

April 7, 2010, about 1,015 of an estimated 1,380 commercial television stations¹⁶ (or about 74 percent) have revenues of \$14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 390.¹⁷ We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations¹⁸ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

6. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

7. **Satellite Telecommunications.** Since 2007, the SBA has recognized satellite firms within this revised category, with a small business size standard of \$15 million.¹⁹ The most current Census Bureau data are from the economic census of 2007, and we will use those figures to gauge the prevalence of small businesses in this category. Those size standards are for the two census categories of “Satellite Telecommunications” and “Other Telecommunications.” Under the “Satellite Telecommunications” category, a business is considered small if it had \$15 million or less in average annual receipts.²⁰ Under the “Other Telecommunications” category, a business is considered small if it had \$25 million or less in average annual receipts.²¹

8. The first category of Satellite Telecommunications “comprises establishments primarily engaged in providing point-to-point telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”²² For this category, Census Bureau data for 2007 show that there were a total of 512 firms that operated for the entire year.²³ Of this total, 464

¹⁶ We recognize that this total differs slightly from that contained in *Broadcast Station Totals*, *supra*, note 83; however, we are using BIA's estimate for purposes of this revenue comparison.

¹⁷ See *Broadcast Station Totals*, *supra*, note 83.

¹⁸ “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 121.103(a)(1).

¹⁹ See 13 C.F.R. § 121.201, NAICS code 517410.

²⁰ *Id.*

²¹ See 13 C.F.R. § 121.201, NAICS code 517919.

²² U.S. Census Bureau, 2007 NAICS Definitions, “517410 Satellite Telecommunications”.

²³ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

firms had annual receipts of under \$10 million, and 18 firms had receipts of \$10 million to \$24,999,999.²⁴ Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by rules adopted pursuant to the Notice.

9. The second category of Other Telecommunications consists of firms “primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.”²⁵ For this category, Census Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year.²⁶ Of this total, 2,346 firms had annual receipts of under \$25 million.²⁷ Consequently, we estimate that the majority of Other Telecommunications firms are small entities that might be affected by our action.

10. *Direct Broadcast Satellite (“DBS”) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. DBS, by exception, is now included in the SBA’s broad economic census category, “Wired Telecommunications Carriers,”²⁸ which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.²⁹ To gauge small business prevalence for the DBS service, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with more than 1,000 employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees. Based on this data, the majority of these firms can be considered small.³⁰ Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and EchoStar Communications Corporation (“EchoStar”) (marketed as the DISH Network).³¹ Each currently offers subscription services.

²⁴ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en

²⁵ U.S. Census Bureau, 2007 NAICS Definitions, “517919 Other Telecommunications”, <http://www.census.gov/naics/2007/def/ND517919.HTM>.

²⁶ See 13 C.F.R. § 121.201, NAICS code 517919.

²⁷ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517919” (issued Nov. 2010).

²⁸ See 13 C.F.R. § 121.201, NAICS code 517110 (2007). The 2007 NAICS definition of the category of “Wired Telecommunications Carriers” is in paragraph 7, above.

²⁹ 13 C.F.R. § 121.201, NAICS code 517110 (2007).

³⁰ See http://www.factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

³¹ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 580, ¶ 74 (2009) (“13th Annual Report”). We note that, in 2007, EchoStar purchased the licenses of Dominion Video Satellite, Inc. (“Dominion”) (marketed as Sky Angel). See Public Notice, “Policy Branch Information; Actions Taken,” Report No. SAT-00474, 22 FCC Rcd 17776 (IB 2007).

DIRECTV³² and EchoStar³³ each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

11. **Fixed Microwave Services.** Fixed microwave services include common carrier,³⁴ private operational-fixed,³⁵ and broadcast auxiliary radio services.³⁶ At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees.³⁷ The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

12. **Cable and Other Program Distribution.** Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."³⁸ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.³⁹ According to Census Bureau data for 2007, there were a total of 955 firms in this

³² As of June 2006, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. *See 13th Annual Report*, 24 FCC Rcd at 687, Table B-3.

³³ As of June 2006, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. *Id.* As of June 2006, Dominion served fewer than 500,000 subscribers, which may now be receiving "Sky Angel" service from DISH Network. *See id.* at 581, ¶ 76.

³⁴ *See* 47 C.F.R. §§ 101 *et seq.* (formerly, Part 21 of the Commission's Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

³⁵ Persons eligible under parts 80 and 90 of the Commission's Rules can use Private Operational-Fixed Microwave services. *See* 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

³⁶ Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

³⁷ *See* 13 C.F.R. § 121.201, NAICS code 517210.

³⁸ U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

³⁹ 13 C.F.R. § 121.201, NAICS code 517110 (2007).

previous category that operated for the entire year.⁴⁰ Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.⁴¹ Thus, under this size standard, the majority of firms can be considered small and may be affected by rules adopted pursuant to the Notice.

13. **Cable Companies and Systems.** The Commission has developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.⁴² Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.⁴³ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.⁴⁴ Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.⁴⁵ Thus, under this second size standard, most cable systems are small and may be affected by rules adopted pursuant to the Notice.

14. **Cable System Operators.** The Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent 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."⁴⁶ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.⁴⁷ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.⁴⁸ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,⁴⁹ and

⁴⁰ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

⁴¹ *See id.*

⁴² *See* 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *See Implementation of Sections of the 1992 Cable Television Consumer Protection and Competition Act: Rate Regulation*, MM Docket Nos. 92-266, 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 para. 28 (1995).

⁴³ These data are derived from R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

⁴⁴ *See* 47 C.F.R. § 76.901(c).

⁴⁵ WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

⁴⁶ 47 U.S.C. § 543(m)(2); *see also* 47 C.F.R. § 76.901(f) & nn.1-3.

⁴⁷ 47 C.F.R. § 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

⁴⁸ These data are derived from R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

⁴⁹ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules.

therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

15. Open Video Services. The open video system (“OVS”) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.⁵⁰ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,⁵¹ OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”⁵² The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, there were a total of 3,188 firms in this previous category that operated for the entire year.⁵³ Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.⁵⁴ Thus, under this size standard, most cable systems are small and may be affected by rules adopted pursuant to the Notice. In addition, we note that the Commission has certified some OVS operators, with some now providing service.⁵⁵ Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.⁵⁶ The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

D. Description of Projected Reporting, Record Keeping, and other Compliance Requirements for Small Entities

16. The *Notice* seeks comment on rules that would affect small television broadcast stations and MVPDs by requiring them to pass through a secondary audio track, containing video description, with any described programming that is provided by a network. The description need not be passed through if the station or MVPD does not have the technical capability to pass it through, or if the entity is already using all of the secondary audio capacity associated with that program for other program-related material. If any small entities are subject to the separate requirement to “provide” video description, we anticipate that they will do so by passing description through to viewers. This separate requirement will thus impose no distinct burden on small broadcasters or MVPDs. These requirements may in some cases result in the need for engineering services. The *Notice* seeks comment, in part, on whether the rules could require the purchase of additional equipment.

⁵⁰ 47 U.S.C. § 571(a)(3)-(4). See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, 24 FCC Rcd 542, 606 para. 135 (2009) (“*Thirteenth Annual Cable Competition Report*”).

⁵¹ See 47 U.S.C. § 573.

⁵² U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

⁵³ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

⁵⁴ See *id.*

⁵⁵ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsr.html>.

⁵⁶ See *Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606-07 para. 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

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

17. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁵⁷ We seek comment on the applicability of any of these alternatives to affected small entities.

18. The requirements proposed in the *Notice*, including those affecting small broadcasters and MVPDs, are largely mandated by Congress. They would in most cases create minimal economic impact on small entities, and could provide positive economic impact by increasing viewership by persons with visual impairments. The Commission has statutory authority to determine the effective date of the rules, and to exempt parties or classes from operation of any or part of the proposed rules. We invite small entities to submit comment on the impact of the proposed rules, and on how the Commission could further minimize potential burdens on small entities if the proposals provided in the *Notice*, or those submitted into the record, are ultimately adopted.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

19. None.

⁵⁷ 5 U.S.C. § 603(c)(1) – (c)(4).

APPENDIX C

2000 Report and Order and Order on Reconsideration

Federal Communications Commission

FCC 00-258

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)
)

REPORT AND ORDER

Adopted: July 21, 2000

Released: August 7, 2000

By the Commission: Commissioner Ness issuing a statement, Commissioners Furchtgott-Roth and Powell concurring in part, dissenting in part, and issuing separate statements.

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I. INTRODUCTION

1. In this *Report and Order*, we adopt rules designed to bring the benefits of video description to the commercial video marketplace. Video description is the description of key visual elements in programming, inserted into natural pauses in the audio of the programming. It is designed to make television programming more accessible to the many Americans who have visual disabilities. As we have noted in this proceeding and elsewhere, television is the primary source of news and information for the majority of Americans, and provides hours of entertainment each week. The Commission has already adopted rules to make the important medium of television more accessible to persons with hearing disabilities.¹ Today we adopt initial video description rules to make television more accessible to persons with visual disabilities.

2. Public broadcasting has developed and refined the process of producing and distributing programming with video description over the last ten years, but virtually no commercial market has followed. Descriptive Video Service (DVS), associated with the noncommercial broadcast station WGBH, has described more than 2000 PBS programs, and more than 80 films for the Turner Classic Movies channel.² Currently, DVS provides "closed" video description – which runs on the Second Audio Program (SAP) channel and so can be heard at the discretion of the viewer – for four daily programs, several weekly programs, selected episodes of other series, and selected specials.³ Some commercial broadcasters also have the technical ability to provide "closed" video description but none have done so. Some cable systems have the capability to provide programming with video description, but do so only on very limited channels, such as the Turner Classic Movies channel, and little if any of this programming is available without the assistance of public funding.⁴ As a result, only a very small fraction of programming contains video description.

3. This *Report and Order* follows Commission review and study of video description for nearly five years, including three notices on the matter, and two reports to Congress. The Commission issued its first *Notice of Inquiry* on video description in 1995.⁵ Section 713(f) of the Communications Act,⁶ added by the Telecommunications Act of 1996, directed the Commission to commence an inquiry on video description, and report to Congress on its findings. Using the record developed in response to the *First*

¹ See *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 and Order*, 13 FCC Rcd 3272 (1997), *recon. granted in part and denied in part*, 13 FCC Rcd 19973 (1998) (adopting closed captioning rules). See also *Second Report and Order*, FCC 00-136 (released April 14, 2000) (adopting rules to enhance the accessibility of emergency information for persons with hearing disabilities).

² WGBH at 2. The commenters and reply commenters in this proceeding, and the abbreviations by which they are referred to in this document, are set forth in Appendix A.

³ "PBS Schedule" (visited June 15, 2000) <www.wgbh.org/wgbh/access/dvs/dvspbs.html>.

⁴ 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 lifestyles of persons with disabilities, provides "open" description of movies each week.

⁵ *Closed Captioning and Video Description of Video Programming*, MM Docket No. 95-176, *Notice of Inquiry*, 11 FCC Rcd 4912 (1995) (*First NOI*).

⁶ 47 U.S.C. § 613(f).

NOI, the Commission issued the required report to Congress in 1996.⁷ The Commission then issued a second *Notice of Inquiry* in 1997,⁸ 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.⁹ Given the importance of enhancing the accessibility of video programming to persons with visual disabilities, and the fact that commercial broadcast stations and MVPDs had not developed video description further during our periods of review, we issued our *Notice of Proposed Rulemaking* last year in 1999.¹⁰

4. The record demonstrates the importance of video description to persons with visual disabilities, although support for our proposal was not unanimous among blind and low vision commenters.¹¹ Margaret Pfanstiehl, a pioneer in the field of video description and who herself has low vision, explains that “when plays, movies, films . . . are professionally described, a wealth of information becomes available. Blind children and adults are amazed at the prevalence and importance of body language in transmitting non-verbal messages.”¹² The comments of the American Council of the Blind contained more than 250 e-mails and letters of support for rules, which explained how video description enhances the understanding of blind and low vision people of television programming and cultural behavior such as body language, and gives them a feeling of independence.¹³ One commenter said that “[w]hether or not one still defines the medium as a ‘vast wasteland,’ there is no denying that TV is the mechanism we Americans turn to, to define ourselves and one another. Blind people have just as much need as any other Americans to experience this medium.”¹⁴ A user of WGBH’s DVS echoes similar views: “[w]hether entertaining, educational or cultural, television has become an integral part of American life. I, and other blind and visually impaired people, have always participated in television viewing, but with DVS, we are finally participating equally.”¹⁵ Helen Harris, founder of a description service, says that “[v]ideo description effectively bridges the gap between the blind and mainstream society by creating a shared

⁷ 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*).

⁸ 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).

⁹ 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*).

¹⁰ Implementation of Video Description of Video Programming, MM Docket No. 99-339, *Notice of Proposed Rulemaking*, 14 FCC Rcd 19845 (1999) (*Notice*).

¹¹ The American Council of the Blind, the American Foundation of the Blind, and many persons with visual disabilities filed comments supporting the Commission requiring some programming to contain video description.

The National Federation of the Blind and a number of its members, however, filed comments asking the Commission to take steps to enhance the accessibility of text-based information in video programming (such as emergency information, the names of speakers, and contact information in advertisements), instead of requiring a limited amount of programming to contain video description. We address these requests below.

¹² Metropolitan Washington Ear at 7.

¹³ ACB at Appendix A.

¹⁴ ACB at Appendix A (e-mail of Penny Reeder).

¹⁵ “DVS Viewer Comments” (visited June 15, 2000), <www.wgbh.org/wgbh/access/dvs/dvscomments.html>.

experience which leaves the blind with an increased sense of normalcy in their lives.”¹⁶

5. Government officials and industry members have supported video description as well. Several members of Congress have submitted letters to the Commission in support of our proposals, and at least one industry member has submitted a letter in support of video description.¹⁷

6. Today we adopt initial video description rules, designed to benefit persons with visual disabilities, but not impose an undue burden on the programming production and distribution industries. As explained below, we conclude that we have the authority to adopt video description rules, and require the top broadcast stations and multichannel video programming distributors (MVPDs) to provide programming with video description on the top programming networks. This will ensure that the broadcast stations and MVPDs that reach the most people will provide video description for the most watched programming. We also adopt rules to enhance the accessibility of emergency information for people with visual disabilities. Specifically, we adopt rules as follows:

- We require affiliates of the top four commercial broadcast TV networks in the top 25 TV markets to provide 50 hours per calendar quarter of prime time and/or children's programming with video description.
- We also require MVPDs with 50,000 or more subscribers to provide 50 hours per calendar quarter of prime time and/or children's programming with video description on each of the top five national nonbroadcast networks they carry.
- In addition, we require any broadcast station, regardless of its market size, to “pass through” any video description it receives from a programming provider, if the broadcast station has the technical capability necessary to do so, and we require any MVPD, regardless of its number of subscribers, to “pass through” any video description it receives from a programming provider, if the MVPD has the technical capability necessary to do so on the channel on which it distributes the programming of the programming provider.
- The first calendar quarter these rules will be effective will be April-June 2002.
- We also require broadcast stations and MVPDs that provide local emergency information through a regularly scheduled newscast, or an unscheduled newscast that interrupts regularly scheduled programming, to make the critical details of that information accessible to persons with visual disabilities in the affected local area. We also require broadcast stations and MVPDs that provide local emergency information through another manner, such as a “crawl” or “scroll,” to accompany that information with an aural tone to alert persons with visual disabilities that they are providing emergency information. These rules relating to emergency information will become effective upon approval by the Office of Management and Budget.

7. The rules we adopt today mark a starting point for further development of video description.

¹⁶ RPI at 2.

¹⁷ Letter from Rep. Wayne T. Gilchrest to William E. Kennard, Chairman, FCC (March 22, 2000); Letter from Rep. Gerald D. Kleczka to William E. Kennard, Chairman, FCC (March 22, 2000); 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).

depending on the efficacy of, and consumer demand for, video description implemented as a result of this *Report and Order*. We expect the experience of the broadcast stations, MVPDs, and networks affected by our rules to guide the industry, the public, and the Commission on whether, how, and when we should phase in more broadcast stations and MVPDs, as well as more programming. Although the rules we adopt today do not apply to digital broadcasts, we expect ultimately to require digital television broadcasts to contain video description. We believe, however, that the decision on how and when to develop those requirements should come after there has been further experience with both digital broadcasting and video description.

II. BACKGROUND

A. Audience for Video Description

8. Video description is designed to make television programming more accessible to persons with visual disabilities, and enable them to "hear what they cannot see."¹⁸ Thus, the primary audience for video description is persons with visual disabilities. Estimates of the number of persons with visual disabilities are as high as twelve million.¹⁹ This estimate includes persons with a problem seeing that cannot be corrected with ordinary glasses or contact lenses, with a range in severity.²⁰

9. A disproportionate number of persons with visual disabilities are seniors. 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.²¹ 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.²² This means that as the population ages, more and more people will become visually disabled.²³

10. 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 disabilities²⁴ 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.

¹⁸ *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)).

¹⁹ *Notice*, 14 FCC Rcd at 19847, ¶ 5 (citing Letter from Larry Goldberg, Director, CPB-WGBH National Center for Accessible Media, to Meryl Iove, FCC 2 (Nov. 4, 1998) (*NCAM Letter*)). See also AFB at 1 (10 million "blind or visually" impaired Americans); U.S. Dept. of Commerce, Economics & Statistics Admin., Bureau of the Census, Statistical Abstract of the U.S. 149 (1998) (8 million).

²⁰ *Notice*, 14 FCC Rcd at 19847, ¶ 5 (citing *NCAM Letter* at 5). NFB states that approximately one million people are legally blind. NFB at 1.

²¹ *Notice*, 14 FCC Rcd at 19847, ¶ 6 (citing *NCAM Letter* at 5-6).

²² 1998 Statistical Abstract of the U.S. at 149.

²³ Jaclyn Parker and Corinne Kirchner, *Who's Watching? A Profile of the Blind and Visually Impaired Audience for Television and Video* at v (1997).

²⁴ 1998 Statistical Abstract of the U.S. at 150.

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.²⁵

B. Process of Providing Video Description

11. WGBH's DVS states that its process of describing programming begins with a describer viewing a program, and writing a script to describe key visual elements. The describer times the placement and length of the description to fit within natural pauses in the dialogue. The narration is recorded and mixed with the original program audio to create a full audio track with video description. That audio track is then laid back to the master on a spare channel if the programming is intended for broadcast, and to a separate master if it is intended for distribution by home video.²⁶ When the audio track with video description is provided on a separate audio channel for broadcast, viewers decide whether they wish to hear the video description. Viewers who wish to hear the description must activate the Second Audio Program (SAP) channel on their TV sets or VCRs. "Closed" video description refers to the process of providing video description on the SAP channel.²⁷ SAP reception is a standard feature of most TV sets and VCRs built since 1990.²⁸ SAP-capable TV sets and VCRs can be relatively inexpensive – less than \$150 – and converter boxes are also available for use with TV sets and VCRs that are not SAP-capable.²⁹

12. WGBH describes programming for approximately \$4000 per hour, and the Narrative Television Network, which also currently describes programming, does so for approximately \$2000 per hour.³⁰ Given that PBS' programming budgets are around \$1.5 million per hour for dramas, and \$750,000 per hour for documentaries,³¹ WGBH's current cost of describing programming is less than 1% of the production budget of PBS documentaries and dramas. WGBH, as well as the Narrative Television Network, state that the production schedules for video description are similar to those for closed captioning, and that the process has been refined over the twenty years that closed captioning, and the ten years that video description, has been provided.³²

13. Programming providers that wish to distribute programming on the SAP channel typically need the capability to support three audio channels at all points in the distribution process. This is because two audio channels are used to support left and right stereo, so that a third audio channel is necessary to support a monaural mix of the main audio and the video description. The programming provider transmits both audio tracks as part of its main signal. Networks, broadcast stations, and MVPDs that do

²⁵ Notice, 14 FCC Red at 19848, ¶ 7 (citing NCAM Letter at 6).

²⁶ "Frequently Asked Questions about Descriptive Video Service." (visited June 15, 2000) <www.wgbh.org/wgbh/access/dvs/dvsfaq.html>.

²⁷ By contrast, "open" video description refers to the process of providing video description as part of the main audio track.

²⁸ WGBH at 2.

²⁹ Notice, 14 FCC Red at 19849, ¶ 12 (citing NCAM Letter at 12).

³⁰ NTN at 2-3; WGBH at 17.

³¹ WGBH at 16.

³² NTN Reply at 2; WGBH Reply at 27.

not have the capability to support three channels of audio generally need to upgrade equipment and plant wiring to do so. The cost depends on the amount and nature of the equipment that needs to be upgraded. According to WGBH, 169 public TV stations have installed the necessary equipment to provide programming with video description via SAP,³³ and the one-time routing and transmission costs of doing so ranged from \$5,000 to \$25,000.³⁴

14. A number of commercial broadcast and nonbroadcast networks have provided programming with Spanish language as a second audio program. Each of the top four commercial broadcast TV networks has provided a Spanish language soundtrack as a second audio program, on at least an occasional basis. At least thirty-three ABC affiliates have the capability to pass through a second soundtrack on the SAP channel; at least twenty-three Fox affiliates do; and approximately twenty NBC affiliates do.³⁵ Some nonbroadcast networks, such as HBO and Showtime, also have offered a Spanish language soundtrack as a separate audio program,³⁶ and, as noted above, Turner Classic Movies has provided a soundtrack with video description as a separate audio program. Some MVPDs that carry their programming provide the audio on the SAP channel. Information submitted by the NAB and NCTA suggest that the cost for any network that cannot currently support a third audio channel to upgrade its facilities to do so on a consistent basis ranges from \$100,000 to over \$1 million.³⁷

³³ WGBH at 15.

³⁴ Notice, 14 FCC Rcd at 19855, 26 (citing NCAM Letter at 10). In its formal comments, NAB also provided some information on costs: it stated that one major network estimated that it would cost its affiliated stations \$800,000 to upgrade their satellite receiver facilities, and that it would cost its owned and operated stations \$400,000 to upgrade their studios. NAB at 16-18. NAB does not identify the network, or the number of the network's affiliated and owned and operated stations that need to upgrade their facilities. Therefore, it is not possible to use the information to determine a per-station cost.

One week before the Commission issued the Sunshine Notice in this proceeding, the NAB submitted an *ex parte* presentation which indicated that it would cost stations on average \$160,000 per station to support video description. See Letter from Jack N. Goodman, NAB to Magalie R. Salas, FCC 1 & App. at 6 (July 7, 2000) (NAB July 7 *Ex Parte*). NAB still did not provide any detailed support for these cost figures. In evaluating the parties' cost data, we give WGBH's greater weight because they are represented to be based on the actual experience of noncommercial stations that have upgraded to support programming with video description.

³⁵ "Monday Night Football on SAP" (August 6, 1999) <www.abcmnf.go.com/news/news19990803_page.html> (identifying ABC affiliates in at least 33 markets where SAP is available); "FOX Sports to broadcast 70th All-Star Game" (visited June 1, 2000) <www.majorleag...1999/allstar/news/foxbroadcast.html> (noting that 23 Fox affiliates have the technical capability to carry SAP); Elizabeth Jensen, "Networks See Benefits of Becoming Bilingual" (August 9, 1999) <www.nabe.org/press_reprints/990809e.html> (stating that fewer than 20 NBC affiliates have SAP technology). Although Commission staff has not been able to locate any information identifying the number of CBS affiliates with SAP capability, the CBS network has provided Spanish language audio for the SAP channel. *Id.*

³⁶ HBO at 5; NCTA Reply at 9-10.

³⁷ NAB at 15-16; NCTA at 14-15. Although as noted each of the top four commercial networks already provides some Spanish language audio for the SAP channel, NAB states that an unidentified major network estimates that it would cost over \$1 million to upgrade its network origination center and satellite distribution system to support a third audio channel on a consistent basis. NAB at 15-16. NCTA estimates that it would cost between \$100,000 and \$200,000 for cable networks that cannot currently support a third audio channel to upgrade their facilities to do so. NCTA at 14-15.

C. Commission Activities

15. The Commission first considered video description when it issued a *Notice of Inquiry* on closed captioning and video description on December 4, 1995.³⁸ 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 1934.³⁹ Section 713(f) directed the Commission to commence an inquiry on video description, and report to Congress on its findings, including an assessment of "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."

16. On July 29, 1996, the Commission released the required report.⁴⁰ The Commission suggested that "[i]nitial 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. . . . Lower priority for video description should be given to programming that is primarily aural in nature, including newscasts and sports events."⁴¹ 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.⁴²

17. On January 13, 1998, we released our second report on video description, as part of our annual report to Congress on competition in the market for the delivery of video programming.⁴³ We stated that "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 the larger markets, and by the larger video programming networks."⁴⁴ The Commission also suggested that "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."⁴⁵

18. In November of last year, we adopted a *Notice of Proposed Rulemaking* in this docket, given that video description had not become more widely available in the commercial video marketplace. As set forth in greater detail below, we outlined in the *Notice* a kind of proposal that we envisioned as a starting point for our initial video description rules. Consistent with our observations in the reports to Congress, we proposed to require the larger broadcast stations and MVPDs to provide video description for the

³⁸ *First NOI*, 11 FCC Rcd 4912.

³⁹ 47 U.S.C. § 613.

⁴⁰ *Video Accessibility Report*, 11 FCC Rcd 19214.

⁴¹ 11 FCC Rcd at 19270, ¶ 140.

⁴² 11 FCC Rcd at 19271, ¶ 142.

⁴³ *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.

⁴⁴ 11 FCC Rcd at 1170, ¶ 271.

⁴⁵ 11 FCC Rcd at 1170, ¶ 271.

most-watched and widely distributed programming. We received more than 100 comments and reply comments in response to the *Notice*.⁴⁶

III. ENTITIES TO PROVIDE PROGRAMMING WITH VIDEO DESCRIPTION

A. Broadcast Stations in Top 25 DMAs

19. Background. In the *Notice*, we proposed to hold broadcast stations in the top 25 DMAs and affiliated with the four largest commercial broadcast networks responsible for providing programming with video description.⁴⁷ We sought comment on our proposal, and on the costs associated with both producing and distributing described programming.⁴⁸ Although NAB argued against any rules (suggesting among other things that it would be costly to provide video description), it supported our proposal to limit the rules to affiliates of the top four networks in the top 25 DMAs if we established rules.⁴⁹ Other commenters, however, asked that we require affiliates of other networks, such as PAX, UPN, and WB, to provide programming with video description.⁵⁰ Some commenters also asked that we require stations in DMAs beyond the top 25 to provide programming with video description now, and that we adopt a schedule to phase in stations in all DMAs.⁵¹

20. Discussion. We adopt our proposal to require broadcast stations in the top 25 DMAs affiliated with the top four commercial broadcast networks (ABC, CBS, Fox, and NBC) to provide programming with video description.⁵² Our goal in this proceeding is to adopt rules designed to enhance the availability of video description, but not impose an undue burden on programming producers and distributors. Broadcast stations in the top 25 DMAs reach approximately 50% of U.S. TV households.⁵³ Those affiliated with the top four broadcast networks provide the highest-rated programming, *i.e.*, the most-watched, and therefore the most-advertiser-supported, programming. Some affiliates of the top four networks in the top 25 DMAs already have the technical capability necessary to provide programming with video description. Those that do not are likely to have the resources to acquire that capability without being unduly burdened. Indeed, NAB survey data suggests that between one-third and one-half of the broadcast stations in the top 25 DMAs

⁴⁶ The commenters and reply commenters, and the abbreviations by which they are referred to in this document, are set forth in Appendix A.

⁴⁷ 14 FCC Rcd at 19854, ¶ 25.

⁴⁸ 14 FCC Rcd at 19855, ¶ 26.

⁴⁹ NAB Reply at 7.

⁵⁰ ACB at 4-5; MATP at 2; NTVAC at 7; WGBH at 3.

⁵¹ Clive at 2 (top 35 markets initially); NTVAC at 5 (top 35 markets initially); WGBH at 3, 4-5, 9, 11 (top 33 DMAs initially).

⁵² Implicit in our decision to hold the largest broadcast stations (and larger MVPDs, as defined below) responsible for providing programming with video description is the decision to hold programming distributors, as opposed to programming producers, responsible for compliance with our rules.

⁵³ Nielsen Media Research, Inc., Media Research Services Group, "U.S. Television Household Estimates," (Sept. 1999).

already broadcast on the SAP channel.⁵⁴ Although we might require more broadcast stations to provide video description over time, depending on the efficacy of, and consumer demand for, video description implemented as a result of this *Report and Order*, we believe that we should postpone adopting a phase-in schedule until after the broadcast stations and MVPDs that are subject to our initial rules have gained some experience providing video description. This experience can provide the industry, the public, and the Commission with an informed basis upon which to propose such a schedule.

21. In order to help us determine which stations we should require to provide video description, we sought comment in the *Notice* on the number of broadcast stations that have SAP capability, and the cost to become so equipped.⁵⁵ No commenter provided data on the number of commercial broadcast stations that have the capability to broadcast on the SAP channel.⁵⁶ As noted above, however, each of the top four commercial broadcast TV networks has provided Spanish language audio on a second soundtrack, and a number of their affiliates have carried that soundtrack. ABC has advertised that it provides Spanish language for the entire season of Monday Night Football, and that affiliates in at least thirty-three markets transmit that audio on the SAP channel.⁵⁷ Many of these affiliates are in the top 25 DMAs. Fox has also provided Spanish language audio for several programs, and at least twenty-three affiliates have the capability to broadcast that audio on the SAP channel.⁵⁸ NBC has provided Spanish audio for several programs, and approximately twenty NBC affiliates have the capability to broadcast that audio on the SAP channel. CBS has also provided Spanish language audio on the SAP channel.⁵⁹ Other broadcast networks, such as PAX, UPN, and WB, however, do not appear currently to offer Spanish language audio on the SAP channel.

22. The NAB suggests that the networks and their affiliates that have offered Spanish language audio have employed *ad hoc*, only temporary solutions to do so, and that it is altogether different – and may cost one “major network” over \$1 million, and its affiliates (in the aggregate) hundreds of thousands of dollars – to support a third audio channel on a consistent basis.⁶⁰ Aside from the fact that NAB does not document or explain these costs in any detail, the simple fact that the networks and their affiliates have provided Spanish language as a second audio program – with one network providing several hours per week for an entire season – indicates that it can be done in a cost-effective manner. In addition, WGBH states that the PBS network did not spend anywhere near \$1 million to upgrade its origination center and satellite distribution system to support video description.⁶¹ As we observed in the *Notice*, WGBH also points out that it cost PBS

⁵⁴ NAB submitted survey data that shows that 45% of stations in DMAs 1-10 equipped to broadcast on the SAP channel in fact do so, and 35% in DMAs 11-25 do so. NAB App. at 6.

⁵⁵ 14 FCC Red at 19855, ¶ 26.

⁵⁶ NAB did not provide any information in its comments on the number of commercial broadcast stations that have the capability to broadcast on the SAP channel. As part of a later *ex parte* presentation, however, NAB indicated that approximately 70% of broadcast stations in the top 50 DMAs have the capability to broadcast on the SAP channel. NAB July 7 *Ex Parte* at App. at 2.

⁵⁷ “Monday Night Football on SAP” (Aug. 6, 1999) <abcnfl.go.com/news/news19990803/page.html>.

⁵⁸ “Fox Sports to broadcast 70th All-Star Game” (visited June 1, 2000).

<www.majorleag.1999.allstar.news.foxbroadcast.html>.

⁵⁹ Elizabeth Jensen, “Networks See Benefits of Becoming Bilingual” (Aug. 9, 1999).

<www.nabe.org/press.reprints.990809e.html>.

⁶⁰ NAB at 15-19.

⁶¹ WGBH Reply at 17.

member stations only around \$5000-\$25,000 to upgrade their stations to acquire the technical capability to support video description.⁶² In addition, WGBH offers a variety of technical solutions at every point in the distribution process to suggest that the cost of supporting a third audio channel is far less than NAB claims.⁶³ WGBH further suggests that the revenues of the largest broadcast stations are more than sufficient to offset any costs associated with upgrading.⁶⁴ The annual advertising revenues of the primary affiliates of the top four commercial networks in the top 25 DMAs range from \$28 million to \$315 million.⁶⁵

23. NAB suggests that any equipment that is upgraded to support a third audio channel will become obsolete when the networks and the stations fully convert to DTV.⁶⁶ WGBH suggests, however, the equipment to support more audio channels will be necessary for DTV, such that any money spent now will not be wasted.⁶⁷ According to WGBH, our video description rules therefore will work in tandem with the transition to DTV.

B. Multichannel Video Programming Distributors with At Least 50,000 Subscribers

24. Background. In the *Notice*, we proposed to require the "larger MVPDs" to provide programming with video description on nonbroadcast networks that reach 50% or more MVPD households.⁶⁸ We sought comment on how to define larger MVPDs, and on our proposal.⁶⁹ NTVAC and WGBH both suggested that MVPDs that serve 500,000 or more subscribers should qualify as larger MVPDs, and WGBH explained that eighteen multiple system operators (MSOs) would so qualify.⁷⁰ NCTA suggests, however, that any cut-off for larger cable operators should take into account the size of each system, since a large MSO may have

⁶² 14 FCC Rcd at 19855, ¶ 26. As noted above, NAB submitted an *ex parte* presentation one week before the Commission issued its "Sunshine Notice," which suggested that it would cost stations on average \$160,000 to upgrade their facilities to support video description. NAB July 7 *Ex Parte* at 1 & App. 6. As explained above, we give WGBH's cost figures greater weight.

⁶³ WGBH Reply at 18-22. WGBH describes possibilities and solutions for every point in the distribution process. WGBH explains that all major professional tape formats used by networks and studios support four channels of audio. It identifies common solutions for routing multiple channels of audio around a network or studio plant. It states that standard microwave technology (used by a network between its origination center and uplink facilities, or by the station between its studio and downlink facilities or transmitter) has supported multiple audio channels for years. It also states that a single satellite transponder can support many services, including multiple audio channels.

WGBH also describes an alternative, inexpensive solution, where additional audio is inserted into the vertical blanking interval (VBI), which renders rewiring and some other upgrading unnecessary. WGBH states that the necessary encoder costs \$2,150 and the necessary decoder costs \$1,700. WGBH at 21.

⁶⁴ WGBH Reply at 24.

⁶⁵ BIA Research Inc., Media Access Pro Database, July 11, 2000.

⁶⁶ NAB at 19.

⁶⁷ WGBH Reply at 28.

⁶⁸ 14 FCC Rcd at 19854-19855, ¶ 25.

⁶⁹ 14 FCC Rcd at 19854-19855, ¶ 25.

⁷⁰ NTVAC at 7; WGBH at 10.

systems around the country that vary greatly in size.⁷¹ NCTA also points out that more than 40 cable networks serve 50% or more of MVPD households,⁷² and that a cable system would need to associate SAP capability with each channel on which it seeks to provide programming with video description.⁷³ NCTA suggested that only 5-15% of the channels of a typical cable system currently have such equipment, and that it would cost several thousand dollars per channel to acquire it, and an additional several thousand dollars to upgrade satellite receiving equipment.⁷⁴ DirecTV suggests that DBS operators should not qualify as "larger MVPDs" because of the "unique burdens" that providing programming with video description would place on them, particularly in providing the programming of local broadcast stations.⁷⁵

25. Discussion. We require MVPDs that serve 50,000 or more subscribers to provide programming with video description on each of any of the top five nonbroadcast networks they carry, as defined by prime time audience share, as well as the programming of broadcast stations and other networks they carry, under certain circumstances, as described below. We believe this result is consistent with our goal of enhancing the availability of video description without imposing an undue burden on the programming production and distribution industries. The "larger MVPDs" as we define them include approximately 275 cable systems that serve approximately 50% of MVPD households,⁷⁶ and two DBS systems that serve 12 million customers. The top five nonbroadcast networks as we define them include those with the most-watched programming during prime time.

26. As NCTA explains,⁷⁷ cable systems and other MVPDs must have the capability to support a third audio channel for each channel on which they intend to provide programming with video description. This suggests that, while it might not be burdensome for many nonbroadcast networks to provide programming with video description, it might be burdensome for cable systems and other MVPDs to retransmit programming with video description on many nonbroadcast networks. We have therefore decided to limit the number of nonbroadcast networks for which "larger MVPDs" must provide video description to a smaller number than we proposed. We select the top five nonbroadcast networks. Given that we below require MVPDs to provide programming with video description during prime time,⁷⁸ we define the top five nonbroadcast networks in terms of prime time audience share, as determined by an average of Nielsen prime time ratings for the time period October 1, 1999-September 30, 2000. We recognize, of course, that the top five nonbroadcast networks, as measured by audience share, do not typically have as high an audience share as the top four broadcast networks, or even the broadcast networks that are not subject to our rules, as several

⁷¹ NCTA Reply at 14.

⁷² NCTA at 23.

⁷³ NCTA at 15-17.

⁷⁴ NCTA at 15-16.

⁷⁵ DirecTV at 5-6, 9. For example, DirecTV explains that it is a national service that carries the programming of many broadcast stations affiliated with the top four networks in the top 25 DMAs, with the result that a requirement to carry video description of these stations alone would require it to carry video description on 100 channels. DirecTV at 6.

⁷⁶ "Cable Industry at a Glance: Systems and Subscribers by Number of Subscribers in System" (visited May 23, 2000) <[ncta.cyberserv.com/qs/user_pages/dev\(num.ofsubs\).cfm](http://ncta.cyberserv.com/qs/user_pages/dev(num.ofsubs).cfm)>.

⁷⁷ NCTA at 23.

⁷⁸ MVPDs may instead provide video description for children's programming if they prefer.

commenters point out.⁷⁹ These nonbroadcast networks, however, have substantial resources, and our underlying goal in this proceeding is to enhance the availability of video description without imposing an undue burden on the television programming production and distribution industries.

27. The per-channel costs for MVPDs also suggests that the cut-off for "larger MVPDs" should be based on cable system size, not MSO size. No commenter, however, suggested a particular system size. We have decided to apply our rules to systems with more than 50,000 subscribers. These systems include approximately 275 cable systems that reach approximately 50% of cable subscribers, just as our rules affect broadcast stations that reach approximately 50% of U.S. TV households. NCTA suggests that the maximum costs for cable systems to upgrade equipment would be around \$3000 per channel (\$2000 per channel to add a stereo generator with SAP capability, and \$1200 per channel to add additional decoders or sound processing capabilities, or to upgrade satellite receivers).⁸⁰ These costs appear to be more than offset, however, by revenues. If each subscriber pays an average of approximately \$45/month for cable service⁸¹ provided by a system with 50,000 subscribers, the smallest cable system subject to our rules would appear to collect \$2.25 million per month, or \$27 million per year. These revenues do not include those from other sources.⁸²

28. Our decision to apply our rules to MVPDs that serve at least 50,000 subscribers will also include two DBS systems that together reach an additional 12 million subscribers. DirecTV indicates that it would need to modify its network in order to support three audio channels, and that it would cost "tens of millions of dollars" to do so even if it were required to provide programming with video description on just a few channels.⁸³ DirecTV, however, had more than 8.5 million customers as of May 2000,⁸⁴ and DBS' average programming price was \$30 per month.⁸⁵ This means that DirecTV subscriber revenues appear to be over \$250 million per month, or over \$3 billion per year. Although EchoStar, the other major DBS carrier, did not file comments in this proceeding, we note that it had more than 4 million subscribers as of May 2000,⁸⁶ such that its subscriber revenues appear to be at least \$120 million per month, or nearly \$1.5 billion per year.

C. Equipped Broadcast Stations and MVPDs

⁷⁹ A&E at 18-19; NCTA at 17-18.

⁸⁰ NCTA at 15-17.

⁸¹ Paul Kagan Assoc., Inc., "The Cable TV Financial Databook 1999" 11 (1999).

⁸² Cable operators also receive revenue from advertising, customer equipment, leased access fees, and non-video services, such as Internet and cable telephony. See In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Services, and Equipment, MM Docket No. 92-266, *Report on Cable Industry Practices*, FCC 00-214, ¶ 34 (released June 15, 2000).

⁸³ DirecTV at 6-7.

⁸⁴ "US DTH Subscribers," (visited July 27, 2000), <www.skyreport.com/skyreport/dth_us.html>.

⁸⁵ In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 99-230, *Sixth Annual Report*, FCC 99-418, ¶¶ 70, 73 (released January 14, 2000).

⁸⁶ "US DTH Subscribers," (visited July 27, 2000), <www.skyreport.com/skyreport/dth_us.html>.

29. Background. In the *Notice*, we proposed to require larger MVPDs to “pass through” the SAP channel audio containing video description of any broadcast station they carried.³⁷ We also proposed *not* to require noncommercial educational (NCE) stations to provide programming with video description, based on the financial difficulties they face, particularly as they transition to DTV.³⁸ A number of commenters suggested that we should require broadcast stations, including NCE stations, and MVPDs that can “pass through” the SAP channel audio to do so.³⁹ Although APTS supported our proposal to exempt NCE stations,⁴⁰ several other commenters did not,⁴¹ with WGBH suggesting that NCE stations, supported by taxpayers, have a particular obligation to air programming that is accessible to all.⁴²

30. Discussion. We will require all broadcast stations, including NCE stations, that have the technical capability necessary to “pass through” any second audio program containing video description that they receive from their affiliated networks. Similarly, we will require all MVPDs that have the technical capability necessary to “pass through” any secondary audio program containing video description that they receive from a broadcast station or nonbroadcast network. We believe this requirement is consistent with our approach to enhance the availability of video description, but not impose an undue burden on programming producers and distributors. WGBH states that 169 PBS member stations already have SAP capability and currently provide video description,⁴³ and our rule should not impose any significant burden on them. In addition, since our requirement will only affect other broadcast stations and MVPDs that already have the technical capability necessary to support video description, we do not believe our rule will impose any burden on the affected stations and MVPDs. We will consider broadcast stations and MVPDs to have the technical capability necessary to support video description if they have virtually all necessary equipment and infrastructure to do so, except for items that would be of minimal cost. To the extent our rule imposes an undue burden on any particular broadcast station or MVPD, it is free to seek an exemption pursuant to the standards we develop and set forth below in section VI.

IV. PROGRAMMING TO CONTAIN VIDEO DESCRIPTION

A. Amount of Programming

31. Background. In the *Notice*, we proposed to require broadcast stations and MVPDs subject to our initial rules to provide at least fifty hours per quarter (roughly four hours per week) of programming with video description.⁴⁴ Several commenters supported our proposal.⁴⁵ Others supported more hours of

³⁷ 14 FCC Rcd at 19852-19853, ¶ 20.

³⁸ 14 FCC Rcd at 19855, ¶ 25.

³⁹ NTN at 3-4; NTVAC at 6; WGBH at 3, 4-5, 9, 11.

⁴⁰ APTS at 3.

⁴¹ MATP at 2; NTVAC at 6; WGBH at 3-4, 15.

⁴² WGBH at 4, 15.

⁴³ WGBH at 15.

⁴⁴ 14 FCC Rcd at 19855, ¶ 29.

⁴⁵ Adaptive Environments at 1; NTVAC at 10 (for Year 1 in their proposed phase-in schedule); TDI at 4.

programming initially, and/or a schedule to phase in more programming in later years.⁹⁶ In the *Notice*, we also noted that the Commission had previously observed that some networks provide Spanish language audio on the SAP channel. We sought comment on the extent to which other languages compete for use of the channel, the impact (if any) of our proposal on these uses, and how any conflicts could be avoided.⁹⁷

32. Discussion. We adopt our proposal to require the broadcast stations and MVPDs subject to quarterly compliance requirements to provide at least fifty hours per calendar quarter of programming with video description.⁹⁸ Our goal in this proceeding is to bring the benefits of video description to the commercial video marketplace, while at the same time not impose an undue burden on the broadcast stations and MVPDs subject to our initial rules. We believe that requiring these broadcast stations and MVPDs to provide fifty or more hours per calendar quarter of programming with video description satisfies this goal. Although we might require more broadcast stations and MVPDs to provide more programming with video description over time, depending on the efficacy of, and consumer demand for, video description implemented as a result of this *Report and Order*, we continue to believe that we should postpone adopting such a phase-in schedule until after the broadcast stations and MVPDs subject to our initial rules have gained some experience in providing video description. This experience can provide the industry, the public, and the Commission with an informed basis upon which to propose such a schedule.

33. We clarify, as suggested by several commenters,⁹⁹ that the broadcast stations and MVPDs may not count toward their 50-hour quarterly requirement programming that they have previously aired with video description, once the rules go into effect. In other words, a broadcast station or MVPD may not count toward its 50-hour quarterly requirement any programming it aired with video description after the effective date of the rules when that same broadcast station or MVPD repeats the same programming later. Broadcast stations and MVPDs may, however, count any programming they air after the effective date in excess of their quarterly requirements, and that they repeat later. In addition, they may count any programming with video description they air *before* the effective date of the rule, and that they later repeat after the effective date. We also clarify, as suggested by several commenters, that once a broadcast station or MVPD has aired a particular program with video description, all of that broadcast station's or MVPD's subsequent airings of that program should contain video description, unless another use is being made of the SAP channel. We impose this requirement because it should not impose any burden on any broadcast station or MVPD subject to our rules, or on their programming suppliers. This is because the cost of both describing programming, and upgrading equipment and infrastructure to distribute it, generally should be a one-time fixed cost. At the same time, we will 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.

34. We also believe that our decision to require that 50 hours per quarter, or roughly 4 hours per week,

⁹⁶ See, e.g., ACB at 3, 5 (250 hours/quarter initially, followed by phasing in all children's programming within 3 years); AFB at 7 (20% of each network's series initially, followed by an additional 20% within 5 years); MATP (10 hours/week initially, phasing in more within 3-5 years); NTN at 4 (phase in all prime time programming within 7 years); NTVAC 10 (4 hours/week initially, followed by phasing in all prime time programming within 7 years, and all children's programming until 3 hours/week); RPI (50 hours/quarter inadequate); WGBH (phase in all prime time programming within 7 years, and all children's programming until 3 hours/week is reached).

⁹⁷ 14 FCC Rcd at 19856, ¶ 30.

⁹⁸ However, non-program minutes, such as advertisements and public service announcements, aired during a described program need not be described.

⁹⁹ NTN at 4; NTVAC at 11; WGBH at 14.

of programming with video description will avoid any conflicts between competing uses of the SAP channel. Some networks use the SAP channel to provide Spanish audio or other services.¹⁰⁰ Although as some commenters point out there is not a technical solution to allow two uses of the SAP channel simultaneously,¹⁰¹ as others point out most networks that use the SAP channel to provide Spanish language audio do so on a limited basis.¹⁰² Those few networks that provide more extensive Spanish language audio are not among the networks that will be affected by our rules.¹⁰³ Thus, we believe that our rules will not create conflicts between Spanish language audio and video description for use of the SAP channel. Although some commenters believe that occasional uses of the SAP channel for different purposes will create viewer confusion,¹⁰⁴ we believe any such confusion can be corrected through viewer education.

B. Prime Time vs. Other Types of Programming

35. Background. In the *Notice*, we proposed to require the broadcast stations and MVPDs subject to our initial rules to provide programming with video description during prime time, or to provide children's programming with video description. We sought comment on our proposal.¹⁰⁵ Several commenters supported our proposal.¹⁰⁶ Others suggested that we should not require certain types of programming to contain video description, or that we should require broadcast stations and MVPDs to provide both children's and prime time programming with video description.¹⁰⁷ In the *Notice*, we also sought comment on how people with visual disabilities will know when programming with video description is scheduled.¹⁰⁸

36. Discussion. We adopt our proposal to require that the described programming must either be shown

¹⁰⁰ HBO at 5; LULAC at 2; NAB at 21; NCTA at 12-13; NCTA Reply at 9-10. According to LULAC, some portion of the programming of the following networks contains Spanish: ABC, CBS, Fox, NBC, Bravo, Cartoon Network, Cinemax, Comedy Central, Encore, HBO, The Movie Channel, Romance Channel, Sci-Fi Channel, Showtime, Starz!, TNT, and USA. LULAC at 2.

In addition to providing Spanish audio, NCTA states that those cable networks that have the capability to support a third audio channel also use the channel to provide supplementary audio information, such as local weather or world news; enhanced TV commentary, such as commentary from a movie's director; and cue tones, or signals to alert head-end equipment to breaks in national programming for insertion of local advertisements. NCTA at 12-13.

¹⁰¹ NAB at 20.

¹⁰² WGBH at 18.

¹⁰³ Approximately 85% of the programming of HBO, The Movie Channel, and Showtime, and 50% of the programming of Encore, contain Spanish audio. HBO at 5; NCTA Reply at 9-10. We do not expect these networks to be among the top five nonbroadcast networks subject to our rules.

¹⁰⁴ DirecTV: HBO at 6; NCTA at 12-13.

¹⁰⁵ 14 FCC Rcd at 19855, ¶ 29.

¹⁰⁶ Adaptive Environments at 1; WGBH at 17.

¹⁰⁷ Clive at 3 (video programming distributors should do both children's and prime time programming); NTVAC at 10 (the ratio of prime programming to children's programming should be 3-to-1); RPI at 4.6 (FCC should not choose programming); TDI at 4 (75% of programming should be prime time).

¹⁰⁸ 14 FCC Rcd at 19855, ¶ 29.

during prime time or be children's programming. Prime time programming is the most watched programming, and so programming provided during this time will reach more people than programming provided at any other time. In addition, as we noted in the *Notice*, the several thousand dollars per hour cost to describe programming is a very small portion of the production budget for the typical prime time program. At the same time, as we noted in the *Notice*, programming with video description may provide a benefit not only to children who are visually disabled, but also to those who are learning disabled.¹⁰⁹ Programming with video description has both audio description and visual appeal, and so has the potential to capture the attention of learning disabled children and enhance their information processing skills.¹¹⁰ Requiring broadcast stations and MVPDs to provide children's or prime time programming with video description thus ensures that the programming reaches the greatest portion of the audience it is intended to benefit the most. Permitting broadcast stations and MVPDs to select between the two provides them flexibility without compromising that goal.

37. In order to help the public identify the broadcast stations and MVPDs that are required to provide programming with video description, and the programming for which they are doing so, we encourage broadcast stations and MVPDs that provide programming with video description to take steps to educate and inform the public about the service. We encourage broadcast stations and MVPDs to promote the service in their programming and on their websites, and provide the relevant information to magazines and newspapers that follow their programming schedules, as some commenters suggest.¹¹¹

38. We note that the National Federation of the Blind and many of its individual members suggest that we should focus not on entertainment programming, but rather on the accessibility of text information aired on TV, such as emergency information, the identity of speakers on news and talk shows, and telephone numbers or other contact information in advertisements.¹¹² We agree with NFB that the accessibility of this type of information is important, and address the accessibility of emergency information in particular below in section VIII. We believe, however, that a secondary audio program may not be the appropriate vehicle to provide text-based information. However, we do encourage producers of programming with text information to provide that information aurally, by announcing the names of speakers. Advertisers should have a commercial incentive to provide contact information aurally.

V. EFFECTIVE DATE OF NEW RULES

39. Background We proposed in the *Notice* to require broadcast stations and MVPDs subject to our rules to begin providing programming with video description starting eighteen months after the effective date of our rules. One commenter supported our proposal.¹¹³ Several commenters suggested that broadcast stations and MVPDs should begin providing described programming earlier, with many suggesting within

¹⁰⁹ 14 FCC Rcd at 19848, ¶ 7.

¹¹⁰ 14 FCC Rcd at 19848, ¶ 7.

¹¹¹ Adaptive Environments at 2; MATP at 3; NTVAC at 13.

¹¹² NFB at 4-5.

¹¹³ Adaptive Environments at 1.

twelve months.¹¹⁴ MPAA claimed that any requirement to begin providing programming with video description within twelve months would be inconsistent with the Commission's approach in closed captioning, and with existing programming contracts.¹¹⁵ NAB suggested that any requirement should coincide with the beginning of the first TV season eighteen months or more after the effective date of the rules.¹¹⁶

40. Discussion. We require the broadcast stations and MVPDs subject to our rules to begin providing programming with video description during the first calendar quarter that is eighteen months after the adoption date of this *Report and Order*, i.e., April-June 2002.¹¹⁷ Although we appreciate the desire of many to have programming with video description earlier, we wish to give the affected broadcast stations, MVPDs, and networks the time that may be necessary to make arrangements to describe the programming, and to upgrade their equipment and infrastructure. We believe that giving the affected parties until April 2002 is ample time. We decline to make our effective date coincide with the beginning of the TV season for broadcast networks because our rules also affect nonbroadcast networks, which may or may not use the same schedule to introduce new programs as broadcast networks do. We encourage parties that seek to make the beginning of their new programming seasons coincide with starting date of their providing video description to make the necessary arrangements to do so, within the time frame to meet their first quarterly compliance requirement in April-June 2002.

VI. EXEMPTIONS

41. Background. In the *Notice*, we proposed to adopt procedures to exempt parties from our video description rules, if compliance would result in an undue burden.¹¹⁸ We noted that, in the closed captioning context, Congress deemed certain factors relevant to showing that compliance would result in an undue burden, and sought comment on whether these procedures should be applied to our video description rules.¹¹⁹ Although not many parties commented on procedures or standards for waiver, WGBH supported adopting the procedures and standards we use for closed captioning for video description.¹²⁰

42. Discussion. We adopt the "undue burden" exemption procedures and standards that we use in the closed captioning context.¹²¹ We therefore will exempt any affected broadcast station or MVPD that can

¹¹⁴ American Council of the Blind at 3, 5; Clive at 2; MATP at 2; NTN at 4; NTVAC at 9; WGBH at 6, 16. One commenter suggested that we should require broadcast stations and MVPDs to begin providing programming with video description immediately. RPI at 2, 22, 27.

¹¹⁵ MPAA Reply at 19-21.

¹¹⁶ NAB at 25-26; WGBH Reply at 34-35.

¹¹⁷ As set forth below in section VIII, the effective date of our emergency rules will be earlier, upon approval by the Office of Management and Budget.

¹¹⁸ 14 FCC Rcd at 19857, ¶ 33.

¹¹⁹ 14 FCC Rcd at 19857, ¶ 33.

¹²⁰ WGBH at 19.

¹²¹ The procedures and standards we use to assess "undue burden" in the closed captioning context are set forth at 47 C.F.R. § 79.1(f).

demonstrate through sufficient evidence that compliance would result in an "undue burden," which means significant difficulty or expense. We will consider the following factors: the nature and cost of providing video description of the programming; the impact on the operation of the broadcast station or MVPD; the financial resources of the broadcast station or MVPD; the type of operations of the broadcast station or MVPD; any other factors the petitioner deems relevant; and any available alternatives to video description.¹²²

43. We exempted categories of programming and providers from our closed captioning rules, and many commenters ask that we do the same for video description.¹²³ Given the limited nature of our initial video description rules, we decline to exempt any particular categories of programming or class of programming providers. We will consider these issues when we consider extending the entities that must provide programming with video description, and the amount they must provide.

VII. ENFORCEMENT

44. Background. In the *Notice*, we proposed to adopt procedures to enforce our initial video description rules. We noted that, in the closed captioning context, the Commission did not adopt reporting requirements, but rather simply adopted pleadings requirements and timetables.¹²⁴ We sought comment on the relevance of these procedures to our initial video description rules.¹²⁵ Those commenters that addressed the issue asked us to adopt an informal complaint procedure,¹²⁶ but one that is less onerous than the one we established for closed captioning, and does not involve quality standards.¹²⁷ Commenters suggested that any entity that violates our rules should be required to provide more programming with video description,¹²⁸ perhaps make a payment, or, in the case of a broadcast station, have their license revoked.¹²⁹

45. Discussion. We adopt enforcement procedures as follows. A complaint alleging a violation of this section may be transmitted to the Commission by any reasonable means, such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, audio-cassette recording, and Braille, or some

¹²² We also adopt the filing and other procedures we use to assess "undue burden" in the closed captioning context. Appendix B sets forth our initial video description rules, and therefore includes these procedures.

¹²³ For example, commenters asked that we exempt certain categories of programming, such as foreign language programming produced outside the United States (Grupo Televisa at 3-8; International Cable Channels Partnership at 3-7), game shows (GSN at 7-8), home shopping programming and infomercials (MPAA at 32; QVC at 4-11), live programming (MPAA at 32; NCTA at 17-20; Weather Channel at 3-5), music programming (MPAA at 32; NCTA at 17-20), news and public affairs programming (C-SPAN at 2-5; MPAA at 32; RTNDA at 2-4), and sports programming (MPAA at 32).

Commenters also asked that we exempt certain classes of programming providers, such as DBS operators (DirecTV Reply at 9), ITFS licensees (WCA at 2-3), and "wireless broadband MVPDs" (WCA at 4-5).

¹²⁴ 14 FCC Rcd at 19857, ¶ 33.

¹²⁵ 14 FCC Rcd at 19857, ¶ 33.

¹²⁶ ACB at 7-8.

¹²⁷ WGBH at 20; WGBH Reply at 16.

¹²⁸ WGBH at 20.

¹²⁹ AFB at 8.