

FCC Opens Proceedings On Satellite Dishes And Online Video Distribution

The FCC is considering whether municipalities should be able to trump property owners' preferences about placement of satellite dishes and whether OTT video providers should be regulated like cable TV providers. The second issue has far-reaching consequences.

By Carl E. Kandutsch ■ *Attorney*

The FCC recently opened two proceedings of interest to readers of this magazine – one of direct interest and the other of potential long-term significance. Of immediate interest to MDU professionals is a possible change to the FCC's rules on over-the-air reception devices (OTARD). Of less immediate but potentially wider significance is the commission's request for public comments on whether the definition of a multichannel video programming distributor (MVPD) should be expanded to include online distributors of video programming services.

DIRECTV/DISH NETWORK PETITION TO AMEND THE OTARD RULES

The OTARD rules, adopted in 1996, prohibit restrictions on the right of a property owner or tenant to install, maintain or use an antenna to receive video programming from direct broadcast satellites, broadband radio services or television broadcast stations. The FCC later amended the rules to apply to property dedicated to a renter's exclusive use, such as a balcony or patio, and to customer-end antennas used to receive or transmit fixed wireless signals.

To facilitate competition from satellite TV providers, the OTARD rules prohibit landlords, condominium or cooperative owners associations and even

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local governments from restricting a resident's ability to install an individual dish antenna in an area within the resident's exclusive control.

Specifically, the rules prohibit restrictions that unreasonably delay or prevent installation, maintenance or use; unreasonably increase the cost of installation, maintenance or use; or preclude reception of an acceptable quality signal. The rules allow limited restrictions related to safety and historic preservation. In addition, a community association or landlord can restrict the installation of individual antennas if a central or common antenna is available. Because the OTARD rules apply only to individual antennas installed within

areas under an MDU resident's exclusive control, restrictions on antennas installed in a common area such as a roof or an exterior wall *are* enforceable.

Under today's rules, a municipality could prohibit individual residents from installing dish antennas on roofs or exterior walls of an apartment or condominium building even if the landlord or a condominium owners association has no such restriction.

If a property owner or an owners association doesn't object to the installation of an individual dish antenna in a common area, why should local government have the authority to override the MDU community's decision? The Satellite Broadcasting and Communications

About the Author

Carl Kandutsch, a former FCC attorney, is in private practice representing MDU property owners and broadband service providers on broadband communications and related real estate matters. Dr. Kandutsch may be contacted through his website (www.kandutsch.com), via email (carl@kandutsch.com) or by telephone (207-659-6247).

Association, along with DISH Network and DIRECTV, filed a petition with the FCC raising precisely this question. Specifically, the petition requests that the OTARD rules be amended to prohibit local governments from restricting the installation of over-the-air reception devices in the common areas of MDU properties.

FCC SEEKS COMMENT ON DEFINITION OF MVPD

Federal regulation of the cable television industry hinges on the definition of an MVPD. A company that fits the definition is subject to most federal laws and FCC regulations governing cable television; a company that doesn't is exempt. Does the definition cover companies that distribute video programming content online, using Internet connections to deliver signals to television sets?

Although industry players, from the newest, smallest start-ups to entrenched cable and telco behemoths, are all struggling to find effective business models, most people believe that the majority of video programming content will soon be delivered by means of high-speed Internet connections rather than over managed networks owned or controlled by cable, satellite and telephone companies. The impending eclipse of traditional cable television delivery systems by online video distribution presents tremendous challenges for market participants, policymakers and regulators.

For owners of programming content and managed signal distribution systems, the most difficult challenge is to monetize the explosive dissemination of proprietary content over decentralized, "end-to-end" data networks that no centralized authority can control. What rules and norms will govern the online distribution of digital content that can be instantaneously replicated and transmitted over the Internet at a marginal cost approaching zero?

For regulators, the challenge is this: Because most online (OTT) video distributors do not *clearly* fall within the current MVPD definition, existing cable television regulations do not apply to those OTT video providers. Would application of some or all legacy regulations to online distributors impede or

The FCC decided in an interim ruling that online programming distributors are not MVPDs. It is asking for comments before its final decision.

liberate emerging markets? Nobody – including the FCC – has ready or reliable answers to these questions.

Cable television regulations that apply only to MVPDs include rules that govern retransmission consent, program access, statutory copyright licensing, cable franchising and cable inside wiring procedures. At some point, the government will have to decide whether these and other rules apply to online video content distributors. Currently, the FCC is compelled to address these issues because of a complaint filed with the FCC's Media Bureau by an online video distributor, Sky Angel, against the Discovery Channel. The complaint alleges that the network unfairly denied Sky Angel access to popular content in violation of the commission's program access rules. Those rules are designed to ensure that competitive MVPDs have nondiscriminatory access to programming affiliated with a cable operator.

In an interim ruling, the bureau stated that the program access rules do not apply to Sky Angel because the company does not use "multiple channels" that "include a transmission path" as required in the statutory definitions of "MVPD" and "channel." In other words, because it transmits program-

ming content to consumers using the public Internet and does not own or operate a network facility, Sky Angel is not an MVPD and may not take advantage of the program access rules.

The industry is divided on this issue. In its filing, Comcast, the nation's largest cable operator, argues that OTT distributors should not be considered MVPDs, in part because cable television regulations would burden the growing OTT industry. DIRECTV believes that if a service behaves like and competes with other MVPDs, it should be regulated in the same way.

Clearly, the commission understands the importance of the issue, does not feel comfortable with the interim ruling and wishes to proceed with caution. Therefore, the Media Bureau issued a request for public comments on whether the terms "MVPD" and "channel" should be interpreted to include online video programming distributors such as Sky Angel.

The request for comments, along with the underlying Sky Angel program access complaint, represents the tip of a large policy iceberg that will reveal itself during the coming years as technologies change and markets develop. ❖

RESOURCES

- FCC request for comments on DIRECTV/DISH Network petition: www.fcc.gov/document/petition-rulemaking-requesting-amendment-otard-rule
- FCC request for comments on definitions of "MVPD" and "channel": www.fcc.gov/document/media-bureau-seeks-comment-interpretation-mvpd-and-channel
- Prior articles about the legal status of online video distributors:
 - No Online Cable Systems – For Now: www.bbpmag.com/2011mags/mayjune11/BBC_MayJun11_OnlineCableSystems.pdf
 - Still No Online Cable System: www.bbpmag.com/2012mags/jan-feb/BBC_Jan12_TheLaw.pdf