the statute and its prior conclusions, which best account for what Congress intended to accomplish.

III. POLICY CONSIDERATIONS COUNSEL STRONGLY AGAINST RECASTING OVDS AS MVPDS.

As Comcast discussed in its initial comments, the statutory arguments that OVDs do not qualify as MVPDs are buttressed by the fact that such an approach also represents sound public policy. Numerous other commenters echoed Comcast's comments. These parties affirmed that the marketplace for video online today is already highly competitive, dynamic, and thriving, and expressed their concern that a decision to recast OVDs as MVPDs would actually harm competition and stifle innovation in this highly dynamic marketplace. These commenters also recognized how such a decision could bleed over into related areas of law – notably copyright – introducing uncertainty and ambiguity in a marketplace that heretofore has been marked by dynamism and innovation. These likely consequences strongly counsel against such a decision.

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[28] CCIA Comments at 2-3 (quoting *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd. 3359, 3384, n.79 (1993)).

A. Treating OVDs as MVPDs Would Vastly Expand OVDs' Regulatory Obligations.

Comcast's initial comments listed seven separate regulatory regimes to which OVDs would be subject if the Commission were to recast them as MVPDs, and expressed concern that such an unprecedented expansion of regulation would actually hamper the dynamism of the marketplace.[29] Various other commenters – including commenters representing OVD interests – agreed:

- The Open Internet Coalition said that, "[g]iven high levels of competition and low barriers to entry [in the online video marketplace] . . . , [s]uch regulation is unwarranted and likely to significantly harm the nascent online video industry, and could deter investment in new online video programming ventures."[30]

- The Computer & Communications Industry Association ("CCIA") noted that recharacterizing OVDs as MVPDs "would stifle innovation, investment, and growth in the online video space and lead to less competition from over-the-top services to traditional video distributors."[31] Of potentially greater concern in light of the existing "low barriers to entry" in the online video marketplace, CCIA said that "requiring compliance with MVPD rules will likely make it difficult, if not impossible, for OVD startups to survive and continue to flourish."[32]

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[29] Comcast Comments at 12-13. For some commenters, the fact that the online video marketplace is competitive and thriving actually is a reason why it *should* be regulated. For example, DirecTV argued that OVDs "have gone from mere curiosities to emerging competitors in a very short period of time, and continue to develop rapidly as the speed and ubiquity of broadband infrastructure improves. In these circumstances, it is appropriate to apply core regulatory rights and responsibilities to both traditional and non-traditional MVPDs." DirecTV Comments at 16. This argument presumes both that every regulation of MVPDs is appropriate for OVDs and that the Commission is the appropriate forum to make this determination, but these presumptions are both incorrect. Some regulations that may be appropriate for traditional MVPDs may not be appropriate for OVDs, and vice versa. More importantly, the appropriate forum to debate and decide on these question is Congress, not a Commission proceeding (and certainly not a "restricted" adjudication between two parties apparently being handled on delegated authority).

[30] Open Internet Coalition Comments at 5.

[31] CCIA Comments at 4.

[32] *Id.*

- The Motion Picture Association of America ("MPAA") asserted that treating OVDs as MVPDs "would discourage the experimentation with business models that has been a hallmark of the online video distribution field to date."[33]

These commenters highlight an important consideration: being an MVPD comes with both rights and responsibilities, but OVDs – like any other over-the-top website or Internet service – largely have been unregulated since their inception.[34] Quite properly, the Commission has not asserted free-floating authority to establish rights and responsibilities for entities merely because they connect to and are accessed via the Internet. To the extent that any individual aspect of communications regulations is to be imposed on such entities, this is a momentous decision that is properly the province of Congress.[35]

B. A Cautious Approach Is Warranted Given the Potential Impact on Content Creators and Owners.

A number of commenters also emphasized in their initial comments that treating OVDs as MVPDs could have negative implications for content producers and rights holders. No entity, including OVDs, may freely appropriate content for distribution online without the consent of the content creator or owner. To the contrary, all parties agreed that OVDs must obtain the necessary distribution rights through marketplace negotiations just as traditional MVPDs negotiate for programming rights today. Importantly, not a single commenter asserted that OVDs should have the ability to carry broadcast signals or any other programming without the appropriate rights holders' permission.

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[33] MPAA Comments at 3.

[34] *See* Open Internet Coalition Comments at 3-5.

[35] "[W]here appropriate, individual aspects of the legacy regime may properly be extended to over-the-top, IP-based video providers on a discrete basis. Congress did just that through the Twenty-First Century Communications and Video Accessibility Act of 2010, which extended closed captioning requirements to IP-delivered video."Verizon Comments at 12.

In its comments, NAB correctly stresses "that new services not be permitted to expropriate broadcast signals."[36] And the NBC, ABC, and CBS Affiliate Associations properly highlight that "programming distributors that utilize the Internet cannot be left to retransmit television broadcast signals online at will."[37] That is the status quo. Because the Commission need not act here to preserve the status quo with respect to the ability of content rights holders, including broadcasters, to control the distribution of their programming (including to whom they distribute their programming, and where, when, and on what terms and conditions), the Commission should heed the warning of the MPAA to "avoid actions that inadvertently could harm the interests of content creators."[38] Specifically, it is unnecessary to stretch the definition of MVPD to include OVDs in order to protect the rights of content creators and broadcasters to control their own programming on the Internet. Similarly, the Commission must also be vigilant to take no actions – or include any discussion – in this proceeding that could imply, or suggest, that OVDs can circumvent the clear legal rights of content creators to control the distribution of content online.

Further, the Commission's regulatory framework is closely "intertwined" with copyright law. The Copyright Act provisions cross-reference the Commission's rules and regulations.[39] Indeed, Comcast noted in its initial comments that the Commission "must be mindful that any conclusion in this proceeding contrary to existing precedent could have implications beyond the

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[36] NAB Comments at 4.

[37] Affiliate Associations Comments at 15.

[38] MPAA Comments at 2.

[39] U.S. Copyright Office, *Satellite Television Extension and Localism Act, Section 302 Report: A Report of the Register of Copyrights* 54 (Aug. 29, 2011). This framework includes the statutory licensing regime established in the Copyright Act. *See* 17 U.S.C. §§ 111(c)-(d).

four corners of the Communications Act and the Commission's rules."[40] Various other commenters agreed that a Commission decision to treat OVDs as MVPDs could bleed over into the realm of copyright law, with significant consequences for the future of the online video marketplace:

- Cablevision noted that "it is well established that Congress intended the compulsory copyright license and FCC rules to work in harmony," and that "Congress's exclusion of OVDs from the compulsory license offers persuasive evidence that it also did not intend for 'MVPD' to encompass non-facilities-based providers."[41]

- MPAA noted that "[c]hanging the scope of a well-established term, such as 'MVPD,' could impact existing programming agreements and the content industry more broadly."[42]

- Discovery expressed its concern that treating OVDs as MVPDS "would place programmers in the difficult position of being forced to acquire online distribution rights for all or substantially all of their programming, from content providers who may not wish to sell those rights – either at all, or at prices that make sense for programmers to acquire those rights."[43]

- MPAA also recognized that a decision to treat OVDs as MVPDs could affect various other copyright-related policy issues, "including cross-border anti-piracy enforcement, international free trade agreements, and the free and open development of business models in the fast-changing online world."[44]

These comments and the potential impact on copyright law further underscore the need for caution by the Commission before it takes any action that could harm the interests of content creators and owners.

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40 Comcast Comments at 2 n.4.

41 Cablevision Comments at 16.

42 MPAA Comments at 1-2.

43 Discovery Comments at 8-9.

44 MPAA Comments at 2.

C. Maintaining the Status Quo Will Not Lead to Changed Behavior on the Part of Marketplace Participants.

Some parties advocating for the Commission to treat OVDs as MVPDs compiled a parade of horribles that they claim will come to pass if the Commission *does not* treat OVDs as MVPDs. For example, Public Knowledge says that, if "an MVPD must provide its subscribers with a transmission path, then any programming that is delivered without a fixed transmission path" – e.g., "IP-based MVPDs such as U-verse that may not assign particular programming networks particular frequencies" – may no longer be subject to traditional MVPD regulation.[45] Public Knowledge theorizes that "any MVPD would be able to spin off its facilities into a separate affiliate and then lease them back in order to avoid MVPD regulation" and that "MVPDs would have an incentive to engineer their systems inefficiently just to qualify for, or fall outside of, particular rules."[46] These assertions, however, are baseless.

First, not a single party has supported the overly strict interpretation of MVPD and channel that these parties suggest is the only possible alternative to their proposals. In particular, nobody has advocated that the definition of MVPD requires a "fixed" transmission path. In fact, it is Public Knowledge that perplexingly and inexplicably incorporates into the statutory definition of "channel" a new requirement that video programming be "assigned . . . particular frequencies" or be "broadcast on a *fixed* 'portion of the electromagnetic frequency spectrum.'"[47] As discussed above, whether an entity is offering an MVPD service is a function of whether the service being offered to the consumer is an integrated combination of transmission and video

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[45] Public Knowledge Comments at 15-16; *see* Sky Angel Comments at 22.

[46] Public Knowledge Comments at 16-17.

[47] *Id.* at 16 (emphasis added).

programming, not whether that transmission is delivered over "particular frequencies," a "fixed" portion of spectrum, leased portions of a telecommunications carrier's facilities, wireless cable spectrum, or satellite.[48]

Second, cable operators consistently have taken the position that their IP-based video services – to the extent that the service in question integrates both transmission and video programming – qualify as MVPD services under the Act.[49] If cable operators acted in a manner consistent with the behavior imputed to them by Public Knowledge, however, they would take a different stance – any service delivered via Internet Protocol would not be an MVPD service and, therefore, would not be subject to MVPD regulations.[50] But cable operators have adopted a reasonable interpretation of the statute that comports with Commission precedent, not the radical and overly narrow interpretation of the statute put forward by Public Knowledge.

Finally, the reasonable approach put forward by Comcast, NCTA, OIC, CCIA, and others is *the status quo*. It is difficult to comprehend how maintaining the status quo would lead to a

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[48] *See supra* pp. 2-10.

[49] *See, e.g.*, Answer & Counterclaims of Time Warner Cable, Inc. at 28, Viacom Int'l, Inc. v. Time Warner Cable, Inc., Civil Action 11-cv-2387 (S.D.N.Y. June 6, 2011) (explaining that Time Warner Cable's iPad application "simply enables TWC's video subscribers to use the iPad as an additional display device within their homes," and that "although the format employed by TWC for distribution to the iPad is commonly referred to as 'IP'. . . TWC does not distribute the video programming to the iPad over the public Internet"). Additionally, cable operators have noted that "video programming transmitted by a cable operator over a cable system using IP technology" is subject to the traditional closed captioning rules. Reply Comments of Time Warner Cable, Inc., MB Docket No. 11-154, at 2, 7-8 (Nov. 1, 2011); Comments of National Cable & Telecomm. Ass'n, MB Docket No. 11-154, at 10 (Oct. 18, 2011) ("[T]he Commission should not confuse distribution using Internet protocol ('IP') – a technology for delivering programming that may have nothing to do with the Internet – with distribution using IP over the Internet.").

[50] AT&T's U-verse video service, referenced by Public Knowledge, is not just an MVPD service but, more precisely, a cable service. *See* Letter from Neal Goldberg, NCTA, to Marlene Dortch, FCC, WC Docket No. 04-36 (Sept. 1, 2005) (attaching a white paper demonstrating that "IP video services [such as those provided by then-SBC and other ILECs] are clearly 'cable services' and the facilities they use are 'cable systems,' making [the ILECs] 'cable operators' subject to the regulatory scheme of Title VI"); Letter from Neal Goldberg, NCTA, to Marlene Dortch, FCC, WC Docket No. 04-36 (Nov. 1, 2005) (responding to then-SBC's arguments for why U-verse should not be considered a cable service).

change in behavior. Public Knowledge, Sky Angel, and others attempt vigorously to portray their position as the status quo, but that simply is not the case. As the Commission has already conceded in its Mandamus Opposition, Sky Angel's position that OVDs may avail themselves of the program access rules is "novel."[51] Adopting those parties' position – i.e., that the Commission should recast OVDs as MVPDs –would mark a dramatic change from the status quo, with a number of negative consequences for the marketplace.

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[51] Opposition of the Federal Communications Commission to Sky Angel's Petition for a Writ of Mandamus at 2, *In re Sky Angel U.S., LLC*, No. 12-1119 (D.C. Cir. Apr. 5, 2012).

IV. CONCLUSION

The comments filed in this proceeding unanimously reinforce that the questions raised in the *Notice* implicate numerous, wide-ranging legal and policy issues. A thorough review of the record confirms Comcast's conclusion that the Bureau cannot change its interpretation of MVPD without untethering itself from the statute and injecting significant regulatory uncertainty into a marketplace that today is thriving and dynamic. The Bureau's best course is to affirm its prior conclusion and leave it to Congress to address whether and how OVDs should be regulated.

Respectfully submitted,

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