

Federal Communications Commission

DA 10-679

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Sky Angel U.S., LLC)
)
Emergency Petition for Temporary Standstill)

ORDER

Adopted: April 21, 2010

Released: April 21, 2010

By the Chief, Media Bureau:

I. INTRODUCTION

1. In this decision, we deny the Petition filed by Sky Angel U.S., LLC (“Sky Angel”) asking the Media Bureau to grant a temporary standstill of the affiliation agreement between Sky Angel and Discovery Communications, LLC and its affiliate, Animal Planet, L.L.C. (collectively, “Discovery”) pending resolution of Sky Angel’s program access complaint.¹ For the reasons discussed below, we find that Sky Angel has failed to satisfy its burden of demonstrating that a standstill is warranted.

II. BACKGROUND

2. Sky Angel states that it provides a subscription-based service of approximately eighty channels of video and audio programming using Internet Protocol Television (“IPTV”) technology.² According to Sky Angel, its subscribers receive programming through a set-top box that has a broadband Internet input and video outputs that connect directly to a television set.³ Sky Angel explains that its service is available to anyone nationwide with a wired or wireless broadband Internet connection.⁴ Sky Angel “believes that it is the Nation’s first provider of a nationwide, real-time linear channel IPTV-based service.”⁵

3. In October 2007, Sky Angel entered into an affiliation agreement with Discovery whereby Discovery would provide Sky Angel with several programming channels for distribution on the Sky Angel system.⁶ The agreement expires on December 31, 2014.⁷ Pursuant to this agreement, Sky

¹ See Sky Angel U.S., LLC, Emergency Petition for Temporary Standstill (March 24, 2010) (“Sky Angel Petition”); Discovery Communications, LLC, Opposition to Emergency Petition for Temporary Standstill (April 12, 2010) (“Discovery Opposition”); Sky Angel U.S., LLC, Emergency Request for Immediate Grant of Petition (April 14, 2010) (“Sky Angel Emergency Request”); Discovery Communications, LLC, Motion to Strike Unauthorized Pleading or, in the Alternative, Response to Emergency Request (April 15, 2010) (“Discovery Motion”); see also Sky Angel U.S., LLC, Program Access Complaint (March 24, 2010) (“Sky Angel Complaint”). We deny Discovery’s request to strike the Sky Angel Emergency Request and, in the interest of a complete record, consider the substantive arguments in both the Sky Angel Emergency Request and the Discovery Motion.

² See Sky Angel Complaint at 1.

³ See *id.* at 2.

⁴ See *id.*

⁵ See *id.* at 3.

⁶ See *id.*

Angel has been providing its subscribers with certain Discovery networks for approximately two and a half years, including the Discovery Channel, Animal Planet, Discovery Kids Channel, Planet Green, and the Military Channel.⁸ Sky Angel submits that these channels are a significant part of its service offering.⁹

4. On January 22, 2010, Discovery notified Sky Angel that it would terminate the affiliation agreement on April 22, 2010 pursuant to a provision of the agreement because Discovery determined that the distribution methodology used by Sky Angel is “not satisfactory.”¹⁰ On March 24, 2010, Sky Angel filed a program access complaint against Discovery and a petition for a standstill of the affiliation agreement.¹¹ Sky Angel claims that Discovery’s decision to terminate the agreement is “unfair” and “discriminatory” under the program access rules because Discovery conducted extensive due diligence of the Sky Angel system before entering into the affiliation agreement;¹² Discovery never previously raised concerns regarding Sky Angel’s distribution methodology;¹³ the Sky Angel system is “extremely secure” and has never experienced a security failure;¹⁴ and Discovery never provided Sky Angel with an explanation of how or why it arrived at a determination that Sky Angel’s distribution methodology was not satisfactory.¹⁵ In addition, Sky Angel notes that Discovery is affiliated with DIRECTV and claims that Discovery’s actions may be intended to stifle competition from competitors to DIRECTV in the video distribution market.¹⁶ In its standstill petition, Sky Angel argues that it is likely to prevail on the merits of its complaint;¹⁷ it will suffer irreparable harm absent a standstill as a result of the loss of current and potential subscribers without the Discovery programming;¹⁸ Discovery will not suffer harm because it will continue to receive the affiliation fees set forth in the agreement;¹⁹ and the public interest would be served by avoiding programming disruptions to current Sky Angel subscribers.²⁰

⁷ See *id.* at 6.

⁸ See *id.*

⁹ Sky Angel explains that it offers subscribers a “Faith Package” of faith-based programming channels and a “Family Friendly Package,” which includes the Discovery networks as well as the NFL Network, the MLB Channel, The Weather Channel, and Hallmark. See *id.* at 8-9. According to Sky Angel, the Discovery channels make up 20 percent of the Family Friendly Package and account for four of the ten most watched channels throughout the Sky Angel service. See *id.* at 9.

¹⁰ See *id.* at Exhibits G and I; Sky Angel Petition at 5.

¹¹ See Sky Angel Complaint; Sky Angel Petition.

¹² See Sky Angel Emergency Request at 2.

¹³ See Sky Angel Complaint at 10, 13-14; Sky Angel Petition at 4-5.

¹⁴ See Sky Angel Complaint at 6-7.

¹⁵ See *id.* at 6, 10-11.

¹⁶ See *id.* at 12-15; *Applications for Authority to Transfer Control, News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee*, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3300-3304, ¶¶ 78-84 (2008) (imposing certain program access conditions on Discovery); see also *id.* at 3302, ¶ 80 (explaining that, in addition to its affiliation with DIRECTV, Discovery is also a cable-affiliated programmer due to its affiliation with Advance-Newhouse and is therefore subject to the program access rules).

¹⁷ See Sky Angel Petition at 4-5.

¹⁸ See *id.* at 5-6.

¹⁹ See *id.* at 6.

²⁰ See *id.*

5. On April 12, 2010, Discovery filed a response to Sky Angel's standstill petition, claiming the petition should be dismissed because the rule permitting a program access complainant to file a standstill petition has not yet taken effect.²¹ Discovery also argues that Sky Angel is not likely to prevail on the merits of its complaint because this dispute is a simple contractual matter that should not involve the Commission;²² that Sky Angel is not entitled to benefit from the program access rules because it does not fulfill the regulatory responsibilities of a multichannel video program distributor under Commission rules, including closed captioning of its programming;²³ and that Sky Angel's complaint is barred by the statute of limitations.²⁴ In addition, Discovery claims that its conduct was not "unfair" under the program access rules because it was simply exercising a negotiated-for termination right in the agreement and, in any event, there is no evidence that exercise of this right had the "purpose or effect" of hindering Sky Angel from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.²⁵ Discovery also argues that its conduct was not "discriminatory" under the program access rules because (i) Sky Angel uses the Internet to distribute Discovery's linear channels, but Discovery does not authorize the distribution of its linear channels over the Internet;²⁶ and (ii) Sky Angel allows its subscribers to access Discovery's linear channels from any location, but Discovery does not authorize the distribution of its linear channels on a service that is transportable among homes.²⁷ Finally, Discovery argues that Sky Angel will not suffer irreparable harm absent a standstill because the Discovery programming is not part of Sky Angel's core faith-based programming;²⁸ Discovery will suffer irreparable harm in the form of "damaged relationships and significant legal risks" if it were to continue to authorize its content to be distributed over the Sky Angel system;²⁹ and the public interest will be served by allowing programmers such as Discovery to rely on the terms of negotiated contracts in experimenting with new distribution platforms, as Discovery maintains that it did in entering into the affiliation agreement with Sky Angel.³⁰

III. DISCUSSION

6. In evaluating a request for preliminary injunctive relief, such as a standstill petition, the Commission and the courts generally consider the following four factors: (i) whether the complainant is likely to prevail on the merits of its complaint; (ii) whether the complainant will suffer irreparable harm absent a stay; (iii) whether grant of a stay will not substantially harm other interested parties; and (iv) whether the public interest favors grant of a stay.³¹ As the moving party, Sky Angel has the burden of

²¹ See Discovery Opposition at 9-13.

²² See *id.* at 1, 12-13.

²³ See *id.* at 1, 3, 13-17.

²⁴ See *id.* at 17-19.

²⁵ See *id.* at 19-20; see also 47 C.F.R. § 76.1001.

²⁶ See Discovery Opposition at 21.

²⁷ See *id.*

²⁸ See *id.* at 22-24.

²⁹ See *id.* at 4, 24-25.

³⁰ See *id.* at 26.

³¹ See, e.g., *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); see also *Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977) (clarifying the standard set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*); *Hispanic Information and Telecomm. Network, Inc.*, 20 FCC Rcd 5471, 5480, ¶ 26 (2005). Sky Angel filed its petition pursuant to Section 76.1003(1) of the Commission's Rules and based on the Commission's general statutory authority to act on standstill petitions. See Sky Angel

proof in support of the standstill.³² The Commission has explained that no single factor is necessarily dispositive and that a compelling demonstration that the public interest would be irreparably harmed lessens the level of certainty required of a moving party to show that it will prevail on the merits.³³ We conclude that Sky Angel has failed to satisfy its burden of demonstrating that a standstill is warranted.

7. With respect to the first factor, we cannot conclude based on the record before us at this stage in the complaint proceeding that Sky Angel has demonstrated a likelihood of success on the merits of its complaint.³⁴ The Communications Act of 1934, as amended (the “Act”), and the Commission’s rules allow only a “multichannel video programming distributor” (“MVPD”) to seek relief under the program access rules.³⁵ Sky Angel, however, has not carried its burden of demonstrating that it is likely to succeed in showing on the merits that it is an MVPD entitled to seek relief under the program access rules. While Sky Angel asserts that it is an MVPD,³⁶ it has failed to analyze whether and how it meets the key elements of the definition of the term “MVPD.” The Act defines a “multichannel video programming distributor” 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.³⁷

Petition at 1, 3-4, 7. Section 76.1003(l) has not yet taken effect and, in any event, pertains to renewals of existing contracts. *See Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, *First Report and Order*, 25 FCC Rcd 746, ¶ 81 (2010) (“*2010 Program Access Order*”) (stating that the Commission will announce the effective date of Section 76.1003(l) following approval by the Office of Management and Budget under the Paperwork Reduction Act). Nonetheless, the Commission has statutory authority to act on a standstill petition in program access cases pursuant to the authority granted to the Commission under Section 4(i) of the Act. *See* 47 U.S.C. § 154(i) (stating that the Commission “may perform any and all acts . . . and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions”); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968); *2010 Program Access Order* at ¶ 72; *AT&T Corp. v. Ameritech Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 14508 (1998); *Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22566 ¶ 159 and n.464 (1997); *Time Warner Cable*, Order on Reconsideration, 21 FCC Rcd 9016 (MB, 2006). The Bureau has delegated authority to resolve a standstill petition under Sections 0.61 and 0.283 of the Commission’s rules. *See* 47 C.F.R. §§ 0.61, 0.283.

³² *See Amendment of Part 22 of the Commission’s Rules*, Order, 8 FCC Rcd 5087, 5087, ¶ 2 (1993).

³³ *See AT&T v. Ameritech*, 13 FCC Rcd at 14515-16, ¶ 14.

³⁴ We note that the pleading cycle has not yet ended on Sky Angel’s program access complaint and there are outstanding requests for discovery.

³⁵ *See* 47 U.S.C. § 548(d) (“Any multichannel video programming distributor aggrieved by conduct that it alleges constitutes a violation of subsection (b) of this section, or the regulations of the Commission under subsection (c) of this section, may commence an adjudicatory proceeding at the Commission.”); 47 C.F.R. § 76.1003(a) (“Any multichannel video programming distributor aggrieved by conduct that it believes constitute a violation of the regulations set forth in this subpart may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. . . .”); 47 C.F.R. § 76.1003(c)(1) (“In addition to the requirements of § 76.7 of this part, a program access complaint shall contain: (1) The type of multichannel video programming distributor that describes complainant . . .”).

³⁶ *See* Sky Angel Complaint at 1, 8; Sky Angel Emergency Request at 5.

³⁷ *See* 47 U.S.C. § 522(13); *see also* 47 C.F.R. § 76.1000(e).

Sky Angel makes no attempt to describe whether and how it offers multiple “channels” of video programming.³⁸ While Sky Angel appears to interpret the term “channel” in a non-technical sense to mean a stream of video programming,³⁹ it fails to address the definitions of that term in the Act and the Commission’s rules, which appear to include a transmission path as a necessary element of a “channel.”⁴⁰ Moreover, the entities in the illustrative list in the Act’s definition of an MVPD all provide transmission paths for the delivery of video programming.⁴¹ The evidence put forth at this stage of the proceeding indicates that Sky Angel does not provide its subscribers with a transmission path; rather, it is the subscriber’s Internet service provider that provides the transmission path.⁴² Because Sky Angel has not shown that it is likely to be able to demonstrate that it is an MVPD entitled to seek relief under the program access statute and rules, we cannot conclude that Sky Angel has met its burden of demonstrating a likelihood of success on the merits of its complaint. In light of our determination on this threshold issue, we find it unnecessary to address whether Sky Angel has met its burden of demonstrating a likelihood of success on the merits with respect to the remaining elements of its complaint.

8. Regarding the remaining factors, we do not find that they tip decisively in favor of granting the standstill petition. With respect to the second factor, we find that Sky Angel will be harmed absent grant of the standstill as a result of the loss of current and potential subscribers who might choose not to subscribe to Sky Angel’s service without the Discovery programming.⁴³ With respect to the third factor, we find that Discovery would be harmed from grant of the standstill as a result of “damaged relationships” [REDACTED] and significant legal risks [REDACTED].⁴⁴ We conclude that harms to both parties may result from either granting or denying the standstill petition and that the balance of harms does not tilt sharply in the favor of either party. With respect to the fourth factor, grant of the standstill would avoid disruption to Sky Angel’s customers, but it is not clear from the record whether Sky Angel could, or has attempted to, obtain comparable programming from another source.

9. On balance, we cannot conclude that Sky Angel has satisfied its burden of demonstrating that a standstill is warranted. Although grant of the standstill would avoid some disruption to Sky Angel’s customers, the balance of harms does not tip sharply in Sky Angel’s favor, and Sky Angel has not met its burden of demonstrating a likelihood of success on the merits of its complaint.⁴⁵ Under judicial and Commission precedent, therefore, Sky Angel has not justified grant of its standstill request.

³⁸ See 47 U.S.C. § 522(4) (defining “channel”).

³⁹ See Sky Angel Complaint at 8.

⁴⁰ See 47 U.S.C. § 522(4) (defining “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 (as television channel is defined by the Commission by regulation)”; 47 C.F.R. § 76.5(r)-(u) (defining “cable television channel” as a “signaling path provided by a cable television system”); see also 47 C.F.R. §§ 73.603, 73.606, 73.681, 73.682(a)(1).

⁴¹ See 47 U.S.C. § 522(13). Although the list is preceded by the phrase “not limited to,” making it clear that the list is illustrative rather than exclusive, it is also preceded by the phrase “such as,” which suggests that other covered entities should be similar to those listed.

⁴² See Sky Angel Complaint at 2 (stating that Sky Angel’s service is “available to any consumer who has broadband Internet access via DSL, wireline or wireless connections”).

⁴³ See Sky Angel Petition at 5-6.

⁴⁴ See Discovery Opposition at 4, 24-25.

⁴⁵ *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.* 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers v. Federal Power Comm’n*, 259 F.2d 921 (D.C. Cir. 1958); *AT&T Corp. v. Ameritech Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 14508 (1996).

10. Our decision to deny Sky Angel's standstill petition should not be read to state or imply that the Commission, or the Bureau acting on delegated authority, will ultimately conclude, in resolving the underlying complaint, that Sky Angel does not meet the definition of an MVPD. Rather, based on the limited record before us at this stage and the lack of Commission precedent on that issue, we are unable to conclude that Sky Angel has met its burden of demonstrating that the extraordinary relief of a standstill order is warranted. We recognize the impact Discovery's actions will have on Sky Angel's customers and encourage Discovery and Sky Angel to work toward a mutually agreeable solution that will avoid disruption of Sky Angel's customers and that sufficiently minimizes the business and legal risks to Discovery pending the outcome of the complaint proceeding.

IV. CONCLUSION

11. Accordingly, **IT IS ORDERED** that Sky Angel's Emergency Petition for Temporary Standstill **IS DENIED**.

12. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's Rules.⁴⁶

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

⁴⁶ 47 C.F.R. § 0.283.