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

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FCC Mail Room

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

REPORT AND ORDER

Adopted: August 24, 2011 **Released: August 25, 2011**

By the Commission: Commissioners Copps and Clyburn issuing separate statements.

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I. INTRODUCTION

1. Pursuant to the Commission's responsibilities under the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA"),[1] this Order reinstates the video description rules adopted by the Commission in 2000.[2] "Video description," which is the insertion of audio narrated descriptions of a television program's key visual elements into natural pauses in the program's dialogue,[3] makes video programming more accessible to individuals who are blind or visually impaired. The United States Court of Appeals for the District of Columbia Circuit vacated the Commission's original video description rules due to insufficient authority soon after their initial adoption.[4] The CVAA has directed us to reinstate those rules with certain modifications.[5] We anticipate that these revised and reinstated rules will afford better access to television programs for individuals who are blind or visually impaired, enabling millions more Americans to enjoy the benefits of television service and participate more fully in the cultural and civic life of the nation.

2. This Order reinstates the requirement that large-market broadcast affiliates of the top four national networks, and multichannel video programming distributor systems ("MVPDs") with more than 50,000 subscribers, provide video description.[6] Covered broadcasters are each required to provide 50 hours of video-described prime time or children's programming, per calendar quarter, and covered MVPDs are required to provide the same number of hours on each of the five most popular nonbroadcast networks.[7] This "most popular" list excludes two nonbroadcast networks that primarily air programming recorded less than 24 hours before it is first aired.[8] The rules also require that all network-affiliated broadcasters (commercial or non-commercial) and all MVPDs pass through any video description provided with programming they carry. They must do so, however, only to the extent that they are technically capable of doing so and when that technical capability is not being used for another purpose related to the programming.[9] As required under the CVAA, these rules will be reinstated on October 8, 2011. Broadcast stations and MVPDs subject to the rules must begin full compliance on July 1, 2012.

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[1] Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010).

[2] The CVAA requires that "the Commission shall, after a rulemaking, reinstate its video description regulations" with certain modifications. CVAA §202(a), Pub L. No. 111-260, 124 Stat. 2751(2010) (to be codified at 47 U.S.C. § 613). The regulations were initially promulgated in *Implementation of Video Description of Video Programming*, MM Docket No. 99-339, Report and Order, 15 FCC Rcd 15230 (2000) ("*2000 Report and Order*"), recon. granted in part and denied in part, 16 FCC Rcd 1251 (2001) ("*Recon*"), and were codified at 47 C.F.R. § 79.3. The Commission initiated this proceeding to implement the CVAA in March 2011. *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43, Notice of Proposed Rulemaking, 26 FCC Rcd 2975 (2011) ("*NPRM*").

[3] CVAA at Title II, sec. 202(a), § 713(h)(1). Video description is sometimes referred to as "audio description"; *see infra* ¶ 56 (discussing the Commission's use of the statutory term "video description").

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

[5] CVAA at Title II, sec. 202(a), § 713(f)(1-2).

[6] Appendix A, *Final Rules* (Revised 47 C.F.R. § 79.3(b)).

[7] *Id.* at § 79.3(b)(1), (3).

[8] *See infra* ¶ 14 (ESPN and Fox News exempted); *see also* CVAA at Title II, sec. 202(a), § 713(f)(2)(E).

[9] Appendix A, *Final Rules* (Revised 47 C.F.R § 79.3(b)(3), (5)).

II. BACKGROUND

3. In 1996, at Congress's direction, the Commission issued a report on the use of video description in video programming.[10] In 2000, the Commission adopted rules requiring certain broadcasters and MVPDs to carry programming with video description.[11] Five months after the rules went into effect, they were vacated by the United States Court of Appeals for the District of Columbia Circuit on the ground that the Commission lacked sufficient authority to promulgate video description rules.[12] On October 8, 2010, President Obama signed the CVAA, which gives the Commission express authority to adopt video description rules. The statute directs the Commission, as an initial step, to reinstate the previously adopted video description rules, with certain modifications.[13] To fulfill our statutory mandate, we adopt the rules discussed below.[14]

III. DISCUSSION

A. Reinstated Rules

4. Section 713(f)(1) of the Communications Act, as added by the CVAA, states that

> the Commission shall, after a rulemaking, reinstate its video description regulations contained in the Implementation of Video Description of Video Programming Report and Order (15 F.C.C.R. 15,230 (2000)), recon. granted in part and denied in part, (16 F.C.C.R. 1251 (2001)), modified as provided in paragraph (2).[15]

Consistent with Congress' directive, we will reinstate the Commission's video description rules on October 8, 2011, with the modifications required by the CVAA and discussed below.[16] The most significant elements of these reinstated rules are:

- Full-power affiliates of the top four national networks located in the top 25 television markets must provide 50 hours per calendar quarter of video-described prime time and/or children's programming. MVPDs that operate systems with 50,000 or more subscribers must provide 50 hours per calendar quarter of video-described prime time and/or children's programming on

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[10] 47 U.S.C. § 613 (this section, Video Programming Accessibility, was added to the Communications Act by Section 305 of the Telecommunications Act of 1996); *see also Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility*, MM Docket No. 95-176, Report, 11 FCC Rcd 19214 (1996) ("Report"). The Commission had initiated the inquiry in 1995, before enactment of the 1996 Act. *Closed Captioning and Video Description of Video Programming*, MM Docket No. 95-176, Notice of Inquiry,11 FCC Rcd 4912 (1995).

[11] *2000 Report and Order*, *supra* note 2.

[12] *Motion Picture Ass'n of America, Inc. v. Federal Communications Comm.*, 309 F.3d 796 (D.C. Cir. 2002).

[13] CVAA at Title II, sec. 202(a), § 713(f)(1) (requiring reinstatement of the rules one year after the date of enactment of the CVAA).

[14] The CVAA imposes other requirements with respect to video description. For example, we are required to submit a report to Congress by April 1, 2014 discussing the status, benefits, and costs of video description on television and Internet-provided video programming. *Id.* at § 713(f)(3). We must submit a second report by October 8, 2019 that provides a detailed review of the video description market and the potential need for expansion of the description mandates. *Id.* at § 713(f)(4)(C)(iii). The CVAA also gives us authority to expand the video description obligations if we determine that the benefits of video description outweigh its costs. *Id.* at § 713(f)(4)(A), (B), (C)(iv). We will address these questions in later proceedings.

[15] *Id.* at § 713(f)(1). *See also id.* at § 713(f)(2) ("Such regulations shall be modified only as follows...").

[16] *See generally 2000 Report and Order* and *Recon*, *supra* note 2.

each of the top five non-broadcast networks that they carry on those systems.

- To count toward the requirement, the programming must not have been previously aired with video description, on that particular MVPD channel or broadcast station, more than once.
- Any broadcast station, regardless of its market size, affiliated or otherwise associated with any television network, must "pass through" video description when the network provides it, if the station has the technical capability necessary to do so, and that technical capability is not being used for another purpose related to the programming. Similarly, any MVPD system, regardless of its number of subscribers, must "pass through" video description when a broadcast station or nonbroadcast network provides it, if it has the technical capability necessary to do so on the channel on which it distributes the broadcast station or nonbroadcast network programming and that technical capability is not being used for another purpose related to the programming. Any programming aired with description must always include description if re-aired on the same station or MVPD channel.
- Complaints alleging a failure to comply with these rules may be filed with the Commission by any viewer, and the Commission will act to resolve such complaints after reviewing all relevant information provided by the complainant and the video programming distributor.

B. Requirement to Provide Video Description

5. Under the reinstated rules, certain broadcast stations and MVPDs have an obligation to provide video description of some of the video programming[17] that they offer. Full-power affiliates of the top national networks that are located in the 25 television markets with the largest number of television households[18] must provide 50 hours per calendar quarter of video-described programming during prime time,[19] or at any time if they are providing children's programming.[20] To count toward this 50-hour requirement, video-described programming must be airing either the first or second time on the station; that is, a video described program may be counted toward the 50 hours when it is originally aired and once more when it is re-run for the first time. Although we anticipate that much of the programming aired with video description will be newly produced, stations may count any program that they are airing for the first or second time with video description after the reinstated rules become effective, even if the program has previously been aired on that station. Similarly, a station may count programming toward its 50-hour obligation even if that programming has aired elsewhere with description, so long as it is airing with description for the first or second time on that station. The rules are identical for MVPDs with

[17] The CVAA defines "video programming" in the video description context as "programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media (as defined in section 3)." CVAA at Title II, sec. 202(a), § 713(h)(2). Section 3 of the Communications Act, as amended in the CVAA, defines consumer-generated media as "content created and made available by consumers to online websites and services on the Internet, including video, audio, and multimedia content." CVAA at Title I, sec. 101(1), § 3 (54). The rules adopted herein adopt the CVAA definition of video programming. *See* Appendix A, *Final Rules* (Revised 47 C.F.R. § 79.3(a)(4)).

[18] These markets are the top 25 as determined by The Nielsen Company as of January 1, 2011 (*i.e.*, the 2010-2011 Designated Market Area rankings).

[19] For this purpose, prime time means 8-11 pm Monday through Saturday, and 7-11 pm on Sunday, except that these times are an hour earlier in the central time zone, and stations in the mountain time zone may choose which "prime time" period to adopt for the purpose of these rules. Appendix A, *Final Rules* (Revised 47 C.F.R. § 79.3(a)(6)). The National Association of Broadcasters ("NAB") supports this definition, which was not opposed by any party. Comments of NAB at note 22.

[20] For this purpose, this is programming directed at children 16 years of age and younger. *See infra* ¶ 51 and Appendix A, *Final Rules* (Revised 47 C.F.R. § 79.3(a)(8)).

50,000 or more subscribers, except that they apply to the programming of each of the top five national non-broadcast networks[21] carried by the MVPDs.

6. MVPD commenters raise some concerns about the requirement to provide video description, as opposed to passing it through when it is received. AT&T argues that

> [b]ecause of the practical, technical, and legal challenges involved, MVPDs are currently incapable of producing video descriptions on their own, and thus should only be required to transmit video descriptions to the extent that they are available.[22]

AT&T notes that "MVPDs do not generally have the expertise, resources, or established processes for" the production of video description.[23] Along similar lines, Verizon explains that "[t]he overwhelming majority of programming viewed by FiOS TV subscribers is received by Verizon and immediately passed on to subscribers in real-time," creating technical hurdles to monitoring and adjusting an audio stream containing video description.[24] Finally, NCTA states that since video description is "a creative work that is derivative of an original work, the descriptive audio may be subject to review and approval by several entities."[25] AT&T argues that it would not be in a position to create such a derivative work without a license from the copyright holders, which "may be hesitant to grant such licenses."[26] For all these reasons, AT&T argues that "the only entity that would be both capable of and authorized to create video descriptions would be the video programming provider," and "the Commission should not skew [the carriage agreement] bargaining process by placing a regulatory obligation on MVPDs that they are unable independently to fulfill."[27]

7. The American Association of People with Disabilities ("AAPD") greets with skepticism Verizon's claim of being totally "hands-off" with their content. They note that "distributors contract with content providers and programmers before any programming is passed through their system, and do not 'blindly' pass along content to viewers."[28] The American Council of the Blind ("ACB") "recognizes the challenges in obtaining copyright permissions and producing audio description for programs," but suggests that relying on these marginal concerns when drafting overarching policy would be allowing the tail to wag the dog.[29] They argue that, rather than delaying full implementation due to these concerns, the Commission should simply take them into consideration, where appropriate, in the context of any future complaint.[30]

8. As industry commenters observe and as the Commission acknowledged in the *NPRM*, most video description has historically been created by programmers with whom broadcast stations and

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[21] The ranking of the Top 5 is based on The Nielsen Company's data on national prime time audience share, the number of subscribers reached, and the amount of non-exempt programming. *See infra* ¶ 12.

[22] Comments of AT&T Services, Inc. ("AT&T") at 7.

[23] *Id.* at 8.

[24] Comments of Verizon Communications, Inc. ("Verizon") at 2.

[25] Comments of NCTA at note 40.

[26] Comments of AT&T at 8.

[27] *Id. See also* Reply of CenturyLink at 4.

[28] Reply of AAPD at 4.

[29] Comments of ACB at 6.

[30] *Id.*

MVPDs contract for distribution of their content.[31] But the obligation on certain broadcast stations and MVPD systems to provide video description to their viewers is fundamental to the video description rules Congress has directed us to reinstate.[32] Limiting our rules to a pass-through obligation would eviscerate them, leaving no requirement in place on any party to ensure the production and distribution of video described content. In addition, doing so would put us in clear violation of Congress' directive that we reinstate the 2000 video description rules.

9. As discussed more fully below, we do not find any of the technical, practical, or legal concerns described by the commenters insurmountable, particularly given the very small amount of programming that must be described. We note that these stations and systems provide 22 hours of prime-time programming per week, and most of the nine broadcast and nonbroadcast networks covered by the rules also provide some amount of children's programming. Out of all these hours of programming each week, a single broadcast or nonbroadcast network will be required to newly describe fewer than four hours each week, and, as long as the described programming is prime-time or children's programming, what is described is at the discretion of the regulated entity and their contractual partners.[33] Each covered station and system knows that it is individually responsible for ensuring that it carries one to two hundred hours of newly described programming each year (depending on the frequency of re-runs). We expect stations and systems to be forward-looking and fully prepared to provide this amount of newly described programming, whether by contract with network programmers or otherwise. Indeed, a third of the covered networks are already providing at least some video description.[34] Commenters identify no relevant distinctions between these networks and the others covered by the rules, giving us every confidence that video description can be successfully expanded within the generous time frame for compliance that we adopt in this Order.[35] Furthermore, as discussed below, the small amount of programming at issue in this proceeding also mitigates many other concerns raised by industry commenters, including those regarding the definition of "near-live" programming,[36] the pass-through obligation,[37] and the alleged need for new blanket exemptions.[38] We are simply not persuaded that these minimal requirements are overly burdensome, given the benefits they provide and our mandate from Congress. We also note that the CVAA requires us to review and reconsider these rules numerous times over the next decade, giving us ample opportunity to resolve any issues that arise upon implementation. Because the CVAA directs us to reinstate the video description rules as they were adopted in 2000, and gives us limited authority to revise them,[39] we believe that it is appropriate to hew closely to the original

[31] *NPRM*, *supra* note 2, at note 47.

[32] *See generally*, CVAA, *supra* note 1. *See also* Reply of NAB at 6 (recognizing that the reinstated rules will require some broadcasters to "provide" video description, even though some elements of that provision are out of their control).

[33] *See infra* ¶ 51 (noting that the Commission declines to seek information about the program selection process).

[34] After the Commission's original video description rules were vacated, some broadcast and nonbroadcast networks voluntarily continued to provide this important service. *See NPRM*, *supra* note 2, at ¶ 4. CBS, Fox, and TNT, for instance, all provide description today and will be providing description under these rules. We commend these networks, and all others that have and continue to voluntarily offer described programming, for recognizing the importance of video description to the members of their audiences who are blind or visually impaired.

[35] *See infra* ¶¶ 34-38 (discussing the compliance timeline).

[36] *See infra* ¶¶ 40-42.

[37] *See infra* ¶¶ 20-21.

[38] *See infra* ¶¶ 45-47.

[39] CVAA at Title II, sec. 202(a), § 713(f)(1-2).

text of the rules where possible. We need not attempt to address every possible situation suggested by commenters that could hypothetically arise; we can address special or unique situations on a case-by-case basis through our administrative procedures. Per the CVAA, we provide for exemptions from the rules where they may be economically burdensome, and establish the process for seeking such exemptions.

1. Broadcast Stations

10. *Reference date for determining the top 25 markets*. In the *NPRM*, the Commission proposed to reinstate the 2000 rules, which designated ABC, CBS, Fox, and NBC affiliates, licensed to the top 25 markets as determined by The Nielsen Company, as the broadcast stations required to provide 50 hours of video description per quarter, and we adopt that proposal.[40] The CVAA directed us to "update the list of the top 25 designated market areas,"[41] and in response, the *NPRM* proposed to apply the rules to the top 25 markets as determined by Nielsen as of January 1, 2011 (*i.e.*, the 2010-2011 designated market areas (DMA) rankings).[42] NAB, the WGBH National Center for Accessible Media ("WGBH"), and ACB agree with this approach to determining the covered broadcast stations, and we adopt the proposal.[43]

11. *New Affiliates*. The Commission also proposed to require stations in those markets that are affiliated with ABC, CBS, Fox, or NBC to provide video description regardless of when the affiliation begins.[44] That is, a station in a top 25 market that is not currently affiliated with one of those networks but becomes affiliated with one of them would be immediately responsible for complying with the video description requirement. NAB asks the Commission instead to give new affiliates a "phase-in period of at least three months (but preferably six months)" before requiring them to provide video description.[45] NAB argues that

> [a] station that becomes a top-four affiliate but is not technically ready to pass through video description will need a reasonable period to deploy the requisite technical capability. The CVAA does not require an immediate imposition of the video description rules on a station that newly becomes a top-four, top-25 affiliate, and NAB anticipates that without such a grace period, a station in this situation would seek a waiver of the rules.[46]

No other comments addressed this argument. We agree with NAB that some stations may require some time to buy or upgrade equipment and software after the affiliation agreement is finalized, and note that we have provided a three month "grace period" to MVPD systems that reach 50,000 subscribers.[47] We

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[40] *NPRM*, *supra* note 2, at ¶ 9.

[41] CVAA, Title II, sec. 202(a), § 713(f)(2)(B).

[42] *NPRM*, *supra* note 2, at ¶ 9. Markets are ranked by Nielsen based on their total number of television households. TVB Market Profiles *at* http://www.tvb.org/market_profiles/131627. DMA is a registered trademark of The Nielsen Company.

[43] *See* Comments of NAB at 11; Comments of WGBH at 11; Comments of ACB at 4. ACB suggests that although Nielsen ratings "may suffice" for determining the top 25 markets at this time, they may ultimately prove insufficient to accurately gauge market size, due to the expanding use of Internet-delivered video. They raise similar concerns about the measurement of audience size when determining the top five nonbroadcast networks. Given that the rules Congress instructed us to reinstate are limited to the provision of video description on television, the reach of broadcast stations and nonbroadcast networks over the Internet is not addressed in this proceeding.

[44] *NPRM*, *supra* note 2, at ¶ 9.

[45] August 19, 2011 Ex Parte of NAB at 1.

[46] Comments of NAB at 11.

[47] *See infra* ¶ 38.

anticipate that a similar period will provide ample time for a station to establish the necessary technical capability. Accordingly, we require new ABC, CBS, Fox, and NBC affiliates in the top 25 markets to provide video description, in the same manner as current ABC, CBS, Fox, and NBC affiliates in the top 25 markets, beginning no more than three months after their affiliation agreement is finalized.

2. Top Five National Nonbroadcast Networks

12. In order to implement the requirement that MVPD systems with more than 50,000 subscribers provide 50 hours per calendar quarter of video-described prime time and/or children's programming on each of the top five non-broadcast networks that they carry,[48] we must identify the "top 5 national nonbroadcast networks that have at least 50 hours per quarter of prime time programming that is not exempt."[49] The prior rules determined the top nonbroadcast networks using "an average of the national audience share during prime time of nonbroadcast networks, as determined by Nielsen Media Research, Inc., for the time period October 1999–September 2000, that reach 50 percent or more of MVPD households."[50] In the *NPRM*, the Commission proposed to measure audience share over an updated time frame, October 2009 – September 2010,[51] and to explicitly exclude from the top five any non-broadcast network that does not provide, on average, at least 50 hours per quarter of prime time non-exempt programming.[52] No commenter opposed this proposal, which we adopt. Therefore, the top five nonbroadcast networks for the purposes of our rules are USA, the Disney Channel, TNT, Nickelodeon, and TBS.[53]

13. The Nielsen Company treats some nonbroadcast "channels" as more than one "network" for ratings purposes – notably, Nickelodeon and Nick at Nite. The Commission asked how we should take this into account when determining which networks are subject to the requirement to provide video description.[54] NCTA responds that, for these purposes, "it makes sense for the Commission to treat those entities as a single network."[55] No other commenters address this question, and we concur with NCTA's suggestion. We therefore consider Nickelodeon and Nick at Nite to be a single network for ranking purposes and will consider them a single network for the purposes of compliance with the 50-hour requirement.

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[48] A number of commenters observe that, as proposed, the rules were ambiguous as to whether it is MVPD size or system size that determines whether a given MVPD system is required to provide description or only to pass it through. Comments of the National Cable & Telecommunications Association ("NCTA") at 3; Reply of the American Cable Association ("ACA") at 2-3; Reply of CenturyLink at 3. The *2000 Report & Order*, however, made it clear that the requirement to provide description was intended to be triggered by system size. *2000 Report and Order*, *supra* note 2, at ¶ 27. We have clarified the language of the rule to reflect this intent. Appendix A, *Final Rules* (Revised 47 C.F.R. § 79.3(b)(4)).

[49] CVAA, Title II, sec. 202(a), § 713(f)(2)(B). "Exempt" programming includes "live or near-live programming." *See infra* ¶ 37.

[50] 47 C.F.R. § 79.3(b)(3).

[51] *NPRM*, *supra* note 2, at ¶ 12. These dates cover the 2009-2010 television season, which is the most recent full television season for which ratings are available.

[52] Appendix A, *Final Rules* (Revised 47 C.F.R. § 79.3(b)(4)); *see also infra* ¶¶ 40-42 (addressing the definition of "live or near-live").

[53] *But see, infra*, ¶ 18 (list will be revised at three year intervals, if ratings change).

[54] *NPRM*, *supra* note 2, at ¶ 12.

[55] Comments of NCTA at note 32.

14. We asked for detailed information from any network that believes it should be excluded from the top five covered networks because it does not "have at least 50 hours per quarter of prime time programming that is not exempt" from these rules.[56] The comments of The Walt Disney Company ("Disney"), as parent company of ESPN, indicate that "ESPN does not provide, on average, at least 50 hours per quarter of prime-time non-exempt programming," and are supported by an affidavit to that effect and "a few illustrative programming schedules."[57] Similarly, the reply of News Corporation ("Fox") indicates that "Fox News qualifies for exclusion from the rules because it does not provide at least 50 hours per quarter of non-exempt (i.e., non-live or non-near live) prime-time programming," and is supported by a declaration to that effect and a programming schedule for a representative week.[58] Both networks base these assertions on the *NPRM's* proposed definition of "near-live" programming as "programming performed and recorded less than 24 hours prior to the time it is first aired,"[59] which we adopt here.[60] No commenter disputes the accuracy of these filings. Thus, pursuant to the terms of the statute, ESPN and Fox News are excluded from the list of top five nonbroadcast networks because they do not "have at least 50 hours per quarter of prime time programming that is not exempt under" the statute.[61]

15. ACB argues that, notwithstanding that the bulk of ESPN's prime-time programming is live or near-live, "there certainly is prime [*sic*] programming that ESPN produces that does not fall under the given rules and should not be exempted."[62] The CVAA, however, limits the list of top five nonbroadcast networks to those networks that provide at least "50 hours per quarter of prime time programming that is not exempt," and does not give the Commission authority to extend video description requirements to any other nonbroadcast networks.[63] Therefore, we decline to adopt ACB's proposal to extend video description requirements to ESPN's non-exempt prime-time programming.

3. Updates to the Lists of Markets and Nonbroadcast Networks

16. *Extension to Top 60 Markets.* The CVAA mandates that the Commission extend the video description requirements to broadcast stations in the top 60 markets after filing a report to Congress on the state of the video description market, and no later than six years after the enactment date of the CVAA.[64] The Report is due to be submitted to Congress between July 1, 2013 and July 1, 2014,[65] and as a result we must extend the video description requirements to the top 60 markets some time between July 1, 2013 and October 8, 2016. In the *NPRM*, the Commission asked whether this Order should identify now the reference date to be used to determine the top 60 markets and a compliance deadline for stations in markets 26-60, or whether the Commission should set those dates following the required report to

[56] *NPRM*, *supra* note 2, at ¶ 12.

[57] Comments of Disney at 1-2, Appendix A, Appendix B.

[58] Reply of Fox at 1, Exhibit No. 1, Exhibit No. 2.

[59] Comments of Disney at note 5; Reply of Fox at note 5.

[60] Appendix A, *Final Rules* (Revised 47 C.F.R. § 79.3(a)(7)); *see also infra* ¶¶ 38-40.

[61] CVAA, Title II, sec. 202(a), § 713(f)(2)(B).

[62] Reply of ACB at 8.

[63] CVAA, Title II, sec. 202(a), § 713(f)(2)(B).

[64] *Id.* at § 713(f)(4)(C)(i-ii).

[65] *Id.* (explaining that the Commission must begin an inquiry into the state of the video description market no later than one year after July 1, 2012, when the rules go fully into effect, and must file the report to Congress no later than a year after beginning the inquiry).

Congress.[66] WGBH states that we "should set a date at this time for the next phase of video description so as to assure that all parties are aware of the pending requirements."[67] ACB agrees that the reference date should be chosen at this time, and that the compliance deadline should be January 1, 2015, to give "sufficient warning" to covered entities and prevent "unnecessary delays."[68] NAB disagrees, arguing that "[t]he broadcast television industry is dynamic, and more experience is needed before any realistic timeframe can be established." It proposes that the Commission act to set these dates no sooner than January 1, 2014.[69] Given the narrow range of possible compliance deadlines, we see no benefit in delaying the selection of either the compliance date or the reference date. Furthermore, as WGBH notes, setting a date at this time gives significant advance notice to the parties likely to be covered.[70] This approach gives major-network affiliates in the top 60 markets additional time to upgrade equipment or architecture in order to provide video description once it is mandated (although, given the pass-through obligations of these stations, we expect that they will have little or no need for upgrades). Given the benefits of selecting compliance and reference dates now, and the absence of any countervailing harms, we elect to do so. The rules extend the requirement to provide 50 hours per quarter of video description to major network affiliates in the 60 largest markets beginning on July 1, 2015. These will be the television markets with the largest number of television households as determined by The Nielsen Company as of January 1, 2015 (*i.e.*, the 2014-2015 DMA rankings).

17. *Updating List of Top 25 Markets.* As discussed above, affiliates of the top four broadcast networks must provide 50 hours of video description per quarter if they are licensed to communities in the top 25 markets as of January 1, 2011. Because the relative size of television markets can change over time, the *NPRM* sought comment on whether we should reconsider the ranking of the top 25 markets at certain intervals to better reflect market conditions.[71] WGBH supports a periodic reconsideration of the rankings and suggests a five-year time frame, while agreeing with the Commission that "the availability of described programming should vary little market-to-market based on the pass-through requirements."[72] ACB agrees that a shifting television market supports periodic reevaluation, although at no less than 24-month intervals.[73] The Commission noted in the *NPRM* that, because of the "pass-through" obligations of network stations outside the top 25 markets, there may be little to no difference in the amount of video described programming available from affiliates of the top four networks in larger and smaller markets.[74] We share NAB's concern about increasing the "complexities of compliance" by modifying the list multiple times if it would have minimal impact on the availability of programming.[75] Thus, we decline to act at this time, but will gather information about this issue when preparing the first report to Congress, looking particularly at the availability of passed-through video description on major network affiliates outside the top 25 and top 60.

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[66] *NPRM, supra* note 2 at ¶ 11.

[67] Comments of WGBH at 3.

[68] Comments of ACB at 5.

[69] Comments of NAB at 12.

[70] Comments of WGBH at 3.

[71] *NPRM, supra* note 2, at ¶ 10.

[72] Comments of WGBH at

[73] Comments of ACB at 4.

[74] *NPRM, supra* note 2, at ¶ 10.

[75] Comments of NAB at 12.

18. *Updating List of Top Five Nonbroadcast Networks.* Ratings of nonbroadcast networks change more frequently over time,[76] and a change in the list of covered nonbroadcast networks could mean a significant change in the described programming available to viewers. The Commission therefore sought comment on whether we should reconsider the ranking of the top five nonbroadcast networks at certain intervals to better reflect current market conditions and, if so, what those intervals should be.[77] Every commenter that addresses this issue supports a periodic reevaluation, although not an annual one.[78] MVPD commenters express some concern about the "ramping-up efforts" that will be necessary when networks are newly added to the top five list.[79] We find more compelling, however, the concerns both MVPD and consumer commenters raise about balancing the need for description of the most popular content against the need to avoid disruption for audiences who come to rely upon video described programming on a given channel.[80] We agree with ACB that a period of less than 24 months would be excessively disruptive to viewers, but that NCTA's proposed five year interval could allow the described programming to get too out of sync with viewer preference. Therefore, in line with ACB's proposal that the revisions occur on a cycle "no less than" two years long, and AT&T's proposal that it be "multi-year," our rules will automatically update the top five list every three years. We agree with NCTA that it is important to give newly included networks time to come into full compliance,[81] so each new list will be based not on The Nielsen Company ratings for the ratings year just ended, but for the previous year. Thus, the first update, on July 1, 2015, will be based on the ratings over the 2013-2014 ratings year. This approach will not only ensure that new top five networks have time to come into compliance, but that there is no interim period during which the list drops below five. To the extent a program network that otherwise would appear in the list of top five nonbroadcast networks does not air at least 50 hours of prime time programming that is not exempt,[82] it must seek an exemption from the video description requirement no later than 30 days after publication of the 2013-2014 ratings information by The Nielsen Company. This requirement will ensure that the nonbroadcast network replacing it in the top five has ample time to come into compliance. We direct the Media Bureau to act on any such requests promptly, applying the definition of "near-live" programming adopted in this Order, and to provide public notice of any resulting revisions to the list.

19. WGBH, ACB, and the American Foundation for the Blind ("AFB") propose a "no-backsliding" rule in both the broadcast and nonbroadcast context. Under such a rule, the large network affiliate stations in a top 25 (or, later, top 60) market would retain the obligation to provide video description even if their market slipped out of the top 25, and MVPDs would retain the obligation to provide video description on any nonbroadcast network that was ever considered a top five network under these rules.[83] NCTA notes that the economic justification for applying the rules to the most popular cable networks – that they could "best bear" the recurring costs of video description – diminishes once a

[76] Comments of WGBH at 3.

[77] *NPRM, supra* note 2, at ¶ 13.

[78] Comments of NCTA at note 32 ("no less than five year intervals"); Comments of AT&T at 10 ("a multi-year reassessment interval"); Comments of ACB at 5 ("no less than 24 months"), Comments of WGBH at 3 ("perhaps on a two-year timeline").

[79] Comments of NCTA at note 32; Comments of AT&T at 9-10.

[80] Comments of NCTA at note 32.

[81] Comments of AT&T at 10; Comments of ACB at 5.

[82] Like ESPN and Fox News, which are excluded from the current top five list.

[83] Comments of WGBH at 2,3; Comments of ACB at 4-5; Reply of AFB at 3-4; Reply of ACB 6-7.

network ceases to be one of the most popular.[84] The same logic would apply to stations licensed to markets that suffer losses of numbers of television households.[85] NCTA also questions whether the Commission has the statutory authority to apply the rules to a network that is not on its top five list (or, by extension, to a station not in a top 25 market).[86] AFB argues that the "Commission's ancillary jurisdiction provides the Commission the flexibility needed" to take this option.[87] We agree with NCTA that the statute does not authorize us to expand the number of nonbroadcast networks subject to our rules beyond the five identified according to the criteria set out in the statute and interpreted here.[88] We therefore decline to adopt a "no-backsliding" rule in either the broadcast or non-broadcast contexts.[89] We encourage those entities initially subject to our rules to continue to provide video description and thereby serve individuals who are blind or visually impaired even after their obligation to do so ceases. We also note that broadcast stations that drop out of the top 25 markets will continue to have an obligation to pass through video description, as discussed below.

C. Pass-Through and Subsequent Airing of Video Described Programming

1. Pass-Through

20. In the *NPRM*, the Commission proposed to reinstate the previously adopted pass-through requirement.[90] Two commenters support this proposal, and no commenter objects.[91] Accordingly, we adopt this requirement without change. Broadcasters affiliated with any network, and all MVPDs, will be required to pass through any video description that they receive from a broadcast or cable network or, in the case of MVPDs, from a broadcast station they carry, subject to the exemptions discussed below.[92] As

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[84] Reply of NCTA at 5.

[85] In addition, a station's dropping off the list of top 25 (or 60) markets will not likely have a significant practical effect, as they will still be required to pass through any video description they receive.

[86] Reply of NCTA at 5.

[87] Reply of AFB at 3-4.

[88] The CVAA states that our reinstated "regulations shall be modified only as follows," including "[t]he Commission shall update...the list of the top 5 national nonbroadcast networks." Since Congress specifically directed us to reinstate the "top 5" requirement, we are not authorized to expand this number. We do have the authority to expand these rules, but only after the passage of time and a review of their impact. CVAA, Title II, sec. 202(a), § 713(f)(4).

[89] We nonetheless encourage parties to voluntarily continue providing video description service once it has begun, because of the benefits it provides to the community and the lower costs of continuing, as opposed to beginning, the provision of video description.

[90] *NPRM, supra* note 2, at ¶¶ 14-16.

[91] Comments of WGBH at 3; Reply of AAPD at 4; *see also, e.g.*, Comments of Verizon at 2 ("Verizon passes along video descriptions when supplied by any of our other content suppliers, and we will continue to do so.").

[92] Appendix A, Final Rules (Revised 47 C.F.R. § 79.3(b)(3), (5)); *but see, infra* ¶¶ 23-31 (discussing exemptions from the pass-through requirement). We also note that the must carry provision of the Communications Act requires cable operators to carry "the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers." 47 U.S.C. § 534(b)(3), 47 C.F.R. § 76.62(e), (f) (cable); 47 U.S.C. § 338(j), 47 C.F.R. § 76.66(j) (DBS). *See also Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules and Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, ¶¶ 60-61 (2001).

the Commission noted in the *NPRM*,[93] this obligation is distinct from the requirement to provide video description.[94] First, it applies to all MVPDs and network-affiliated broadcast stations (including non-commercial stations), rather than a subset of large-market entities.[95] Second, broadcast stations and MVPDs with the obligation to provide 50 hours of description must continue to pass through any video description that they receive even after they have provided the 50 required hours of description.[96]

21. Although, as noted, no commenter opposes adoption of the reinstated pass-through rules, NCTA does express some concern about whether MVPDs will be able to identify video-described programming provided by broadcasters in order to pass it through, because broadcasters are not required to include the IS0-639 language descriptor.[97] NAB responds that broadcasters will be able to include this descriptor without difficulty, and argues that this matter can be resolved by industry coordination and we should not impose a regulatory solution at this time.[98] In line with our preference to hew closely to the video description rules as originally adopted, and given the likelihood of technological shifts in this area,[99] we decline to dictate the method of identifying video described programming at this time.

2. Subsequent Airings

22. The Commission also proposed to reinstate the rule that, once a broadcast station or MVPD system has aired a program with description, either as part of its 50-hour obligation or because it passed the description through, that program must always include description if re-aired on the same station or MVPD channel.[100] In practice, we anticipate that most described programming will be provided to viewers as it is received from a network or other program supplier. The Association of Public Television Stations, *et al.* ("APTS") expresses concern about the requirement to re-air description it does not control.[101] If stations or systems contract with program suppliers for described programming, rather than providing the description themselves, they can also ensure via contract that future airings of a described program also contain description.[102] As a result, the program will be provided to the station or system with a video description track, and this rule will function identically to the "pass-through" rule.

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[93] *NPRM*, *supra* note 2, at ¶ 14.

[94] *See supra* ¶¶ 5-9.

[95] *2000 Report and Order*, *supra* note 2, at ¶ 30.

[96] *Recon*, *supra* note 2, at ¶ 14 (NAB recognized that entities that had met their 50 hour obligation were still required to pass description through to viewers). Broadcast stations and MVPDs that pass through video-described programming from a network can count that programming toward their 50 hour obligation, so long as it is either aired during prime time or is children's programming, and has not been previously aired on that channel more than once since the adoption of our rules.

[97] Comments of NCTA at 8-9. The IS0-639 language descriptor is essentially a metadata "tag" that is used by digital cable systems for "signaling the presence of and providing information about individual AC-3 audio streams." Many broadcasters use a different "tag," due to updates to the digital broadcast television standard. Comments of NCTA at 8.

[98] Reply of NAB at 6-7.

[99] *See infra* ¶ 29-31 (discussing the difficulties with carrying video description on an additional audio stream at this time).

[100] *NPRM, supra* note 2, at ¶ 6.

[101] Comments of APTS at 6.

[102] Of course, if the station or system provides the description, or if it exists in a file in their control, the station or system should likewise have no difficulty complying with this requirement.

As the Commission explained in the *2000 Report & Order*, this requirement "should not impose any burden on any broadcast station or MVPD subject to our rules, or on their programming suppliers."[103] Once a program has aired with description, viewers reasonably anticipate that it will be at least as accessible in later airings. Furthermore, Congress has directed us to reinstate this rule. Therefore, we adopt this proposal, and reinstate the rule without change.[104] As discussed below,[105] however, and consistent with the rules adopted in 2000, the station or MVPD system need not include video description with a subsequent airing of a program if it is using the technology used to provide video description for a conflicting program-related purpose.

3. Technical Capability Exception

23. In the original rules, the pass-through requirement did not apply when a station or MVPD channel did not have the "technical capability necessary to pass through the video description."[106] The Commission explained that it would "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."[107] In the *NPRM*, the Commission noted the evolution toward digital programming since the original rules were adopted, and sought comment on how this Order should take digital programming into account when determining whether a distributor has "the technical capability necessary."[108] We find that the exception remains necessary despite the passage of time. As APTS notes, almost half of public television stations are not providing a second audio stream capable of including video description at this time, and many are incapable of doing so.[109] We also find that there is insufficient justification for revising the "minimal cost" standard.[110] We therefore reinstate the technical capability exception as previously adopted.

24. In the *2000 Report and Order*, the Commission noted that it did "not believe [the pass-through] rule [would] impose any burden on the affected stations and MVPDs," because the rule only applied to "broadcast stations and MVPDs that already [had] the technical capability necessary to support video description."[111] ACB appears to oppose the exception as proposed, suggesting that, unless a station or system faces an "undue burden, there should be no other reason" not to pass video description through.[112] NAB reads their proposal to require the Commission to review the technical capability claims

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[103] *2000 Report and Order, supra* note 2, at ¶ 33.

[104] Appendix A, *Final Rules* (Revised 47 C.F.R. § 79.3(c)(3), (4)); *see also Recon*, *supra* note 2, at note 74 ("Broadcast stations and MVPDs can count a repeat of a previously aired program in the same quarter or in a later quarter, but only once altogether").

[105] *See infra* ¶ 28.

[106] This exception does not apply in the context of the "subsequent airing" rule, because any channel on which description has previously aired has the demonstrated technical capability to air description again.

[107] *2000 Report and Order*, *supra* note 2, at ¶ 30.

[108] *NPRM*, *supra* note 2, at ¶ 16.

[109] Comments of APTS at 4. As discussed below, if these stations are capable of providing a secondary audio stream that includes video description at "minimal cost," they will be required to do so starting July 1, 2012.

[110] *See infra* ¶ 27 (discussing a proposal to revise the minimal cost standard).

[111] *2000 Report and Order*, *supra* note 2, at ¶ 30.

[112] Comments of ACB at 5. We note that "undue burden" has been replaced with the phrase "economically burdensome" in the individual exemption rules adopted in this item, but the process for seeking such an exemption remains the same. *See infra* ¶¶ 43-44.

of any station or system before it could rely on this exception, and argues that this would result in an "extraordinary drain on Commission resources."[113] ACB's Reply, however, indicates that it is opposed not to the proposed implementation of the exception, but to the exception in its entirety. ACB objects to the possibility that we would "*only* apply audio description pass through rules to stations that are technically capable," arguing that this would not create incentives for stations and systems to develop pass through capacity.[114]

25. To the extent not all stations and systems will have the technical capability to pass through video description by the implementation date, by its terms the exception will limit the scope of the pass-through rule.[115] We note, however, that, as equipment prices drop over time and older architectures are upgraded, this exception will apply to fewer and fewer stations and systems. Furthermore, the CVAA directs us to reinstate the rules as they were adopted in 2000, and gives us limited authority to revise them.[116] We agree with NAB that the record does not support revising this rule, and as NAB proposed we will "only require pass through of audio description when a station [or system] becomes technically capable."[117]

26. We note that, although the workings of the exception were not discussed in the *2000 Report and Order* or *Recon*, as a practical matter it is self-implementing. A station or system may refrain from passing description through if it would be able to demonstrate, in the event of a complaint, that at the time of the failure to pass some description through, it was not technically capable of doing so (and could not become capable at minimal cost).[118]

27. Commenter Cristina Hartmann asks that the Commission explicitly define the term "minimal cost" as a percentage of annual gross revenues.[119] Ms. Hartmann expresses concern that leaving the term undefined will result in the indefinite maintenance of the status quo.[120] ACB raises a similar concern in its Reply.[121] We find this concern to be speculative, however, and to provide an insufficient basis on which to deviate from the original rules Congress has directed us to reinstate. Thus, we adopt the approach of the *2000 Report & Order,* finding that a station or system is technically capable to pass video description through if it has "virtually all necessary equipment and infrastructure to do so, except for items that would be of minimal cost."[122] We also emphasize that this exception does not apply to the requirement to provide description in the first instance. Those stations and MVPD systems obligated to

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[113] Reply of NAB at 12-13.

[114] Reply of ACB at 5.

[115] *2000 Report and Order*, *supra* note 2, at ¶ 30. ("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").

[116] CVAA at Title II, sec. 202(a), § 713(f)(1-2).

[117] *Id.*

[118] Thus, APTS' proposed special exemption for public television stations is unnecessary. *See* Comments of APTS at 5. If the cost of passing description through is minimal, it will not implicate the funding issues APTS raises. If it is more than minimal, it is not required, and no special exemption is necessary.

[119] Reply of Cristina Hartmann at 9-11.

[120] *Id.*

[121] Reply of ACB at 5.

[122] *2000 Report & Order*, *supra* note 2, at ¶ 30.

provide 50 hours of described programming must do so, regardless of technical capability.[123]

4. "Other Program-Related Service" Exception

28. On reconsideration of the 2000 rules, the Commission adopted an exception to the pass-through and subsequent airing requirements, holding that when the secondary audio program ("SAP") equipment and channel were being used to provide another program-related service, such as foreign-language audio, a station or MVPD system did not have to stop providing that service in order to provide the video description. This action was based on the fact that in the analog world, the SAP channel could not be used to provide two services simultaneously, and there was significant value in existing uses of the secondary audio (usually to provide Spanish-language audio).[124] In the *NPRM* in this proceeding, the Commission pointed out that digital transmission enables broadcasters and MVPDs to provide numerous audio channels for any given video stream, thus allowing simultaneous transmission of a variety of audio tracks, and asked whether it is necessary or appropriate to apply this exception to digital transmissions.[125] We are persuaded that, given the current state of technology, and the continuing and growing importance of service to Spanish language viewers, it is appropriate to continue the exception for now.

29. A number of commenters support elimination of this exception, largely on the assumption that the ability to carry numerous audio streams would alleviate any concerns about conflicts on any given audio channel.[126] Many industry commenters, however, argue that, given the current state of technology, we cannot assume that MVPDs and broadcasters are able to carry numerous audio streams. NCTA notes that cable systems have been designed, and cable equipment manufactured, for a two-stream architecture.[127] AT&T, CenturyLink, DirecTV, and DISH point to similar legacy equipment issues, as well as potential bandwidth constraints.[128]

30. Industry commenters argue that it is not only their architecture that will need updating to enable widespread access to multiple audio streams, but consumer equipment as well. NAB explains that "use of a third audio stream [rather than the second] to *deliver* video descriptions... may actually disenfranchise many blind and visually impaired consumers because they will not be able to *access*" the descriptions, for the reasons described below.[129] Viewers relying on analog television sets, whether attached to over-the-air converter boxes or MVPD-connected set-top boxes, may still rely on secondary

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[123] These stations or systems may seek a waiver from the Commission on the grounds that the rules are economically burdensome. Appendix A, *Final Rules* (Revised 47 C.F.R. § 79.3(d)).

[124] *Recon, supra* note 2, at ¶ 15.

[125] *NPRM, supra* note 2 at ¶ 15 ("digital video signals can have an enormous number of alternative audio tracks; although as a practical matter that number may be limited by the amount of bandwidth allocated to the programming stream, digital programming can technically include more than three audio tracks"), citing MPEG Compression Standard ISO/IEC 13818-1; Advanced Television Systems Committee ("ATSC") A/53, A/52 Standards.

[126] Comments of WGBH at 3; Comments of ACB at 6; Reply of the American Association of People with Disabilities ("AAPD") at 3.

[127] Comments of NCTA at 5; see also Reply of ACA at 3-4.

[128] Comments of AT&T at 3; Joint Comments of DirecTV, Inc. and Dish Network, L.L.C. ("DBS Providers") at 2-3; Reply of CenturyLink at 3-4.

[129] Comments of NAB at 8. *See also*, Comments of DBS Providers at 2-3; Comments of AT&T at 3; Comments of NCTA at 5-6; Reply of ACA at 3-4; Reply of Cristina Hartmann at 11-12; Reply of CenturyLink at 3-4; Reply of NCTA at 3-6; Reply of AT&T at 5-6.

audio program ("SAP") technology and thus be limited to a maximum of one "additional" channel.[130] Even viewers with digital sets may be unable to find and activate an audio stream that has been properly labeled "VI" ("Visually Impaired") pursuant to the ATSC standard, because few digital sets that take advantage of that capability are available.[131]

31. Thus, if we were to eliminate the exception for other program-related content, one of two things would likely happen. Stations and systems would replace some other program-related content with video description to comply with the pass-through requirement, potentially depriving audiences, including in many instances non-English speaking communities who use the second audio stream to receive Spanish-language programming, of a valuable service. Alternatively, stations and systems would provide the passed-through video description on an audio stream tagged "VI," making it difficult, if not impossible, for the target audience to access it. The record contains no information about the prevalence of use of secondary audio streams to provide other program-related content, so we do not know the full impact of this exception. Nonetheless, we conclude that, since the potential for conflicting uses that originally drove adoption of the exception in the virtually all-analog world in 2000 remains today, we will reinstate the exception as originally adopted and defer to stations and systems to determine how best to serve their audiences.[132] We will, however, revisit the need for this exception when we review the state of the market.[133] We expect that at some point in the near future, due to voluntary upgrades and equipment obsolescence, broadcasters, MVPDs, and the installed base of consumer equipment will be sufficiently advanced to handle a video description audio track that does not conflict with any other program-related service, obviating this exception.[134]

32. Even today, however, we strongly encourage stations and systems to provide video description simultaneously with other program-related content when they can do so. When both video description and another program-related secondary audio stream (usually Spanish language) is available for a given program, our rules allow the station or system to choose which to pass through .[135] In some

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[130] *NPRM*, *supra* note 2, at ¶ 15; *but see* Comments of the Consumer Electronics Association ("CEA") at 4 (at least some MVPD equipment allows the audio channel to be chosen at the set-top box, which would allow any subscriber to access any audio stream provided by the MVPD regardless of the type of television the stream is sent to). As discussed in this section, however, many MVPD systems may still be architecturally limited to two audio streams, rendering this point moot.

[131] Comments of NAB at 7 ("NAB is not aware of any DTV receiver currently available in the market that can recognize and allow a consumer to choose an audio stream 'tagged' as VI."); Comments of CEA at 3 ("many legacy TVs may only present audio streams marked as 'complete main'"). ACB argues that MVPDs could target equipment upgrades to the homes of individuals who will most benefit from video description, in order to reduce the cost of transitioning. Reply of ACB at 4. Even if targeted upgrades to consumer premises equipment were feasible, however, and even if that equipment could be used to select the "VI" audio so that it could be output to legacy televisions in a usable fashion, some MVPDs would not have the system architecture in place to actually deliver more than two audio streams to that equipment.

[132] *See, e.g.*, Comments of the Walt Disney Company ("Disney") at 4 ("Disney Channel would like to ensure that its programming is accessible by *both* the visually-impaired and the Spanish-speaking communities."); Reply of NCTA at 4; *see also* Reply of AT&T at 6 (stations and systems should have the flexibility to choose when it would be better to provide "other secondary audio that serves the public interest.").

[133] This review will begin no later than July 1, 2013. CVAA at Title II, sec. 202(a), § 713(f)(3). *See also* CVAA at Title II, sec. 203(d) (requiring that we undertake a rulemaking addressing technical standards, which must be completed within 18 months after the second VPAAC Report to the Commission (due April 8, 2012)).

[134] June 23, 2011 Ex Parte Presentation of CEA at 2.

[135] Appendix A, *Final Rules* (Revised 47 C.F.R. § 79.3(b)(3), (5)).

cases, that system or (more commonly) station will have the capability to pass both "additional" audio streams through simultaneously. In such a case, we encourage them to do so. When more than two audio tracks are passed through, the "second" track (likely Spanish language) will often be the only "additional" audio track many viewers can access, due to the limits of legacy equipment. Nonetheless, an increasing number of viewers will be able to access another "additional" audio track if it is provided, due to the growing adoption of newer technology. Indeed, individuals who are blind or visually impaired may be early adopters of such technology. Therefore, stations and systems should take full advantage of their capabilities to ensure the widest possible access to video described programming.

33. We emphasize that the other program-related content exception does not apply to the requirement to provide description, but only to the pass-through and "previously described" obligations. Video description of programming must be provided in a manner accessible by all consumers if a large-market broadcaster or large MVPD system intends to count that programming toward its requirement to provide 50 hours of description.

D. Phase-In

34. As required by statute, these rules will be "reinstated" on October 8, 2011 ("the day that is 1 year after the date of enactment").[136] As discussed below, broadcasters and MVPDs will have to be in full compliance beginning on July 1, 2012.[137] The *NPRM* had proposed that compliance begin on January 1, 2012, but the record provides little support for that proposal.

35. Most consumer advocates acknowledge that there could be difficulties with the introduction of description on January 1, 2012, only 85 days after reinstatement of the rules.[138] They are dismissive, however, of industry claims about the need for a full year to prepare for compliance, given the long history of these rules and industry participation in the drafting of the CVAA.[139] ACB proposes and AAPD supports a 60 day "testing" period, beginning January 1, 2012, in which viewers, distributors, and programmers could work together to test and verify the systems for provision and pass-through of video description, with full compliance required beginning March 1, 2012.[140] AFB also acknowledges that some stations or systems might have implementation difficulties that could justify up to three months of additional time.[141]

36. Industry commenters are largely unified not only in their opposition to a January 1 compliance date, but also in their support for compliance beginning in the fourth quarter of 2012.[142] They

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[136] CVAA, Title II, sec. 202(a), § 713(f)(1).

[137] The Paperwork Reduction Act requires that any new regulation imposing a paperwork burden be reviewed and approved by OMB before it becomes effective. The Paperwork Reduction Act of 1995 ("PRA"), Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

[138] Comments of ACB at 5 (indicating that stations with "little experience with description" will need time to coordinate reception and pass-through of video descriptions); Reply of AAPD at 7 ("multiple entities and technologies [are] involved" and testing is necessary to ensure audience is receiving the signal); Reply of AFB at 2 ("sometimes unforeseen practical circumstances can arise that thwart even the best of good intentions").

[139] *See e.g.*, Reply of AAPD at 4-5; Reply of AFB at 2.

[140] Comments of ACB at 5; Reply of AAPD at 7.

[141] Reply of AFB at 2.

[142] Comments of NAB at 15 (proposing October 1, 2012); Comments of NCTA at 13 (same); Comments of APTS (October 8, 2012); Reply of AT&T at 2-4 (fourth quarter 2012); Reply of ACA at 5 (same).

note that certain central questions will remain in flux until the release of this Order,[143] and that there are legal and contractual issues that cannot be resolved until its release (including program selection, standards setting, and coordination among individual MVPDs, broadcast stations, and programmers).[144] NAB argues that we should roughly align the compliance date of the rules with the start of the fall television season, so that "program production systems" for new programs could be revised to include video description.[145] NAB proposes October 1 as the compliance date, even though the fall season generally begins several weeks earlier, because it is the first day of a calendar quarter and compliance with the rules is calculated on a quarterly basis.[146] NCTA also argues for an October 1 compliance date, which it states will allow programmers to choose programs that will provide the most benefit to consumers of video description, rather than have the choices "dictated simply by the exigencies of compliance."[147] Commenters also point to technical concerns with a shorter timeframe for compliance. Both programmers and distributors must verify, and possibly update, their transmission capabilities to handle video description.[148] Finally, NCTA notes that the original rules gave stations and systems 18 months to comply, considerably more than the timeline proposed in the NPRM or by the consumer groups this time around.[149]

37. While we agree with consumer advocacy groups that industry does not need as much time to come into compliance with the CVAA-mandated rules as it did when the Commission originally adopted video description requirements a decade ago, a phase-in period of approximately nine months, is reasonable given the challenges cited by commenters. We continue to believe, as the Commission said in the *NPRM*, that "although the CVAA deferred certain implementation issues to the Commission, to a great extent the entities that will be subject to our reinstated rules have been aware of the pending requirements since at least the enactment of the CVAA on October 8, 2010."[150] We are persuaded, however, that enough issues were in flux until the release of this Order that the covered entities are justified in their request for more than the proposed 85 days to come into compliance. As discussed above, we do not believe it will be difficult for broadcasters and MVPDs to negotiate the rights to provide video description given the small amount of video-described programming required and their discretion in choosing it. Nonetheless, we recognize that complex programming agreements may need to be renegotiated. We also agree with NAB that it is appropriate to start the compliance date with the beginning of a calendar quarter to simplify compliance and enforcement.[151] Given this long lead time, we believe that the vast majority of broadcast stations and MVPD systems can have their systems fully tested and be prepared to provide video description beginning July 1, 2012. We expect that this extended phase-in period will mean that few, if any, stations or systems will need an extension of time to come into

[143] Comments of NCTA at 10. These issues include the identity of the top 25 markets and the top five networks, and the standard for considering waiver requests, all finalized herein.

[144] Comments of NCTA at 12; Comments of NAB at 8; Reply of AT&T at 4. NCTA also argues in passing that the House Committee Report on the CVAA assumed that the rules will be in full effect "approximately" one year after they are reinstated. Comments of NCTA at fn. 29. We find that the language of the House Committee Report, particularly given its use of the term "approximately," does not compel any particular compliance date.

[145] Comments of NAB at 15.

[146] Comments of NAB at 15-16.

[147] Comments of NCTA at 12, 13

[148] Comments of NCTA at 12-13.

[149] Comments of NCTA at 11.

[150] *NPRM, supra* note 2, at ¶ 19.

[151] Comments of NAB at 15-16.

full compliance.

38. We also proposed that, should any MVPD system not serving at least 50,000 subscribers on the effective date of the rules begin to do so at a later date, it must provide video description on the top five non-broadcast networks, in the same manner as MVPD systems currently serving 50,000 or more subscribers, beginning no more than three months after reaching 50,000 subscribers.[152] We received no comments on this proposal. As the *NPRM* noted, an MVPD should be aware in advance that it is approaching the 50,000 subscriber threshold, and we believe three months is sufficient time to come into compliance with the requirement to provide 50 hours of video description per quarter.[153] Therefore, we adopt this proposal.

E. Exemptions

39. As discussed in the *NPRM*, the CVAA directs us to exempt programming that is "live or near-live" from the operation of these rules, and directs us to take that exemption into consideration when determining whether a non-broadcast network is covered by the video description rules.[154] As discussed above, we have adopted the *NPRM's* proposed definition of "near-live" and taken it into account when determining the top five list.[155] The CVAA also gives the Commission authority to provide certain other individual or categorical exemptions. We adopt the proposal to make individual exemption determinations on the basis of economic burden, adopt a narrow "breaking news exemption," and decline to adopt further exemptions at this time.

1. Live or Near-Live Programming

40. As the Commission explained in the *NPRM*, "live" programming is "programming aired substantially simultaneously with its performance."[156] No commenter objects to this definition, which we adopt. The Commission further explained that some television programs are "filmed and produced just hours before they are first aired," and that others are aired live on the East Coast but three hours later on the West Coast.[157] With this understanding, the Commission proposed that programming performed and recorded less than 24 hours prior to the time it was first aired be considered "near-live," and asked whether this time period would "ensure that programming is not covered by the reinstated rules unless there is ample time to create and insert video descriptions in the programming before it is aired."[158]

41. The legislative history of the CVAA sheds no light on the intended definition of "near-

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[152] *NPRM*, *supra* note 2 at ¶ 18.

[153] Given that all MVPDs are required to pass through video description they receive unless they lack the technical capability to do so or are using that capability for another program-related service, in most cases being elevated into the category of MVPDs that must also "provide" video description should have little effect on viewer access to described programming.

[154] *NPRM*, *supra* note 2 at 20 (citing CVAA, Title II, sec. 202(a), § 713(f)(2)(B), (E)).

[155] *See supra* ¶ 14.

[156] *NPRM, supra* note 2, at 21.

[157] *Id.*

[158] *Id.* We note our disagreement with those commenters who argue that because it is possible to provide video description in real-time, we should not exempt live programming, or at least all live programming, at all. Reply of Harry Brown; Reply of AAPD at 7; Comments of ACB at 4. Given the statute's explicit direction that the "regulations shall not apply to live or near-live programming," we have no discretion in this matter. CVAA, Title II, sec. 202(a), § 713(f)(2)(E).

live,"[159] but common sense suggests that a "nearly live" program is one that is aired a very short time after its performance or recording. NCTA argues that "many episodes of programs are not ready [to be described] until very close to the time they are scheduled to air,"[160] and agrees with NAB that no program can begin the description process until it is delivered "in final, edited and approved form."[161] These commenters propose, therefore, that the question of whether a program is "near-live" should have no connection to when it was performed or recorded. They also argue that it takes over a week to add video description to a program even after it has been "approved," and that the Commission should therefore define seven- or ten-day-old programming as "near-live."[162] We conclude that reading "near-live" as referring to programming that is "complete, with no further edits,"[163] seven or ten days before airing would strain the common-sense meaning of the term "near-live," which connotes both a short time frame (of much less than seven or ten days) and one that is tied to when a performance occurred "live."[164]

42. In any case, we do not believe the definition of "live or near-live" is as broadly significant as either industry or advocate commenters suggest. Because the obligation to provide video description is only for a limited number of hours, the definitions' primary purpose at this stage is to determine which nonbroadcast networks are excluded from the top five, and no commenter addressed how or whether any proposed change to the definition would change the top five list. As discussed in more detail in paragraph 9 above, covered entities may choose which approximately four hours of programming a week they will describe. We presume that they and their programmer partners will choose to describe programs that can be described in a timely fashion. Indeed, a number of programs are being video described today without any regulatory mandate at all,[165] and we have every reason to believe that, except in the rare instances discussed in paragraph 44, below, networks will have enough programming from which to choose to meet the CVAA's minimal requirements without encountering problems due to the definition of "near-live."[166] Some consumer advocates propose that "historically

[159] S. Rep. 111-386 at 12 (2010); H. Rep. 111-563 at 28-29 (2010).

[160] Comments of NCTA at 14.

[161] Comments of NAB at 17. *See also* Comments of WGBH at 4.

[162] Comments of NAB at 9; Comments of NCTA at 14.

[163] Comments of WGBH at 4.

[164] *See* Comments of Joe Clark at 2 ("The *practicality* of [video-]describing a late-arriving show that is indisputably prerecorded is an issue different from" whether it is "near-live."). We note that in the context of closed captioning of Internet Protocol ("IP")-delivered video programming these terms may be defined differently. The Commission's Video Programming Accessibility Advisory Committee ("VPAAC") has recommended that, in that context, we look to the time between a program's airing on television and its delivery via IP, rather than the time between its recording and airing. In that case as well, however, VPAAC suggests that "near-live" is best interpreted to mean a period of hours, not days. First Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010 (rel. July 13, 2011).

[165] *See supra* note 34.

[166] NAB also proposes that we exempt "delayed or repeated" airings of live or near-live programs, arguing that "it would be nonsensical to require a network or station to assume the costs of video description for programming primarily intended to be aired live, simply because such programming was re-aired at a later time." Comments of NAB at 16, 18. We decline to extend the exemption to this programming. If "live or near-live" programming is re-aired long enough after it is performed and recorded that it is no longer "near-live," there is no reason to distinguish between it and programming that was never aired live. In either case, there is sufficient time to describe the programming, if the distributor chooses to describe it. Furthermore, if a station or system would prefer not to describe "delayed or repeated" airings of live or near-live programming, it can choose (or contract for its program supplier to choose) alternative programming.

significant events," such as the Olympics and Presidential inaugurations, be covered by the rules even if they are live or near-live.[167] Leaving aside whether that would be permissible under the CVAA, the flexibility on the part of the programmers to describe their choice of programming means that, regardless of how we structure the exemptions, there is no guarantee that any specific programming will be described.[168] Because no commenter demonstrates that the 24-hour definition will increase the burden of compliance, and no commenter offers a reasonable alternative definition of "near-live," nor demonstrates the impact of that definition on the top five, we adopt the proposal. We may revisit this issue at a later date, and will gather information about it when preparing the first report to Congress.[169]

2. Other Exemptions

43. Section 713(f)(2)(C) of the Communications Act, as added by the CVAA, states that

> [t]he regulations may permit a provider of video programming or a program owner to petition the Commission for an exemption from the requirements of [the video description provisions] upon a showing that the requirements contained in this section be [*sic*] economically burdensome.[170]

The Commission proposed to reinstate the previously adopted process for requesting an individual exemption from our rules, replacing the term "undue burden" with "economically burdensome," while using the same range of factors previously applied under the undue burden standard.[171] As discussed in the *NPRM*, this revision ensures that the video description rules are aligned with the standard used in the closed captioning context.[172] NAB and AAPD support this proposal, and we adopt it.[173]

44. NCTA expresses concern about the fact that the proposed rule defined "economically burdensome" as "imposing significant difficulty or expense."[174] As the *NPRM* explained, we intend to "use the same factors as applied to the undue burden standard" (and listed in the proposed rule itself) to determine whether the rules are economically burdensome (*i.e.*, whether they impose significant difficulty or expense).[175] Although the factors listed are not identical to those NCTA proposes,[176] the list is not

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[167] Comments of ACB at 6 (the Olympics); Reply of AAPD at 7 (Super Bowls); Reply of ACB at 7 (Presidential inaugurations).

[168] We note that parties are of course not prohibited from describing programming that falls within the live or near-live exemption, and that any such described programming that a station or system provides may be counted toward the 50-hour requirement.

[169] *See supra* ¶ 16.

[170] *Id.* at § 713(f)(2)(C). We note that Section 713(f)(2)(C) is expressed in permissive terms (e.g., "the regulations may permit"), rather than the mandatory language that appears in other subsections of the legislation. *Compare* 713(f)(2)(A) ("the regulations shall apply"). Accordingly, under subsection (C), the Commission may permit exemptions based on the 'economically burdensome' standard, but is not required to do so.

[171] Comments of NAB at 23. In the CVAA, Congress revised Section 713(d)(3) of the Communications Act, which relates to closed captioning exemptions, by removing the reference to the "undue burden" standard and replacing it with a reference to the "economically burdensome" standard. CVAA, Title II, sec. 202(c).

[172] *NPRM, supra* note 2, at ¶ 22.

[173] Comments of NAB at 23; Reply of AAPD at 8-9; *see also* Reply of Cristina Hartmann at 13-14.

[174] Appendix A, *Final Rules* (Revised 47 C.F.R. § 79.3(d)(2)).

[175] *NPRM, supra* note 2, at ¶ 22.

[176] Comments of NCTA at 15-16 (citing the *NPRM* at note 66).

exclusive.[177] We will consider all relevant evidence that the rules are "economically burdensome" to a petitioning party.

45. The *NPRM* sought comment on whether the Commission should adopt any categorical exemptions, beyond the exemption for "live or near-live" programming.[178] NAB proposes that we exempt all locally produced programming, as well as all news programming, from the coverage of the rules.[179] It argues that if we "added such a burden" to locally produced programming, it could become so expensive and untimely that the amount produced would drop. It points to a similar exemption in the closed captioning rules.[180] Those rules, of course, require all programming to be captioned unless excepted, and are therefore fundamentally different from these rules, which require only a small amount of programming, chosen by the programmer, to be described. NAB also argues that there are special legal concerns with the description of news programming in particular, contending that declining to exempt non-live news programming from these rules would mean that "broadcasters would be forced to add subjective video descriptions from non-journalists into the middle of news reporting."[181] As discussed in paragraph 9, above, the very small amount of programming that must be described means that it is unnecessary to carve out exemptions for particular types of programs beyond the live and near-live exemption mandated by the CVAA. Stations and systems may choose what to describe and how and by whom a program is described, and may simply choose not to describe any programming that would be difficult to describe. Thus, NAB has not persuaded us that covering locally produced and news programming by the video description rules will be unduly burdensome for providers. Furthermore, no party recommending blanket exemptions for certain types of programs provided evidence of how or if these new exemptions would shift the list of top five nonbroadcast networks (which is based, in part, on the provision of sufficient non-exempt programming).[182] Therefore, we decline to adopt these proposed categorical exemptions.

46. We note and acknowledge NCTA's point that due to special circumstances, a covered network could theoretically have fewer than 50 hours of scheduled prime-time or children's programming that can count toward the requirement in a given quarter.[183] NCTA proposes that we adopt a categorical exemption from the 50 hour minimum requirement for networks in this situation, crediting them with

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[177] 47 U.S.C. 613(e) ("In determining whether the closed captions necessary to comply with the requirements of this paragraph would result in an undue economic burden, the factors to be considered *include*..." (*emph. added*); Appendix A, *Final Rules* (Revised 47 C.F.R. § 79.3(d)(3)) ("In addition to these factors, the petitioner must describe *any other factors it deems relevant* to the Commission's final determination...") (*emph. added*).

[178] *NPRM, supra* note 2, at ¶ 26.

[179] Comments of NAB at 18-19. NAB also proposes to exempt Mobile DTV (discussed *infra* ¶ 55), and NCTA proposes a blanket exemption for nonbroadcast networks with fewer than 50 hours of prime-time or children's programming that can count toward the requirement in a given quarter (discussed *infra* ¶ 44). We decline to grant either exemption for the reasons noted above. *See* Comments of Joe Clark (opposing the grant of any new blanket exemptions).

[180] Comments of NAB at 18.

[181] Comments of NAB at 19. *But see* Reply of Cristina Hartmann at 7-8 (dismissing NAB's concerns as groundless).

[182] *See supra* ¶ 12.

[183] Comments of NCTA at 17 (raising concerns about a situation in which "a program network airs a considerable amount of live or near-live programming during prime time in any particular calendar quarter (for example, to offer seasonal sporting event programming), or if a network schedule is filled with previously-described programming" and as a result "the network does not have the requisite hours of non-repeat programming in its prime time or children's programming line-up to describe").

satisfying the requirement if they describe all of the non-exempt programming in a quarter that could count toward the requirement even if that would be fewer than 50 hours of described programming.[184] We decline to adopt such an exemption at this time, when we and the parties have little experience with the actual impact of the rules or ability to craft an exemption tailored to the types of special circumstances that may arise. We anticipate that these instances will be exceedingly rare; as noted in paragraph 9 above, these networks air many, many hours of prime-time and children's programming each quarter, and only 50 of those need be newly described or first-time re-runs. If such a situation does arise, however, a station or system (or the programmer itself) may petition the Commission for a waiver. Finally, NCTA can raise this issue again in the context of a future review, once the actual impact of these rules can be assessed.

47. One proposal that would not affect the top five list and is not obviated by the limited description requirements is the "breaking news exemption" that NAB proposes.[185] In the children's television context, broadcasters must provide three hours per week of "core" educational and informational children's programming in order to receive expedited renewal of their licenses.[186] Generally, if that program is preempted, it must be rescheduled, but we do not require that it be rescheduled if the preemption is for breaking news.[187] In similar fashion, NAB suggests that we "allow video described programming to be preempted for breaking news and emergency information without negative consequences."[188] In practice this would mean that if an unscheduled news bulletin interrupted an hour-long video described program, the station or system would still be allowed to count that program in its entirety toward the 50 hour quarterly requirement. We agree that this is a sensible exemption, and adopt it.[189]

F. Digital Format

48. Section 713(f)(2)(A) of the Communications Act, as added by the CVAA, states that "[t]he regulations shall apply to video programming, as defined in subsection (h), insofar as such programming is transmitted for display on television in digital format."[190] In the *NPRM*, the Commission proposed to clarify that the video description rules apply to all programming, including digital programming, which was not widespread at the time of the adoption of the original rules.[191] All commenters who respond to this proposal support it.[192] In a footnote, NCTA does raise a concern that the proposal could be read to imply a definition of "video programming" broader than the one in the CVAA

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[184] Comments of NCTA at 17.

[185] Comments of NAB at 20.

[186] 47 C.F.R. § 73.671(d).

[187] *Children's Television Obligations of Digital Television Broadcasters*, MM Docket No. 00-167, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 22943, ¶ 39 (2004).

[188] Comments of NAB at 20.

[189] *See also* CVAA, Title II, sec. 202(a), § 713(g)(requiring unscheduled news bulletins that report emergency information to convey such information in a manner that is accessible to individuals who are blind or visually impaired).

[190] 47 USC § 613(f)(2)(A).

[191] *NPRM, supra* note 2, at ¶ 27.

[192] Comments of the Consumer Electronics Association ("CEA") at 2; Comments of WGBH at 5; Comments of ACB at 7.

itself.[193] We adopt the *NPRM's* proposal to extend the reinstated rules to cover all video programming, and reiterate that we use the term "video programming" as it is defined in the CVAA.[194]

49. The *NPRM* also proposed rules to govern our treatment of the secondary streams of digital broadcasters.[195] We received few comments on this issue.[196] We adopt the proposal to consider only programming on the primary programming stream when measuring a broadcast station's compliance with the "50 described hours" requirement, unless the station carries another top-four national broadcast network on another stream.[197] In situations in which a broadcast station carries a different top-four network's programming on a secondary stream, we will apply the rules in the same manner as if the network programming on that stream were carried by a separate station. We also adopt the *NPRM's* proposal to impose the pass-through requirement, discussed above, on all network-provided programming carried on all of an affiliated station's programming streams, a proposal which no commenter directly addressed. This approach ensures the availability of described programming to the widest possible audience. NAB seeks assurance that major network affiliates on secondary streams will be eligible for technical capability exemptions from the pass-through requirements. We clarify that a major network carried on a secondary stream will be treated no differently than any other station or system required to pass description through; thus, it may seek a technical capability exemption.[198]

G. Other Issues

50. *Quality Standards*. The *NPRM* sought comment on whether we should adopt quality standards for video description. The majority of commenters that address this question are strongly opposed to the imposition of quality standards of any kind.[199] Other commenters do support the imposition of quality standards, with some pointing to the possible adoption of such standards in the closed captioning context as a demonstration of the need for rules.[200] Nonetheless, we decline to adopt any such standards at this time. We acknowledge that our capacity to adequately judge description quality could benefit from practical experience as entities begin implementing these rules. Nonetheless, given the quality issues that have arisen in the closed captioning context, we will invite comments on the quality of video description when we conduct the inquiry that will inform our first report to Congress under the CVAA. We also recommend that the VPAAC consider this issue, and will include any analysis they provide in the same report. If necessary, we will revisit this issue at a later date.

51. *Program Selection*. In the *NPRM*, the Commission sought comment, for informational

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[193] Comments of NCTA at note 12.

[194] "[P]rogramming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media." CVAA, Title II, sec. 202(a), § 713(h)(1). *See also NPRM, supra* note 2, at note 25 ("The proposed rules adopt the CVAA definition of video programming.").

[195] *NPRM, supra* note 2, at ¶ 28.

[196] Comments of ACB at 7 (supporting the Commission's proposals).

[197] Thus, except as noted, a station that multicasts does not have to provide more than 50 hours of video description per quarter, all of which must be on its primary stream.

[198] Comments of NAB at 14.

[199] *See, e.g.*, Comments of APTS at 6; Comments of NCTA at 18; Comments of Verizon at 2-3; Comments of NAB at 24, 25; Comments of Joe Clark at 3; Reply of NCTA at 7; Reply of AT&T at 7-8; Reply of Cristina Hartmann at 14-16; Reply of NAB at 13.

[200] Comments of WGBH at 5; Comments of ACB at 7-8 (notes the need for quality standards in closed captioning); Reply of AAPD at 14 (notes the inconsistent quality of closed captioning and warns against a similar danger in video description).

purposes, on how programs are likely to be chosen for description.[201] The majority of commenters that address this question are strongly opposed to the Commission seeking information about program selection even for informational purposes.[202] Given the fact that only a small subset of programming will be required to be video described, the Commission also asked whether we should require that the availability of video description on certain programs be publicized in a certain way.[203] All commenters agree that this information should be widely and clearly available, and most agree that this will occur without the need for regulation.[204] We decline, at this time, to require that the availability of video description on certain programs be publicized in a certain manner. Nonetheless, we expect that programmers, stations, and systems will provide this information to viewers in an accessible manner, including on their websites and to companies that publish television listings information. We recommend that the VPAAC consider this issue and analyze industry best practices. In particular, we recommend that the VPAAC consider how broadcasters provide notice to MVPDs as to which programming is video described, and how effective that notice is. Both NAB and NCTA indicated that use of the ISO-639 language descriptor might be appropriate, but that the issue can be resolved through industry coordination.[205] We recommend the VPAAC examine whether this coordination has been successful.

52. *Updated A/53 Standard.* The Commission's rules incorporate the ATSC digital broadcast standard by reference, but have not been updated to reflect the 2010 revisions to the A/53 standard.[206] The *NPRM* proposed to update our rules to incorporate A/53 Part 5: 2010,[207] which deals with the provision and reception of an audio stream that has been tagged "VI" ("Visually Impaired") pursuant to the ATSC standard. Commenters generally strongly support the need for and value of updating the standard.[208] NAB supports the update, but objects that updating our rules only to incorporate the latest version of Part 5 is "illogical," and proposes that we initiate a new proceeding to update the entire standard at once.[209] As discussed above, a "VI"-tagged audio stream will likely not be accessible by legacy equipment, so in the short term video description will generally not be transmitted using this tag.[210]

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[201] *NPRM, supra* note 2, at ¶ 30.

[202] Comments of APTS at 6; Comments of NCTA at 18; Comments of NAB at 25; Reply of Cristina Hartmann at 14-16.

[203] *NPRM, supra* note 2, at ¶ 30.

[204] Comments of NCTA at 18; Comments of NAB at 24-25; Comments of WGBH at 5-6; Comments of ACB at 2; *but see* Reply of AAPD at 9-13.

[205] Comments of NCTA at 8; Reply of NAB at 6-7.

[206] 47 C.F.R. 73.682(d).

[207] *NPRM, supra* note 2, at ¶ 31.

[208] Comments of CEA at 3; Comments of APTS at 7; Comments of WGBH at 6. *But see*, Ex Partes, Comments, and Reply of Dolby. Dolby "supports the Commission's proposal to update the video description rules to incorporate the [2010] standard." Reply of Dolby at 1. Dolby prefers an alternative technical approach to the delivery of video description, however, and argues that the Commission should adopt rules that "allow for the transition to this improved receiver-mix technology." Comments of Dolby at 3. We note that, while our rules can incorporate a third party standard by reference, they cannot preemptively incorporate future changes to that standard (thus the need for a proactive update in this proceeding). 1 C.F.R. § 51.1(f) ("Incorporation by reference of a publication is limited to the edition of the publication that is approved. Future amendments or revisions of the publication are not included.").

[209] Comments of NAB at note 16.

[210] *See supra* ¶ 30.

CEA argues, however, that "it is important that the industry as a whole begin following A/53 Part 5: 2010" in the near future, so the update of Part 5 will help "ensure that video description can be received by all DTV receivers"[211] on a going forward basis. There is thus a prospective benefit from this narrow update, and NAB identifies no countervailing harm.[212] Since it is clear that updating the entire standard is beyond the scope of this proceeding, we will not delay adoption of updated Part 5. Accordingly, we adopt the *NPRM's* proposal and revise our rules to reflect the latest version of A/53 Part 5 adopted by ATSC.[213]

53. *Children's Programming*. Under the rules we are adopting today, broadcast stations and MVPDs required to provide 50 hours of video described programming per quarter may do so during prime time or children's programming. The Commission has defined children's programming differently in different contexts. Our limits on commercial advertising in children's programming apply to programming "produced and broadcast primarily for an audience of children 12 years old and younger."[214] In contrast, our processing guidelines for children's educational and informational programming apply to programming that "furthers the educational and informational needs of children 16 years of age and under."[215] Because older children with vision or other impairments can benefit from video description, the *NPRM* proposed to define children's programming in this context as programming directed at children 16 years of age and under. Commenters support this definition, agreeing that it would provide benefits "to a wide range of blind and visually impaired children."[216] ACB and Joe Clark argue that, regardless of the definition, "not all of a network's description content should be from children's programming,"[217] or the Commission's rules "will have failed."[218] NCTA objects, suggesting that "[t]he rules adopted by the Commission in 2000 included no such prohibition, and the Commission does not have authority to add one."[219] Setting aside questions of authority, we agree with our predecessors regarding the potential value of these rules for children.[220] We therefore adopt the proposal to define children's programming as programming directed at children 16 years of age and under, and, as noted above,[221] to permit video described children's programming to count toward the 50 hour description requirement.

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[211] *NPRM, supra* note 2, at ¶ 31.

[212] In the NPRM implementing the Commercial Advertisement Loudness Mitigation ("CALM") Act, released May 27, 2011, we referenced this proposed rule change and stated that "this proposal is consistent with our proposed rules [in the CALM Act proceeding]" and that the "2010 ATSC A/53 Standard, Part 5, contains the new methods to measure and control audio loudness, reflected in the ATSC A/85 RP." *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Notice of Proposed Rulemaking, 26 FCC Rcd 8281 (2011) (citing 2010 ATSC A/53 Standard, Part 5 at § 2.1 at 5 (referencing A/85) and § 5.5 at 9 (Dialogue Level)).

[213] ATSC Digital Television Standard, Document A/53 Part 5: 2010 (July 6, 2010).

[214] 47 C.F.R. 73.670, note 2.

[215] 47 C.F.R. 73.671(c).

[216] Comments of WGBH at 6; see also Comments of NAB at note 22.

[217] Comments of ACB at 2.

[218] Comments of Joe Clark at 4.

[219] Reply of NCTA at note 19.

[220] *2000 Report and Order, supra* note 2, at ¶ 10.

[221] *See supra* ¶ 4.

54. *Subsection G.* Section 713(f)(2)(G) of the Communications Act, as added by the CVAA, says that

> [t]he Commission shall consider extending the exemptions and limitations in the reinstated regulations for technical capability reasons to all providers and owners of video programming.[222]

In the *NPRM*, we proposed to take no action under this provision. No commenter addressed this proposal. After consideration, we decline to take action under this provision.

55. *Methods of filing complaints.* The rules we adopt herein permit viewers to file complaints about a failure to comply with the video description rules by "any reasonable means," such as letter, facsimile transmission, telephone (voice/TRS/TTY), e-mail, audio-cassette recording, and Braille, or some other method that would best accommodate the complainant.[223] ACB expresses concern that the exclusion of web-based electronic filing from the list of examples means that it is not available.[224] On the contrary, anyone can file a complaint through the main FCC web portal, and the rule as drafted permits video description complaints to be filed that way.[225] Once the rules become effective, the Commission will release a consumer advisory that will provide step-by-step instructions on how to file complaints in various formats, including via the Commission's web site. ACB also asks for a publicly accessible database of complaints.[226] Although we do not release certain information about individual complaints because of privacy concerns, the Consumer and Governmental Affairs Bureau does periodically release reports concerning accessibility complaints, and will continue to do so.[227]

56. *Low Power Broadcast Stations.* The *NPRM* sought comment on whether the requirement to provide description and the pass-through obligation should apply to low power broadcasters under the reinstated rules, and we find that it does.[228] ACB notes that low power stations were not explicitly exempted in the previous rules and argues that they therefore should not be exempt now.[229] NAB argues, not that the rules do not apply, but that the Commission should refrain from applying them pending the conclusion of the low-power DTV transition.[230] We agree with ACB that the broad language of the original video description rules, referencing all "television broadcast stations," is controlling.[231] We therefore conclude that the best reading of the reinstated rules is that they apply to all television stations, including stations in the low power broadcast service. As NAB notes, many low power broadcasters have not yet completed their transition to digital, but the record in this proceeding does not support the service-wide exemption NAB proposes. We do not, however, want to impose costs that would impede these

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[222] CVAA, Title II, sec. 202(a), § 713(f)(2)(G).

[223] Appendix A, *Final Rules* (Revised 47 C.F.R § 79.3(e)).

[224] Comments of ACB at 8.

[225] *See* http://www.fcc.gov/complaints.

[226] Comments of ACB at 8.

[227] Past reports are available at http://transition.fcc.gov/cgb/quarter/welcome.html.

[228] *NPRM, supra* note 2, at ¶¶ 9, 14.

[229] Comments of ACB at 4.

[230] Comments of NAB at note 21.

[231] *2000 Report and Order, supra* note 2, at Appendix B (Rules).

stations from making a timely transition.[232] We are therefore prepared to entertain a petition to delay the implementation of these rules for a narrowly-crafted class of low-power broadcast stations that have not completed their transition to digital. If the petitioners can demonstrate that compliance with the video description rules on July 1, 2012 would be economically burdensome to members of that class, we could delay their implementation for an appropriate time period.[233]

57. *Mobile DTV*. The *NPRM* did not specifically seek comment on the application of the rules to Mobile DTV, but insofar as it is used by a network-affiliated broadcaster to transmit programming for display on television, it is subject to these rules.[234] NAB agrees that the CVAA "requires mobile devices to include video description," but argues for a delay in applying the rules to Mobile DTV broadcasts. They explain that the current generation of Mobile DTV devices are limited, and that "Mobile DTV receivers that support video description are not expected to be available for another two years."[235] Given the nascency of this service, and the fact that requiring pass-through of video description with Mobile DTV broadcasts would have little benefit to consumers at this time, we agree with NAB that it is appropriate to delay the effectiveness of these rules. We therefore grant broadcasters offering Mobile DTV 24 months after the date of reinstatement of these rules (that is, until October 8, 2013) to bring those broadcasts into compliance with the video description rules.

58. *Audio Description*. ACB argues that the Commission should use the term "audio description," rather than the term "video description" throughout our rules and in Commission actions.[236] NAB notes that it supports doing so, "if such term is preferable to consumers and potential users of such technology."[237] No other commenter supported this proposal, however, indicating that at best this is an open question for the blind and visually impaired community as a whole.[238] Congress directed us to reinstate our "video description regulations,"[239] so absent clear evidence that this phrase is inappropriate or inaccurate, we will retain the statutory term for purposes of our rules.[240]

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[232] The Commission recently established September 1, 2015 as the date for the completion of the low power television digital transition. *See* Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations, *Second Report and Order,* FCC 11-110, released July 15, 2011.

[233] *See* CVAA, Title II, sec. 202(a), § 713(f)(2)(D).

[234] Use of the Mobile/Handheld Digital Television Standard (A/153) allows broadcasters to provide a digital stream of video programming that can be received by compliant portable devices, even while the devices are in motion, and supports multiple audio streams. A/153 is a subsidiary element of the A/53 standard, and has not been formally adopted by the Commission, but its use is permitted under the flexible content provisions of the A/53 standard. *Dell Inc. and LG Electronics USA, Inc. Request for Waiver of Section 15.117 of the Commission's Rules*, MB Docket No. 10-111, Order, 25 FCC Rcd 9172 at ¶ 3 (2010).

[235] August 19, 2011 Ex Parte of NAB at 2. The CVAA also requires us to develop and apply accessible user interface design rules to mobile devices. NAB notes that we are directed to delay the effective date of those rules for Mobile DTV devices, and argues that the video description rules themselves should also be delayed. Comments of NAB at 22 (citing CVAA at Title II, sec. 204(d)).

[236] Comments of ACB at 3.

[237] Reply of NAB at note 3.

[238] AAPD expressed indifference regarding the specific term used, so long as it is used consistently. Reply of AAPD at 13.

[239] CVAA at Title II, sec. 202(a), § 713(f)(1).

[240] We will consider this issue during our upcoming inquiry, to determine whether the prevailing trend is to change this terminology to "audio description."

59. *Non-Substantive Revisions*. In addition to the revisions discussed above, we make several necessary non-substantive revisions to the rules. These include revisions and additions to the Definitions section of the prior rules,[241] changes to the second paragraph of the Procedures for Exemptions section[242] to reflect that they apply to video programming "providers" rather than just video programming "distributors," updates to the Complaint Procedures,[243] a clarification that it is system size, rather than Operator size, that determines the applicability of the rules to MVPDs,[244] and non-substantive wording changes intended to make the meaning of the rules clearer.

60. *Other Proposals Raised*. Some parties propose additional Commission action in this area; for instance, AFB proposes that the Commission subsidize video description on public television, and ACB proposes that we require description of IP delivered content that has been aired with description on television.[245] At this time we decline to go beyond the rules we adopt in this Order. We will commence an inquiry into the state of the video description market by July 1, 2013,[246] and commenters will have an opportunity at that time to raise any issues which still appear to demand statutory or regulatory action.

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

61. As required by the Regulatory Flexibility Act of 1980 ("RFA"),[247] the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to the Second Report and Order. The FRFA is set forth in Appendix B.

B. Final Paperwork Reduction Act of 1995 Analysis

62. This document contains information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. The requirements were submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA on March 18, 2011 at the Notice of Proposed Rulemaking stage. OMB approved the proposed requirements on April 22, 2011. The requirements were adopted as proposed. The Commission will activate the burden in OMB's system and publish an effective date notice informing the public when the requirements will go into effect. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), the Commission previously sought specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

C. Additional Information.

63. For additional information on this proceeding, contact Lyle Elder, Lyle.Elder@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

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[241] Appendix A, *Final Rules* (Revised 47 C.F.R. § 79.3(a)).

[242] Appendix A, *Final Rules* (Revised 47 C.F.R. § 79.3(d)(2)(ii-iv)).

[243] Appendix A, *Final Rules* (Revised 47 C.F.R. § 79.3(e)).

[244] Appendix A, *Final Rules* (Revised 47 C.F.R. § 79.3(b)(4), (5)).

[245] Reply of AFB at 2-3; Comments of ACB at 4; *see also, e.g.*, Comments of NAB at 25 (viewers should come to the Commission for information on which programming is video described); Comments of AT&T at 2 (video description rules should limit contractual terms).

[246] CVAA, Title II, sec. 202(a), § 713(f)(3) ("The Commission shall commence the following inquiries no later than 1 year after the completion of the phase-in of the reinstated regulations…").

[247] *See* 5 U.S.C. § 604.

V. ORDERING CLAUSES

64. **IT IS ORDERED** that, pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751, and the authority contained in Sections 1, 2(a), 4(i), 303, and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 303, and 613, this REPORT AND ORDER is HEREBY ADOPTED.

65. IT IS FURTHER ORDERED that Parts 73 and 79 of the Commission's rules, 47 C.F.R. Parts 73 and 79, are AMENDED as set forth in Appendix A, and such rule amendments shall be effective 30 days after the date of publication of the text thereof in the Federal Register, except to the extent they contain information collections subject to PRA review. The rules that contain information collections subject to PRA review WILL BECOME EFFECTIVE following approval by the Office of Management and Budget.

66. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this SECOND REPORT AND ORDER, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

67. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this SECOND REPORT AND ORDER in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules[1]

We amend Part 73 of Title 47 of the Code of Federal Regulations as follows:

Part 73 – Radio Broadcast Services

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, 334, 336, and 339.

2. Section 73.682 is amended by revising subsection (d) to read as follows:

(d) *Digital broadcast television transmission standard.* Effective May 29, 2008 transmission of digital broadcast television (DTV) signals shall comply with the standards for such transmissions set forth in ATSC A/52: "ATSC Standard Digital Audio Compression (AC–3)" (incorporated by reference, see §73.8000), ATSC A/53, Parts 1–**4 and** 6: 2007 "ATSC Digital Television Standard," (January 3, 2007), **and ATSC A/53, Part 5: 2010 "ATSC Digital Television Standard," (July 6, 2010)**, except for section 6.1.2 ("Compression Format Constraints") of A/53 Part 4: 2007 ("MPEG–2 Video Systems Characteristics") and the phrase "see Table 6.2" in section 6.1.1 Table 6.1 and section 6.1.3 Table 6.3 (incorporated by reference, see §73.8000), and ATSC A/65C: "ATSC Program and System Information Protocol for Terrestrial Broadcast and Cable, Revision C With Amendment No. 1 dated May 9, 2006," (January 2, 2006) (incorporated by reference, see §73.8000). Although not incorporated by reference, licensees may also consult ATSC A/54A: "Recommended Practice: Guide to Use of the ATSC Digital Television Standard, including Corrigendum No. 1," (December 4, 2003, Corrigendum No. 1 dated December 20, 2006, and ATSC A/69: "Recommended Practice PSIP Implementation Guidelines for Broadcasters," (June 25, 2002) (Secs. 4, 5, 303, 48 Stat., as amended, 1066, 1068, 1082 (47 U.S.C. 154, 155, 303)). ATSC A/54A and ATSC A/69 are available from Advanced Television Systems Committee (ATSC), 1750 K Street, NW., Suite 1200, Washington, DC 20006, or at the ATSC Web site: *http://www.atsc.org/standards.html* .

We amend Part 79 of Title 47 of the Code of Federal Regulations as follows:

Part 79 – Closed Captioning and Video Description of Video Programming

1. The authority citation for Part 79 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 613.

2. Section 79.3 is replaced to read as follows:

§ 79.3 Video description of video programming.

(a) *Definitions.* For purposes of this section the following definitions shall apply:

[1] Additions are indicated in **bold**.

(1) *Designated Market Areas (DMAs).* Unique, county-based geographic areas designated by The Nielsen Company, a television audience measurement service, based on television viewership in the counties that make up each DMA.

(2) *Video programming provider.* Any video programming distributor and any other entity that provides video programming that is intended for distribution to residential households including, but not limited to, broadcast or nonbroadcast television networks and the owners of such programming.

(3) *Video description/Audio Description.* The insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue.

(4) *Video programming.* Programming provided by, or generally considered comparable to programming provided by, a television broadcast station, but not including consumer-generated media.

(5) *Video programming distributor.* Any television broadcast station licensed by the Commission and any multichannel video programming distributor (MVPD), and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission.

(6) *Prime time.* The period from 8:00 to 11:00 p.m. Monday through Saturday, and 7:00 to 11:00 p.m. on Sunday local time, except that in the central time zone the relevant period shall be between the hours of 7:00 and 10:00 p.m. Monday through Saturday, and 6:00 and 10:00 p.m. on Sunday, and in the mountain time zone each station shall elect whether the period shall be 8:00 to 11:00 p.m. Monday through Saturday, and 7:00 to 11:00 p.m. on Sunday, or 7:00 to 10:00 p.m. Monday through Saturday, and 6:00 to 10:00 p.m. on Sunday.

(7) *Live or near-live programming.* Programming performed either simultaneously with, or recorded no more than 24 hours prior to, its first transmission by a video programming distributor.

(8) *Children's Programming.* Television programming directed at children 16 years of age and under.

(b) The following video programming distributors must provide programming with video description as follows:

(1) Commercial television broadcast stations that are affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC), and that are licensed to a community located in the top 25 DMAs, as determined by The Nielsen Company as of January 1, 2011, must provide 50 hours of video description per calendar quarter, either during prime time or on children's programming, on each programming stream on which they carry one of the top four commercial television broadcast networks. If a station in one of these markets becomes affiliated with one of these networks after the effective date of these rules, it must begin compliance with these requirements no later than three months after the affiliation agreement is finalized;

(2) Beginning July 1, 2015, commercial television broadcast stations that are affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC), and that are licensed to a community located in the top 60 DMAs, as determined by The Nielsen Company as of January 1, 2015, must provide 50 hours of video description per calendar quarter, either during prime time or on children's programming, on each programming stream on which they carry one of the top four commercial television broadcast networks. If a station in one of these markets becomes affiliated with one of these

networks after July 1, 2015, it must begin compliance with these requirements no later than three months after the affiliation agreement is finalized;

(3) Television broadcast stations that are affiliated or otherwise associated with any television network must pass through video description when the network provides video description and the broadcast station has the technical capability necessary to pass through the video description, unless it is using the technology used to provide video description for another purpose related to the programming that would conflict with providing the video description;

(4) Multichannel video programming distributor (MVPD) systems that serve 50,000 or more subscribers must provide 50 hours of video description per calendar quarter during prime time or children's programming, on each channel on which they carry one of the top five national nonbroadcast networks, as defined by an average of the national audience share during prime time of nonbroadcast networks that reach 50 percent or more of MVPD households and have at least 50 hours per quarter of prime time programming that is not live or near-live or otherwise exempt under these rules. Initially, the top five networks are those determined by The Nielsen Company, for the time period October 2009–September 2010, and will update at three year intervals. The first update will be July 1, 2015, based on the ratings for the time period October 2013–September 2014; the second will be July 1, 2018, based on the ratings for the time period October 2016–September 2017;and so on; and

(5) Multichannel video programming distributor (MVPD) systems of any size:

(i) must pass through video description on each broadcast station they carry, when the broadcast station provides video description, and the channel on which the MVPD distributes the programming of the broadcast station has the technical capability necessary to pass through the video description, unless it is using the technology used to provide video description for another purpose related to the programming that would conflict with providing the video description; and

(ii) must pass through video description on each nonbroadcast network they carry, when the network provides video description, and the channel on which the MVPD distributes the programming of the network has the technical capability necessary to pass through the video description, unless it is using the technology used to provide video description for another purpose related to the programming that would conflict with providing the video description.

(c) *Responsibility for and determination of compliance.*

(1) The Commission will calculate compliance on a per channel, and, for broadcasters, a per stream, calendar quarter basis, beginning with the calendar quarter July 1 through September 30, 2012.

(2) In order to meet its fifty-hour quarterly requirement, a broadcaster or MVPD may count each program it airs with video description no more than a total of two times on each channel on which it airs the program. A broadcaster or MVPD may count the second airing in the same or any one subsequent quarter. A broadcaster may only count programs aired on its primary broadcasting stream towards its fifty-hour quarterly requirement. A broadcaster carrying one of the top four commercial television broadcast networks on a secondary stream may count programs aired on that stream toward its fifty-hour quarterly requirement for that network only.

(3) Once a commercial television broadcast station as defined under paragraph (b)(1) of this section has aired a particular program with video description, it is required to include video description with all subsequent airings of that program on that same broadcast station, unless it is using the technology used

to provide video description for another purpose related to the programming that would conflict with providing the video description.

(4) Once an MVPD as defined under paragraph (b)(3) of this section:

(i) has aired a particular program with video description on a broadcast station it carries, it is required to include video description with all subsequent airings of that program on that same broadcast station, unless it is using the technology used to provide video description for another purpose related to the programming that would conflict with providing the video description; or

(ii) has aired a particular program with video description on a nonbroadcast network it carries, it is required to include video description with all subsequent airings of that program on that same nonbroadcast network, unless it is using the technology used to provide video description for another purpose related to the programming that would conflict with providing the video description.

(5) In evaluating whether a video programming distributor has complied with the requirement to provide video programming with video description, the Commission will consider showings that any lack of video description was de minimis and reasonable under the circumstances.

(d) *Procedures for exemptions based on economic burden.* (1) A video programming provider may petition the Commission for a full or partial exemption from the video description requirements of this section, which the Commission may grant upon a finding that the requirements would be economically burdensome.

(2) The petitioner must support a petition for exemption with sufficient evidence to demonstrate that compliance with the requirements to provide programming with video description would be economically burdensome. The term "economically burdensome" means imposing significant difficulty or expense. The Commission will consider the following factors when determining whether the requirements for video description would be economically burdensome:

(i) The nature and cost of providing video description of the programming;

(ii) The impact on the operation of the video programming provider;

(iii) The financial resources of the video programming provider; and

(iv) The type of operations of the video programming provider.

(3) In addition to these factors, the petitioner must describe any other factors it deems relevant to the Commission's final determination and any available alternative that might constitute a reasonable substitute for the video description requirements. The Commission will evaluate economic burden with regard to the individual outlet.

(4) The petitioner must file an original and two (2) copies of a petition requesting an exemption based on the economically burdensome standard in this paragraph, and all subsequent pleadings, in accordance with §0.401(a) of this chapter.

(5) The Commission will place the petition on public notice.

(6) Any interested person may file comments or oppositions to the petition within 30 days of the public notice of the petition. Within 20 days of the close of the comment period, the petitioner may reply to any comments or oppositions filed.

(7) Persons that file comments or oppositions to the petition must serve the petitioner with copies of those comments or oppositions and must include a certification that the petitioner was served with a copy. Parties filing replies to comments or oppositions must serve the commenting or opposing party with copies of such replies and shall include a certification that the party was served with a copy.

(8) Upon a finding of good cause, the Commission may lengthen or shorten any comment period and waive or establish other procedural requirements.

(9) Persons filing petitions and responsive pleadings must include a detailed, full showing, supported by affidavit, of any facts or considerations relied on.

(10) The Commission may deny or approve, in whole or in part, a petition for an economic burden exemption from the video description requirements.

(11) During the pendency of an economic burden determination, the Commission will consider the video programming subject to the request for exemption as exempt from the video description requirements.

(e) *Complaint procedures.*

(1) A complainant may file a complaint concerning an alleged violation of the video description requirements of this section by transmitting it to the Consumer and Governmental Affairs Bureau at the Commission by any reasonable means, such as letter, facsimile transmission, telephone (voice/TRS/TTY), e-mail, audio-cassette recording, and Braille, or some other method that would best accommodate the complainant's disability. Complaints should be addressed to: Consumer and Governmental Affairs Bureau, 445 12th Street, SW, Washington, DC 20554. A complaint must include:

(i) The name and address of the complainant;

(ii) The name and address of the broadcast station against whom the complaint is alleged and its call letters and network affiliation, or the name and address of the MVPD against whom the complaint is alleged and the name of the network that provides the programming that is the subject of the complaint;

(iii) A statement of facts sufficient to show that the video programming distributor has violated or is violating the Commission's rules, and, if applicable, the date and time of the alleged violation;

(iv) The specific relief or satisfaction sought by the complainant; and

(v) The complainant's preferred format or method of response to the complaint (such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, or some other method that would best accommodate the complainant).

(2) The Commission will promptly forward complaints satisfying the above requirements to the video programming distributor involved. The video programming distributor must respond to the complaint within a specified time, generally within 30 days. The Commission may authorize Commission staff either to shorten or lengthen the time required for responding to complaints in particular cases. The

answer to a complaint must include a certification that the video programming distributor attempted in good faith to resolve the dispute with the complainant.

(3) The Commission will review all relevant information provided by the complainant and the video programming distributor and will request additional information from either or both parties when needed for a full resolution of the complaint.

(i) The Commission may rely on certifications from programming suppliers, including programming producers, programming owners, networks, syndicators and other distributors, to demonstrate compliance. The Commission will not hold the video programming distributor responsible for situations where a program source falsely certifies that programming that it delivered to the video programming distributor meets our video description requirements if the video programming distributor is unaware that the certification is false. Appropriate action may be taken with respect to deliberate falsifications.

(ii) If the Commission finds that a video programming distributor has violated the video description requirements of this section, it may impose penalties, including a requirement that the video programming distributor deliver video programming containing video description in excess of its requirements.

(f) *Private rights of action are prohibited*. Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice of Proposed Rule Making* in this proceeding.[2] The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[3]

A. Need for, and Objectives of, the Report and Order

2. This *Report and Order* reinstates the Commission's video description rules. "Video description," which is the insertion of audio narrated descriptions of a television program's key visual elements into natural pauses in the program's dialogue,[4] makes video programming more accessible to individuals who are blind or visually impaired. This is in compliance with the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA"), which directed the Commission to reinstate the rules with certain modifications.[5] The reinstated rules require large-market broadcast affiliates of the top four national networks and multichannel video programming distributor ("MVPD")[6] systems with more than 50,000 subscribers to provide video description.[7] Covered broadcasters are required to provide 50 hours of video-described prime time or children's programming, per quarter, and covered MVPD systems are required to provide the same number of hours on each of the five most popular nonbroadcast networks that carry at least 50 hours of non-exempt programming per calendar quarter.[8] The rules also require that all network-affiliated broadcasters (commercial or non-commercial) and all MVPDs pass through any video description provided with programming they carried, to the extent they are technically capable and not using the capacity for another program-related service.[9] This pass-through requirement will affect any small MVPD system or network-affiliated broadcaster. As required under the CVAA, we are reinstating these rules on October 8, 2011, and broadcast stations and MVPD systems subject to the rules must begin full compliance in the third quarter of 2012.

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

[2] *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43, Notice of Proposed Rulemaking, 26 FCC Rcd 2975 (2011) ("*NPRM*").

[3] *See* 5 U.S.C. § 604.

[4] CVAA at Title II, sec. 202(a), § 713(h)(1). Video description is sometimes referred to as "audio description"; *see infra* ¶ 58 (discussing the Commission's use of the statutory term "video description").

[5] Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) ("CVAA") at Title II, sec. 202(a), § 713(f)(1-2).

[6] *E.g.*, cable, direct broadcast satellite, etc.

[7] Appendix A, Final Rules (revised 47 C.F.R. § 79.3(b)).

[8] *Id.* at § 79.3(b)(1), (4).

[9] *Id.* at § 79.3(b)(3), (5).

B. Legal Basis

3. The authority for the action taken in this rulemaking is contained in the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751, and Sections 1, 2(a), 4(i), 303, 307, 309, 310, and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 303, 307, 309, 310, and 613.

C. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

4. No comments were filed in response to the IRFA.

D. Description and Estimate of the Number of Small Entities to Which the Proposals Will Apply

5. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules if adopted.[10] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction"[11] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[12] 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 Small Business Administration (SBA).[13] The rule changes proposed herein will directly affect small television broadcast stations and small MVPD systems, which include cable operators and satellite video providers. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

6. ***Television Broadcasting***. The SBA defines a television broadcasting station as a small business if such station has no more than $14.0 million in annual receipts.[14] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[15] The Commission has estimated the number of licensed commercial television stations to be 1,390.[16]

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[10] 5 U.S.C. § 603(b)(3).

[11] 5 U.S.C. § 601(b).

[12] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[13] 15 U.S.C. § 632.

[14] *See* 13 C.F.R. § 121.201, NAICS Code 515120 (2007).

[15] *Id.* This category description continues, "These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in producing programming. *See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

[16] *See* News Release, "Broadcast Station Totals as of December 31, 2010," 2011 WL 484756 (F.C.C.) (dated Feb. 11, 2011) ("*Broadcast Station Totals*"); also available at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0211/DOC-304594A1.pdf.

According to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) as of January 31, 2011, 1,006 (or about 78 percent) of an estimated 1,298 commercial television stations[17] in the United States 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 391.[18] We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[19] 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.

7. 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.

8. **Satellite Telecommunications**. Since 2007, the SBA has recognized satellite firms within this revised category, with a small business size standard of $15 million.[20] 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.[21] Under the "Other Telecommunications" category, a business is considered small if it had $25 million or less in average annual receipts.[22]

9. 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."[23] For this category, Census Bureau data for 2007 show that there were a total of 512 firms that operated for the entire year.[24] Of this total, 464

[17] We recognize that this total differs slightly from that contained in *Broadcast Station Totals*, *supra*, note 56; however, we are using BIA's estimate for purposes of this revenue comparison.

[18] *See Broadcast Station Totals*, *supra*, note 56.

[19] "[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).

[20] *See* 13 C.F.R. § 121.201, NAICS code 517410.

[21] *Id.*

[22] *See* 13 C.F.R. § 121.201, NAICS code 517919.

[23] U.S. Census Bureau, 2007 NAICS Definitions, "517410 Satellite Telecommunications".

[24] 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.[25] Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by rules adopted pursuant to the Notice.

10. 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."[26] For this category, Census Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year.[27] Of this total, 2,346 firms had annual receipts of under $25 million.[28] Consequently, we estimate that the majority of Other Telecommunications firms are small entities that might be affected by our action.

11. *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,"[29] 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.[30] 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.[31] 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).[32] Each currently offers subscription services.

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

[26] U.S. Census Bureau, 2007 NAICS Definitions, "517919 Other Telecommunications", http://www.census.gov/naics/2007/def/ND517919.HTM.

[27] *See* 13 C.F.R. § 121.201, NAICS code 517919.

[28] 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).

[29] *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.

[30] 13 C.F.R. § 121.201, NAICS code 517110 (2007).

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

[32] *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).

DIRECTV[33] and EchoStar[34] 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.

12. **Fixed Microwave Services**. Microwave services include common carrier,[35] private-operational fixed,[36] and broadcast auxiliary radio services.[37] At present, there are approximately 31,549 common carrier fixed licensees and 89,633 private and public safety operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. Microwave services include common carrier,[38] private-operational fixed,[39] and broadcast auxiliary radio services.[40] They also include the Local Multipoint Distribution Service (LMDS),[41] the Digital Electronic Message Service (DEMS),[42] and the 24 GHz Service,[43] where licensees can choose between common carrier and non-common carrier status.[44] The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, the Commission will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—i.e., an entity with no more than 1,500 persons is considered small.[45] For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which

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[33] 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.

[34] 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.

[35] 47 C.F.R. Part 101 *et seq.* (formerly, part 21 of the Commission's Rules) for common carrier fixed microwave services (except MDS).

[36] 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.

[37] Auxiliary Microwave Service is governed by Part 74 and Part 78 of Title 47 of the Commission's Rules. Available to licensees of broadcast stations, cable operators, and to broadcast and cable network entities. 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 TV pickup and CARS pickup, which relay signals from a remote location back to the studio.

[38] *See* 47 C.F.R. Part 101, Subparts C and I.

[39] *See* 47 C.F.R. Part 101, Subparts C and H.

[40] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. 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 TV pickups, which relay signals from a remote location back to the studio.

[41] *See* 47 C.F.R. Part 101, Subpart L.

[42] *See* 47 C.F.R. Part 101, Subpart G.

[43] *See id.*

[44] *See* 47 C.F.R. §§ 101.533, 101.1017.

[45] 13 C.F.R. § 121.201, NAICS code 517210.

supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.[46] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the number of firms does not necessarily track the number of licensees. The Commission estimates that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

13. **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."[47] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[48] According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.[49] Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.[50]

14. **Cable Companies and Systems**. The Commission has also 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.[51] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[52] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[53] Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000-19,999 subscribers.[54] Thus, under this second size standard, most cable systems are small.

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[46] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

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

[48] 13 C.F.R. § 121.201, NAICS code 517110 (2007).

[49] 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) (located at http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en).

[50] *See id.*

[51] 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. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[52] 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.

[53] 47 C.F.R. § 76.901(c).

[54] Warren Communications News, *Television & Cable Factbook 2008*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2007). The data do not include 851 systems for which classifying data were not available.

15. **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."[55] 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.[56] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[57] 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,[58] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

16. **Open Video Services**. Open Video Service (OVS) systems provide subscription services.[59] 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.[60] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[61] OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."[62] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for the OVS 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.[63] In addition, we note that the Commission has certified some OVS operators, with some now providing service.[64] Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS

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[55] 47 U.S.C. § 543(m)(2); *see also* 47 C.F.R. § 76.901(f) & nn.1–3.

[56] 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).

[57] 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.

[58] 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.

[59] *See* 47 U.S.C. § 573.

[60] 47 U.S.C. § 571(a)(3)-(4). *See 13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

[61] *See* 47 U.S.C. § 573.

[62] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

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

[64] A list of OVS certifications may be found at http://www.fcc.gov/mb/ovs/csovscer.html.

franchises.[65] 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, at least some of the OVS operators may qualify as small entities. The Commission further notes that it has certified approximately 45 OVS operators to serve 75 areas, and some of these are currently providing service.[66] Affiliates of Residential Communications Network, Inc. ("RCN") received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 44 OVS operators (those remaining) might qualify as small businesses.

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

17. These rules affect small television broadcast stations and small 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. "Technical capability" means a station or system has "virtually all necessary equipment and infrastructure to do so, except for items that would be of minimal cost" 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 small MVPDs. These requirements may in some cases result in the need for engineering services.

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

18. 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.[67]

19. These rules may have a significant economic impact in some cases, and that impact may affect a substantial number of small entities. Although alternatives to minimize economic impact have been considered, the video description rules have been reinstated in their present form because of the Congressional mandate, and the Commission has very limited authority to revise them. However, the importance of minimizing adverse economic impact on small entities has been recognized. Exemptions from the pass-through requirement, the rule most likely to apply to small entities, are easily available for parties that will face more than minimal cost to comply. Furthermore, these rules could provide off-setting positive economic impact on small entities by increasing viewership by persons with visual impairments.

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[65] *See 13th Annual Report*, 24 FCC Rcd at 606-07, ¶ 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.

[66] *See* http://www.fcc.gov/mb/ovs/csovscer.html (current as of February 2007).

[67] 5 U.S.C. § 603(c)(1) – (c)(4).

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

20. None.

H. Report to Congress

21. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[68] In addition, the Commission will send a copy of the *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The *Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register.[69]

[68] *See* 5 U.S.C. § 801(a)(1)(A).

[69] *See* 5 U.S.C. § 604(b).

STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010,* MB Docket No. 11-43

The promise of the Twenty-First Century Communications and Video Accessibility Act of 2010 is predicated on the ability of 54 million Americans with disabilities to access the technology and media necessary to fully participate in today's communications world. This Report and Order on Video Description is one big step forward after years of delay. There are some broadcasters and cable networks which continued to provide video description even after the courts vacated the FCC's previous rules in 2002 and I salute CBS, FOX and TNT for their strong commitment to their consumers with disabilities.

The blind and visually impaired community has been waiting for action on video description for a long time. As President Barack Obama said at the CVAA bill signing, "It was a victory won by countless Americans who refused to accept the world as it is, and against great odds, waged quiet struggles and grassroots crusades until finally change was won." In that spirit I wish to thank the champions in the disabilities community; the sponsors of the legislation that made these actions possible: Representative Ed Markey and Senator Mark Pryor; and the work of Karen Peltz Strauss among others in the Consumer and Governmental Affairs Bureau and the Media Bureau.

My hope going forward is that the work product of those providing this important service is strong and serves the disabilities community in the best possible manner. I also would like to think that as the technology improves there will be ways to increase this service to the greatest possible audience and we will not have to accept the choice of Spanish language service or video description. With this Report and Order we take the next step in the implementation of this crucial service and it is vital that we remain vigilant in order to ensure full compliance. We must provide the framework so that a commitment is met to inform consumers when and where this service will be available.

With a July 1, 2012 deadline the full expectation is that the necessary pieces will be in place to seamlessly provide video description. I wish to thank Commissioner Mignon Clyburn for her dedication on this issue. Although I would have preferred and I am not convinced it would be too burdensome on companies to comply even earlier, I am pleased that the Chairman and my colleagues have moved up the timeline to support the long-delayed hopes of Americans with disabilities. Given the delay experienced by blind and visually impaired viewers for such an essential service we should be doing everything in our power to make sure they don't wait a day more than is necessary.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010,* MB Docket No. 11-43

In restoring the video description regulations that the Commission previously adopted in 2000, we further expand access to video programming and take another step toward the fulfillment of the rulemakings sought by the 21st Century Communications and Video Accessibility Act of 2010 (CVAA). In responding to the full intent of Congress, we have acted in a manner that will enable certain citizens among us to reap the benefits of televised content in an even more complete way, ending a wait that has gone on for far too long.

I often speak about the rich diversity of this country, and when doing so I am usually making mention of varying ethnicities or my fellow female citizens. However, the beneficiaries of the rulemaking we release today are part of a group that isn't often included under the umbrella of diversity in this context, but it should be. Our blind and visually-impaired family members, friends, and neighbors have been waiting for user-friendly communications services that address their needs in an equal and thorough way, and this action gets them one step closer to enjoying something that so many of us take for granted.

In providing video description, America's blind community will not only be able to enjoy the entertainment that video content providers offer, but they will also be part of the conversations around it. I want to stress this, as I can imagine how left out a visually-impaired child feels when his or her classmates are discussing what happened on a popular show the night before, and to not be a part of that conversation or be able to follow along. The same is true for blind adults, for whom the proverbial water cooler chats about TV shows hold little meaning or enjoyment. This item will assist those individuals in getting even closer to the mainstream when it comes to popular culture, and we are a better and more complete nation for it.

The July 1, 2012 date of enactment will allow users of video description to enjoy the new TV shows of next fall from the beginning, which is an integral component of the social importance of this item. Further, with the 22nd anniversary of the signing of the Americans with Disabilities Act falling on July 26, 2012, I am ecstatic that the video description improvements we implement via this Order will be in place.

I want to congratulate the visually-impaired community for their tireless and extraordinary efforts toward this historic development, and am honored to be part of the culmination of such determination and passion.