

**Response to questions from The Honorable Bobby Rush by John Bergmayer,  
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**January 14, 2014**

**1. Do you believe that technologies and industry models have changed or are changing dramatically enough for Congress to consider redefining or revising the term, "multichannel \_video programming distributor" (MVPD) in the Communications Act?**

There are several ways that Congress could consider revisiting the regulatory category of "multichannel video programming distributor" (MVPD). The most obvious would be for policymakers to clarify that this is a technology-neutral term that does not depend on last-mile facilities ownership.

Congress has already adopted a technology-neutral definition of multichannel video programming distributor. Section 602(13) of the Communications Act defines one 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.

I believe this broad definition encompasses any distributor of channels of "video programming" as defined by the Act--which would mean that a "virtual cable system" like Sky Angel would qualify, but a provider of on-demand or downloadable programming (such as Netflix or iTunes) would not. For the Subcommittee's reference, I am attaching a more detailed legal analysis of this point that Public Knowledge has previously filed with the FCC. In short, however, I see no evidence that Congress intended the term to encompass only technologies in existence at the time of the provision's adoption, or that it should be restricted to providers that own last-mile physical facilities.

However, I am aware that not all in the Commission or the Communications bar more generally agree with this interpretation. I would therefore support legislatively clarifying that the term encompasses all technologies, including online video.

Longer term, Congress may wish to revisit the practice of distinguishing between video providers that offer "channels" and those that do not. However, such a change would be more appropriate after more competition has developed in the video market. Premature action in this regard could solidify the market position of current MVPD incumbents and harm online competition.

**As many of you know, the DC Circuit Court of Appeals heard oral arguments this week in the case of Verizon vs. FCC, which challenges the Commission's authority under the Communications Act to promulgate "so-called" net neutrality rules.**

**If the DC Circuit were to VACATE or to order the Commission to revise its rules substantially, how might that affect parties' abilities to negotiate retransmission consent agreements "in good faith" and at arms-length?**

If the DC Circuit were to vacate the Open Internet rules, I do not think there would be many direct effects on retransmission negotiations. However, an open Internet is necessary to protect online video competition. The existence of online video providers can affect carriage negotiations, since they serve both as alternate providers for consumers, alternate sources of programming, and alternate distributors.

**2. Would there be resulting business uncertainties and would those uncertainties be good or bad for consumers? Why?**

There would be business uncertainties that harmed consumers if the DC Circuit vacates the Open Internet order--in particular, investment in online video ventures may be lessened.

**Regarding another line of cases, it appears that the DC Circuit and the US Second Circuit are in some disagreement over when and whether emerging video networks can retransmit over-the-air broadcast content.**

**3. I know that the DC Circuit ruling is only a few days old and you may not have fully reviewed it, but which of the courts' interpretations of federal communications and copyright law is more defensible?**

**4. If one circuit court's application of the law and legal reasoning is more compelling or defensible than the other circuit court's ruling, please explain why.**

Public Knowledge has filed amicus briefs in various cases arguing that Aereo and like services should prevail on the merits. With regard to the Aereo and FilmOn Cases, the Second Circuit's analysis is more sound, because it preserves the distinction between "public" and "private" performances. Every day, people access content over the Internet that they have lawfully paid for via cloud storage and other services. It should be clear that a person accessing his own content on a cloud service is not engaging in a performance, and that a cloud service is not "publicly performing" a copyrighted work simply by allowing a user to store and access her

own content. However, under the DC Circuit's reasoning, it is unclear whether many existing online business models are somehow engaging in public performances of various works, simply by providing basic storage and access functions. Parties on the other side of this dispute have not put forth a convincing case that their legal position would not have consequences for online businesses that extend beyond the specialized fact pattern of online antenna rental services.

**Mr. Munson pointed out in his testimony that added regulations on broadcasters “stem from what some have characterized as a ‘social contract’ between the government and the broadcasting industry: broadcasters use licensed spectrum to serve the public interest and offer their service free to American consumers.”**

**Many of these broadcast TV consumers and watchers are minorities. In the 2013 Ownership Survey and Trend Report, it was cited that 22 percent of all African-American households and 25 percent of Hispanic households are broadcast-only homes. Additionally, minorities comprise 41 percent. Notwithstanding this fact, minority and female ownership of television stations and cable systems has shrunk dramatically over the years.**

**5. Do any of you challenge or take issue with the proposition that minority TV broadcast and cable system owners can be just as if not more responsive to the needs of their minority viewers and audiences?**

I agree that the best way to ensure that the media remain responsive to minority needs and interests is to promote and preserve minority ownership of media-- minorities should write, produce, broadcast, and distribute video programming, and minorities should own companies and facilities at every link in this chain. Ensuring that media meets the needs of all members of the community is an important component of the public interest.

**6. Other than the reinstatement of the minority tax certificate, which NAB has supported, what measures can Congress take so that more programming and news meeting the critical needs of minority viewers and consumers gets carried over the public airwaves, using public rights-of way?**

The FCC and other policymakers have an obligation to ensure that media companies that use the public airwaves or public rights-of-way are serving the public interest. If media companies are not, I believe policymakers should be more ready than they have been in the past to deny them access to these public assets.

Going forward, I also believe that policymakers should encourage minorities to bypass traditional gatekeepers and produce their own content and distribute it online, while protecting their ability to reach viewers by promoting Internet openness, ensuring that data caps do not discourage the emergence of the Internet as a primary video distribution platform, and ensuring universal access to adequate broadband.

**Mr. Munson says in his testimony that broadcasters are more regulated than any other video platform, including cable and satellite. He goes further to say that FCC public filing rules, including a requirement for local broadcast TV stations to place sensitive pricing information online should also apply to cable systems.**

**7. Assuming for argument that this requirement was made applicable to other video providers, couldn't it lead to more good faith negotiation over retransmission consent agreements?**

The best way to promote good-faith negotiation (apart from the FCC's adoption of a few key per se bad faith rules) would be binding, baseball-style arbitration. In this style of arbitration, each party makes its best offer, and the arbitrator chooses the fairest of the two offers. This encourages each side to make its offer as fair as possible from the beginning and discourages extreme starting negotiating positions. Arbitrators should generally have access to whatever information they need to make a fair assessment.

Certainly, if MVPDs make more information public, this might aid negotiations, as well. While I would hesitate to say that MVPDs should have the exact same disclosure requirements as broadcasters--the public interest calculus for the different types of entity is simply different--I also think that consumers would benefit from knowing where their cable bills are going. Indeed, some MVPDs might welcome certain disclosure requirements, as they can be prohibited from disclosing the terms of carriage deals by contract.

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

**COMMENTS OF PUBLIC KNOWLEDGE**

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## INTRODUCTION AND SUMMARY

The Commission should clarify that online video providers such as Sky Angel are “multichannel video programming distributors” (MVPDs). Only a technology-neutral reading of the term is consistent with the text and purpose of the Communications Act.<sup>1</sup> This action will not redefine all online video platforms as MVPDs. Nor will it define any online video system as a cable system.<sup>2</sup> Rather, only those MVPDs that closely emulate traditional, channel-based MVPDs will be affected. To implement this, the Commission will have to slightly modify a few of its regulations. But this reading is consistent with the technologically-neutral approach Congress has taken to video competition since the Cable Television Consumer Protection and Competition Act of 1992, and as such, no statute stands in the way of this pro-consumer, pro-competitive understanding of the law.

Additionally, the Commission should find that Section 628 of the Communications Act prohibits anti-competitive actions by any MVPD against any video programming distributor, multichannel or not. There is no sound policy reason for the Commission to prohibit anti-competitive actions by one MVPD against another MVPD, but not by an MVPD against a non-MVPD video programming distributor.

Finally, the Commission should issue a further notice of inquiry in this docket that seeks comment on a comprehensive policy framework for non-multichannel

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<sup>1</sup> For example, the Commission is charged with promoting an “efficient” communications system. 47 U.S.C. § 151. The goal of “efficiency” would not be well-served if the Bureau makes distinctions between like systems based only on irrelevant technical implementation details.

<sup>2</sup> For Communications Act purposes. Whether a system is a “cable system” for copyright purposes is another matter. *See* 17 USC § 111.

video. While on-demand content is “video programming” under the Act, it is not channel-based. But it is clear that the market is moving increasingly toward on-demand video, and the Commission should seek to understand the competitive effects that this transition may cause.

**I. The Term “Multichannel Video Programming Distributor” Encompasses All Platforms That Make Available Prescheduled “Video Programming”**

Any provider that makes available multiple channels of video programming is a “multichannel video programming distributor” (“MVPD”). While distributors like Sky Angel indisputably offer “video programming,” the Bureau has asked whether online services offer “channels” of video programming. As used in the Cable Television Consumer Protection and Competition Act of 1992, a “channel” is a stream of signal of prescheduled video programming. Since an online distributor like Sky Angel offers “channels” in this sense just as DirectTV or Time Warner Cable do, such distributors meet the definition of MVPD.

***A. Principles of Statutory Construction Demand That The Commission Take Account of Context When Interpreting a Statute***

The word “channel” is used in different ways in the Communications Act. In a video context, the Act uses the term both in a “container” sense, to refer to a range of frequencies used to transmit programming, and in a “content” sense to refer to the programming itself, or the programmer. This figure of speech is known as synecdoche, and it pervades the language. “When we say ‘the kettle is boiling’ we do not mean that the metal container (the kettle) has become a lump of molten metal;

we mean that the contents of the kettle (the water in it) has boiled.”<sup>3</sup> Thus when the term is used in the Act it is necessary to read the word in either the “container” sense, or in the “contents” sense, as context demands.

There is nothing unusual about reading a statutory term different ways in different contexts. While there is an interpretive presumption that a term that appears several times in a statute is given the same reading each time,<sup>4</sup> the Supreme Court has explained that this presumption “readily yields” and that “[i]t 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>5</sup> As the Court further explained,

Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed.<sup>6</sup>

Commission practice confirms that the same word can be given a different construction when it is used by different acts. For example, the Commission interprets the word “telecommunications” to mean one thing under the Telecommunications Act, and another thing under the Communications Assistance

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<sup>3</sup> CHRISTOPHER KELEN, AN INTRODUCTION TO RHETORICAL TERMS 28 (Humanities-Ebooks 2007).

<sup>4</sup> *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994)

<sup>5</sup> *Atlantic Cleaners & Dyers. v. United States*, 286 US 427, 433-34 (1932)

<sup>6</sup> *Id.* at 433.

for Law Enforcement Act.<sup>7</sup> As the DC Circuit recognized, it is well within the Commission's authority to give words different constructions from one act to another when the different laws evince "different texts, structures, legislative histories, and purposes."<sup>8</sup> Similarly, the word "channel" means one thing when used as part of the Cable Communications Act of 1984<sup>9</sup> ("1984 Cable Act") and another thing when used as part of the definition of multichannel video programming distributor ("MVPD") in the Cable Television Consumer Protection and Competition Act of 1992<sup>10</sup> ("1992 Cable Act"). In particular, the word "channel" in the 1992 Cable Act should be given a "content" reading, since only that reading is consistent with the Act's pro-competitive purposes.

***B. Other Provisions of the Law, Commission Practice, and Common Usage All Demonstrate That the Term "Channel" Has Both a "Container" and a "Contents" Sense***

According to the 1984 Cable Act, "the term 'cable channel' or 'channel' means 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)." In the *Sky Angel Standstill Denial*<sup>11</sup> the Bureau used this definition to find that Sky Angel is not a "multichannel video programming distributor" (MVPD), since an MVPD "makes available for purchase...multiple channels of video programming."<sup>12</sup> The Bureau reasoned that

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<sup>7</sup> See *American Council on Educ. v. FCC*, 451 F. 3d 226, 230 (DC Cir. 2006).

<sup>8</sup> *Id.* at 231.

<sup>9</sup> PL 98-549, 98 Stat. 2779 (1984).

<sup>10</sup> PL 102-385, 106 Stat. 1460 (1992).

<sup>11</sup> *Sky Angel Emergency Petition for Temporary Standstill, Order*, 25 FCC Rcd. 3879 (MB 2010).

<sup>12</sup> 47 USC § 522(13).

Sky Angel does not make available for purchase any “channels” since the electromagnetic frequency spectrum that its video programming uses for transmission is provided by a viewer’s broadband ISP and not by Sky Angel.<sup>13</sup>

This construction’s primary flaw is that it ignores the relevant context. The term “MVPD” was adopted as part of the 1992 Cable Act, not the 1984 Cable Act. As will be discussed below, the 1992 Cable Act was concerned with promoting inter-platform competition and (contrary to the Bureau’s conclusion) not all of systems listed in the statute as illustrative of MVPDs provide a transmission path. But it is important to note that *even the 1984 Cable Act’s definition* uses both senses of the term “channel” (the container sense and the contents sense) when it speaks of one kind of channel carrying another kind of channel. This demonstrates that the drafters of the 1984 Cable Act saw a channel as both a medium of communication (in this case, the frequency which a communication may use) and the content of a communication itself (a television station, or television channel). Otherwise, the statute would be incoherent. Used only in the “container” sense, one channel cannot “deliver” another. A channel can be used to retransmit content, but 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. Thus the 1984 Cable Act’s definition of “channel” itself uses the term “channel” in both the “delivery” sense and the “content” sense.

The Commission frequently uses the term in both senses, as well. For example, in its recent NPRM on revision of the program access rules, it wrote that “consumers

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<sup>13</sup> *Sky Angel Standstill Denial* at ¶ 4.

do not consider the SD version of a particular channel to be an adequate substitute for the HD version.”<sup>14</sup> The word “channel” in this context makes no sense if it means “a portion of the electromagnetic frequency spectrum.” There is no “HD” or “SD” version of a particular frequency band; rather, particular frequency bands can carry content that is in either HD or SD. Similarly the Commission, in discussing the Comcast Network, wrote that “this terrestrially delivered, Comcast-affiliated local news and information channel is available only to Comcast and Cablevision subscribers and is withheld from competitors to incumbent cable operators.”<sup>15</sup> Here again the Commission uses the term to refer to content and not to a frequency band. And in its Comcast/NBCU conditions order, while the Commission declined to resolve whether an online video distributor (OVD) could be an MVPD,<sup>16</sup> it discussed how “the fact that most OVD services do not currently offer consumers all popular linear channels does not mean that they cannot and will not do so in the near future.”<sup>17</sup> Thus the Commission has already acknowledged that no technical barrier stands in the way of online services providing “channels” of programming to their customers. Generally speaking it is clear from context whether the Commission (or Congress) is using “channel” in a content or a container sense, and in those cases

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<sup>14</sup> Revision of the Commission’s Program Access Rules, *Notice of Proposed Rulemaking*, MB Docket No. 12-68, FCC 12-30 (Mar. 20, 2012) at ¶ 54. *See also* Program Access Rules & Examination of Programming Tying Arrangements, *First Report & Order*, 25 FCC Rcd. 746, ¶ 55 (2010).

<sup>15</sup> Program Access Rules & Examination of Programming Tying Arrangements, *First Report & Order*, 25 FCC Rcd. 746, ¶ 30 (2010).

<sup>16</sup> Applications of Comcast Corp., GE Co. & NBC Universal, Inc., *Memorandum Opinion & Order*, 26 FCC Rcd. 4238 (2011) at ¶ 61 n.131.

<sup>17</sup> *Id.* ¶ 80.

where there may be ambiguity, qualifying words (such as “channel capacity”<sup>18</sup>) provide the necessary disambiguation. In the case of the definition of MVPD in the 1992 Cable Act, as will be discussed below, it is clear from the context and purpose of the law that a “channel” is intended to be given a service-based, not a technology-based reading.

Two popular reference works will conclude the demonstration that the word “channel” in a television context frequently is used in two different senses. First, the Oxford English Dictionary defines 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,” providing both senses of the word.<sup>19</sup> Second, Wikipedia, with an ethos very different from the OED, similarly provides both senses. It writes that “[i]n 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,” providing the “container” sense of the word. But it concludes with the content sense, explaining that “[i]n common usage, the term also may be used to refer to the station operating on a particular frequency.”<sup>20</sup>

While the different ways that the 1984 Cable Act, the Commission, or anyone or anything else uses the term does not determine how the 1992 Cable Act uses the term, it is instructive to observe these different senses since they illustrate the

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<sup>18</sup> See Internet Ventures Petition for Declaratory Ruling that Internet Service Providers are Entitled to Leased Access to Cable Facilities, *Memorandum Opinion & Order*, 15 FCC Rcd. 3247 (2000).

<sup>19</sup> Oxford English Dictionary Online Edition, <http://www.oed.com> (accessed May 2, 2012).

<sup>20</sup> Channel (broadcasting), [http://en.wikipedia.org/w/index.php?title=Channel\\_\(broadcasting\)&oldid=442911630](http://en.wikipedia.org/w/index.php?title=Channel_(broadcasting)&oldid=442911630) (last visited May 2, 2012; last edited Aug. 3, 2011).

different meanings the word can have in different contexts. In sections below it will be shown how the word “channel” when read in the context of the 1992 Cable Act must be given a “content” reading, both to make sense of the statutory context and to give effect to Congress’s pro-competitive intent.

***C. The 1992 Cable Act Uses “Channel” To Mean “Prescheduled Video Programming”***

The 1992 Cable Act gives the following definition of “multichannel video programming distributor”:

the term “multichannel video programming distributor” means 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[.]<sup>21</sup>

A plain reading of this definition demonstrates that MVPDs are characterized by what they do, not how they do it. *All* providers who “make[] available for purchase, by subscribers or customers, multiple channels of video programming” qualify. As the FCC has previously found, the plain language of this definition does not require that an MVPD “operate [its] vehicle for distribution.”<sup>22</sup> Indeed, in the Telecommunications Act of 1996 Congress demonstrated that an MVPD need not be facilities-based when it mentioned that an MVPD might “use the facilities” of another provider.<sup>23</sup> This shows that the last time it considered this issue, and consistent with the 1992 Cable Act, Congress found that “MVPD” was a service-oriented category

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<sup>21</sup> 47 U.S.C. § 522(13).

<sup>22</sup> Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, *Third Report & Order & Second Order on Reconsideration*, 11 FCC Rcd. 20227, ¶ 171 (1996).

<sup>23</sup> 47 U.S.C. § 543(l)(1)(D) (discussing a “multichannel video programming distributor using the facilities of [a] carrier or its affiliate”).

and not a technological silo. The law does not require that an MVPD build or operate last-mile wired facilities, launch a satellite, or use any particular technology or method of program delivery.

To further clarify this, Congress provided in its definition a list of every then-existing multichannel service (“a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor”) while expressly reserving that the list was not intended to be exhaustive (“a person such as, but not limited to.”) This demonstrates that Congress intended the definition to encompass technologies that, at the time, had not yet been developed.

In its *Sky Angel Standstill Denial* the Bureau took note of this but reasoned that, because the definition states that an MVPD must be a system “such as” the ones expressly listed, to be an MVPD a system must share characteristics with the ones given.<sup>24</sup> Of course, any MVPD 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. But the Bureau further reasoned that each listed MVPD provides a “transmission path” it uses to deliver video programming.<sup>25</sup> (This reasoning informed its narrow construction of “channel,” discussed below.) In addition to contradicting FCC precedent, this analysis is flawed for at least three reasons.

First, while it may be that a cable system or a telco MVPD “provides” a transmission path in the sense that they physically string copper wires or fiber optic

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<sup>24</sup> *Sky Angel Standstill Denial* at ¶ 7 n.41.

<sup>25</sup> *Id.* at ¶ 7.

cable, wireless systems like DBS and MMDS do not similarly “provide” a transmission paths. They use licensed spectrum to transmit information like any other wireless services. They did not build this spectrum and do not “provide” it.

Second, even if the Bureau decides that wireless systems do “provide” (or “make available”) a transmission path, it is not clear that online systems do not provide transmission paths in the same way. For example, an online video distributor might enter into a relationship whereby it leases and resells last-mile broadband capacity.<sup>26</sup> And even a traditional cable system does not necessarily provide a complete transmission path to a viewer’s television: the viewer herself or a landlord might provide inside wiring, for instance. Given this background, since online services generally own or lease some facilities (such as servers) and “transmit” programming partly on their own Internet connections, they “provide” transmission paths in the same sense as other MVPDs.

Third, it is the wrong question. Nothing in the text or legislative history of the Act suggests that Congress intended to hide an unstated requirement that MVPDs must be facilities-based. Thus analyzing whether or not particular video platform is or is not facilities-based and whether or not it provides a transmission path is an unnecessary diversion. It is clear from context that as part of the definition of MVPD “channel” should be given a “contents” reading. Questions about the nature of the facilities an MVPD uses are thus inapposite. Consumers do not purchase “a portion

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<sup>26</sup> See Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, *Third Report & Order & Second Order on Reconsideration*, 11 FCC Rcd. 20227, ¶ 171 (1996). Furthermore, it is well-established that a “facilities-based” provider may be a reseller. See, e.g., Flying J Petition for Expedited Declaratory Ruling, *Memorandum Opinion & Order*, 18 FCC Rcd. 10311 (2003).

of the electromagnetic spectrum” when they subscribe to an MVPD. They buy access to content—in particular, to channels like NBC, ESPN, and Comedy Central. An MVPD like Comcast even distinguishes its various TV plans as offering different levels of “on demand” and access to different numbers of “channels.”<sup>27</sup> The channels in question are given names like “MTV” and “Discovery,” not like “549.25 MHz.” This demonstrates that what matters to everyone concerned is the content, not the precise carrier.

This practice is consistent with the statute, which makes clear that consumers buy access to “video programming” in two primary ways: on-demand, and via prescheduled channels. The law distinguishes these two services when it provides that

the term ‘interactive on-demand services’ means a service providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming prescheduled by the programming provider[.]<sup>28</sup>

On-demand and prescheduled programming thus represent different models of presenting “video programming.” By defining a kind of service (“interactive on-demand service”) that is distinct from MVPDs, and by providing that video common carriers that offer only interactive on-demand services would not be considered “cable systems” (one kind of MVPD)<sup>29</sup> Congress drew a line between providers of prescheduled video programming on the one hand, and providers of on-demand video programming on the other. Since on-demand video programmers are *not*

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<sup>27</sup> See, for example, Comcast’s overview at <http://comcast.com/Corporate/Learn/DigitalCable/digitalcable.html> (last accessed May 10, 2012).

<sup>28</sup> 47 U.S.C. § 522(12).

<sup>29</sup> 47 U.S.C. § 522(7)(C).

cable systems and are therefore not MVPDs, it follows that a provider of prescheduled video programming *is* an MVPD. Thus, for the purposes of the 1992 Cable Act, a “channel” of video programming must simply mean “prescheduled video programming,” or a provider of such programming.<sup>30</sup>

“Channels” and “on-demand” are both *services*, not technological delivery methods. The overall statutory scheme would fail if a “channel” were found to be a transmission method while “on-demand” remained a service. As will be discussed more fully below, under this reading, there is no reason why an on-demand service could not be delivered via a channel. Only a reading that understands that both of these terms refer to mutually exclusive services prevents such commingling.

***D. The Legislative History of the 1992 Cable Act Confirms That “MVPD” Is a Technology-Neutral Category***

The 1984 Cable Act was “was premised on the expectation that emerging competition in the video marketplace would result in reasonable rates for cable service and improved customer services practices.”<sup>31</sup> However, after its passage “competition to cable from alternative multichannel video technologies largely ... failed to materialize.”<sup>32</sup> Business and regulatory barriers stood in the way of competition, and consumers suffered.

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<sup>30</sup> While an MVPD becomes one by virtue of delivering channels of video programming, video programming it offers via any means (including on demand) may be subject to special requirements. For example, video programming offered on-demand by an MVPD is subject to program access rules while on-demand programming offered by a non-MVPD would not be. See Applications of Comcast Corp., GE Co. & NBC Universal, Inc., *Memorandum Opinion & Order*, 26 FCC Rcd. 4238 (2011) at ¶ 54 n.122.

<sup>31</sup> H.R. Rep. No. 102-628 (1992) at 26.

<sup>32</sup> *Id.*

In response, Congress enacted the 1992 Cable Act. In that Act, rather than simply regulating monopolist cable systems, Congress enacted a series of measures designed to promote consumer welfare by enabling competition to cable from systems that used different transmission methods. Rather than regulating each different system differently according to its technology, Congress created a new service category, “multichannel video programming distributors” (MVPDs), along with a framework that treated all MVPDs alike. Thus, the program access and retransmission consent systems that were central components of the 1992 Cable Act apply to all MVPDs, not just to cable or just to satellite TV. Of course, where there are good reasons to treat different classes of MVPDs differently Congress continues to do so. But the future-proof laws that concern MVPDs generally were specifically designed to be technology-neutral and can apply to online MVPDs today just as, in 1992, they easily encompassed cable, direct broadcast satellite, and multichannel multipoint systems.

A “principal goal” of the 1992 Cable Act was “to encourage competition from alternative and new technologies,”<sup>33</sup> by extending like treatment (e.g., under the program access rules, and for retransmission consent purposes) to like services.<sup>34</sup> This would enable competition rather than regulation to protect consumers. The House found that “competition ultimately will provide the best safeguard for consumers in the video marketplace and strongly prefers competition and the

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<sup>33</sup> *Id.* at 27.

<sup>34</sup> 1992 Cable Act, PL 102-385, 106 Stat. 1460 at 1482 (retransmission consent applies to all multichannel video program distributors), 1494 (some MVPDs are prohibited from taking anti-competitive actions against any MVPD).

development of a competitive marketplace to regulation.”<sup>35</sup> (It also found that “until true competition develops, some tough yet fair and flexible regulatory measures are needed.”<sup>36</sup>) Along these lines, the Senate found that “[e]ffective competition is achieved when there is competition from both another ‘multichannel provider’ (such as a competing cable operator, microwave or satellite system) and a sufficient number of over-the-air broadcast signals”<sup>37</sup>—thus recognizing the need for broad, multi-platform competition between video providers without regard to their specific modes of operation.

The fact that online MVPDs were not yet possible when Congress passed the 1992 Cable Act is of no importance. To be sure, Congress enacted the 1992 Cable Act in response to conditions that were prevalent in 1992.<sup>38</sup> But in defining MVPDs it used broad language, and “[t]he use of broad language ... to solve [a] relatively specific problem ... militates strongly in favor of giving [a statute] broad application.”<sup>39</sup> In any event the problem that it sought to solve—consumer harms caused by a lack of sufficient competition—persists today. And the solution is the same: a service-oriented approach to the video market that permits MVPDs using any technology to compete with established cable systems.

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<sup>35</sup> H.R. Rep. No. 102-628 (1992) at 30.

<sup>36</sup> *Id.*

<sup>37</sup> S. Rep. No. 102-92 (1992) at 63.

<sup>38</sup> The legislative history’s reference to “facilities-based” competition should be read in this light. *See* H.R. Rep. No. 102-862 at 993 (1992). In 1992 the main competition to cable that could be foreseen was facilities-based. However, given the broad language of the Act, the pro-competitive policies that Congress enacted should not be confined to particular kinds of technology.

<sup>39</sup> *Consumer Electronics Ass’n v. FCC*, 347 F. 3d 291 (D.C. Cir 2003).

Given the pro-competitive, technology-agnostic approach evinced in the statute and the legislative history it is clear that Congress intended “MVPD” to be a service category, not a technological silo. If it intended to require that MVPDs be facilities-based it could have easily said so in the statute. It is unlikely that it would have enacted such a requirement through the circuitous means of incorporating in its definition one of the possible senses (the “container” sense) of the word “channel.”<sup>40</sup> Thus, the Bureau should revise the construction of “channel” as contained in the definition of MVPD that it adopted in the *Sky Angel Standstill Denial* to reflect Congress’s technology-neutral intent.

***E. A Narrow Reading of “Channel” Would Have Unintended Consequences***

Unless the Bureau revises the restrictive definition of “channel” it adopted in the *Sky Angel Standstill Denial*, numerous unintended consequences will follow. These go beyond the anti-competitive and anti-consumer effects that would be expected to follow from artificially restricting market entry. Instead the Bureau may find that many “channels” that are currently offered by MVPDs are not channels at all anymore—or it may find that other services offered by MVPDs, such as interactive apps or on-demand programming are suddenly defined as “channels,” based only on the behind-the-scenes technical characteristics of the way that the content is delivered.

For example, if the Bureau continues to hold that an MVPD must provide its subscribers with a transmission path, then any programming that is delivered without a fixed transmission path may become ineligible. IP-based MVPDs such as

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<sup>40</sup> See *Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001).

U-Verse that may not assign particular programming networks particular frequencies may not provide any “channels” at all if “channel” is defined in this way. Switched digital networks on cable systems may no longer count as “channels” since they are not continually broadcast on a fixed “portion of the electromagnetic frequency spectrum.” And 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. At the same time, if an MVPD provides its video-on-demand or other services on particular bands of frequencies, then these services would be considered “channels” under the Commission’s rules. **There is *nothing* in the definition of “channel” as adopted by the *Sky Angel Standstill Denial* that would exclude on-demand services.** As was mentioned above, because “on-demand” is a kind of service, if “channel” refers to a means of delivery then on-demand video programming could very well be delivered via a “channel.” By contrast, a service-based reading of “channel” precludes this. For the purposes of defining an MVPD, only a service-based reading of the term “channel” that refers to a prescheduled transmission of video programming is sufficient to both 1) ensure that traditional “channels” continue to be considered “channels” under the Commission’s rules, and 2) ensure that *only* traditional channels are considered “channels” under the Commission’s rules.

Needless to say such shifting categories would wreak havoc with the Commission’s ability to oversee the MVPD market—existing programming may fall outside the program access rules while other services come within them, and MVPDs would have an incentive to engineer their systems inefficiently just to

qualify for, or fall outside of, particular rules. The Commission has seen ample evidence of exactly this kind of behavior—MVPDs have continually tried to skate around FCC and Congressional policy by delivering programming via terrestrial wires instead of satellite, providing only the standard definition and not the high definition versions of feeds to competitors, and so forth. It does not require much imagination to see how a cable system might stop providing some programming to a DBS competitor by claiming that this programming no longer counted as a “channel” under the Commission’s rules since it is not offered over an assigned transmission path.

***F. Many Policy Benefits Would Follow From the Bureau’s Clarification That Online Services Can Choose to Compete as MVPDs***

*1. Consumers Would Benefit*

By clarifying that an online system can qualify as an MVPD, the Bureau will significantly benefit consumers. A typical viewer will go from having a choice of one or two MVPDs to any number of them. Just as a reader today is no longer limited to the local newspaper and one or two national papers, but can read online news from around the country and around the world, by clarifying that online systems can qualify as MVPDs, the Bureau will make it so that viewers can choose from between a large number of competitive MVPDs instead of being limited to the same few options, year after year.

*2. Independent Programmers Would Benefit*

Independent programmers will benefit, as well. Today an independent programmer has no choice but to deal with a handful of large programming distributors, on terms the distributors set. While the program access rules prevent

an MVPD from keeping a programmer from being carried by other current MVPDs, nothing at the moment prevents a company like Comcast demanding, as a condition for being carried on Comcast, that the programmer stay off of online platforms. With its clarification the Commission will fix that by extending the same protection that programmers enjoy with respect to current competitive MVPDs to online MVPDs. This will ensure that programmers can bid distributors against each other, extract more favorable terms, and extend the reach of their programs.

*3. All Online Video Distributors Would Benefit, Even Ones That Are Not MVPDs*

Non-MVPD online programmers will benefit from the FCC's clarification, as well. Many online video platforms like Netflix and Vimeo have chosen business models that take them outside the meaning of "MVPD." These new models of video distribution have been a boon to both viewers and content creators, but they are not full substitutes for traditional MVPD service. They usually lack "must-see" programming such as current TV shows, live sports, and popular cable networks. While many viewers have "cut the cord" (cancelled their MVPD subscription) and replicated much of what they might have watched through free over-the-air broadcast TV and mixing and matching online services, this is generally an imperfect substitute that does not offer all of the programming available through a traditional MVPD—and is technologically complex (and somewhat cumbersome) besides. But if more viewers were able to access *all* of the programming they currently access through a traditional MVPD subscription online, more consumers might be able to switch completely to competitive offerings. For example, a given viewer might not have an Amazon Instant Video subscription today, since she finds

cable programming indispensable and, on-balance, finds that cable on-demand video is good enough to not justify subscribing to an online service. But if online MVPDs were allowed to thrive consumers might be able to efficiently mix and match, obtaining on-demand video from one source and traditional network and cable channels from another source. So if a viewer were able to subscribe to an online MVPD and access the indispensable programming that currently keeps her tied to cable, she might find that Amazon Instant Video serves well as the on-demand component of her viewing. Online MVPDs would therefore benefit non-MVPD video distributors by allowing viewers to fill in the gaps and obtain the programming that the non-MVPDs cannot or do not provide, which makes viewers more likely to switch to competitive online offerings.

Additionally, it is likely that in a world with online MVPDs, non-MVPD online video program distributors might be able to access programming they are currently shut out from. Currently, facilities-based MVPDs seek out and obtain some measure of exclusivity, which can limit online distribution. But if online MVPDs had the same access to programming as facilities-based MVPDs then that exclusivity would be impossible. There would thus be no reason for an MVPD to keep programming off of non-MVPD platforms such as iTunes or Netflix.

#### *4. Device Makers and Their Customers Would Benefit*

A rise in the number of cord-cutters would also benefit companies that make devices and services that facilitate online viewing, such as Boxee, Roku, Hauppauge, and many others. Today a viewer might not be willing to invest in a device that makes online video as easy or easier to watch than traditional MVPD video, since it

would be an additional box, taking up space next to a cable set-top box and being yet another gizmo to set up, configure, and maintain. But if a viewer could use such a device to watch every kind of content it is more likely that they would be willing to cut the cord and invest in such a device. This would have a number of positive effects.

Currently MVPD viewers are, for the most part, stuck using MVPD-provided devices to navigate and watch TV. Compared with the competitive markets in smartphones, tablets, computers, and other areas of consumer electronics these devices have bad user interfaces, few features, and are generally poor. This is simply because a lack of competitive pressure eliminates the incentive for the companies that provide these devices to innovate. MVPDs buy these devices from manufacturers, not consumers, so the devices tend to reflect the MVPD priority to keep consumers watching MVPD and not online content, and not the viewer priority to have an intuitive, useful device. The consumers who are stuck using these boxes have no alternatives; they cannot simply go to the store and buy a better one. The competitive marketplace for devices that would arise in the wake of the FCC's decision to allow online MVPDs to play by the same rules as other MVPDs would improve this situation, allowing devices like the Roku and the Apple TV (which are already superior to cable set-top boxes) to begin providing all, not just some, of a viewers content. The increase utility of these devices would attract yet more companies to the market,<sup>41</sup> and would in turn encourage cord-cutting, which would

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<sup>41</sup> Sony, Apple, and Intel have all been reported as being interested in entering the online MVPD market. See Yukari Iwatani Kane & Ethan Smith, *Apple Sees New Money in Old Media*, WALL STREET JOURNAL,

encourage new online video platforms. These virtuous cycles would benefit viewers and significantly improve video competition generally.

*5. Competitive MVPDs Would Benefit*

Finally, online MVPDs would also benefit current, facilities-based MVPDs in a number of ways. Currently, many MVPDs pay high rates for retransmission consent. But if an MVPD's customers were able to access broadcast content from other sources, the MVPD might simply decline to carry expensive broadcast signals, saving significantly without inconveniencing its customers (or offsetting that inconvenience with lower rates). Additionally, a more fluid MVPD market would allow current MVPDs to become online MVPDs as well, competing outside of their traditional service areas.

***G. The Majority of Current Online Video Services Are Not, and Could Not Become, MVPDs Unless They Chose To***

Although this should be evident from the above, it bears emphasizing that by clarifying that a "channel" can be provided online, the Bureau would not somehow transform current services like Hulu, Netflix, and iTunes into MVPDs. While they provide "video programming" within the meaning of the law, these services do not offer channels of programming—their content is typically available on demand. If the Bureau acts consistently with these comments their regulatory status would not change.

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<http://online.wsj.com/article/SB10001424052748703405704575015362653644260.html> (Jan. 22, 2010) (Apple); Marguerite Reardon, *Is Intel Developing an Online TV Service?*, CNET, [http://news.cnet.com/8301-30686\\_3-57395834-266/is-intel-developing-an-online-tv-service/](http://news.cnet.com/8301-30686_3-57395834-266/is-intel-developing-an-online-tv-service/) (Mar. 12, 2012) (Intel); Andrew Wallenstein, *Sony Virtual MSO Play Could Hinge on Comcast*, VARIETY, <http://www.variety.com/article/VR1118053341> (Apr. 30, 2012) (Sony).

However, the Bureau’s action would allow any service that *chooses* to operate as an MVPD to do so. Any service that begins to offer video programming via multiple channels online would be able to benefit from the retransmission consent and program access regimes, and would, like any other MVPD, be subject to public interest obligations.<sup>42</sup> By adopting a proper reading of “MVPD” that includes online services the Commission will both promote new entry and competition without extending regulations to any services that do not wish to operate as MVPDs.

## **II. The Commission Has Discretion to Interpret the Law to Enhance Competition**

### ***A. The Commission Should Resolve Any Statutory Ambiguity in Favor of Competition***

The terms “channel” and “multichannel video programming distributor” are not ambiguous. As discussed above, in the context of the 1992 Cable Act “channel” unambiguously refers to a stream of prescheduled video programming, and a multichannel video programming distributor is any provider who provides this service, such as a cable system, DBS, or an online provider such as Sky Angel.

However, if the Commission finds the statute and the legislative history insufficient to demonstrate whether an online video service can be defined as an MVPD, the Commission has the authority to make that clarification. Under the Commission’s *Chevron* deference it has the authority to interpret the relevant terms

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<sup>42</sup> To be sure a proper reading of “MVPD” or “channel” is not the end of the legal work that the Commission will have to do to accommodate online MVPDs—the Commission may have to update some of its MVPD-wide rules, such as CableCARD support, 47 C.F.R. §§ 76.1200-76.1210, and certain technical requirements, *e.g.* 47 C.F.R. § 76.610, to better ensure that Congressional intent is carried out with respect to this new technology. But such ministerial fixes are well within the Commission’s authority and are a necessary part of carrying out the pro-competitive goals of the 1992 Cable Act.

and find that online services can be treated as MVPDs. Congress delegated power to the Commission to adopt the interpretation of ambiguous language that best furthers the public interest goals of the Communications Act. As the Supreme Court explained, “[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.”<sup>43</sup> Here, if the Commission finds that the operative definitions do not definitively answer whether online systems that offer channels of programming are MVPDs, it should use its implicit delegation of authority to clarify the terms in a way that gives effect to Congress’s pro-competitive intent.

***B. The Commission Can Use Its Ancillary Authority to Promote Video Distribution Competition***

Furthermore, even if the Commission adopts a reading of statutory language that puts online services outside of the definition of “MVPD,” it still has ancillary authority to determine that online services will be treated *as if* they were MVPDs. Congress expressly gave the Commission power “to perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”<sup>44</sup> There are two conditions for ancillary jurisdiction and both are satisfied here.<sup>45</sup> First, the Commission’s general

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<sup>43</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984).

<sup>44</sup> 47 U.S.C. § 154(i). See *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

<sup>45</sup> See *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010); *American Library Ass’n v. FCC*, 406 F.3d 889, 691-92 (D.C. Cir. 2005).

jurisdictional grant under Title I covers all “communication by wire or radio,”<sup>46</sup> which includes online delivery of video programming, and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities because of the close relationship between online services, broadcasting, and facilities-based MVPDs. In *Southwestern Cable*, the Supreme Court explained that the Commission did not have express authority over cable television under the then-existing Communications Act, but the Commission could regulate cable television to the extent “reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting.”<sup>47</sup> Just as cable television was reasonably ancillary to regulating television broadcasting, online video services are reasonably ancillary to regulating MVPDs. Therefore, the Commission has the discretion to treat online services that offer MVPD services as though they were MVPDs even in the event it chooses to read the relevant statutes in a way that excludes online services.

### **III. The Commission Should Update Its Policy Framework for Online and On Demand Video**

#### ***A. Section 628 Prohibits Anti-Competitive Actions By an MVPD Against Any Video Distributor***

The Commission should use its authority over the video programming distribution market to protect online video distribution generally, by prohibiting MVPDs from behaving anticompetitively in ways that harm any video distributor, whether or not it is an MVPD. Section 628 of the Communications Act provides authority for this. This Section bans any actions “the purpose or effect of which is to

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<sup>46</sup> 47 U.S.C. §§ 151, 152.

<sup>47</sup> *Comcast*, 600 F.3d at 646 *citing Southwestern Cable Co.*, 392 U.S. at 178.

hinder significantly or to prevent any multichannel video programming distributor from providing ... programming to subscribers or consumers.”<sup>48</sup> The close connection between the markets for MVPD and non-MVPD video distribution mean that anticompetitive actions taken against an non-MVPD would likely have a deleterious effect on the ability of a competitive MVPD to offer programming—for example, by increasing its costs, or inhibiting the ability of an MVPD to offer programming on demand or online. The Commission and the courts have traditionally given Section 628 a “broad and sweeping”<sup>49</sup> reading that gives the Commission the authority to protect video competition as necessary. The Commission should follow this precedent and find that Section 628 prohibits anti-competitive actions by MVPDs against video distributors generally.

***B. The Commission Should Consider the Policy Implications of the Increasing Popularity of On Demand Video***

Finally, as more video moves online and as on-demand services have become an ever-greater part of even traditional MVPDs’ offerings, it seems apparent that “channel”-oriented video consumption may, in the near future, no longer be the dominant way that viewers access some forms of programming. Some kinds of “must-see” programming may move solely to on-demand video and thus fall outside the Commission’s competition rules. While the program access proceeding provides a vehicle to address some of these issues that docket is far more complex and deals with many other issues. Thus, in a further Notice of Inquiry in this docket, the Commission should begin to consider the ways in which its competitive framework

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<sup>48</sup> 47 U.S.C. § 548.

<sup>49</sup> *Cablevision v. FCC*, 649 F.3d 695, 704 (D.C. Cir. 2011) (citing *Nat. Cable & Telecommunications Assoc. v. FCC*, 567 F. 3d 659, 664 (D.C. Cir. 2009)).

is challenged by the rise of on-demand video, and what steps it can take to ensure that the video market becomes more competitive.

**CONCLUSION**

For the reasons above, the Commission should find that online services that offer multiple channels of video programming fall within the statutory definition of “multichannel video programming distributor.”

Respectfully submitted,

John Bergmayer  
*Senior Staff Attorney*  
PUBLIC KNOWLEDGE

May 14, 2012

**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 PUBLIC KNOWLEDGE**

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June 13, 2012

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## INTRODUCTION AND SUMMARY

The commenters in this proceeding have put forth a variety of legal and policy arguments both for and against the Commission recognizing that certain online providers can be multichannel video programming distributors (MVPDs). Certain misconceptions seem common among many commenters opposed to this pro-competitive action. These reply comments will briefly address these concerns as well as addressing related matters.

First, even supporter's of the Media Bureau's initial interpretation that provision of multiple, physical conduits to the home similar to 1984-style analog cable channels is the *sine qua non* of MVPD status concede that there is nothing in the plain language of the statute that compels such an interpretation.<sup>1</sup> Not only—as Public Knowledge, DirecTV, and AT&T observed in their initial comments—would such an interpretation would exclude many existing MVPDs, it would require the FCC to make constant arbitrary distinctions as to what does or doesn't constitute a “transmission path” and how much of the transmission path must an entity provide to win MVPD status. How would the FCC distinguish, for example, Sky Angel's physical facilities at the beginning of its transmission path where it receives the programming and the box it provides users to decode the programming from, for example, a DBS provider leasing a transponder on a satellite and using the “public airwaves” to transmit programming to a satellite receiver dish? Why is transmission

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<sup>1</sup> Comments of Comcast in MB Docket No. 12-83 (May 14, 2012), at 8 (asking the Bureau to disregard the “untidiness” of the statutory language because “the intention was plain and universally understood”). Comcast's argument is somewhat undercut, however, by its insistence that this “plainly understood” meaning applied only to DBS, when the statute explicitly states otherwise. *Id.*

of programming to cable headends via satellite permissible, but transmission through the Internet “cloud” is not? Will Verizon Wireless become an MVPD if it offers subscribers an option to stream Time Warner Cable’s video service, because it is now Verizon Wireless offering the “channel”?

It is far more sensible, and more in keeping with both the statutory language and the Legislative intent, to use the functional definition of MVPD urged by PK and others. The interpretation urged by the cable incumbents invites arbitrary distinctions that will only increase confusion and chill innovation and investment as the market increasingly embraces digital technologies.

Second, nothing in this proceeding would impact cable-specific regulation nor would Sky Angel or similar MVPDs acquire cable-specific obligations. Comcast’s inexplicable but undoubtedly sincere concern that its would-be rivals will be crushed by the unbearable burdens that only a facilities based provider can endure is touching, but unwarranted.<sup>2</sup> Likewise, the somewhat more understandable concern from content providers with regard to preserving retransmission consent revenues, or from existing online tech companies that they will be transformed into MVPDs, is equally unwarranted.

On the other extreme, certain existing incumbents argue that a finding for Sky Angel will lower the barriers to competition and unleash competition “disruptive” to existing industry arrangements is somewhat more substantive. Accordingly, they argue for a definition that will suitably shackle new entrants and preserve the status quo. While PK wishes it could share the optimistic view of some commenters that

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<sup>2</sup> Comcast Comments at 10-13.

the barriers to entry will drop so low that *anyone* could start a competing MVPD,<sup>3</sup> the cost of programming and other factors seem likely to keep out many would-be competitors.

Section 628 and the 1992 Act generally were intended to facilitate precisely the kind of “disruptive” competition these incumbents fear. It does not, as the incumbents suggest, provide free programming. It does not even provide the kind of price-control subsidy cable operators enjoy under the pole attachment rules. It simply gives those online distributors that want to provide MVPD services a level playing field on which to compete. The FCC should honor the Congressional intent to promote such “disruptive” competition by adopting a non-facilities based definition of “MVPD.”

Finally, if the Bureau determines that “MVPD” and “channel” are ambiguous, it should refer the matter *en banc* to the Commission because the Bureau does not have the authority to decide novel questions of law.

**I. There is No Requirement That an MVPD Must Provide a Complete Physical Transmission Path to a Viewer—Especially Since Such a Requirement Might Exclude Traditional MVPDs.**

The law does not require that an MVPD must provide the entire “transmission path” that takes service to the customer, and arguing otherwise leads to absurd results. Syncbak is correct to observe that most ISPs do not provide a complete transmission path to a consumer’s home: the last step of an Internet connection is typically provided over user-provided WiFi or ethernet.<sup>4</sup> Similarly, the last step of a cable “transmission path” may be home wiring provided by the subscriber or

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<sup>3</sup> Comments of Cablevision in MB Docket No. 12-83, at 4 (May 14, 2012).

<sup>4</sup> Comments of Syncbak in MB Docket No. 12-83, at 8-9 (May 14, 2012).

building owner and not over wires provided by a cable operator. Homes and apartment buildings, for example, may be built with coaxial wiring preinstalled. Furthermore, cable systems have historically not provided “end to end” transmission of programming—leased satellite transmission capacity and other means are often part of the transmission path. And as MVPDs increasingly provide services to subscribers “over the top”—through video streaming apps, initiatives like TV Everywhere, and so forth—it becomes even more difficult to hold on to a requirement that MVPDs provide “transmission” as well as content.<sup>5</sup>

These issues illustrates the problems that arise from an overly physicalistic view of a “channel”—*e.g.*, suddenly a cable provider is not an MVPD—and argues against the Bureau creating a non-statutory requirement that MVPDs must provide a “transmission path,” however conceived. Under this supposed “plain meaning” of the statute, the Commission will increasingly be required to make and justify arbitrary distinctions over what physical facilities an MVPD must provide. Is it sufficient that Sky Angel has physical facilities where it receives satellite distributed programming and transmits this to subscribers, who must have a physical box to decode the channels? It is hard to distinguish this from providers using wireless transmission, such as Wireless Cable providers and DBS providers, except that Sky Angle uses the Cloud and DBS provider use the public airwaves.

Such an interpretation would also raise questions where a wireless provider such as Verizon Wireless offers a video service. If what matters is the physicality,

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<sup>5</sup> Also, as PK argued in its initial comments, there is no reason to conclude that wireless services such as DBS provide a transmission path to consumers. Radio broadcasting does not involve any sort of physical “path.”

not the nature of the programming, then Verizon Wireless' Viewdini service would appear to be an MVPD service because it aggregates multiple "video programming" which it provides through wireless channels. But Sky Angel, which actually pays to acquire programming and which maintains its own facilities, would not be an MVPD. This obviously absurd result—and resulting confusion—is best avoided by adopting a definition of MVPD that relies on what consumers commonly understand as a programming channel rather than on artificial distinctions not found in the statute.

Nevertheless, to the extent that the Bureau does decide to impose such a requirement, there is still no reason that online services cannot qualify as MVPDs. Syncbak is further correct that online services, as much as traditional cable systems, can be viewed as providing "transmission paths" to viewers' homes. In the case of online MVPDs, the transmission paths are composed of multiple physical and logical links. As PK argued in its comments,<sup>6</sup> there is no requirement that an MVPD provide a complete *physical* transmission path to a viewer—especially since such a requirement might exclude many traditional MVPDs. Thus the recognition that logical links would satisfy any transmission path requirement settles the issue that online services can qualify as MVPDs.

## **II. The Proper Reading of "MVPD" Does Not Affect Cable-Specific Regulation.**

As Public Knowledge (PK) discussed in its comments,<sup>7</sup> the statute and Commission regulations use the word "channel" differently in different contexts. Thus, if the Bureau does hold that an online service can be an MVPD and finds that

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<sup>6</sup> Comments of Public Knowledge in MB Docket No. 12-83, at 10 (May 14, 2012).

<sup>7</sup> Comments of Public Knowledge at 2-15 (May 14, 2012).

the word “channel” in the definition of MVPD does not refer to a specific physical transmission path, there would be no effect on any provisions that plainly do use the word channel to refer to a communications path and not to programming. In particular, when the statute speaks of “channel capacity,” it is apparent that Congress intended the phrase to refer to capacity and not programming.<sup>8</sup>

Thus, what the Bureau does in this context will have no effect on rules about public, educational, or governmental (PEG) use of cable systems (nor on the question of who may qualify as a cable system as opposed to the broader category of MVPD). Nor will it impact franchise fees, pole attachment rates, or any other obligations or privileges uniquely assigned to the cable industry. The argument that adoption of a definition of MVPD that would somehow alter the regulatory status of existing cable systems, or that Sky Angel or other MVPDs using broadband to bring programming to the home of the viewer would find themselves subject to cable-specific regulations, is utterly unfounded.

### **III. Although A Decision For Sky Angel Will Lower Barriers To Entry and Spur Competition, The Cost of Programming and Other Obligations Associated With MVPD Status Will Still Limit Entry.**

Cablevision is representative of commenters that urge the Commission to avoid the disruption that would stem from clarifying what services are MVPDs. It writes:

De-coupling MVPD status from facilities ownership or control would effectively enable anyone to leverage the offering of a handful of amateur video clips into a right to demand access to high quality programming networks, a change of such far-reaching consequences for the video distribution and programming industries that it cannot be the correct interpretation of the term.<sup>9</sup>

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<sup>8</sup> See 47 U.S.C. § 531.

<sup>9</sup> Comments of Cablevision in MB Docket No. 12-83, at 4 (May 14, 2012).

Because the notice primarily raised issues of statutory interpretation, it is not initially clear what weight the Bureau should give such concerns. Here, Congress has created a broad category (multichannel video programming distributors) that unambiguously includes online providers that offer content via “channels,” and the Bureau has no choice but to give effect to Congressional intent. Standard tools of statutory interpretation, including consulting the legislative history to the extent that it is necessary to clarify Congressional intent, suffice.

Thus, in some respects, Cablevision’s concern is simply irrelevant. But when considering that Congressional intent to improve competition is clearly concordant with good policy, the issues Cablevision raises become relevant because the “harm” that Cablevision foresees is actually in the public interest. The “far-reaching consequences” it complains of are nothing more than the salutary effects of competition. Anyone *should* be able to start an MVPD. Nothing the Bureau does would somehow give online providers content for free or on terms that are somehow more favorable than those Cablevision itself enjoys—online MVPDs will have capital and content costs like any others.

The regulatory implications of clarifying who may be an MVPD may be profound. While none of the MVPD-related *statutes* raise any problems, the Commission will have to update many of its implementing rules to account for the full technological variety of different kinds of MVPDs.<sup>10</sup> But contrary to some commenters, the results

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<sup>10</sup> One issue the Commission will have to grapple with relates to geography. An online MVPD, of course, has nationwide footprint like satellite, rather than a local footprint like cable. If such an MVPD carries a broadcast signal, should it only be allowed to make that signal available to its original market? Why should the Commission extend legacy requirements that stem from the physically local nature

of this clarification will not simply be a boon for online operators (and consumers), since there are regulatory obligations as well as benefits that attend MVPD status.

As the Bureau summarized:

The regulatory benefits of MVPD status include the right to seek relief under the program access rules and the retransmission consent rules. Among the regulatory obligations of MVPDs are statutory and regulatory requirements relating to program carriage, the competitive availability of navigation devices (including the integration ban), the requirement to negotiate in good faith with broadcasters for retransmission consent, Equal Employment Opportunity (“EEO”) requirements, closed captioning and emergency information requirements, various technical requirements (such as signal leakage restrictions), and cable inside wiring requirements.<sup>11</sup>

Given this array of regulatory obligations, the choice to become an online MVPD is not an easy one. In addition to capital and funding the entity must be willing to operate in a regulated environment. But since entities like Sky Angel have shown they are willing to do this, the Commission’s rules should not prevent them from providing a dose of healthy disruption to the video market.

**IV. The Bureau Should Refer the Matter *En Banc* to the Commission if the Bureau Finds That “MVPD” and “Channel” are Ambiguous Because the Bureau Lacks Delegated Authority to Decide Novel Issues of Law.**

PK does not concede that the definition of MVPD or channel is ambiguous because the evidence so strongly suggests a technology-neutral reading. Nevertheless the very existence of this proceeding shows that these definitions are, at least, controversial. If the Bureau does decide that the relevant terms are

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of broadcast and cable to the online world? *See* Comments of M3X Media in MB Docket No. 12-83, at 7-9 (May 14, 2012) (initiating this discussion).

<sup>11</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, ¶2 (Mar. 30, 2012).

ambiguous, PK urges the Bureau to refer the matter *en banc* to the Commission, since the Bureau lacks the delegated authority to decide novel issues of law.<sup>12</sup>

Ambiguous terms in the Communications Acts represent implicit delegations of authority from Congress to the Commission to “fill in the gaps” with its policy expertise.<sup>13</sup> As PK discussed at length in its comments the sound policy in this case favors competition and not unnecessary technology-drawn barriers to entry. Thus if the Commission finds it necessary to clarify an ambiguous term where Congressional intent is not clear, it should do so in the only way that benefits the public by finding that online providers can be classified as MVPDs.

## **CONCLUSION**

For the reasons above and in PK’s initial comments, the Commission should find that online services that offer multiple channels of video programming fall within the statutory definition of “multichannel video programming distributor.”

Respectfully submitted,

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<sup>12</sup> See 47 CFR § 0.283(c) (matters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines must be referred to the Commission *en banc*, rather than the Chief of the Media Bureau, for disposition).

<sup>13</sup> See Comments of Public Knowledge at 23, citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984).