

ALERT

# FCC Seeks Comment On Updating Its Definition of Multichannel Video Programming Distributor For the Internet Age

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The Federal Communications Commission (FCC or Commission) is looking to bring its definition of a multichannel video programming distributor (MVPD) into the Internet age. In a long-rumored Notice of Proposed Rulemaking (NPRM), the FCC proposes a technology-neutral definition of MVPD that would include any entity that “makes available for purchase, by subscribers or customers, multiple linear streams of video programming, regardless of the technology used.” The definition is specifically designed to include Internet-based services. The NPRM seeks comment regarding the legal basis for that interpretation and the implications for both programmers and distributors. It also seeks comment on an alternative interpretation that would require the distributor to have control over a transmission path in order to qualify as an MVPD.

Comments will be due within thirty (30) days of publication in the Federal Register, with reply comments due fifteen (15) days later.

## Defining the Term MVPD

The NPRM focuses on two possible definitions of an MVPD: (1) any entity that distributes multiple linear programming streams, including Internet-based services; or (2) an entity that both distributes multiple linear programming streams and controls a transmission path. In proposing to adopt the former definition, the Commission contends that it is most consistent with the language and purpose of the Communications Act.

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## Practice Areas

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Media  
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In the Communications Act, the term MVPD is defined as follows:

[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.

Much of the discussion regarding the definition focuses on the phrase “multiple channels of video programming.” A key issue for the Commission is that the Communications Act defines a “channel” as “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel.” The agency ultimately concludes that, as used in the definition of MVPD, the term “channel” is ambiguous, and that it need not be bound by the statutory definition in defining an MVPD.

In its 2010 decision denying an emergency petition by an online video provider seeking to obtain the benefit of the agency’s program access regime, the Media Bureau preliminarily determined that the distributor had not demonstrated that it was an MVPD eligible for the protections of the program access rules because it had failed to address the definitions of “channel” in the Act and the Commission’s rules. According to the Bureau, the definitions “appear to include a transmission path as a necessary element of a ‘channel.’” Recognizing that this potential interpretation had broader implications, the Bureau later sought further comment on the definitional issue.

Now, in the NPRM, the FCC proposes to interpret the term “channels of video programming” to mean “prescheduled streams of video programming” that does not require the provision of the transmission path by the distributor. The agency believes that its definition is a reasonable interpretation of the Act and most consistent with Congressional intent, aligns consumer expectations and industry developments, and is consistent with the common meaning of the word channel. The Commission finds that the term “channel” as used in the definition of an MVPD is ambiguous. In so finding, the Commission emphasizes that Congress adopted its definition of “channel” not in the 1992 Cable Act, when it adopted the definition of MVPD, but rather in the 1984 Act, which was more narrowly focused on the regulation of cable television. Moreover, it concludes that use of a cable-specific definition is inconsistent with the illustrative list of MVPDs used in the definition, which include DBS providers and TVRO operators. The agency states that a definition of MVPD that does not require a transmission path is more consistent with Congress’s intent to define MVPD in a broad and technology-neutral way, the “common, everyday meaning” of the term channel, and is “most consistent with consumer expectations and industry trends.”

The NPRM also seeks comment on how to interpret the term “multiple” in the definition and how the proposed definition would apply to niche online subscription programming providers. Among other things, the Commission asks whether it can exclude such providers by requiring that a certain number of channels be offered, such as twenty, in order for the distributor to be considered an MVPD. Similarly, the NPRM asks whether a service that provides discrete, intermittent events at prescheduled times, such as the online services provided by the major sporting leagues, should be included within the definition of an MVPD. The agency

proposes to exclude these services and others that only make available content that the distributor owns. The Commission asks whether the offering of a programmer, such as Disney, of a package of linear feeds of its own networks would make the program provider an MVPD. Additionally, it asks whether TV Everywhere services, for which there is no separate charge to the consumer, should be deemed “available for purchase.” Finally, the NPRM proposes not to extend the definition of an MVPD to entities that are located overseas but make linear video programming networks available for purchase in the United States over the Internet.

While asking for comment on an alternative definition that would require the distributor to provide a transmission path in order to be considered an MVPD, the FCC indicated that it was troubled by the notion that a provider, merely by adopting a different distribution technology, could change from an MVPD to a non-MVPD, or vice-versa. It also asks whether there is a reasonable basis to believe that Congress intended to distinguish between entities that make two separate transmission paths available to each subscriber and those that use switched digital video and, therefore, do not associate a unique transmission path with each video programming stream.

Although the Commission focuses on these two possible definitions of an MVPD, it also asks whether other interpretations are both consistent with the statute and better serve Congressional intent. Two of the options mentioned include a “functional equivalency” standard or a standard that allows Internet-based distributors to elect whether or not to avail themselves of MVPD status.

### **Regulatory Implications of MVPD Interpretations**

In addition to asking which definition is most consistent with the statute, the agency notes that classification as an MVPD would both bring benefits and impose obligations on a distributor, and, accordingly, the agency seeks comment on the regulatory implications of the alternative definitions of an MVPD. Specifically, the FCC asks whether its proposal would provide “innovative companies access to programming that consumers want” or whether it would “unduly and unnecessarily burden companies seeking to offer innovative new services.”

The NPRM identifies numerous privileges and obligations of MVPDs, asking how entities covered by the proposed definition would fare under these regulatory regimes and whether it should waive or exempt Internet-based distributors from certain regulatory requirements.

Specifically, the NPRM seeks comment on the applicability of the following rules:

- Program Access
  - Whether, under the program access rules, cable-affiliated programmers would be required to negotiate with and license programming to Internet-based distributors and, if so, how it will affect the value of cable-affiliated programming;
  - Whether a cable affiliated programmer can withhold programming from Internet-based distributors based on concerns about signal security and piracy;
  - Whether cable-affiliated networks generally have the rights to authorize Internet distribution and, if not, whether they should be required to obtain those rights in order to comply with the program

- access rules; and
- Whether, under the transmission-based definition, cable-affiliated programmers could refuse to make programming available to Internet-based programmers not owned by MVPDs.
- Retransmission Consent
  - Whether the retransmission consent rules would force broadcasters to negotiate with and license their signals to potentially large numbers of Internet-based distributors;
  - How to determine whether a broadcaster has engaged in “good faith negotiations” if Internet-based providers are not entitled to a statutory copyright license;
  - Whether the duty to negotiate in good faith with broadcasters will unduly burden the resources of Internet-based MVPDs;
  - Whether Internet-based MVPDs could choose not to offer local content, and therefore, not to negotiate with broadcasters; and
  - Whether network affiliation agreements restrict the ability of local broadcasters to grant retransmission consent rights to Internet-based MVPDs.
- Program Carriage
  - Whether the application of program carriage rules will prevent large Internet-based distributors from demanding a financial interest or exclusive rights from programmers; and
  - Whether Internet-based distributors will have an incentive to favor affiliated programming.
- Other MVPD Obligations: The NPRM also asks about the costs and impacts of extending other MVPD obligations to Internet-based providers, including closed captioning; video description; accessibility of emergency information; accessible user interfaces and menus; equal employment opportunity requirements; commercial availability of navigation devices; signal leakage; inside wiring; commercial loudness; and access to multiple dwelling units.

The NPRM also seeks to update the record regarding the interplay between the copyright laws and the definition of an MVPD, including the effect of a revised MVPD definition on the statutory licensing regime for broadcast television content and the rights of cable programmers to authorize Internet distribution.

### **Classification of IP-Based Services Offered By Facilities-Based Distributors**

In a final section of the NPRM, the FCC asks how the use of Internet Protocol to deliver cable services should affect the classification of a facility as a cable system or an entity as a cable operator. The NPRM states, “[i]t seems evident that merely using IP to deliver cable service does not alter the classification of a facility as a cable system or of an entity as a cable operator. That is, to the extent an operator may provide video programming service over its own facilities using IP delivery within its footprint it remains subject to regulation as a cable operator.”

Noting that the Act defines a cable operator as an entity that provides cable service over a cable system, the Commission begins this portion of the NPRM by interpreting the terms cable service, cable system and cable operator. It first notes that the Commission and other authorities have previously concluded that the definition of “cable service” includes linear IP video service. It then states that, “to the extent a cable operator uses a ‘a set of closed transmission paths’ to provide cable service, as one providing IP video programming over its copper wire (including coaxial cable) or fiber optic cable does, its facility meets the definition of cable system.” Finally, it concludes that “an entity that delivers cable services via IP is a cable operator to the extent it delivers those services as managed video services over its own facilities and within its footprint.” The Commission concludes that regulating IP-based service provided by a cable operator over its facilities within its footprint as a cable service is not only compelled by the statutory definitions, but that it is also good policy to subject these services to “the pro-competitive, consumer-focused regulations that apply to cable.”

Nevertheless, the agency recognizes that cable operators and DBS providers are contemplating new business models that might be indistinguishable from other “over-the-top” (OTT) services. The NPRM, therefore, proposes to distinguish between the “managed” video service that an existing cable operator or DBS provider offers over its own facilities and an over-the-top video service that they might offer over the Internet. The FCC would subject the former to regulation as a “cable operator,” but would treat the provider as a “non-cable MVPD” with respect to its OTT service. As a result, OTT services, even if offered by an existing cable operator or DBS provider, would not be subject to traditional cable regulations (such as annual regulatory fees, Emergency Alert System compliance, commercial limits in children’s programs, political programming and candidate access rules, national subscriber limits, or mandatory carriage of broadcast signals). Even if an OTT service is available within a cable operator’s footprint, the NPRM proposes not to regulate it as a cable service if it is provided to subscribers without regard for whether they subscribe to a cable operator’s managed video service, even if it is also accessible over that cable operator’s broadband facilities. The agency also asks whether the tentative conclusion should change if a cable operator provides an OTT service within its footprint only, rather than nationally.

Comments in response to the NPRM will be due within thirty (30) days of publication in the Federal Register, with reply comments due fifteen (15) days later.

If you have questions or are interested in submitting comments, please contact the Wiley Rein attorney who handles your FCC matters or one of the attorneys listed below.