

SUMMARY OF STATEMENT OF ROBERT W. JOHNSON, SKY ANGEL U.S., LLC

Sky Angel provides an exclusively family-friendly, affordable service of about eighty linear channels of programming. The encrypted programming can only be accessed via a set-top box connected to a subscriber's broadband Internet connection. Because the set-top box connects directly to a TV set and subscribers select a desired channel through an on-screen guide, the service is functionally identical to traditional MVPDs. Like any new entrant, Sky Angel's ability to compete rests in large part on being able offer a variety of popular programming options. Recognizing this fact in 1992, Congress enacted the program access requirements, which prohibit a programmer affiliated with a cable operator from unreasonably refusing to deal with, or otherwise discriminating against, rival MVPDs. Unfortunately, the video distribution marketplace remains willing to engage in anti-competitive tactics in order to harm emerging competitors, as Sky Angel's ongoing experience clearly demonstrates.

Although Sky Angel had timely paid all fees to Discovery Communications for two years, Discovery suddenly informed Sky Angel that it planned to terminate their contract. Because Discovery refused to explain or retract its threat, Sky Angel filed a program access complaint with the FCC. In response, Discovery argued that Sky Angel fails to qualify as an MVPD. Sky Angel fits squarely within the express terms of the MVPD definition, is functionally identical to traditional MVPDs from a consumer perspective, and provides the exact competition Congress sought to encourage, but the FCC still has not ruled on the complaint twenty-seven months later, during which time Sky Angel has lost subscribers, and failed to gain new subscribers, due to the absence of Discovery programming. Anti-competitive conduct, and the FCC's failure to enforce the program access rules, continue to prevent the full realization of the public interest benefits Congress sought to achieve – increased competition, Internet use and consumer choice, affordable rates, innovation, and expanded programming diversity. Congress should act to ensure a level playing field for new entrants in the video distribution marketplace.

STATEMENT OF ROBERT W. JOHNSON, CEO OF SKY ANGEL U.S. LLC

June 25, 2012

Chairman Walden, Ranking Member Eshoo, and members of the Subcommittee on Communications and Technology, it is my pleasure to have this opportunity to testify at your hearing today on The Future of Video and thank you for inviting me to participate. We think our experience with starting and operating an innovative new family-oriented video distribution service demonstrates significant problems with the manner in which the FCC is failing to enforce program access laws and regulations, so that a valuable new competitive entrant, such as Sky Angel, faces anticompetitive conduct from incumbent operators in the industry. We believe that the public interest in supporting competition in video distribution, expanded use of the Internet, diversity in programming sources, and affordable choices for American families requires the attention of the Congress.

Introduction: The Goal of Sky Angel

Sky Angel was founded for the purpose of providing American families with a high-quality and affordable video distribution service in their homes that would offer family-friendly programming exclusively. I am one of the founders of Sky Angel. Our deep Christian roots guide the company. Sky Angel separately offers packages of Christian and secular video programming, as well as a combination package of all programming. Sky Angel is not a religious or proselytizing organization. Its goal is to offer a safe haven for families, and children, to enjoy as large a selection as possible of live video and audio programming, and recorded video programming, without fear of exposure to graphic sexual or similar content. Now operating under the brand FAVE TV, Sky Angel carefully selects all of its programming to

ensure high-quality and strong family values. Our service is a proud recipient of the Seal of Approval from the Parents Television Council.

Starting in 2008, Sky Angel began distribution of exclusively family-friendly video programming, on a nationwide basis, at affordable subscriber rates. Today, it offers more than 80 channels that are live, linear programming networks, many of which are familiar in American households, such as The Hallmark Channel, Fox News, the NFL Channel, Bloomberg and the Weather Channel, to name a few. Sky Angel was the first American video programming distributor to provide a service which uses Internet Protocol Television (“IPTV”) technology and a set-top box. Subscribers cannot access Sky Angel’s encrypted programming without the set-top box, which has broadband Internet inputs and video outputs that connect directly to their television sets. No external computer or software is necessary to subscribe to, or receive, Sky Angel programming.

What Sky Angel Does and How It works

Sky Angel offers consumers a competitive alternative to other MVPD systems at affordable rates. Currently, the complete package of more than 80 live video and audio programming channels, as well as access to a large VOD library of exclusively family-friendly movies, costs \$32.99 a month. American families can have Sky Angel in their homes as an exclusive source of wholesome video entertainment or they can subscribe and have Sky Angel in addition to another MVPD. The choice is theirs. All any American family needs for Sky Angel is a television set and a broadband Internet service of modest capability.

Although distribution of video programming through the use of IPTV technology is fairly well known in Europe, and other parts of the world, Sky Angel was the first to offer a true IPTV video programming distribution system throughout the United States using this technology. Sky

Angel's IPTV system does not distribute programming on the World Wide Web, but rather relies on a combination of its own facilities, and in part, on subscribers' broadband Internet connections as a partial path in its distribution system. In summary, this is how Sky Angel provides its video service:

- Sky Angel enters into definitive written agreements with program providers/rights holders for distribution of programming to Sky Angel subscribers via its IPTV system under which Sky Angel pays the programmers monthly fees per Sky Angel subscriber who receives its channel.
- Sky Angel enters into subscription relationships with consumers for multiple, live linear channels of programming, who are sent Sky Angel set-top boxes, which are necessary to receive programming from Sky Angel and which Sky Angel directly and remotely controls at all times.
- Sky Angel receives content from programmers' satellite locations, and then processes and encrypts it.
- Sky Angel transmits the encrypted programming to its two headends via fiber optic cable which it controls.
- The encrypted programming then is distributed to Sky Angel subscribers, in part through Internet connections which those subscribers have contracted for from ISPs.
- The programming is received by the Sky Angel set-top boxes, decrypted, and then transmitted to subscribers' television sets with industry-standard copy protections.
- At no time is the World Wide Web, or home computers, part of the Sky Angel service.
- Sky Angel exclusively controls the origination, distribution, and reception of all programming, and at no time may anyone receive the programming except authorized subscribers via their authenticated set-top boxes.

To a consumer, Sky Angel is functionally identical to traditional cable and satellite video distribution services. All programming is available via a typical set-top box, which is controlled by the consumer using a standard remote control. The consumer simply scrolls across a menu of channel choices, and "clicks" the one he or she wants to watch. Sky Angel provides closed captioning, high definition and similar services on much the same basis as MVPDs do generally.

Sky Angel Should Benefit from Statutory Program Access Protections

Congress enacted a broad definition of MVPD in the 1992 Cable Act, which the FCC implemented. That definition provides:

...the term “multichannel video programming distributor” means 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... (47 U.S.C. §522(13) (Section 602)) (emphasis added).

Of course, in 1992 Congress did not envision video distribution partially using the Internet, because it did not exist, which is a perfect example of why Congress wisely did not limit the MVPD definition to existing 1992 technology. To qualify as an MVPD, and have statutory program access protections, an entity simply must offer multiple programming channels, for purchase, to subscribers or customers. By implication, there would be some similarity to traditional cable or satellite offerings, but this broad definition clearly is not specific to any particular technology or requires ownership or operation of specific kinds of facilities. Even a cursory look at how Sky Angel provides its service shows that it falls squarely under this definition of MVPD. And just as clearly, web-based, video-on-demand or non-subscription video offerings do not fall under the definition.

Sky Angel Faces Anti-Competitive Obstacles

Unfortunately, Sky Angel has encountered serious difficulties in the marketplace, primarily in its ability to acquire programming for its subscribers and to make the Sky Angel system more attractive and competitive. To be sure, Sky Angel does not attempt to attract viewers who insist upon access to salacious programming sources. But among the providers of must-have family-friendly programming, there is considerable resistance to entering into distribution contracts with Sky Angel. Sky Angel adds programming channels to its system only

through negotiated written agreements with programming owners. Under those programming distribution contracts, Sky Angel pays the programmers fees per subscriber which, in all likelihood, are considerably higher than the fees that large MVPDs pay, because a tiny start-up like Sky Angel has no market power or other ability to bargain for discounted fees. A number of programmers simply will not deal with Sky Angel, essentially denying Sky Angel access to important programming sources, even though Sky Angel ends up paying premium fees.

The ongoing dispute between Sky Angel and Discovery Communications is a perfect example of the problem that Sky Angel faces in attempting to acquire, and pay for, must-have family programming. This dispute also shows that Congress needs to ensure that the regulatory processes it has put into place are being appropriately and fairly administered.

In 2007, Sky Angel and Discovery entered into an Affiliation Agreement for the distribution of five channels of Discovery programming, including “The Discovery Channel” and “Animal Planet.” Some Discovery channels are “must-have” programming for Sky Angel’s service, and two of Discovery’s channels quickly became among the top-five most-watched channels offered by Sky Angel. At all times, Sky Angel paid Discovery the monthly subscriber fees that Discovery wanted under the Affiliation Agreement.

The Affiliation Agreement, the term of which extends through December 31, 2014, expressly permits Sky Angel’s use of IPTV technology, and provides a detailed definition of an IP System that is identical to Sky Angel’s service. In September 2009, Discovery proposed that the parties expand their relationship, asking Sky Angel to carry, and pay for, additional Discovery-owned networks. However, in December 2009, Discovery unexpectedly informed Sky Angel that it planned to terminate the Affiliation Agreement four years early, and thus withhold its programming from Sky Angel’s subscribers and potential subscribers. Although

Sky Angel repeatedly sought additional information from Discovery, and offered to cooperate fully to address Discovery's alleged "concerns," Discovery refused to provide any justification, reasonable or otherwise, for its termination. Instead, Discovery simply repeated that it was "uncomfortable" with Sky Angel's "distribution methodology," which had not changed since Discovery carefully examined the system and the parties executed the Affiliation Agreement. The definitions in the Affiliation Agreement provided in detail for the carriage of the programming over IPTV.

Discovery was achieving its business goals under its Affiliation Agreement with Sky Angel – new distribution of its programming channels with payment of lucrative subscriber fees in return. Certainly, Discovery's sales personnel were pleased with the Sky Angel agreement because they sought to expand the arrangement, for additional fees, of course. However, for reasons that could not have been economic, Discovery terminated the agreement.

The FCC Program Access Process Is an Ongoing Failure

Because of Discovery's threats and refusal to explain or relent, on March 24, 2010, Sky Angel filed a Program Access Complaint and Emergency Petition for Temporary Standstill with the FCC in an attempt to prevent Discovery's unjustified and unlawful withholding. The Complaint relied on the 1992 Cable Act and the FCC's implementing rules. On April 21, 2010, before Sky Angel timely responded to Discovery's claimed defenses, including that Sky Angel fails to "qualify" as an MVPD under the statute, the FCC's Media Bureau declined to issue a standstill, based only on the incomplete record before it. Discovery severed its programming connection with Sky Angel the next day. The FCC has taken no other substantive action in the more than two years since April 2010, and so Sky Angel and its subscribers remain deprived of the Discovery programming or a decision on the merits by the FCC. Sky Angel has suffered

harm, in the form of lost revenue, subscribers, and marketing opportunities, because of Discovery's action and the FCC's refusal to protect it.

Although the Bureau declined to grant a standstill at that time, it expressly did not rule on any of the merits of Sky Angel's program access complaint, including whether Sky Angel qualifies as an MVPD entitled to the program access protections Congress intended to apply to new, innovative competitors in the video distribution marketplace. Rather, the Bureau simply found that, because of "the limited record before" it and "the lack of Commission precedent" regarding a service such as Sky Angel, it was "unable to conclude that Sky Angel has met its burden of demonstrating that the extraordinary relief of a standstill order is warranted." The pleading cycle did not conclude until after the Bureau declined to grant a standstill, so Sky Angel had no opportunity to address Discovery's unexpected, and strained, legal and factual contentions made in opposition to Sky Angel's complaint and standstill petition.

The record of evidence before the FCC is that:

- Sky Angel qualifies as an MVPD entitled to relief under the program access rules. Sky Angel clearly falls within the broad statutory and regulatory definitions of an MVPD, and its innovative service, while not known to Congress twenty years ago, is exactly the type of new entrant Congress intended to promote in order to increase competition in the video distribution marketplace.
- Discovery continues to engage in unfair acts and unlawful discrimination by withholding its programming from Sky Angel while permitting far larger video programming distributors, including its affiliates, to offer their subscribers multiple linear channels of Discovery programming via broadband Internet connections.
- As has been demonstrated to the FCC, and is known to anyone who cares to look, DISH currently offers its 14 million subscribers unlimited Internet access to all of the live channels they subscribe to, including numerous Discovery channels, via Internet access from any U.S. location, at no extra cost. Discovery permits that Internet-based distribution of its channels by DISH. The "True TV Everywhere" offering by DISH proves that Discovery does not suffer harm from Internet distribution of its channels of a vastly greater scope than Sky Angel provides to its 20,000, or so, subscribers.

- Sky Angel has suffered, and will continue to suffer, irreparable harm due to Discovery's withholding of its programming. Sky Angel subscribers no longer can access Discovery programming, and consumers considering subscribing to Sky Angel have had less incentive to do so for more than two years. Further, Sky Angel's "first to market" advantage in offering this innovative and affordable service continues to deteriorate, and several large programming providers continue to hesitate to enter into distribution agreements with Sky Angel expressly because of Discovery's unlawful withholding.
- Discovery would suffer no harm because it would simply be providing programming to a distributor which uses the same distribution technology as other distributors of its programming, and Discovery would receive additional revenue on a per-subscriber basis at rates it required and contractually agreed to. Other large MVPDs also offer versions of "TV Everywhere" which include Discovery channels provided via some form of Internet distribution.

The D.C. Circuit Had to Scrutinize the FCC Process

Under its program access procedures, the FCC has committed to resolving program access complaints within five months of submission. However, because of almost two years of inactivity by the FCC, Sky Angel felt compelled to ask the United States Court of Appeals for the D.C. Circuit to order the FCC to act in the case by filing a Petition for Writ of Mandamus. To Sky Angel's great satisfaction, in a matter of only a few days after filing its Petition, the Court ordered the FCC to respond to Sky Angel's Petition within 30 days.

Before the 30 days had expired, the FCC assigned the Sky Angel Complaint a file number, which the agency had failed to do for the previous two years. It also accepted a form of protective order between the parties, which also had been languishing at the FCC for most of two years. Then, the FCC "launched" a proceeding, asking for public comment regarding the meaning of the MVPD definition and asking many other questions, the vast majority of which were unnecessary to act upon Sky Angel's program access Complaint. The pleading cycle closed for those comments, and reply comments, on June 13, 2012.

To date, the FCC still has not acted substantively on Sky Angel's Complaint. Nor has it acted on Sky Angel's motion seeking information from Discovery (pending without action for

more than two years), Sky Angel's renewed request for a standstill (pending without action for more than 13 months), or Sky Angel's request to sanction Discovery for lack of candor and to investigate if Discovery had misrepresented its claims of "harm" (also pending for more than 13 months).

Congress Should Ensure That There is a Level Playing Field for Video Competition

So far, the regulatory process that Congress enacted in the 1992 Act has been an utter failure for Sky Angel, its subscribers, and the public interest which would benefit from the improved choice and pricing of its service. The fundamental purpose of Sky Angel's complaint is to evoke the program access rights under the 1992 Act so that Discovery would deal fairly with Sky Angel in its programming decisions, and not disadvantage Sky Angel, while providing exactly the same programming to large MVPDs. Sky Angel believes that the program access framework would be beneficial to it and the public interest if it were fairly and promptly enforced. Sadly, the small competitive entrant is being given short shrift by the FCC, and therefore, advancing the interests of multi-billion dollar incumbent MVPDs.

In fact, the recent record before the FCC demonstrates that a majority of interested parties, representing various segments of the video distribution marketplace, agree that Congress intended a broad definition of MVPD so that competitors, such as Sky Angel, would receive fair treatment in access to programming. In contrast, opponents are primarily incumbent MVPDs, who argue for a narrow definition of MVPD, taking exactly the opposite position they promoted in 1992 when the Act was passed and implemented.

Sky Angel, itself, is not a competitive threat to incumbent MVPDs because of its small size and family-friendly commitment. However, it represents a technology and system that could be very effective in competing against the established providers because of its far lower

cost of entry into the market and ability to offer service nationwide, wherever broadband Internet connectivity is available.

In addition to the dispute with Discovery, Sky Angel has faced refusal to deal from other programmers. For example, and quite shocking, C-SPAN refuses to permit Sky Angel to distribute its channels. Although C-SPAN entered into an agreement with Sky Angel and began to provide its programming, C-SPAN cut its service off three days later, saying that it had “made a mistake,” without any other explanation. Interestingly, C-SPAN is offered on the Internet as a “free” public service to all. Perhaps telling is that C-SPAN is controlled by the cable television industry, which claims that it does not need to be regulated in this area because it can be trusted to do the right thing. No doubt, the fox was quoted as saying much the same on the way to the chicken coop. In addition, a number of larger programmers, which are not distributors, have refused to deal with Sky Angel, saying (or implying) that they want to avoid conflicts within the industry.

Sky Angel believes that if Congress and the FCC made it clear that the law requires that it, and other new entrants, be treated fairly, then these failures to deal would be removed, or at least mitigated. Therefore, Sky Angel urges Congress to make sure that the existing provisions of the 1992 Cable Act are fairly and promptly enforced.

Sky Angel relies upon a set-top box as an essential component of its distribution system. Sky Angel supports fairness in set-top box technology and distribution. It would be delighted if set-top boxes generally supported the distribution of its service, so long as the integrity of its system, especially including encryption, is preserved.

Sky Angel is not an ISP. It does not provide Internet service. It relies upon the Internet connections of its subscribers for “last mile” access to the set-top boxes in their homes. Sky

Angel has no arrangements with ISPs, and its service is subject to any data caps imposed upon subscribers by ISPs.

In conclusion, Sky Angel believes that it represents an important part of the future of video on the Internet. It offers a service that is cost-effective and consumer-friendly, permitting American families to have an alternative to the established, incumbent MVPDs, in a form that is functionally identical. It would improve use of, and access to, the Internet by consumers. The Sky Angel service is not web-based, or even connected to a home computer, and its characteristics fall clearly and squarely under the MVPD definition passed by Congress in the 1992 Cable Act. As such, on the one hand it should be protected under the program access rights that Congress included in the 1992 Act, and on the other hand, Sky Angel is entirely different from all web-based, video-on-demand and/or non-subscription video services, such as Netflix, Hulu, and YouTube. None of those services fall under the MVPD definition.

Sky Angel urges Congress to ensure that there is a level playing field so that it, and other new entrants, may have the opportunity to compete fairly for video subscribers and thus enhance the public interest, and consumer choice, by providing new opportunities and uses for the Internet, now and in the future.

Thank you again for the opportunity to testify and I would be pleased to answer any questions that you may have or provide additional information.