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

In the Matter of	)	MM Docket No. 99-339
Implementation of Video Description of Video Programming	)	

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NOTICE OF PROPOSED RULEMAKING

Adopted: November 18, 1999 Released: November 18, 1999

Comment Date: January 24, 2000
Reply Comment Date: February 23, 2000

By the Commission:

I. INTRODUCTION

1. Television plays a significant role in our society. Television programming shapes public opinion and culture in myriad ways. It is the principal source of news and information and provides hours of entertainment every week to American homes.[1] For the millions of Americans with visual disabilities – who watch television in similar numbers and with similar frequency to the general population – the difficulty of being able to follow the visual action in television programs puts them at a significant disadvantage.[2] This disadvantage can be overcome through the use of video description, through which narrated descriptions of a television program's key visual elements are inserted during the natural pauses in the program's dialogue.[3] Video description is typically provided through the use of the Secondary Audio Programming channel so that it is audible only to those who wish to hear the narration. The narration generally describes settings and actions that are not otherwise reflected in the dialogue, such as the movement of a person in the scene. In this *Notice of Proposed Rulemaking*, we propose to adopt limited requirements to ensure that video description is more available so that all Americans can

[1] *See, e.g.*, Roper Starch, *America's Watching: Public Attitudes Toward Television* at 1-2 (1997) (reporting results of survey and stating that "[d]espite an ever-growing array of options, more people find out about what's happening in the world from television than from all other sources combined" and "[t]elevision remain[s] Americans' primary and most credible source of news and product information, as well as a source of information on important social issues").

[2] Jaclyn Parker and Corrine Kirchner, *Who's Watching? A Profile of the Blind and Visually Impaired Audience for Television and Video* at v-vi (1997) (*Who's Watching*).

[3] 47 U.S.C. § 613(g) (defining video description).

enjoy the benefits of television. We expect to expand these requirements once we have gained greater experience with video description.

2. Public television has been airing described video programming for more than a decade. WGBH's Descriptive Video Service (DVS) has described more than 1600 PBS programs, and in the fall of 1998 provided video description of three daily programs, four weekly programs, selected episodes of three other series and several specials.[4] Many commercial broadcasters also have the technical ability to air described video programming, but few have done so. Many cable systems have the capability to provide described programming, but do so only on very limited channels, such as the Turner Classic Movies channel, and none of this programming is available without the assistance of public funding.[5] As a result, less than 1% of all programming contains video description.

3. The Commission has previously conducted inquiries on video description. The Commission issued its first *Notice of Inquiry* on video description in 1995.[6] Section 713(f) of the Act,[7] added by the 1996 Act, directed the Commission to commence an inquiry on video description, and report to Congress on its findings. Using the record adduced in response to the *First NOI*, the Commission issued the required report to Congress in 1996.[8] The Commission then issued a second *Notice of Inquiry* in 1997,[9] and submitted more information to Congress on video description in its 1997 annual report on competition in the markets for the delivery of video programming.[10] The availability of video description has not meaningfully improved during the past several years while these proceedings were ongoing.

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[4] Letter from Larry Goldberg, Director, CPB-WGBH National Center for Accessible Media, to Meryl Icove, Director, FCC Disabilities Task Force 2 (Nov. 4, 1998) (*NCAM Letter*). A copy of this letter and its attachments will be placed in the record in this proceeding. DVS receives major support from the U.S. Department of Education.

[5] DVS has described more than 50 films for the Turner Classic Movies channel. NCAM Letter at 2. With financial assistance from the U.S. Department of Education, the Narrative Television Network also provides "open" video description (*i.e.*, as discussed below, the video description cannot be turned off) for the Good Life TV Network. In addition, Kaleidoscope Television, the cable programming network devoted to the needs of persons with disabilities, provides "open" description of movies each week.

[6] In the Matter of Closed Captioning and Video Description of Video Programming, MM Docket No. 95-176, *Notice of Inquiry*, 11 FCC Rcd 4912 (1995) (*First NOI*). The Commission received over 130 comments in response to the *NOI*. Commenters included broadcaster, cable and other video programming interests, as well as advocates for persons with disabilities.

[7] 47 U.S.C. § 613(f).

[8] In the Matter of Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility, MM Docket No. 95-176, *Report*, 11 FCC Rcd 19214 (1996) (*Video Accessibility Report*).

[9] Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141, *Notice of Inquiry*, 12 FCC Rcd 7829 (1997) (*Second NOI*). The Commission received over 60 comments in the context of the annual assessment of the markets for the delivery of video programming. Commenters included broadcaster, cable and other video programming interests, as well as advocates for persons with disabilities.

[10] Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141, *Fourth Annual Report*, 13 FCC Rcd 1034 (1998) (*Fourth Annual Report*).

4. Various parties have asked the Commission to take steps to enhance the availability of video description. As discussed below, the Commission has received two specific proposals to implement the service, both of which suggest that we phase in video description over a number of years.[11] In addition, the President's Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters has encouraged digital broadcasters to provide video description.[12] The Commission has also received letters of support from Congress and industry.[13] Through this proceeding, we seek comment on ways to increase the availability of video description, without imposing an undue burden on industry.

II. BACKGROUND

5. Audience for Video Description. Video description is designed to make television programming more accessible to persons with visual disabilities, and enable them to "hear what they cannot see."[14] Thus, the primary audience for video description is persons with visual disabilities. Estimates of the number of persons with visual disabilities range from more than eight million[15] to nearly twelve million.[16] The group includes persons with a problem seeing that cannot be corrected with ordinary glasses or contact lenses, with a range in severity.[17]

6. A disproportionate number of persons with visual disabilities are older. The National Center for Health Statistics reports that eye problems are the third leading cause, after heart disease and arthritis, of restricting the normal daily activities of persons 65 years of age or older.[18] While only 2-3% of the population under 45 years of age has visual disabilities, 9-14% of the population 75 years of age or older does.[19] This means that as the population ages, more and more people will become visually disabled.[20]

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[11] *See infra* ¶¶ 16-18.

[12] Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, *Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters* at section III.8 (1998). This report is available at www.ntia.doc.gov/pubintadvcom/pubint.htm.

[13] Letter from Sen. John F. Kerry to William E. Kennard, Chairman, FCC (July 1, 1999); Letter from R.E. Turner, Vice Chairman, Time Warner, to William E. Kennard, Chairman, FCC (May 4, 1999).

[14] *First NOI*, 11 FCC Rcd at 4913, ¶ 1 (*NOI*) (citing Telecommunications Reform, Hearings on S. 1822 Before the Committee on Commerce, Science, and Transportation, 103rd Cong., 2d Sess. (1994) (statement of Margaret R. Pfanstiehl, President of the Metropolitan Washington Ear)).

[15] U.S. Dep't of Commerce, Economics & Statistics Admin., Bureau of the Census, Statistical Abstract of the U.S.149 (1998).

[16] NCAM Letter at 5.

[17] NCAM Letter at 5.

[18] NCAM Letter at 5-6.

[19] 1998 Statistical Abstract of the U.S. at 149.

[20] *Who's Watching* at v.

7. Secondary audiences for video description exist as well. For example, at least one and a half million children between the ages of 6 and 14 with learning disabilities[21] may benefit from video description. Because the medium has both audio description and visual appeal, it has significant potential to capture the attention of learning disabled children and enhance their information processing skills. Described video programming capitalizes on the different perceptual strengths of learning-disabled children, pairing their more-developed modality with their less-developed modality to reinforce comprehension of information.[22]

8. The secondary audience may also include persons without disabilities. Just as health club members and sports bar patrons have become beneficiaries of closed captioning, viewers who are doing several things at once, who need to attend to something during a program, or who leave the room during a program, may become beneficiaries of video description.[23] In fact, the Narrative Television Network, which provides video description that is "open" and therefore cannot be turned off, reports that 60% of its audience is not visually disabled.[24]

9. Technology. Video description can be either "open" or "closed." Open description is provided as part of the main soundtrack of a program. As a result, no special equipment is needed for a broadcaster or multichannel video programming distributor (MVPD) to transmit the descriptions or for the viewer to receive them. The descriptions cannot, however, be turned off.

10. Closed description is provided on the Secondary Audio Programming, or SAP, channel. The SAP channel allows for an additional audio soundtrack for a program, independent of or separate from the monaural and stereophonic soundtracks. A secondary carrier, or subcarrier, transmits the SAP channel audio soundtrack through a modulator. When the SAP channel is used, a programming distributor transmits two separate audio tracks. The second audio track is transmitted with the main program signal. For example, the SAP channel as currently used by PBS for its video description is transmitted with the main program signal from the network's master control facility and satellite distribution system to the local station's broadcast facility and through the local transmitter. To accommodate the additional soundtrack, changes may need to be made to some network and local stations' plant wiring and equipment. At the local transmitter, the broadcast station or cable operator must have the technical facilities to pass through the subcarrier signal to include the SAP channel information.[25]

11. The CPB-WGBH National Center for Accessible Media (NCAM) reports that, as of 1998, 156 public television stations reaching 79 million (80%) of TV households had installed the necessary equipment to distribute descriptions via SAP.[26] In addition, each of the four largest commercial television networks (ABC, CBS, Fox, NBC) offered Spanish audio on the SAP

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[21] 1998 Statistical Abstract of the U.S. at 150.

[22] NCAM Letter at 6.

[23] NCAM Letter at 7-8.

[24] NCAM Letter at 8.

[25] *Video Accessibility Report*, 11 FCC Rcd at 19256-19257, ¶¶ 100, 102.

[26] NCAM Letter at 10.

channel last year.[27] According to NCAM, in the top 25 DMAs, 81% of one major commercial network's affiliates are SAP-equipped, and, in the top 50 DMAs, 69% of cable systems are.[28] NCAM also reports that SAP has been a standard feature of stereo broadcasting for the past fifteen years; as of 1997, 650 TV stations broadcast in stereo, amounting to roughly 40% of total TV stations.[29] For those stations that are not yet SAP-equipped, NCAM estimates that the cost to update equipment to become so is between $5,000 and $25,000, based on the experience of the noncommercial stations that are SAP-capable.[30]

12. To receive information contained within the SAP channel, a viewer must have a receiver (TV set) capable of delivering it. According to the Consumer Electronics Manufacturers Association, as of January 1998, 59% of TV sets sold, and 90% of VCRs sold, have stereo capability, and most of these are SAP-equipped.[31] The Commission observed several years ago that 52% of American households at the time had SAP-compatible TV sets, and 20% had such VCRs.[32] SAP-capable TV sets and VCRs can be relatively inexpensive, less than $150, and a converter box is also available for use with TV sets and VCRs that are not SAP-capable.[33]

13. Prior Video Description Inquiries. The Commission first considered video description when it issued a *Notice of Inquiry* on closed captioning and video description on December 4, 1995.[34] Several months later, the Telecommunications Act of 1996 became law. Section 305(f) of the 1996 Act added new section 713 to the Communications Act of 1934.[35] Entitled "Video Programming Accessibility," section 713 addressed closed captioning and video description. With respect to video description specifically, section 713(f) stated:

> VIDEO DESCRIPTIONS INQUIRY. – Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall commence an inquiry to examine the use of video descriptions on video programming in order to ensure the accessibility of video programming to persons with visual impairments, and report to Congress on its findings. The Commission's report shall assess appropriate methods and schedules for phasing video descriptions into the marketplace, technical and quality standards for video descriptions, a definition of programming for which video descriptions would apply, and other technical and legal issues that the Commission deems appropriate.

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[27] NCAM Letter at 13.

[28] NCAM Letter at 13.

[29] NCAM Letter at 12.

[30] NCAM Letter at 10.

[31] NCAM Letter at 12.

[32] *Video Accessibility Report*, 11 FCC Rcd at 19256, ¶ 101.

[33] NCAM Letter at 12.

[34] *NOI*, 11 FCC Rcd 4912.

[35] 47 U.S.C. § 713.

14. On July 29, 1996, the Commission released the required report,[36] based on the record adduced in response to the *NOI*. The Commission did not issue specific guidance on the criteria enumerated in section 713, because "the present record on which to assess video description . . . is limited, and the emerging nature of the service renders definitive conclusions difficult."[37] However, the Commission noted that "the development of rules for closed captioning, which is more widely available, can provide a useful model for the process of phasing in broadened use of video description."[38] Noting that some programming distributors do not have SAP capability, that funding to support the service remains an issue, and that description may implicate certain copyright law issues, the Commission stated:

> Irrespective of the level and source of funding, it appears desirable to phase in the service over a period of years. We believe that initial requirements for video description should be applied to new programming that is widely available through national distribution services and attracts the largest audiences, such as prime time entertainment series. Over a period of several years, video description should be phased in for programming with more limited availability, including services distributed in limited areas, and programming that attracts smaller audiences, such as daytime shows. Lower priority for video description should be given to programming that is primarily aural in nature, including newscasts and sports events. Phasing in video description in this manner would follow the model of closed captioning.[39]

The Commission concluded that it should monitor the service and seek more information in the context of its annual report on competition in the market for the delivery of video programming.[40]

15. On January 13, 1998, the Commission released its second report on video description, as part of its annual report to Congress on competition in the market for video programming.[41] In the *Fourth Annual Report*, the Commission stated that "it is certain that 'closed' video description is feasible," given that it is already being provided by some, such as PBS.[42] The Commission noted the expense of providing the service, citing, for example, information provided by WGBH that the expense of describing programming was approximately $3,400 per hour, and that the expense of noncommercial broadcasters that have upgraded equipment to become SAP-capable

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[36] *Video Accessibility Report*, 11 FCC Rcd 19214.

[37] 11 FCC Rcd at 19269-19270, ¶ 138.

[38] 11 FCC Rcd at 19270, ¶ 138. Because of the separate statutory requirements for closed captioning and video description, closed captioning implementation issues became the subject of separate notices and orders in MM Docket No. 95-176. *See* Closed Captioning and Video Description, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility, MM Docket No. 95-176, *Notice of Proposed Rulemaking*, 12 FCC Rcd 1044 (1997); *Further Notice of Proposed Rulemaking*, 13 FCC Rcd 5627; *Report and Order*, 13 FCC Rcd 3272 (1997) (*Closed Captioning Order*); *Order on Reconsideration*, 13 FCC Rcd 19973 (1998) (*Closed Captioning Reconsideration Order*).

[39] 11 FCC Rcd at 19270, ¶ 140.

[40] 11 FCC Rcd at 19271, ¶ 142.

[41] *Fourth Annual Report*, 13 FCC Rcd at 1034. The Commission had previously released a notice on video description, among other things, to develop a record for this report. *See Second NOI*, 12 FCC Rcd 7829.

[42] 11 FCC Rcd at 1169, ¶ 268.

ranged from $5000 to $25,000.[43] The Commission again noted copyright issues. Taking these factors into account, the Commission stated:

> any requirements for video description should begin with only the largest broadcast stations and programming networks that are better able to bear the costs involved. The appropriate timeframe for any requirements might take into account DTV penetration and availability. For example, a minimal amount of video description could be required to be provided by the larger broadcast stations in the larger markets, and by the larger video programming networks. In any event, any requirement should have an exemption for smaller broadcasters, MVPDs, and programming networks.[44]

The Commission suggested that "priority should be given to programming where there is significant action not apparent to persons with visual disabilities."[45] Finally, the Commission stated that, "[w]hether funded through public sources or through a more direct regulatory requirement, a period of trial and experimentation would be beneficial so that more specific information would be available as to the types of programming that would most benefit from description, the costs of providing video description, and other matters."[46]

16. Coalition and NCAM Proposals. Following the *Fourth Annual Report*, NCAM submitted a proposal to phase in video description. This proposal was based on an earlier one submitted by the National Coalition of Blind and Visually Impaired Persons for Increased Video Access (Coalition),[47] but modified and updated to take into account the Commission's closed captioning rules.

17. NCAM proposes that initial video description requirements apply to the largest broadcast networks (ABC, CBS, Fox, NBC, and PBS), and national non-broadcast networks, such as cable networks, that serve 50% or more of the total number of MVPD households. In order to ensure that video description provided by these distributors is capable of being received by viewers, NCAM proposes local pass-through requirements on a staggered schedule.[48] Thus, NCAM suggests that by the end of the first year after any Commission rules become effective, affiliates of the broadcast networks identified above in the top 25 markets would be required to pass through the description provided by the networks, and all cable systems in the top 25 markets would be required to pass through the description provided by those broadcasters and by national non-broadcast networks serving 50% or more of the total number of MVPD households. By the end of the second year, these requirements would be extended to the top 50 markets; by the end of the third year, to the top 100 markets; and by the end of the fourth year, to the top 200 markets.[49]

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[43] 11 FCC Rcd at 1169, ¶ 269.

[44] 11 FCC Rcd at 1170, ¶ 271.

[45] 11 FCC Rcd at 1170, ¶ 271.

[46] 11 FCC Rcd at 1170, ¶ 271.

[47] Report of National Coalition of Blind and Visually Impaired Persons for Increased Video Access, MM Docket No. 95-176, WT Docket No. 96-198 (filed Feb. 7, 1997) (Coalition Report).

[48] NCAM Letter at 31.

[49] NCAM Letter at 32.

18. Both the Coalition and NCAM propose that initial video description requirements apply to prime time and children's programming, and suggest that requirements for other programming be deferred for several years until the infrastructure for video description has developed more, and the Commission, the industry, and the public have gained more experience with the technology.[50] Both the Coalition and NCAM propose that the requirements be phased in over a seven-year period. By the end of the first year after any Commission rules become effective, the distributors would be required to describe four hours of prime time programming per week.[51] By the end of each succeeding year, they would be required to describe an additional three hours of prime time programming per week, until all twenty-two hours of prime time programming (excluding live newscasts) are described.[52] In addition, by the end of the second year, both the Coalition and NCAM propose that the applicable distributors be required to describe three hours of children's programming per week.[53]

III. PROPOSALS AND REQUEST FOR COMMENT

19. We propose to adopt limited rules to phase "closed" video description into the marketplace. We hope to ensure the more widespread availability of video description, but to proceed incrementally so as not to impose a significant burden on video programming distributors. We thus propose that the largest video programming distributors should provide a limited amount of video description of their prime time and/or children's programming. We believe that requiring these distributors to provide some video description will not be economically burdensome for them. We further believe that requiring them to provide video description of a small portion of their prime time and/or children's programming will ensure the widest availability of video description to audiences that are most likely to benefit from it. We ask for comment on these views.

20. In this section, we outline a particular proposal of the kind that that we envision for the initial implementation of these rules. The proposal would require broadcasters affiliated with ABC, CBS, Fox, and NBC in Nielsen's top 25 Designated Market Areas (DMAs), and larger MVPDs, to provide some "closed" video description.[54] We propose that these broadcasters and MVPDs provide a minimum of 50 hours per calendar quarter (roughly four hours per week) of described prime time and/or children's programming.[55] Larger MVPDs would be required to

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[50] NCAM Letter at 32; Coalition Report at 11-12.

[51] NCAM Letter at 31; Coalition Report at 10.

[52] NCAM Letter at 31; Coalition Report at 10.

[53] NCAM Letter at 31; Coalition Proposal at 11.

[54] We seek comment below on how to define the larger MVPDs that would be subject to the proposed initial rules. *See infra* ¶ 25.

[55] The proposed requirement that distributors provide roughly four hours per week of prime time and/or children's programming is a hybrid of the first phase of the Coalition's and NCAM's proposals. As mentioned above, they propose that distributors provide four hours per week of described prime time programming the first year after any Commission rules became effective, and some additional hours of described children's programming the second year after any Commission rules became effective.

carry the described programming of the broadcasters affiliated with the top 4 networks, and of nonbroadcast networks that reach 50% or more of MVPD households.[56] We also propose that these broadcasters and MVPDs begin providing the required described programming no later than 18 months after the effective date of our rules. We further propose to adopt procedures to waive our rules if compliance would be unduly burdensome, and to adopt enforcement procedures. These proposals are described in more detail below.

21. This approach is generally modeled after our closed captioning rules. Our approach here is more measured, however, because video description technology is not as developed as closed captioning technology, and all distributors may not have the technical capability now to provide described programming. As the Commission, the industry, and the public gain greater experience with video description, we will review the rules we propose to adopt now, and modify them as the public interest requires. We expect to increase the amount of required described programming over time "in order to ensure the accessibility of video programming to persons with visual impairments," as envisioned by Congress in the section 713(f) of the Act.

22. We recognize that broadcasters are in the process of converting from analog to digital technology. The flexibility inherent in digital technology may make the provision of video description even easier and less costly. Given that the need for video description exists now and that the transition to digital will not occur overnight, however, we do not wish to wait for the transition to be complete before adopting video description requirements. We are thus proposing to apply the requirements outlined in this *Notice* to analog broadcasters. We do intend, however, to extend our video description requirements to digital broadcasters in the future. We are inclined not to adopt a specific timetable to apply to digital broadcasters in the *Report and Order* arising out of this *Notice*, but rather to address such specifics in a future proceeding. At that time we can craft rules based upon the experience we have gained as a result of analog broadcasters' implementation of our initial requirements. We seek comment on this approach. We also seek comment on what technical issues are raised by the provision of video description by digital broadcasters and on how the conversion to digital affects the costs associated with the provision of video description.

23. Entities to Describe Programming. We propose to hold programming distributors, as opposed to producers, responsible for compliance with our video description rules. We recognize that distributors may not actually describe the programming. In the closed captioning proceeding, the Commission observed that others such as producers might more efficiently caption programming, but reasoned that the Commission could more easily monitor and enforce the rules by holding distributors responsible for compliance.[57] We believe this reasoning is equally applicable here, and therefore propose to hold distributors responsible for complying with video description requirements. We seek comment on these views.

24. We propose to apply our rules to all distributors of video programming over which we have jurisdiction. Video programming distributors include television broadcast stations, cable operators, direct broadcast satellite (DBS) operators, home satellite dish (HSD) providers, open

[56] The proposed requirement that larger MVPDs carry the described programming of the top four commercial broadcast networks and nonbroadcast networks that reach 50% or more of MVPD household follows from NCAM's proposal, and the Commission's decision regarding real-time captioning programs of live programs such as newscasts. *See infra* note 64.

[57] *Closed Captioning Order*, 13 FCC Rcd at 3286, ¶¶ 27-28.

video system (OVS) operators, satellite master antenna television (SMATV) operators, and wireless cable operators using channels in the multichannel multipoint distribution service (MMDS). We believe that as many distributors as possible should provide video description to enhance the availability of the service, as well as to ensure a level playing field among distributors. MVPDs are increasingly the primary source of video programming for most Americans,[58] and noncable MVPDs continue to grow.[59] Some MVPDs may require separate SAP generators for each channel they wish to distribute with audio on a SAP channel.[60] It does appear, however, that most of the distribution technologies are capable of transmitting audio on the SAP channel or through other means.[61] We seek comment on this proposal.

25. We believe, however, that our initial rules should only require the largest distributors to provide video description. As the Commission stated in the *Fourth Annual Report*, "any requirements for video description should begin with only the largest broadcast stations and programming networks that are better able to bear the costs involved . . . . For example, a minimal amount of video description could be required to be provided by the larger broadcast stations in larger markets, and by the larger video programming networks."[62] The costs of providing video description include the cost of having programming described, and, in some instances, the cost of upgrading equipment.[63] We thus propose to require the affiliates of the four largest broadcast networks (ABC, CBS, Fox, and NBC) in the top 25 DMAs, and the larger MVPDs to provide video description.[64] Our proposal is consistent with the first phase of NCAM's proposal. We seek comment on our proposal, and on how to define the larger MVPDs to which our initial rules should apply. We seek to identify those MVPDs that are comparable to the broadcast stations we have proposed to require to provide described programming. As indicated

[58] In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 98-102, *Fifth Annual Report*, 13 FCC Rcd 24284, 24288 at ¶ 8 (*Fifth Annual Report*) (noting that 76.6 million households subscribed to MVPD services as of June 1998).

[59] *Fifth Annual Report*, 13 FCC Rcd at 24288, ¶ 8 (noting that the number of cable subscribers increased 2%, and the number of noncable MVPD subscribers increased 18%, between June 1997 and June 1998).

[60] *Video Accessibility Report*, 11 FCC Rcd at 19259, ¶ 109.

[61] *Video Accessibility Report*, 11 FCC Rcd at 19259, ¶ 109 and 19262, ¶ 117 (noting that cable, MMDS, and SMATV operators are technically capable of transmitting information on the SAP channel, but that HSDs are not). Digital technologies, such as DTV and DBS, do not require the use of the SAP channel, but have the capability of transmitting multiple audio programs associated with a single audio program.

[62] 11 FCC Rcd at 1170, ¶ 271.

[63] 11 FCC Rcd at 1170, ¶ 271.

[64] This is similar to the Commission's decision in the closed captioning proceeding with respect to the captioning of programming such as live newscasts. We concluded that "we should impose a real-time captioning requirement on a limited group of the largest video programming providers, including the four major national broadcast networks (i.e., ABC, CBS, Fox and NBC), broadcast stations associated with these networks in the top 25 television markets as defined by Nielsen's Designated Market Areas ('DMAs'), and nonbroadcast networks serving over 50% or more of the total number of multichannel video programming distributor ('MVPD') households." *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 19992, ¶ 38. We reasoned that these entities had access to real-time captioning resources and requiring them to use such resources would not be economically burdensome. *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 19992, ¶ 37.

above, we acknowledge and expect that programming networks, and not broadcast stations and MVPDs, will actually describe programming, but we believe, for ease of enforcement and monitoring of compliance with our rules, that we should hold distributors responsible for compliance. Our proposal would not require any noncommercial stations to provide video description at this time, given the financial difficulties that many of them face, particularly during the transition to DTV.[65]

26. To help us better evaluate our proposal and realize our goal of maximizing video description without imposing an undue burden, we also seek further comment on the costs of video description. The Commission has previously noted that the cost of describing prime time programming may be as much as several thousand dollars per hour, although commenters have pointed out that the cost of describing prime time programming is but a small fraction of the total budget of such programming.[66] We seek additional comment on the costs of describing programming, including more information on the costs relative to the production budgets of programming such as prime time programming. The Commission has also noted that the cost of upgrading equipment may be between $5,000 and $25,000, although NCAM reports that 81% of one network's affiliates are SAP-equipped, and 69% of cable systems are. We seek more complete and updated information on the number of broadcasters and MVPDs that are SAP-equipped. We seek further comment on the cost of upgrading equipment, particularly from broadcasters that have already done this.

27. We also seek comment on our proposal to require the largest distributors to provide described programming beginning 18 months after the effective date of our rules. We wish to select a beginning date that ensures more widespread video description is available rapidly, but does not impose an undue burden on distributors.

28. We intend our proposal to require the largest programming distributors to provide a limited amount of video description to be a starting point for further development of the service. The experience of the largest programming distributors will provide us with concrete information upon which to propose a schedule to phase in other distributors. We seek comment on an appropriate timetable for the next phase in.

29. Programming to be Described. We propose that the distributors should initially provide a minimum of 50 hours per quarter (roughly four hours per week) of video description of prime time and/or children's programming. As the Commission stated in the *Video Accessibility Report*, "initial requirements for video description should be applied to new programming that is widely available through national distribution services and attracts the largest audiences, such as prime time entertainment series."[67] Our proposal to require distributors to describe roughly four hours per week of prime time programming is consistent with first phase of the Coalition's and NCAM's proposals. Although four hours per week appears to be a reasonable starting point, we prefer to express the requirement as 50 hours per quarter in order to grant distributors additional

[65] Because of these financial difficulties, the Commission granted noncommercial stations the longest time period in which to complete the transition to DTV. *See* In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Service, MM Docket No. 87-268, *Fifth Report and Order*, 12 FCC Rcd 12809, 12852 at ¶ 104 (1997). We also note that noncommercial stations provide video description in the absence of Commission rules requiring them to do so.

[66] Coalition Report at 6; *Fourth Annual Report*, 11 FCC Rcd at 1166, ¶ 263.

[67] 11 FCC Rcd at 19270.

flexibility in selecting the best programming to describe. We propose also to permit distributors to meet the 50 hour video description requirement by describing children's programming in order to meet the needs of children with visual disabilities. As indicated above, NCAM suggests that video description of children's programming would also provide a benefit to children with learning disabilities. Within these broad categories of programming, the distributors would have flexibility to decide which programming will reach the largest audience and be most likely to provide the intended benefits of video description. We seek comment on our proposal, and on any alternatives. Instead of requiring that the minimum number of hours of video description apply to prime time and children's programming, should we allow distributors complete flexibility to choose which programming to describe? Should we establish certain parameters to ensure that distributors select programming that has a significant audience that would benefit from video description?[68] Whether we prescribe prime time and/or children's programming or not, is a minimum of 50 hours per quarter (roughly 4 hours per week) appropriate for the initial requirement? We seek comment on the resources currently available to describe programming. We also seek comment on how to ensure that the public, and in particular people with disabilities, know when described video programming is scheduled.[69]

30. Commenters in our earlier *NOI* proceedings have noted that Spanish-language audio sometimes competes for use of the SAP channel. We seek comment on the extent to which Spanish or other languages use or plan to use the SAP channel, the impact, if any, of today's proposals on such services, and how such potential conflicts could be avoided or minimized. Further, although we believe that adoption of digital technology will eliminate any potential conflict between competing users of the SAP channel, we seek comment on whether there are any technical solutions to such potential conflicts in the analog environment.

31. In addition, commenters in our earlier *NOI* proceedings have argued that a second script, which may constitute a "derivative work" under copyright law, is necessary to provide video description. As noted above, however, many distributors have provided video description for years, and apparently have not found this to be an obstacle. We seek comment on whether copyright issues could become an obstacle to video description, and, what could be done to prevent or minimize such a result.

32. The Coalition points out that public safety messages that scroll across the TV screen are totally inaccessible to persons with visual disabilities, and proposes that an aural tone be required to accompany the messages to alert such persons to turn on a radio, the SAP channel, or a designated digital channel.[70] We believe that it is of vital importance for these emergency messages to be accessible to persons with visual disabilities. We seek comment on the Coalition's proposal, how it relates to the Commission's current standards for broadcasting

[68] *Cf.* In the Matter of Policies and Rules Concerning Children's Television Programming, Revision of Programming Policies for Television Broadcast Stations, MM Docket No. 93-48, *Report and Order*, 11 FCC Rcd 10660, 10706 at ¶ 99 (1996) (*Children's TV Report and Order*) (limiting "core" children's programming to that aired between 7:00 a.m. and 10:00 p.m. in order "to encourage broadcasters to air educational programming at times the maximum number of child viewers will be watching").

[69] *Children's TV Report and Order*, 11 FCC Rcd at 10668 –10669, ¶ 57 (requiring broadcasters to identify "core" children's programming as such to publishers of program guides in order to provide parents with advance notice of scheduling of educational programs).

[70] Coalition Report at 12.

emergency information,[71] and on any other effective approaches to this problem. Could these messages be provided via "open" description?

33. Waivers and Enforcement Procedures. We also propose to adopt procedures to enforce our rules, and to waive them if compliance would result in an undue burden. The Commission adopted such procedures in its closed captioning rules.[72] Guided by statutory factors, the Commission determined that factors relevant to a showing that compliance with its closed captioning rules would result in an undue burden are the nature and cost of captioning the programming, the impact on the operation of the petitioner, the financial resources of the petitioner, and the type of operations of the petitioner. The Commission also adopted some basic pleading requirements and timetables for petitions for waiver. In terms of enforcement, the Commission did not adopt any reporting requirements, but rather simply adopted pleading requirements and timetables. We seek comment on whether these procedures are appropriate for our initial video description rules.

IV. JURISDICTION

34. We seek comment on the question whether we possess statutory authority to adopt the above-proposed video description rules. We also seek comment on the question whether the existence or relative strength of such authority varies according to the type of video programming provider – broadcaster, cable operator, or DBS company, for example – potentially subject to the rules.

35. In connection with this jurisdictional question, we note that section 1 of the Act established the Commission "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, *to all the people of the United States* . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service. . . . "[73] Also, section 2(a) grants the Commission jurisdiction over "all interstate and foreign communication by wire or radio" and "all persons engaged within the United States in such communication. . . . "[74] In addition, section 4(i) of the Act empowers "[t]he Commission [to] perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[75] Finally, section 303(r) directs the Commission, "as the public interest, convenience, and necessity

[71] 47 C.F.R. § 73.1250.

[72] 47 C.F.R. § 79.1(f) (procedures for waiver); 47 C.F.R. § 79.1(g) (procedures for enforcement).

[73] 47 U.S.C. § 151 (emphasis added).

[74] 47 U.S.C. § 152. Section 3(33) of the Act defines "communication by radio" to mean "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. § 153(33). Section 3(52) defines "communication by wire" to mean "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. § 153(52).

[75] 47 U.S.C. § 154(i).

requires," to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions in this Act . . . ."[76]

36. We further observe that Congress has expressed a general legislative preference for the increased accessibility of certain communications services for persons with disabilities. Section 225 requires the Commission to ensure that "interstate and intrastate telecommunications relay services are available, to the extent possible and in the most effective manner, to hearing-impaired and speech-impaired individuals in the United States."[77] Similarly, section 255 requires manufacturers of telecommunications equipment, and providers of telecommunications services, to make such equipment and services "accessible to and usable by individuals with disabilities, if readily achievable."[78] Section 303(u) generally requires television receivers to be equipped with a closed captioning chip.[79] Section 710 provides for compatibility between telephones and hearing aids.[80] In addition, the 1998 amendments to section 508 of the Rehabilitation Act require federal departments and agencies to accommodate persons with disabilities, including both employees and members of the public, with respect to the accessibility of information, technology, and data.[81]

37. Other sections of the Act may also relate to the Commission's authority to adopt video description rules. For example, in order to grant a Title III license, renew such a license, or permit the assignment or transfer of such a license, sections 309(a), 307(c)(1) and 310(d) of the Act, respectively, require the Commission to find that the "public interest, convenience, and necessity" will be served thereby.[82]

38. Also potentially relevant to this inquiry is section 713(f). That provision directed the Commission to "commence an inquiry to examine the use of video descriptions on video programming in order to ensure the accessibility of video programming to persons with visual impairments, and report to Congress on its findings." As noted above, the report was to address "appropriate methods and schedules for phasing video descriptions into the marketplace, technical and quality standards for video descriptions, a definition of programming for which video descriptions would apply, and other technical and legal issues that the Commission deems appropriate."

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[76] 47 U.S.C. § 303(r).

[77] 47 U.S.C. § 225(b)(1).

[78] 47 U.S.C. §§ 255(b), 255(c). In asserting ancillary jurisdiction to include information services within our section 255 requirements for telecommunications services, we relied on sections 1-3 of the Act as authority. Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, As Enacted by the Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities, WT Docket No. 96-198, *Report & Order and Further Notice of Inquiry*, FCC 99-181 (Sept. 29, 1999) at ¶¶ 93-98.

[79] 47 U.S.C. § 303(u).

[80] 47 U.S.C. § 610.

[81] 29 U.S.C. § 794d(a)(1)(A).

[82] 47 U.S.C. §§ 309(r), 307(c)(1), 310(d).

39. We seek comment on the question whether these provisions of the Act, taken together, provide sufficient authority to adopt the proposed video description regulations and on the scope of such authority as it relates to different types of programming providers.

V. CONCLUSION

40. We adopt this *Notice* in order to stimulate greater availability of video description, while at the same time not impose an undue burden on distributors. To meet the needs of the millions of Americans with visual disabilities, many public television stations and a few cable programmers have voluntarily provided some video described programming, and we applaud these efforts. Through the limited requirements we propose today, we hope to make this service more widely available to ensure that all Americans have access to video programming.

VI. ADMINISTRATIVE MATTERS

41. Comments and Reply Comments. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before January 24, 2000 and reply comments on or before February 23, 2000. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

42. Comments filed through ECFS can be sent as an electronic file via the Internet to http://www.fcc.gov/e-file/ecfs.html. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment via e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

43. Parties who choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., TW-A325, Washington, D.C. 20554.

44. Parties who choose to file paper should also submit their comments on diskette. These diskettes should be addressed to: Wanda Hardy, Paralegal Specialist, Mass Media Bureau, Policy and Rules Division, Federal Communications Commission, 445 Twelfth Street, S.W., 2-C221, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Word 97 or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the lead docket number in this case (MM Docket No. 99-353), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy – Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must sent diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 445 Twelfth Street, S.W., CY-B402, Washington, D.C. 20554.

45. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 Twelfth Street, S.W., CY-A257, Washington, D.C. 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0270, (202) 418-2555 TTY, or bcline@fcc.gov. Comments and reply comments also will be available electronically at the Commission's Disabilities Issues Task Force web site: www.fcc.gov/dtf. Comments and reply comments are available electronically in ASCII text, Word 97, and Adobe Acrobat.

46. This document is available in alternative formats (computer diskette, large print, audio cassette, and Braille). Persons who need documents in such formats may contact Martha Contee at (202) 4810-0260, TTY (202) 418-2555, or mcontee@fcc.gov.

47. *Ex Parte* Rules. This proceeding will be treated as a "permit-but-disclose" proceeding, subject to the "permit-but-disclose" requirements under section 1.1206(b) of the rules. 47 C.F.R. § 1.1206(b), as revised. *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description or the views and arguments presented is generally required. *See* 47 C.F.R. § 1.1206(b)(2), as revised. Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b).

48. Initial Regulatory Flexibility Analysis. With respect to this *Notice*, an Initial Regulatory Flexibility Analysis ("IRFA") is contained in Appendix A. As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 603, the Commission has prepared an IRFA of the possible economic impact on small entities of the proposals contained in this *Notice*. Written public comments are requested on the IFRA. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis, we ask a number of questions in our IRFA regarding the prevalence of small businesses in the television broadcasting industry. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the *Notice*, and must have a distinct heading designating them as a response to the IRFA. The Reference Information Center, Consumer Information Bureau, will send a copy of this *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

49. Initial Paperwork Reduction Act Analysis. This *Notice* may contain either proposed or modified information collections. As part of our continuing effort to reduce paperwork burdens, we invite the general public to take this opportunity to comment on the information collections contained in this *Notice*, as required by the Paperwork Reduction Act of 1996. Public and agency comments are due at the same time as other comments on the *Notice*. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) ways to enhance the quality, utility, and clarity of the information collected; and (c) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, 445 Twelfth Street, S.W., Room C-1804, Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 17th Street, NW, Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

50. Additional Information. For additional information on this proceeding, please contact Eric Bash, Policy and Rules Division, Mass Media Bureau, (202) 418-2130, (202) 418-1169 TTY.

VII. ORDERING CLAUSES

51. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, 310, and 713 of the Communications Act, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, 310, 613, this *Notice of Proposed Rulemaking* is ADOPTED.

52. IT IS FURTHER ORDERED that the Commission's Reference Information Center, Consumer Information Bureau, shall send a copy of this *Notice*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with the Regulatory Flexibility Act.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 603 ("RFA"), the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible economic impact on small entities by the policies and rules proposed in this *Notice of Proposed Rulemaking* (*Notice*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice* provided above in paragraph 38. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. *See* 5 U.S.C. § 603(a). In addition, the *Notice* and the IRFA (or summaries thereof) will be published in the Federal Register. *See id.*

Need for, and Objectives of, the Proposed Rules

Section 713(f) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 613, directed the Commission, within six months of its enactment, to "commence an inquiry on video descriptions on video programming in order to ensure the accessibility of video programming to persons with visual impairments, and report to Congress on its findings." Section 713(f) required the report to "assess appropriate methods and schedules for phasing video descriptions into the marketplace, technical and quality standards for video descriptions, a definition of programming for which video descriptions would apply, and other technical and legal issues that the Commission deems appropriate."

Legal Basis

This *Notice* is adopted pursuant to sections 1, 2(a), 4(i), 303, 307, 309, 310, and 713 of the Act, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, 310, 613.

Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

The Regulatory Flexibility Act defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under section 3 of the Small Business Act.[83] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[84]

Small TV Broadcast Stations. The SBA defines small television broadcasting stations as television broadcasting stations with $10.5 million or less in annual receipts.[85]

The *Notice* proposes to limit the TV broadcast stations that must provide described programming to the TV broadcast stations affiliated with the top four commercial networks in the top 25

[83] 5 U.S.C. § 601(3) (1980).

[84] 15 U.S.C. § 632.

[85] 13 C.F.R. § 121.201 (SIC Code 4833)

Nielsen Designated Market Areas (DMAs). According to Commission staff review of the BIA Publications, Inc., Master Access Television Analyzer Database, less than five commercial TV broadcast stations subject to our proposal have revenues of less than $10.5 million dollars. We note, however, that under SBA's definition, revenues of affiliates that are not television stations should be aggregated with the television station revenues in determining whether a concern is small. Our estimate may thus overstate the number of small entities since the revenue figure on which it is based does not include or aggregate revenues from nontelevision affiliated companies.

Small MVPDs. The *Notice* proposes to limit the MVPDs that must provide described programming to larger MVPDs. The *Notice* seeks comment on how to define the MVPDs to which the initial rules should apply, and seeks to identify those MPVDs that are comparable to the broadcast stations affiliated with the top 4 commercial networks in the top 25 DMAs. The *Notice* thus proposes not to apply the initial rules to smaller MVPDs.

It is possible, however, that the MVPDs we ultimately decide to require to provide described programming may constitute a "small business" under some definitions. For that reason, we review below the definition of "small business" for various MVPDs.

SBA has developed a definition of a small entity for cable and other pay television services, which includes all such companies generating $11 million or less in annual receipts.[86] This definition includes cable system operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Bureau of the Census, there were 1423 such cable and other pay television services generating less than $11 million in revenue that were in operation for at least one year at the end of 1992.[87] We will address each service individually to provide a more succinct estimate of small entities. We seek comment on the tentative conclusions below.

Cable Systems: The Commission has developed its own definition of a small cable company for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.[88] We estimate that there were 1439 cable operators that qualified as small cable companies at the end of 1995.[89] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1439 small entity cable system operators under this definition.

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[86] 13 C.F.R. § 121.201 (SIC Code 4841).

[87] U.S. Bureau of the Census, 1992 Economic Census, 1992 Census of Transportation, Communications and Utilities at Firm Size 1-123.

[88] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of $100 million or less. *See* In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nos. 92-266, 93-215, *Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995).

[89] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb.29, 1996 (based on figures for Dec. 30, 1995).

The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[90] The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, does not exceed $250 million in the aggregate. Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1,450. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

MMDS: The Commission refined the definition of "small entity" for the auction of MMDS as an entity that together with its affiliates has average gross annual revenues that are not more than $40 million for the proceeding three calendar years.[91] This definition of a small entity in the context of the Commission's *Report and Order* concerning MMDS auctions that has been approved by the SBA.[92]

The Commission completed its MMDS auction in March, 1996 for authorizations in 493 basic trading areas ("BTAs"). Of 67 winning bidders, 61 qualified as small entities. Five bidders indicated that they were minority-owned and four winners indicated that they were women-owned businesses. MMDS is an especially competitive service, with approximately 1,573 previously authorized and proposed MMDS facilities. Information available to us indicates that no MDS facility generates revenue in excess of $11 million annually. We tentatively conclude that for purposes of this IRFA, there are approximately 1,634 small MMDS providers as defined by the SBA and the Commission's auction rules.

ITFS: There are presently 2,032 ITFS licensees. All but one hundred of these licenses are held by educational instructions. Educational institutions are included in the definition of a small business.[93] However, we do not collect annual revenue data for ITFS licensees and are not able to ascertain how many of the 100 non-educational licensees would be categorized as small under the SBA definition. Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

DBS: As of December, 1996, there were eight DBS licensees. However, the Commission does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be impacted by these proposed rules. Although DBS service requires a great investment of capital for operation, we acknowledge that there are several new entrants in

[90] 47 U.S.C. § 543(m)(2).

[91] 47 C.F.R. § 21.961(b)(1).

[92] In the Matter of Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, MM Docket No. 94-31 and PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589 (1995).

[93] SBREFA also applies to nonprofit organizations and governmental organizations such as cities, counties, towns, townships, villages, school districts, or special districts, with populations of less than 50,000. 5 U.S.C. § 601(5).

this field that may not yet have generated $11 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

HSD: The market for HSD service is difficult to quantify. Indeed, the service itself bears little resemblance to other MVPDs. HSD owners have access to more than 265 channels of programming placed on C-band satellites by programmers for receipt and distribution by MVPDs, of which 115 channels are scrambled and approximately 150 are unscrambled.[94] HSD owners can watch unscrambled channels without paying a subscription fee. To receive scrambled channels, however, an HSD owner must purchase an integrated receiver-decoder from an equipment dealer and pay a subscription fee to an HSD programming package. Thus, HSD users include: (1) viewers who subscribe to a packaged programming service, which affords them access to most of the same programming provided to subscribers of other MVPDs; (2) viewers who receive only non-subscription programming; and (3) viewers who receive satellite programming services illegally without subscribing. Because scrambled packages of programming are most specifically intended for retail consumers, these are the services most relevant to this discussion.[95]

According to the most recently available information, there are approximately 30 program packages nationwide offering packages of scrambled programming to retail consumers.[96] These program packages provide subscriptions to approximately 2,314,900 subscribers nationwide.[97] This is an average of about 77,163 subscribers per program package. This is substantially smaller than the 400,000 subscribers used it the commission's definition of a small MSO. Furthermore, because this is an average, it is likely that some program packages may be substantially smaller.

OVS: The Commission has certified three OVS operators. On October 17, 1996, Bell Atlantic received approval for its certification to convert its Dover, New Jersey Video Dialtone ("VDT") system to OVS.[98] Bell Atlantic subsequently purchased the division of Futurevision which had been the only operating program package provider on the Dover system, and has begun offering programming on this system using these resources.[99] Metropolitan Fiber Systems was granted certifications on December 9, 1996, for the operation of OVS systems in Boston and New York, both of which are being used to provide programming.[100] On October 10, 1996, Digital Broadcasting Open Video Systems received approval to offer OVS service in southern

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[94] Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, *Third Annual Report*, CS Docket No. 96-133, 12 FCC Rcd 4358, 4385 at ¶ 49 (1996).

[95] *Third Annual Report*, 12 FCC Rcd at 4385, ¶ 49.

[96] *Third Annual Report*, 12 FCC Rcd at 4385, ¶ 49.

[97] *Third Annual Report*, 12 FCC Rcd at 4385, ¶ 49.

[98] Bell Atlantic-New Jersey, Inc. Certification to Operate an Open Video System, *Order*, 11 FCC Rcd 13249 (CSB 1996).

[99] Bell Atlantic, *Bell Atlantic Now Offering Video Services in Dover Township New Jersey* (news release), Nov. 1, 1996.

[100] In the Matter of Metropolitan Fiber Systems/New York Inc. d/b/a MFS Telecom of New York to Operate an Open Video System, Metropolitan Fiber Systems/McCourt, Inc. Certification to Operate an Open Video System, *Consolidated Order*, 11 FCC Rcd 20896 (CSB 1996).

California.[101] Because these services have been introduced so recently, little financial information is available. Bell Atlantic and Metropolitan Fiber systems have sufficient revenues to assure us that they do not qualify as small business entities. Digital Broadcasting Open Video Systems, however, is a general partnership just beginning operations. Accordingly, we tentatively conclude that one OVS licensee qualifies as a small business concern.

SMATVs: Industry sources estimate that approximately 5,200 SMATV operators were providing service as of December, 1995.[102] Other estimates indicate that SMATV operators serve approximately 1.05 million residential subscribers as of September, 1996.[103] The ten largest SMATV operators together pass 815,740 units.[104] If we assume that these SMATV operators serve 50% of the units passed, the ten largest SMATV operators serve approximately 40% of the total number of SMATV subscribers. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten SMATVs, we tentatively conclude that a substantial number of SMATV operators qualify as small entities.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The *Notice* proposes to hold certain TV broadcast stations and MVPDs responsible for providing 50 hours per quarter of described prime time and/or children's programming. Those broadcast stations and MVPDs must keep sufficient records to show that they are providing and have provided at least the required amount of described programming.

Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

As indicated above, the *Notice* proposes to limit the TV broadcast stations and MVPDs that must provide described programming to larger TV broadcast stations (specifically, commercial TV broadcast stations affiliated with the four largest commercial broadcast networks in the top 25 DMAs) and larger MVPDs. The *Notice* seeks comment on how to define the MVPDs to which the initial rules should apply, and seeks to identify those MVPDs that are comparable to the broadcast stations affiliated with the top four networks in the top 25 DMAs. The Commission, therefore, has taken steps to minimize the impact of the proposed rules on small business.

Although the *Notice* proposes to hold the larger broadcast stations and MVPDs responsible for compliance with the initial rules, the Commission acknowledges that the broadcast and nonbroadcast networks that supply programming to the broadcast stations and MVPDs will most likely provide the actual video description of the programming. The *Notice* proposes, however, to limit the programming that must be described to that shown on the four largest commercial

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[101] Digital Broadcasting OVS Certification to Operate an Open Video Systems, *Order*, 11 FCC Rcd 12854 (CSB 1996). Digital Broadcasting Video Systems proposes to use local exchange company facilities for the transmission of video services.

[102] *Third Annual Report*, 11 FCC Rcd at 4403, ¶ 81.

[103] *Third Annual Report*, 11 FCC Rcd at 4403, ¶ 81.

[104] *Third Annual Report*, 11 FCC Rcd at 4403, ¶ 81.

broadcast networks, and on nonbroadcast networks that reach 50% or more of MVPD households. The Commission has, therefore, taken steps to minimize the impact of the proposed rules on small business.

Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

None.