



Virginia Association of Broadcasters Legal Review



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FCC SEEKS COMMENT ON INCLUDING INTERNET-BASED PROGRAMMING DISTRIBUTORS WITHIN THE DEFINITION OF “MVPD”

In a [Notice of Proposed Rulemaking](#) issued on December 19, 2014 (the “Notice”), the Federal Communications Commission announced its intent to “modernize” the interpretation of “multichannel video programming distributor” or “MVPD” to include services that make video programming available to subscribers over the Internet—that is, “online video distributors” or “OVDs.” The Notice represents the latest step in the FCC’s years-long consideration of this issue, first raised by a 2010 program access complaint filed by Internet-based programming distributor Sky Angel U.S., LLC. The Media Bureau issued a public notice seeking comment on its tentative interpretation of the term “MVPD” in 2012; the Media Bureau has since terminated that docket to allow the Commission to seek broad public input on the important issues raised by the current Notice.

To justify the Commission’s proposed expansion of the term, the Notice cites congressional intent that “MVPD” be defined “in a broad and technology-neutral way” and remain “sufficiently flexible to cover providers using new technologies” as well as the Commission’s obligation to promote competition in the delivery of video programming. A broadened interpretation of the term MVPD, the Commission believes, will encourage innovation and competition, to the ultimate benefit of consumers, by ensuring both that OVDs have access to programming that viewers want and that consumers have greater choice in video programming distributors.

Several issues raised by the Notice are of particular interest to broadcasters, including the following:

- The broad, technology-neutral interpretation of MVPD proposed by the Notice would include subscription-based services (such as Aereo, Inc.) that provide “multiple streams of video programming distributed at a prescheduled time”—that is, “linear” programming—rather than programming available at the viewer’s

choosing. The Commission’s proposed interpretation, then, would *exclude* on-demand services such as Netflix and Hulu Plus.

- The Commission’s proposal would include OVDs within the definition of MVPDs regardless of whether the distribution service controls the “transmission path”—that is, the physical facility—by which programming is delivered to subscribers. The Commission views that non-facilities-based interpretation as consistent with the operative language of the Communications Act, the Commission’s own prior rulings, congressional intent, consumer expectations, and industry trends.
- The Notice tentatively concludes that the regulatory definition should *exclude* a distributor that only makes its own programming available over the Internet, such as online offerings provided by sports leagues or a television network’s streaming service.
- The Commission seeks comment on whether OVDs must offer a minimum number of channels or hours of programming before it would be considered an MVPD.
- The Notice asks whether an OVD should be allowed to decide whether it wants to be classified as an MVPD—and whether the Commission has the authority to implement such a rule.
- The Notice seeks comment on the costs and benefits of extending both the regulatory *privileges* (such as the program access rules and the retransmission consent regime) and *obligations* (such as the good faith negotiation requirement for retransmission consent, the closed captioning and video description rules, and EEO requirements) applicable to traditional MVPDs to Internet-based distribution services. The Commission notes that certain regulatory obligations might require waiver or modification for Internet-based services and seeks detailed comment on each of several specific obligations.
- The Commission seeks comment on the interplay between the expanded interpretation of MVPD and the fact that OVDs are not entitled to a statutory copyright license. That issue was brought into sharp relief by Internet start-up Aereo’s efforts earlier this year to invoke the compulsory copyright license and the Copyright Office’s tentative refusal of Aereo’s request.
- The Notice also raises a number of other issues related to the “practical impacts” of the good faith negotiation requirement for both OVDs and broadcasters, including whether broadcasters will be obligated to negotiate for retransmission consent with thousands of OVDs (and vice-versa), how the good-faith negotiation rules will apply if an OVD seeks to carry only network programming or to carry local broadcast stations nationwide, and the impact of network affiliation

agreements on local stations' ability to grant retransmission rights to Internet-based MVPDs.

- The Notice observes that certain statutory and regulatory requirements specific to cable and satellite operators, such as the network non-duplication and syndicated exclusivity rules, do not apply to "MVPDs" and thus will not apply to OVDs unless they also qualify as one of those services. The Commission seeks comment on whether any of the cable- or satellite-specific obligations should be extended to OVDs and, if so, whether the Commission has the authority to impose them.
- The Notice discusses at some length the need to ensure that an expanded interpretation of "MVPD" does not allow incumbent cable and satellite providers to evade regulatory requirements by migrating their services to the Internet. To that end, the Commission makes clear that cable and satellite providers' traditional offerings would remain subject to existing regulations (even if, in the case of cable service, the cable operator provides managed video programming services over its own facilities using Internet-based delivery), while new "over the top" video services would be regulated only as MVPDs under the Commission's proposed definition.

As this list indicates, the MVPD proceeding raises a host of complex, interrelated issues that broadcasters will need to address through their trade associations in coming weeks. Although these issues are of enormous significance to broadcasters (as well as traditional MVPDs) and are likely to prompt numerous comments, the Commission has set an aggressive comment cycle: Initial comments are due within 30 days of publication of the Notice in the Federal Register (which, as of January 8, 2015, has not yet occurred), and reply comments are due 15 days later. We will keep you informed of developments in this important proceeding.

by Wade Hargrove and Julia Ambrose

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**FCC ANNOUNCES SEVERAL DATE CHANGES: SPECTRUM AUCTION
COMMENT DEADLINES; SPECTRUM AUCTION WEBINARS;
CLOSED CAPTIONING RULES**

A. Spectrum Auction Comment Deadlines Extended

In our Legal Memorandum dated December 29, 2014, we provided the deadlines for filing comments and reply comments in response to the recently-adopted [Public Notice](#) in the FCC's broadcast spectrum auction proceeding. On January 7, 2015, the FCC announced an extension of those deadlines. Parties wishing to file in response to the Public Notice relating to the mechanics of how the auction will be conducted will now have until February 13, 2015, to file comments and until March 13, 2015, to file reply comments.

B. Spectrum Auction Webinar Dates Changed

On December 19, 2014, the FCC announced that it would conduct a series of webinars relating to the spectrum auction and, more specifically, to the recently-adopted [Public Notice](#) (i.e., the same Public Notice for which the comment deadlines were just extended, as noted above). These webinars are intended to facilitate public input on the proposals set forth in the Public Notice.

Because the FCC has changed the dates for the webinars, you should disregard the dates that we provided in our December 29, 2014, Legal Memorandum. Here are the new dates, as announced by the FCC on January 6, 2015:

- Forward Auction Webinar: Thursday, January 15 at 10:30 a.m.
- Reverse Auction Webinar: Tuesday, January 20 at 10:30 a.m.
- Integration Webinar: Friday, January 23 at 10:30 a.m.

According to the FCC, “additional details about the webinars, including how interested parties can attend, will be released soon.”

C. All January 15, 2015, Closed Captioning Deadlines Delayed to March 16, 2015

On December 18, 2014, we distributed a Legal Memorandum advising that the new closed captioning quality standards that were scheduled to take effect on January 15, 2015, would be delayed until March 16, 2015. In the same memorandum, we explained that certain new closed captioning recordkeeping requirements would still go into effect on January 15. On December 29, 2014, the FCC formally announced that the effective date of the new closed captioning recordkeeping requirements (in addition to the new closed captioning quality standards) would be delayed to March 16, 2015. That gives stations 60 extra days to prepare for compliance with both the recordkeeping requirements and the quality standards. We recommend that stations begin now to prepare for the March 16 effective date.

More detail about these new rules may be found in our legal memoranda dated December 18, 2014, October 17, 2014, and April 16, 2014.

by Stephen Hartzell

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If you should have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

Stephen Hartzell, Editor

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