**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Video Description: Implementation of the | ) | MB Docket No. 11-43 |
| Twenty-First Century Communications and | ) | |
| Video Accessibility Act of 2010 | ) | |

# COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION


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## TABLE OF CONTENTS

INTRODUCTION/SUMMARY.....1

I. THE CVAA PROVIDES ONLY LIMITED AUTHORITY TO MODIFY THE REINSTATED VIDEO DESCRIPTION RULES.....3

A. The Commission Cannot Increase the Number of Covered Networks.....5

B. The Commission Cannot Adopt a "No Backsliding" Rule.....9

C. Video Description Rules Do Not, and Should Not, Apply to VOD Content.....11

II. ANY INCREASE IN VIDEO-DESCRIBED HOURS MUST PROVIDE FLEXIBILITY.....13

III. THE CABLE INDUSTRY IS WORKING TO IMPROVE CONSUMER ACCESS TO VIDEO-DESCRIBED PROGRAMMING.....16

IV. IMPLEMENTATION PERIODS FOR ANY NEW REQUIREMENTS MUST BE REASONABLE.....18

CONCLUSION.....20

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The National Cable & Telecommunications Association[1] hereby submits its comments on the *Notice of Proposed Rulemaking* ("*Notice*") in the above-captioned proceeding.[2]

## INTRODUCTION/SUMMARY

NCTA's member companies have been providing customers who are blind or visually impaired with video-described programming for several years. That programming not only includes the fifty hours each calendar quarter required by the Federal Communications Commission's ("Commission's") rules on the top five nonbroadcast and top four broadcast networks, but also includes a growing library of programming that has previously been video-described.

With this proceeding, the Commission looks to expand the amount of video-described programming required to be offered on program networks provided by cable operators and other multichannel video programming distributors ("MVPDs") as well as broadcast networks, both by

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[1] NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of broadband service after investing over $245 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to approximately 30 million customers.

[2] *See In re Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Notice of Proposed Rulemaking, 31 FCC Rcd 2463 (2016) ("*Notice*").

increasing the number of hours of required video-described programming and by expanding the number of program networks that must offer such programming.

The Commission understood from the very start that the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA") gave it "authority to *expand the video description hour requirements* and the number of markets in which broadcasters are required to provide description if we determine that the benefits of television description outweigh its costs."[3] Congress has taken no action in the interim to broaden the Commission's charge. Proposals to change the number or nature of covered nonbroadcast networks, whether through doubling the number of covered networks, adopting a "no backsliding" rule, or other material revisions, rest on a misreading of the breadth of the Commission's authority and run afoul of the carefully balanced provisions of the CVAA. In addition, any mandate to include video description in on-demand programming is not contemplated in the CVAA, nor would it be technically feasible at this time.

The cable industry continues to diligently work to identify ways to help customers better discover and access the video-described programming that is being offered. The industry participates in the Commission's Disability Advisory Committee ("DAC") and, along with consumers and other industry participants, is integrally involved in helping to solve problems identified by consumers in order to facilitate ease of use of the video-described programming that is available today. These voluntary stakeholder efforts, rather than Commission mandates, should be relied on to ensure that information about which programming is video-described is available to consumers.

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[3] *In re Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Notice of Proposed Rulemaking, 26 FCC Rcd 2975 ¶ 5 (2011) (emphasis supplied) ("*2011 DVS NPRM*").

Finally, the Commission must adopt reasonable implementation policies for any new requirements. In particular, any requirement that increases the hours of video-described programming must provide a sufficient period for compliance and appropriate flexibility.

## I. THE CVAA PROVIDES ONLY LIMITED AUTHORITY TO MODIFY THE REINSTATED VIDEO DESCRIPTION RULES

The Commission's first effort to require the broadcast and cable industries to provide 50 hours of video-described programming per calendar quarter was struck down by the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), which found that Congress had not provided the Commission authority in the 1996 amendments to the Communications Act or elsewhere to adopt video description rules.[4] The D.C. Circuit reminded the Commission that "the adoption of rules mandating video description" is not permissible simply because "Congress did not expressly foreclose the possibility."[5] It was against this backdrop that Congress adopted the comprehensive video description regime set forth in the CVAA.

Like much of the CVAA, the video description provision struck a carefully balanced compromise. The CVAA for the first time granted the Commission authority to adopt video description rules, but set strict parameters around future expansion of those initially-adopted requirements. Congress spelled out that the Commission should "reinstate" the specific regulations previously adopted by the Commission that the D.C. Circuit had invalidated in *MPAA*.[6] It permitted only certain modifications to those "reinstated" regulations.[7] After a period in which the reinstated rules were in effect, the Commission was directed to conduct "Inquiries

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[4] *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F. 3d 796, 805 (D.C. Cir. 2002).

[5] *Id.*

[6] 47 U.S.C. § 713(f)(1) ("Reinstatement of Regulations").

[7] *Id*. § 713(f)(2) ("Modifications to Reinstated Regulations").

on Further Video Description Requirements."[8] The CVAA gave the Commission "continuing authority" to adopt certain additional regulations in this area no earlier than two years after issuance of the reports.[9]

The *Notice* proposes to significantly rewrite – or wholly eliminate – components of the rules that Congress directed the FCC to reinstate under what the Commission claims is its "continuing authority,"[10] contrary to the plain language of the CVAA. The *Notice* proposes to scrap the limits on the number of covered networks in the reinstated rules by doubling the number of covered nonbroadcast networks from five to ten;[11] to eliminate the fifty percent reach requirement in the reinstated rules;[12] and to adopt a "no backsliding" rule[13] that would require the continued provision of video description by any network once it has been found to be one of the top five (or ten if the proposed rules are adopted) nonbroadcast networks even if it dropped out of the most highly-rated networks. Contrary to the assumptions embodied in the *Notice*, the Commission's "continuing authority" to adopt additional video description requirements of any kind is carefully constrained and specifically delimited. Section 713(f)(4) provides authority to adopt additional rules in only two discrete areas: increasing the number of hours of video-described programming on covered networks and increasing the number of designated market

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[8] *Id.* § 713(f)(3) ("Inquiries on Further Video Description Requirements").

[9] *Id.* § 713(f)(4) ("Continuing Commission Authority").

[10] *See, e.g.*, *Notice* ¶ 3 ("Congress… granted the Commission continuing authority to adopt additional regulations so long as the benefits of those new regulations outweigh their costs."); *id.* ¶ 8.

[11] *Id.* ¶ 20.

[12] *Id.* ¶ 29.

[13] *Id.* ¶ 26.

areas under certain circumstances not at issue here. The "continuing authority" to act in these specified areas is narrow, not broad.[14]

### A. The Commission Cannot Increase the Number of Covered Networks.

Section 713(f)(4) – entitled "Continuing Commission Authority – must be considered as part of the entirety of the CVAA video description provisions. While this subsection references the Commission's ability to issue "additional regulations," read in context it is clear that those additional regulations are limited to an increase in hours on those networks subject to the "reinstated" rules adopted under Section 713(f)(1).[15]

Section 713(f)(1) mandated the reinstatement of the specific video description rules that had been struck down by the D.C. Circuit. Those rules provided for 50 hours of video-described programming on the top five nonbroadcast networks. Congress also prescribed the sole ways in which the reinstated rules could be modified, specifying in Subsection (f)(2) that the "reinstated" regulations "shall be modified *only* as follows."[16] With respect to the nonbroadcast networks subject to the video description requirement, the *only* modification authorized was an "update … [to] the list of the *top 5 national nonbroadcast networks that have at least 50 hours per calendar quarter of prime time programming* that is not exempt under this paragraph…." The Commission conducted such an update just last year.[17] The CVAA granted the Commission no

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[14] Such a narrow reading of Commission authority is consistent with the significant First Amendment concerns with more expansive video description requirements. The current proposals compel more extensive video description which, unlike closed captioning, is not merely a written transcript of existing speech. In addition, if unreasonably applied, additional regulations seem more likely to affect constitutionally-protected programming and scheduling decisions. *See infra* Section II.

[15] 47 U.S.C. § 713(f)(4)(B) ("If the Commission makes the determination under subparagraph (A) and issues additional regulations, the Commission may not increase, in total, the hour requirement for additional video described programming by more than 75 percent of the requirement in the regulations reinstated under paragraph (1).").

[16] *Id.* § 713(f)(2)(B) (emphasis supplied).

[17] *See In re Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Order and Public Notice, 30 FCC Rcd 2071 (2015).

other authority – express or otherwise – to adopt wholesale changes either to the number of or nature of nonbroadcast networks covered.

If there is any ambiguity about the extent of the Commission's authority to adopt additional changes to the rules Congress ordered to be "reinstated," an examination of the legislative history confirms this narrow intent. The House bill, H.R. 3101, included a separate provision ("increased availability") that would have permitted the Commission, ten years after adoption of the law, "based upon the findings, conclusion, and recommendations contained in the report under clause (i), *to increase the availability of such programming*."[18] The House Report explains that this provision would have given the Commission the authority it claims it has here: "Ten years after the date of enactment, the Commission shall have the authority to require an increase in the amount of available video described programming, *including an increase in the number of networks required to provide such programming* or the number of hours required to be provided."[19] The Senate bill, by contrast, included no such additional authority.[20] The Senate bill, which ultimately was signed into law, excluded the provision on additional authority found in the House bill, leaving only a simple increase in hours on the networks subject to the reinstated rules (and, at a later time, expanded coverage by broadcast stations in additional markets).[21]

This meaning was well-understood at the time of the law's passage. In fact, the Coalition of Organizations on Accessible Technology, one of the main proponents of the law,

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[18] Twenty-First Century Communications and Video Accessibility Act of 2010, H.R. 3101, § 202(a)(3) (amending 47 U.S.C. § 713(f)(4)(B)(ii)) (emphasis supplied).

[19] H.R. Rep. No. 111-563, at 29 (2010) (emphasis supplied).

[20] S. 3304; S. Rep. No. 111-386 (2010).

[21] *See* Statement of Commissioner Michael O'Rielly, Approving in Part and Dissenting in Part ("[I]t's implausible to think – and actually contrary to the canons of statutory construction – that we have authority to apply the rules to more networks now, six years after enactment, when language that would have allowed us to do the same thing ten years after enactment didn't even survive the legislative process.").

contemporaneously wrote that "after 4 years, [the law] permits the FCC to increase video description to 7 hours per week on *9 television channels*" (i.e., the five nonbroadcast and four broadcast networks under the reinstated rules).[22] Indeed, the Commission itself understood the limits on its authority, explaining in its first *Notice* post-CVAA that "the CVAA also gives us authority to *expand the video description hour requirements* and the number of markets in which broadcasters are required to provide description if we determine that the benefits of television description outweigh its costs."[23] Congress has taken no steps since to increase the Commission's charge with respect to video description.[24]

Finally, even if, arguendo, the Commission has broader "continuing authority" to adopt additional regulations that increase the overall amount of video-described programming, that authority is further constrained by the limitation on the number of "total hours" of described programming that Congress expressly adopted. The CVAA provides that "the Commission may not increase, *in total*, the hour requirement for additional described programming by more than

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[22] The Int'l Center for Disability Resources on the Internet, *Passage of the 21st Century Communications & Video Accessibility Act of 2010*, Sept. 30, 2010 (citing COAT summary of the bill as passed), *available at* http://www.icdri.org/News/21CentCommACT.htm. The American Council of the Blind expressed the same view. Am. Council of the Blind ("ACB"), *What the Twenty-First Century Communications and Video Accessibility Act of 2010 Will Do for People Who Are Blind or Visually Impaired* ("After four years the bill permits the FCC to increase video description to 7 hours per week on 9 television channels."), *at* http://www.acb.org/adp/commact.html (last visited June 27, 2016).

[23] *2011 DVS NPRM* ¶ 5 (emphasis supplied).

[24] For similar reasons, the Commission does not have authority to repeal or narrow any carve-out for specific categories of programming or networks that Congress, through the CVAA, required to be reinstated. *See MPAA* 309 F.3d at 805 ("The FCC's position seems to be that the adoption of rules mandating video description is permissible because Congress did not expressly foreclose the possibility. This is an entirely untenable position."). For example, Section 713(f) of the Communications Act does not grant the Commission the express power to eliminate – through "additional regulations" or otherwise – the reinstated exemptions for any nonbroadcast network that either (i) does not reach at least 50 percent of MVPD households; or (ii) does not provide, on average, at least 50 hours per quarter of prime-time non-exempt programming. Because the statute directed the Commission to reinstate each of these exemptions, and provided no authority to modify such exemptions, the statute's failure to accord the Commission express authority to subject these specific exemptions to wholesale changes in the future denies the Commission such authority, especially in light of the direct D.C. Circuit precedent on this subject.

75 percent of the requirement in the regulations reinstated under paragraph (1)."[25] Therefore, even if the restrictions on modifications to the reinstated regulations did not expressly preclude the Commission from overriding the limits on the number of covered networks, this provision separately caps the total number of *increased hours* of mandated video-described programming permitted under any rules arising from this proceeding. Doubling the number of networks subject to the requirement *and* increasing the number of required hours would run afoul of this express restriction as a matter of math alone.[26]

The *Notice*'s reasoning for requiring the addition of more nonbroadcast networks is questionable in any event. While the *Notice* suggests that including additional networks below the top five would likely not impose significant technical or cost issues, it confuses the issue of start-up costs for programmers with those of distributors.[27] While MVPDs are required to pass through any secondary audio stream they receive that might include audible emergency information,[28] making it likely that most MVPDs have a secondary stream capability,[29] the same is not true of nonbroadcast networks since they may not provide emergency information at all.

And for those networks that lack a secondary audio stream, creating the capability to provide video description will require considerable effort and expense. Program networks that

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[25] 47 U.S.C. § 713(f)(4)(B).

[26] *See* Statement of Commissioner Ajit Pai, Approving in Part and Dissenting in Part (calculating only an additional 337.5 hours per quarter of video-described programming would be permissible under this provision, as opposed to the 862.5 hours per quarter proposed in the Notice). The *Notice's* explanation of this language is beyond the bounds of reasonableness and finds no support in either the plain language or legislative history. *See Notice* ¶ 14 (reading the phrase "in total" to mean "that if the Commission increases the required hours per-network of video described programming in increments, the total increase cannot exceed 75 percent"). Moreover, this interpretation would unlawfully render the phrase surplusage.

[27] *Notice* ¶ 11.

[28] *Id.* n.43.

[29] Some MVPDs were granted extensions. *See In re Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Memorandum Opinion & Order, 30 FCC Rcd 5012 (2015) (granting waivers to certain analog-only and hybrid cable systems).

need to provide video description for the first time must build the work flow components to receive, manage, store and embed a video description file onto an associated program episode. They must acquire the capability to detect the presence or absence of video description on the second audio channel, as well as the ability to automatically switch to the appropriate audio source. In addition, they must develop the appropriate procedures for reviewing program schedules and associated licensing agreements to determine what programming may be legally described. And they must adjust the timing of program delivery in order to build in additional room for creation of the descriptions, which affects program production schedules.

### B. The Commission Cannot Adopt a "No Backsliding" Rule.

The Commission equally lacks authority to expand the number of networks subject to a video description requirement through adoption of a "no backsliding" rule. When the Commission previously rejected just such an approach, it "agree[d] with NCTA that the statute does not authorize us to expand the number of nonbroadcast networks subject to our rules beyond the five identified according to the criteria set out in the statute and interpreted here."[30] Although the Commission at that time suggested in a footnote that "after the passage of time and a review of their impact," it has "authority to expand these rules" (citing Section 713(f)(4)), for the reasons cited above, that suggestion misreads the CVAA.[31]

Even assuming, arguendo, that the Commission has the discretion to do so, it should not adopt a "no backsliding" rule. Such a rule not only would ignore the limits on the number of networks subject to the rule, but it also would conflict with the logic behind periodic updates to

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[30] *In re Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report & Order, 26 FCC Rcd 11847 ¶ 19 & n.88 (2011) ("*2011 DVS Order*").

[31] *Notice* ¶ 26.

the list of the top five networks. It would mean that once a programmer is subject to the rules, it will always be subject to the rules, regardless of changed circumstances.

Requiring a network that has slipped out of the top five (or ten if the proposed rules are adopted) to continue to shoulder the same financial costs of creating new video-described programming as its more highly-rated and financially successful peers would be unfair. The on-going costs of describing the program would be the bulk of the costs for networks that already have a secondary audio stream on which to transmit video description. As a result, a network with changed fortunes would still be expected to cover the same costs as more highly-rated competitors, ad infinitum.

This unfairness is not mitigated by the ability of a covered network to petition for an exemption under the economically burdensome provisions.[32] Requiring the filing of a petition imposes its own costs on a network that may be struggling. And the fall-back of an individual petition is no justification for adopting a rule that would ignore the rationale for limits in the first place.[33]

Nothing suggests that a network might not voluntarily continue to video-describe if it has the financial wherewithal and customer interest. The Commission already has "encouraged parties to voluntarily continue providing video description service once it has begun, because of the benefits it provides to the community and the lower costs of continuing, as opposed to

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[32] *Id.* ¶ 27 (proposing that "a network that finds inclusion economically burdensome may petition . . . for exemption from the effect of the rules").

[33] *See In re Implementation of Video Description of Video Programming*, Memorandum Opinion & Order, 16 FCC Rcd 1251 ¶ 12 (2001) (limiting to the top five nonbroadcast networks as defined by national audience share and that reach 50 percent or more of MVPD households "best fulfills our goal of ensuring the widest availability of video description").

beginning, the provision of video description."[34] That is the best – and only lawful – way to proceed.

### C. Video Description Rules Do Not, and Should Not, Apply to VOD Content.

The *Notice* asks whether the Commission should require video on demand ("VOD") programming to be described "if it has been previously carried by that MVPD with video description," noting that it has clarified that "closed captioning must be preserved in VOD programming."[35] Doing so would be a departure from the Commission's current approach, and should be rejected.

As explained above, the CVAA provided the Commission specific and limited authority to apply video description obligations, centered on reinstatement (with limited exceptions) of rules adopted by the Commission in 2000. The video description rules adopted by the Commission in 2000 did not extend to VOD content, even though the Commission was well aware that programming could be accessed "on demand" at that time. Indeed, as the Commission has explained, "Commission guidance with respect to the *captioning* of 'on demand' programming was first provided in 1997."[36]

The lack of a video description requirement for VOD content in the reinstated rules makes sense, given the technical realities of VOD platforms. MVPD systems may not have the technical ability to pass through a secondary audio stream on VOD platforms. Even when a VOD platform can support a secondary audio stream, the VOD version and the linear version of

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[34] *2011 DVS Order* ¶ 19, n.89.

[35] *Notice* ¶ 37.

[36] *See In re Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc., Petition for Rulemaking*, Report & Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 2221 ¶ 118 (2014).

a program may include different audio tracks, among other differences.[37] For example, while the linear version of a program may include video description in the secondary audio stream, the VOD version often has no secondary audio at all, or may have Spanish or another foreign language in the secondary audio. And if the VOD version has Spanish or another foreign language in the secondary audio, because currently there is no technical ability to carry a third audio stream, the only way to also have video description on that VOD program would be to "double publish" the program – *i.e.*, publish one VOD version with Spanish or another foreign language in the secondary audio, and a second VOD version with video description. Such an approach could lead to consumer confusion in locating a VOD program, and also tax the capacity of the VOD platform. In sum, the fact that an MVPD carries a particular program on a linear network with video description has no bearing on whether that MVPD can do so on an on-demand basis or whether a later on-demand version of the program made available by the MVPD was provided by a network that is or remains subject to the video description rules at the time provided.

Although it speaks to a different situation, the Commission's explanation for how to treat "subsequent airings" of programming containing video description provides a useful analogy here. When it adopted video description rules in 2000, the Commission explained that once an MVPD has aired a particular program with video description on a particular linear broadcast station or nonbroadcast network, all of that MVPD's "subsequent airings" of that program on that

[37] The linear and VOD versions of the program also may have different formats/program lengths (*e.g.*, VOD assets typically include a different amount of advertising than linear programs), and may be delivered in different ways. For example, a VOD asset may be delivered to an MVPD by an entity other than the linear network, as entities other than MVPDs often hold the distribution rights for programming assets provided on demand – *e.g.*, VOD distribution rights may be held by the content owner, a syndicator, an MVPD, a broadcast network, an "over-the-top" (OTT) provider like Netflix, Amazon, or Hulu, a combination of these, or none of these. Additionally, if a VOD asset is provided to an MVPD with descriptions, those descriptions could differ from the described linear program carried by the MVPD because descriptions may have been produced for the program by another entity at another time.

particular station or network "should contain video description, unless another use is being made of the SAP channel."[38] The Commission explained, however, that this requirement "should not impose any burden on any broadcast station or MVPD subject to our rules, or on their programming suppliers . . . because the cost of both describing programming, and upgrading equipment and infrastructure to distribute it, generally should be a one-time fixed cost."[39] At the same time, the Commission specified that it would "allow programming providers to repeat programming without video description, if they wish to make another use of the SAP channel, such as Spanish language audio."[40] The rules the Commission adopted in 2011 implementing the CVAA followed this approach.[41]

Given the significant differences in programming offered on VOD versus linear programming, a requirement to describe VOD programming that was provided on a linear basis with descriptions would be burdensome (and far exceed a "one-time fixed cost"). Any such requirement would involve solving complex technical and rights issues that would involve a number of stakeholders, including movie studios, program networks, program aggregators, MVPDs, and others. The Commission should refrain from applying video description obligations to programs offered on VOD.

## II. ANY INCREASE IN VIDEO-DESCRIBED HOURS MUST PROVIDE FLEXIBILITY

The *Notice* proposes to increase the quarterly requirement for video-described programming on each covered network from 50 hours per quarter to the maximum allowed by

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[38] *In re Implementation of Video Description of Video Programming*, Report & Order, 15 FCC Rcd 15230 ¶ 33 (2000) ("*2000 DVS Order*").

[39] *Id.*

[40] *Id.*

[41] *See 2011 DVS Order* ¶ 22.

the rules – 87.5 hours per quarter.[42] While the *Notice* characterizes this 75% increase as "relatively small,"[43] it would be mean that a covered network would be required to provide nearly 7 hours of video-described prime time or children's programming each week of the year – up from about 4 hours per week under the rules today. If the Commission were to determine that the "need for and benefits of providing video description for video programming . . . are greater than the technical and economic costs of providing such additional programming,"[44] it should take measures to ensure that significantly increasing the hours of video-described programming can be done in a manner that is not economically burdensome or technically challenging to covered program networks. The Commission must adopt exceptions and policies related to the increase in required hours that avoid a conflict between the need to provide video description and program scheduling.

Nearly doubling the amount of video-described requirements will almost inevitably lead to issues that need to be considered at the outset, and not as part of an ad hoc waiver process. Some of the covered nonbroadcast networks may provide a significant amount of live programming during prime time that is simply not suitable for video description; some may not provide any children's programming that might count toward satisfying the requirement; some may run repeats of video described programming that can only be counted once (in addition to the original airing) under the rules; and some may desire to serve foreign language audiences as well as the blind and visually-impaired.[45] The Commission should incorporate flexibility into

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[42] *Notice* ¶ 18.

[43] *Id*.

[44] 47 U.S.C. § 713(f)(4)(a).

[45] In that regard, the *Notice* also asks about the state of the marketplace with regard to the use of multiple audio streams. *Notice* ¶ 38. It is still the case that the secondary audio stream for the most part is used for both video description and foreign language programming, most often Spanish. Industry is voluntarily exploring a path forward to better signal the availability of video description, so that blind customers will not need to switch back

any rules increasing the number of hours to ensure that any new requirement does not dictate programming schedules, either directly or indirectly.[46]

One way to provide this flexibility would be to enable networks to average their compliance across multiple calendar quarters.[47] This would enable programmers that, for example, may have a heavy concentration of live programming during one time of the year to make up any missing hours in other quarters by providing more video-described programming during a period when it shows less live programming. The Commission also should consider a rule that allows programmers to count towards compliance video-described programming aired on a related nonbroadcast network.

Similar to a proposal we offered previously, the Commission should also adopt a rule providing a categorical exemption from the 87.5-hour requirement if all non-exempt programming in a quarter that could count toward the requirement is video-described by a program network, even if it amounts to less than 87.5 hours.[48] Such an exemption would be preferable to a case-by-case waiver, as it will provide the certainty necessary to ensure that programmers are not forced to artificially construct a program schedule simply to ensure a sufficient number of "describable" programming hours.[49]

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and forth to find English-language described programming. Currently, the Video Description Working Group of the DAC is working toward a recommendation in this area.

[46] *See also supra* note 14.

[47] *See generally* 47 C.F.R. § 73.671 (Children's educational and informational programming rules provide flexibility by permitting television stations to average compliance over a 6 month period and to count efforts across multiple streams of digital programming.).

[48] *See* NCTA Comments, MB Dkt. No. 11-43 at 16-17 (filed Apr. 28, 2011); *see also 2011 DVS Order* ¶ 46 (acknowledging our concern, but declining to adopt a categorical exemption at this time).

[49] Moreover, waivers impose unnecessary costs on the networks and burdens on the Commission – diverting resources that could be put to more productive uses.

Another way to ease the impact on program schedules would be by enabling networks to count more than a single repeat towards the hours requirement. This could be particularly helpful during certain quarters where there are fewer new episodes than other times of the year.

## III. THE CABLE INDUSTRY IS WORKING TO IMPROVE CONSUMER ACCESS TO VIDEO-DESCRIBED PROGRAMMING.

The *Notice* seeks comment on questions relating to improving consumer access to video description, including the status of industry efforts, and proposes to adopt rules in this area.[50] The cable industry continues to work hard to successfully implement the reinstated video description rules and to ensure that consumers can enjoy the benefits they deserve pursuant to the CVAA – including accessing the growing library of video-described programming. As described below, work to help customers better locate the video-described programming that is available is ongoing on a voluntary basis. The Commission should allow these efforts to continue to fruition before adopting additional regulatory mandates.

*Program guide information*. We appreciate the opportunity to comment on the industry's efforts related to providing video description information to program guide services.[51] Today, on a voluntary basis, programming networks are notifying the publishers of program guides when a program contains video description. In addition, certain cable operators already indicate in their advanced electronic program guides whether a particular program contains video description.[52] That said, some issues with respect to the accuracy of the information displayed in guides have been identified, making information about available video-described programming both over- and under-inclusive. Industry representatives have made a commitment to solve these accuracy

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[50] *See Notice* ¶¶ 31-35.

[51] *See id.* ¶ 32 (seeking comment on, among other things, whether networks provide information about video description to program guide services).

[52] As operators roll out new equipment in the coming months and years, they will be able to provide additional information about their programming to consumers via advanced electronic program guides.

issues, and much progress has already been made. In addition, members of the DAC are collaborating to both solve these issues and to identify an appropriate entity that can serve as an aggregator of data about what programming contains video description.[53]

Nonetheless, the *Notice* asks whether the Commission should take regulatory action in this area, including whether it should adopt a requirement that "covered distributors notify publishers of programming guides when a program will be video described."[54] As we have previously explained, any requirement for a distributor to provide specific information in a programming guide is outside of the scope of what is required by the CVAA[55] or the Communications Act.[56] Given voluntary efforts currently underway and the lack of statutory authority to adopt a requirement governing guide data, Commission action at this time is unwarranted.

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[53] In the meantime, there are several ways that consumers can identify video described programming. *See In re Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report To Congress, 29 FCC Rcd 8011 ¶ 26 ("*2014 DVS Report*") (noting the use of on-screen icons; reporting that broadcast networks and programmers list video-described programs on their websites, and that some programmers offer information via telephone numbers; indicating that listings data is provided to guide services and other aggregators of such information (including certain advocacy groups); and explaining that certain information can be found on the Commission's website).

[54] *Notice* ¶ 31.

[55] As explained herein, Section 202 of the CVAA requires the Commission to reinstate video description regulations adopted by the Commission in 2000 with specific, limited exceptions. The 2000 rules did not include any obligation for cable operators to publicize program listings, and a publication requirement is not listed as an exception noted in the CVAA. Thus, there is no rule for the Commission to reinstate. Furthermore, we have previously demonstrated that the Commission does not have the authority under the CVAA to require a cable operator to include any particular information in its programming guides. *See* NCTA Comments, MB Dkt. No. 12-108 at 11-12 (filed July 15, 2013). The Commission agreed in a separate proceeding implementing the CVAA. *See In re Accessibility of User Interfaces, and Video Programming Guides and Menus*, Second Report & Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 30 FCC Rcd 13914 ¶ 26 (2015) (rejecting a requirement that an electronic program guide include specific content).

[56] Section 624(f) of the Act bars the Commission and franchising authorities from "impos[ing] requirements regarding the provision or content of cable services" except as expressly provided in Title VI. *See* 47 U.S.C. § 544(f)(1). And nothing in Title VI grants the Commission the authority to require a cable operator to include any type of content in an on-screen text menu or guide. Nor does the Commission have ancillary authority to adopt this requirement. *See American Library Ass'n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005). Moreover, any mandate dictating the content of the programming guide itself would raise First Amendment concerns.

*Dedicated customer service*. With respect to proposals in the *Notice* to require dedicated customer service, the *Notice* itself explains that the Commission "recently adopted rules in another proceeding which should[, once effective,] 'alleviate the issues identified by consumer commenters by making it easier for individuals who are blind or visually impaired to access the secondary audio stream for video description.'"[57] Those rules will go into effect in less than six months.[58] Moreover, as we have previously pointed out, proposals for dedicated customer service contacts can be problematic for numerous reasons.[59] Finally, the Commission's original video description rules did not include any customer service requirements – adding such an obligation would exceed the Commission's statutory authority pursuant to the CVAA. Given these considerations, it would be prudent for the Commission to refrain from adopting new rules. However, if the Commission nevertheless decides to pursue a dedicated customer service requirement in the instant proceeding, the Commission should allow distributors to provide a contact office for consumers to use for all accessibility concerns, rather than create a separate contact for each area (captioning, video description, etc.).

## IV. IMPLEMENTATION PERIODS FOR ANY NEW REQUIREMENTS MUST BE REASONABLE.

The *Notice* seeks comment on how to implement the proposal to expand the number of hours requirement and other proposed rule changes.[60] The video description provisions of the

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[57] *See Notice* n.105 (citing *2014 DVS Report* ¶ 33).

[58] *See 2014 DVS Report* ¶ 33 ("The compliance deadline for entities covered by the new user interfaces rules is December 20, 2016, subject to certain exceptions.").

[59] *See* NCTA Comments, MB Dkt Nos. 12-107 & 11-43 at 8 (filed July 23, 2013) (noting, among other things, that "in some cases, publicizing a dedicated complaint number has resulted in that phone number being misused, wasting valuable resources on issues not at all related to accessibility"); NCTA Comments, MB Dkt No. 12-107 at 15 (filed Dec. 18, 2012).

[60] *See Notice* ¶ 30.

CVAA contemplate "an appropriate phased schedule of deadlines for compliance."[61] The *Notice* explains that covered entities had approximately ten months to comply when the rules were reinstated in 2011.[62] A longer time frame is appropriate here for the increase in hours requirement.

As we previously explained, networks must establish a budget based on their program schedules and determine which shows to describe.

> Given the costs of video description, original programs that may later be distributed on other platforms (such as DVDs) are likely to be candidates for description. Depending on how much original versus licensed product is shown in any particular calendar quarter, networks may need more time to clear rights to include video description in licensed product given that it is a new, derivative work based on the original program. The compliance deadline must also be sensitive to the realities of program schedules. And it must include sufficient lead time for networks to have flexibility to choose those programs for which video description makes the most sense. Providing that needed flexibility will, in turn, offer a greater opportunity for choosing a mix of program types to video describe that will best serve consumers. Otherwise, these choices of necessity will be dictated simply by the exigencies of compliance.[63]

The Commission provided an eighteen-month compliance period when it first adopted video description rules.[64] At a minimum, the Commission should provide that same time frame in this context. That would mean that if the Commission resolves this proceeding by the beginning of 2017, program networks would have the benefit of any Commission update to the list of top five nonbroadcast networks before any increased hour requirement took effect.

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[61] CVAA § 202(a)(3), § 713(f)(1) & (f)(2)(F).

[62] *See Notice* ¶ 30.

[63] NCTA Comments, MB Dkt. No. 11-43 at 11-12 (filed April 28, 2011).

[64] *See 2000 DVS Order* ¶ 40 (providing an eighteen month compliance period).

## CONCLUSION

For the foregoing reasons, the Commission should adopt rules consistent with these comments.

Respectfully submitted,

**/s/ Rick Chessen**

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