



# Virginia Association of Broadcasters Legal Review



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**IMPORTANT – TIME SENSITIVE**

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## **FCC SEEKS COMMENT ON MEANING OF “MVPD”—THE FCC’S RULING COULD HAVE PROFOUND IMPACT ON RETRANSMISSION CONSENT**

The FCC has issued an important *Public Notice* seeking comment on how the terms “multichannel video programming distributor” (MVPD) and “channel” should be interpreted. The FCC’s ruling could affect whether new “over-the-top” (OTT) providers of video services through the Internet qualify under FCC regulations as “MVPDs,” and, thus, whether they (a) must obtain a television station’s consent to retransmit its signal, and (b) qualify for the benefits of the cable network “program access” rule.

An adverse ruling would have negative consequences for local television stations in that it would allow Internet companies to retransmit the signals of local television stations without their consent.

The FCC has set an April 30 deadline for initial public comment.

### **I. Background**

An entity that qualifies as an “MVPD” under the Communications Act and FCC rules receives certain regulatory benefits, but it also incurs certain regulatory obligations. Among other things, an MVPD is entitled to the benefit of the “program access rules” that require vertically integrated cable networks to make their network programming available on non-discriminatory terms to all MVPDs. The current FCC proceeding grew out of a “program access” complaint filed by Sky Angel U.S., LLC, an Internet program provider, against Discovery Communications, LLC, and its affiliate Animal Planet, L.L.C. for denying access to their cable network programming. Sky Angel streams

approximately 80 channels of video and audio programming (such as MLB Network, Hallmark Channel, and Weather Channel) through a set-top box that has a broadband Internet input that connects directly to each subscriber's television set. Sky Angel contends it is a "MVPD" and is, therefore, entitled to access to the Disney Network's cable network programming. In a preliminary ruling, the FCC's Media Bureau ruled Sky Angel is not a MVPD, but now the Bureau is considering the merits of the case and has asked for public comment on the issue of whether Internet providers of video programming should be treated for regulatory purposes as "MVPDs."

Other Internet providers of video programming, such as ivi TV and FilmOn, have streamed television station signals over the Internet. And the latest, Aereo (f/k/a Bamboom), claims it "rents" dime-sized antennas and associated network DVRs to its subscribers, who then can view local television stations over any Internet-connected device. Each of these three companies has asserted that it is not a MVPD and, accordingly, does not need to obtain retransmission consent from the television stations whose signals it is retransmitting. As a result, lawsuits were filed by various stations against them.

Plainly, the stakes in the FCC's current proceeding in which it will address the definitional issue are high for local television stations.

## **II. Potential Interpretations of "Multichannel Video Programming Distributor**

The Communications Act defines an MVPD 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.

The definition turns, in particular, on the meaning of "*multiple channels of video programming.*"

The term "channel" is defined in the Act as "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)."

Previously, the Media Bureau, in ruling on Sky Angel's request, determined on a preliminary basis that MVPDs are only those entities that make available for purchase both a transmission path (capable of delivering "video programming") and content (multiple streams of "video programming").

The FCC is asking a host of questions on how to interpret the definitions of “MVPD” and the various other statutory terms and phrases. The Commission notes that the definition of “MVPD” was adopted in the 1992 Cable Act, and that definition relies on the term “channel” which was adopted as part of the 1984 Cable Act.

The Commission also notes that the legislative history of the 1992 Cable Act was intended, in part, to promote “facilities-based” competition. Thus, the FCC asks what does “facilities-based” mean in this context. What entities today make available “multiple channels of video programming” for purchase without also making available a “transmission path”? Where do entities such as Netflix, Hulu Plus, and other Internet distributors of video programming fit in this scheme?

The Commission has previously held that an entity need not own or operate the facilities that it uses to distribute video programming to subscribers in order to qualify as an MVPD. But if such a video programming distributor and broadband Internet provider have a joint marketing agreement or joint venture to provide the service, does this allow them to escape certain regulatory obligations? Could this result in an unduly confusing regulatory regime where an entity’s regulatory status could vary from market to market (or even customer to customer) based on its contractual arrangements with third parties?

More pointedly, these lines of questions raise a serious concern that if by definition an Internet provider of video programming is not a “MVPD,” then those providers, as well as traditional cable and satellite companies, through “affiliated” companies, could stream local station signals and avoid having to obtain retransmission consent.

### **III. Potential Interpretations of “Channel”**

The FCC is seeking comment on alternative interpretations of the term “channel” and whether an entity should be considered an MVPD if it makes available for purchase multiple “video programming networks” without regard to whether it offers a “transmission path.” The Commission notes that the 1984 Cable Act focused exclusively on the regulation of cable television—not on newer technologies, such as MMDS and DBS, let alone Internet providers. The Commission, therefore, asks whether it can reasonably read the definition of “MVPD” not to incorporate the preexisting statutory definition of “channel” contained in the same provision of the Communications Act. For example, the FCC asks whether it is reasonable to use a cable-specific definition of the term “channel” to define the term “MVPD,” which is intended to encompass video programming distributors that include, but are not limited to, cable systems. Similarly, can the phrase “multiple channels of video programming” be interpreted in the more common, less technical, everyday sense to mean “multiple video programming networks”?

The Act defines “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast

station,” and this definition was also added in the 1984 Cable Act. The FCC asks whether this means that the programming provided by an MVPD would have to be comparable to that provided by a television broadcast station in 1984 in the sense that it would limit MVPDs to only those entities making available for purchase *pre-scheduled, real-time, linear streams of programming*, the way television broadcast stations do. In other words, should the definition of MVPD exclude any entity that makes available programming for purchase or rental exclusively on an “on-demand” basis (such as a per-episode or per-clip basis)?

Recently, Peter Stern, Time Warner Cable’s chief strategy officer suggested that cable television could offer TV programming like Pandora offers music: You turn on your device, and the programming you are most interested in will just play sequentially. Would a cable operator providing this service be an MVPD and be required to obtain consent from the stations whose signals are being streamed in this future scenario?

#### **IV. Significance of A Commission Ruling**

The significance of an FCC ruling can hardly be overstated. If Internet video providers *are* MVPDs, then they would be required to obtain retransmission consent, and stations could control the distribution of their signals through retransmission consent agreements and monetize the retransmission. Stations, in turn, of course, would be required by existing FCC rules to negotiate retransmission of their signals, in “good faith,” with each OTT. Some broadcasters have concerns about the security of transmitting station signals over the public Internet and the potential for hacking and resulting importation of hundreds of out-of-market duplicating signals.

But if such Internet providers are *not* MVPDs, then Section 325(b) of the Communications Act would not apply to them; and Stations would, in that case, be unable to control the distribution of their signals on the Internet and unable to monetize the value of retransmission of their signal.

Copyright is also an issue. The Copyright Office has stated that companies using the public Internet to transmit stations do not qualify for the cable compulsory copyright license. Thus, if that position should be reversed in court and if the FCC should rule that Internet companies are not required to obtain retransmission consent, then Internet companies could retransmit station signals locally at will by paying a token compulsory copyright fee. The issue, therefore, has multiple moving parts.

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Comments are due April 30, 2012, and reply comments are due May 30, 2012.

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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.

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