

whether special circumstances exist that warrant deviation from the general rule, and whether the waiver will serve the public interest.<sup>165</sup> Accordingly, we seek comment on the factors that the Commission should evaluate in determining whether an apparatus is eligible for a waiver. Should we consider how the apparatus is designed and marketed? How should we consider the fact that different people may consider the same device as having a different “essential utility”? In recognition of the fact that, as technology evolves, the “essential utility” of apparatus may change, should waivers be temporary, and if so, what should their duration be and what process should be used for renewing waivers? We invite examples of apparatus that are or are not primarily designed for receiving or playing back video programming transmitted simultaneously with sound, and examples of apparatus that do or do not derive their essential utility from receiving and playing back video. Where do devices such as video gaming consoles, cellular telephones, and tablet devices fit within these criteria? Are there any specific classes of apparatus that warrant the establishment of a categorical or blanket waiver, or should all waivers be addressed case-by-case? We note that personal computers and video gaming consoles are used by a large percentage of viewers of VPDs/VPPs.<sup>166</sup> Should we make any special considerations for these devices? If the Commission considers waivers for a particular “class” of apparatus, what factors should we consider, and how should we determine what apparatus constitute a “class”? Should the Commission adopt a process for determining whether to waive the closed captioning requirements of Section 203 of the CVAA, or should we handle waivers pursuant to Section 1.3 of our rules?<sup>167</sup>

51. We also seek comment on whether apparatus also includes software. To what extent is hardware that is designed to receive or play back video programming dependent on software for its functionality? For example, consumers view programming intended to be covered by Section 202 on personal computers and cellular telephones. Both a computer and a cellular phone can be viewed as a single apparatus or several working together, such as the processor, memory, and storage, the display and other peripheral components, and the operating system and applications. If software is considered an apparatus, we seek comment on how the Commission can ensure compliance, particularly when software is provided over the Internet directly to the end user.<sup>168</sup>

52. *Screen Size and Display-Only Monitors.* The closed captioning requirement of the CVAA is no longer restricted to television receivers or to those devices with screens larger than 13 inches, exceptions that were put into place by the Television Decoder Circuitry Act.<sup>169</sup> As Congress noted, consumers now view video programming on smaller and portable devices, and to the extent “achievable,” closed captioning must be made available on these devices.<sup>170</sup> However, apparatus that use a picture screen that is less than 13 inches in size and that are designed to receive or play back video must be equipped with built-in closed caption decoder circuitry or the capability to display closed captions only if this is “achievable.”<sup>171</sup> Therefore, while we propose to remove the screen-size limitation entirely from

<sup>165</sup> *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)); see also 47 C.F.R. § 1.3.

<sup>166</sup> Nielsenwire, “What Netflix Viewers Are Watching... And How,” July 27, 2011 at [http://blog.nielsen.com/nielsenwire/online\\_mobile/what-netflix-and-hulu-users-are-watching-and-how/](http://blog.nielsen.com/nielsenwire/online_mobile/what-netflix-and-hulu-users-are-watching-and-how/) (visited August 30, 2011).

<sup>167</sup> See 47 C.F.R. § 1.3 (“Any provision of the [Commission’s rules] may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”).

<sup>168</sup> Section 330(b) of the Act as modified by the CVAA prohibits the shipment in interstate commerce, manufacture, assembly or import from a foreign country of apparatus violating the rules we adopt in this proceeding.

<sup>169</sup> Pub. L. No. 101-431, 104 Stat. 960 (1990). Previously codified at 47 U.S.C. §§ 303(u), 330(b).

<sup>170</sup> S. Rep. No. 111-386 at 14.

<sup>171</sup> 47 U.S.C. § 303(u)(2)(A).

Section 15.119 and Section 15.122 of the Commission's rules, and to not include any screen size limitation in our new rules,<sup>172</sup> we address the issue of achievability below. Additionally, the CVAA provides that "any apparatus or class of apparatus that are display-only video monitors with no playback capability are exempt from the requirements" to display or render captions and we subsequently propose adopting this exception as written.<sup>173</sup> How should the Commission define devices that qualify for inclusion in this exempted category of apparatus? It would seem that Congress intended to exempt computer monitors with this language, because the monitor itself lacks playback capability. We seek comment on what other devices, if any, Congress intended to exempt by this language.

53. *Achievability.* The CVAA contains a definition for achievability, directing that for the purposes of the CVAA, determining whether a requirement is achievable consists of evaluating the following factors: (1) the nature and cost of the steps needed to meet the requirements of this section with respect to the specific equipment or service in question; (2) the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies; (3) the type of operations of the manufacturer or provider; and (4) the extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.<sup>174</sup> We seek comment on how to apply this definition to apparatus subject to Section 203 of the CVAA. Under this definition, what classes of devices that are otherwise designed to display or record video are nevertheless incapable of supporting closed captioning? Is there a screen size or resolution at which it would become so difficult to read captions that there would be no benefit to justify the cost of including this capability? Are there devices which simultaneously contain the processing power to display video yet are incapable of processing the additional data necessary to display closed captions? Finally, what characteristics of a manufacturer's operations should the Commission consider in determining whether it is achievable for that manufacturer to include closed caption capability in a device with a screen size less than 13 inches? For example, should the Commission consider whether the manufacturer is a small business, and if so, is there an existing definition of "small business" that the Commission should apply? How should an evaluation of what is "achievable" differ from an evaluation of what is "technically feasible"?<sup>175</sup>

54. *Recording Devices.* In addition to devices that consumers use to directly view video, those that record video must also have closed-captioning capability. Specifically, the CVAA added Section 303(z) to the Act, which requires that, "if achievable . . . apparatus designed to record video programming . . . [must] enable the rendering or the pass-through of closed captions."<sup>176</sup> Thus, we seek comment on codifying this requirement verbatim in our rules and interpreting "apparatus" that are designed to "record video programming" to also include hardware-only products. We seek comment on whether we should also interpret "apparatus" that are designed to "record video programming" to include software-only products, such as software designed to enable a PC to function as a video recording platform. While some devices, such as digital video recorders, plainly appear to be covered by this section, other devices, such as network-connected hard drives, also can be used to record video. For example, home-networking protocol suites, such as DLNA,<sup>177</sup> permit networked devices, such as

<sup>172</sup> 47 C.F.R. § 15.119 (closed captioning requirements for analog television receivers), 47 C.F.R. § 15.122 (closed captioning requirements for digital television receivers).

<sup>173</sup> 47 U.S.C. § 303(u)(2)(B).

<sup>174</sup> 47 U.S.C. § 617(g).

<sup>175</sup> See ¶ 49, *supra*.

<sup>176</sup> 47 U.S.C. § 303(z)(1).

<sup>177</sup> See Digital Living Network Alliance, [www.dlna.org](http://www.dlna.org).

computers and hard-drives, to be used for video storage while control of those devices is accomplished by a combination of software running on the device itself and on devices accessing or manipulating the video stream. We seek comment on the proper scope of the definition of “apparatus designed to record video programming.” Additionally, to the extent the definition of “achievable” differs from that discussed above, we seek comment on determining the capabilities of recording devices relative to display devices.

55. *Interconnection Mechanisms.* Finally, the CVAA directs the Commission to regulate interconnection mechanisms. Specifically, the CVAA requires that “interconnection mechanisms and standards for digital video source devices [be] available to carry from the source device to the consumer equipment the information necessary to permit or render the display of closed captions.”<sup>178</sup> We seek input on how this objective can best be achieved. Is it sufficient to require that intermediate devices, such as set-top boxes and digital video recorders, be capable of conveying closed captions to display devices and to assume that standards for interconnection will be developed as necessary? Does the Commission need to extend its regulations to manufacturers or standards bodies that develop and deploy these interconnection mechanisms to ensure that they are capable of conveying closed captioning information? Should the Commission take a more active role in requiring a particular standard? We additionally seek comment on what specific connections Congress intended to be covered by this provision. For example, component video connections and HDMI, used to transmit high definition video signals from a set-top box or computer to a television or monitor, do not carry closed captions.<sup>179</sup> However, based on our requirements, those devices connected to the television or monitor via HDMI or component video would be required to render the captions prior to transmitting the video signal. Did Congress intend to cover home networking connections, such as WiFi or Multimedia Over Coax (MoCA), and if so, should we instead direct our attention to the protocol suites which use these interconnection technologies, such as DLNA? We seek comment on what it means to carry the necessary information to “permit or render the display of closed captions” and what existing technologies satisfy this requirement.

#### **B. Obligations under Section 203 of the CVAA**

56. In this *NPRM*, we also seek comment on the features and specifications that must be supported by the devices covered by Section 203. Section 203(c) requires that the Commission prescribe performance and display standards for built-in decoder circuitry or capability designed to display closed captioned video programming.<sup>180</sup> The VPAAC Report addresses this issue, recommending a feature set which mirrors that available on television receivers and we propose rules requiring these same features. These capabilities include the presentation of captions, via roll-up, pop-on, or paint-on techniques, and the setting of semantically significant character formatting, as well as capabilities regarding character color, character opacity, character size, fonts, caption background, character edge attributes, caption window color, and language selection.<sup>181</sup> We further propose, pursuant to the VPAAC recommendation, that these settings be user configurable and that the user’s selection be retained between viewing sessions, though where the user has not made a selection, the settings provided by the content owner are displayed.<sup>182</sup> While the VPAAC states that the functionality in an IP world should not be less than what is provided to consumers through digital television, there are other features the VPAAC Report identifies as components

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<sup>178</sup> 47 U.S.C. § 303(z)(2).

<sup>179</sup> See *Does HDMI Support Closed Captioning?* High Definition Multimedia Interface, Frequently Asked Questions at <http://www.hdmi.org/learningcenter/faq.aspx#117>. Captions are rendered by the host device, such as a set-top box and transmitted in an open matter, rendered into the video stream. While this makes captioning available, it does not utilize the functionality built into the end device, which some consumers may prefer.

<sup>180</sup> Pub. L. No. 111-260, § 203(c).

<sup>181</sup> VPAAC Report at 13-16.

<sup>182</sup> *Id.* at 15.

of the “experience” that must be provided to users, but that are not included in the VPAAC Report’s discussion of specific capabilities, such as the user-controlled placement of captions.<sup>183</sup> We seek comment on the list of features included in the VPAAC Report, especially whether the requirements must be modified for specific classes of devices, such as those with very small screens or those with limited processing power. To what extent beyond what is currently available should users be able to control the appearance of their captions through user tools on video apparatus? Which aspects must, and which may, be user-controllable? Is there a need to require such functionality to ensure compliance? We also seek comment on the inherent differences, technical and otherwise, in the rendering of captions on Internet-connected devices (e.g., on a web browser or a smartphone app) versus television receivers? What are the inherent differences, technical and otherwise, in the rendering of captions on mobile devices versus fixed-use television and video receivers?

57. We seek comment on what standards, if any, the Commission should mandate to implement the goals of Section 203 of the CVAA. In particular, we seek comment on whether we should adopt a particular delivery file format that devices must support. The VPAAC Report discusses three use cases of how content can be distributed via the Internet to consumer devices: Use Case 1, where content is delivered to an unaffiliated device; Use Case 2, where content is delivered to a web browser; and Use Case 3, where content is delivered to a managed device or application.<sup>184</sup> The VPAAC Report concludes that Use Cases 2 and 3 “require a specific standard distribution format based on standards developed within an open process by recognized industry standard-setting organizations;” however it does not identify what that standard should be.<sup>185</sup> When the Commission initially adopted rules for closed captioning, it adopted certain standards for delivery and decoding of captions and made those standards mandatory for all devices capable of receiving television content.<sup>186</sup> In those cases, however, a clear industry standard and consensus on the format already existed, and the standard was applied with respect to one television delivery standard. Furthermore, television programmers rarely maintain any relationship with the devices displaying the content they provide. In the Internet-delivery context, however, VPDs/VPPs deliver content in many different formats, each continually evolving, and a Commission-mandated standard could restrict industry innovation. Conversely, Congress clearly envisioned consumers being able to access closed captions contained in any programming on any device that is capable of displaying the associated video, and a lack of standards could make this goal more difficult and costly to achieve.<sup>187</sup> Furthermore, the relationship between the content provider and the device or software provider may be such that the VPP/VPD could contract with device manufacturers to support captions in the format the VPP/VPD chooses. With respect to Use Case 1, the VPAAC Report concludes that a common file format is required, and suggests SMPTE-TT as that format.<sup>188</sup> We seek comment on whether we should require a particular delivery standard or standards to be supported on devices pursuant to Section 203 of the CVAA. As an alternative, would a more general rule requiring that devices capable of receiving unaffiliated content from VPPs/VPDs be capable of decoding and rendering captions transmitted by VPPs/VPDs be preferable to achieve the goals of the CVAA?

58. *Alternate Means of Compliance.* The CVAA permits that “an entity may meet the requirements of sections 303(u), 303(z), and 330(b) of the [Act] through alternate means than those

<sup>183</sup> *Id.* at 34, Appendix C.

<sup>184</sup> *Id.* at 18-20.

<sup>185</sup> *Id.* at 27.

<sup>186</sup> See *Closed Captioning Requirements for Digital Television Receivers*, Report and Order, 15 FCC Rcd 16788, 16792 (2000) (“*DTV Receiver Closed Captioning Order*”); *TDCA Order*.

<sup>187</sup> See S. Rep. No. 111-386 at 14; H.R. Rep. No. 111-563 at 30.

<sup>188</sup> VPAAC Report at 27.

prescribed by regulations . . . as determined by the Commission.”<sup>189</sup> We seek comment on a process by which the Commission may determine that the alternate means selected by a party nevertheless meet the requirements of the preceding sections. Additionally, are there some requirements above that cannot be met via alternate means, such as the use of a standardized interconnection or the functional requirements prescribed above?<sup>190</sup>

59. *Location of Rules within the Code of Federal Regulations and Miscellaneous Issues.*

Finally, we seek comment on any other issues that need to be addressed by the Commission to meet the CVAA’s objective of ensuring that consumers can receive closed captions on video apparatus covered by the Act. For example, while we currently propose to create and modify requirements in Part 15 of the Commission’s rules, we seek comment on whether a more appropriate location for these rules would be proximate to the existing closed captioning and video description rules in Part 79, or as a new, video-device specific section created to consolidate the device rules other than those relating to reception of radio frequency signals that the Commission currently maintains. Part 15 of the Commission’s rules contains numerous ancillary obligations (such as certification or verification) and attendant definitions which may or may not be beneficial to the overall goals of the rules. By creating a new section, we could consolidate various rule parts related to video devices, including other video device rules contained in Title 47 of the C.F.R. that are not directly related to the reception of radio frequency signals. In this case, for example, Section 15.122, the closed captioning rules for digital television, could be moved, and Section 15.119 could be moved if it is still necessary, or else deleted. Are there additional benefits or implications to separating device rules for closed captioning from the general Part 15 requirements?

C. **Schedule of Deadlines**

60. While the CVAA specifies that the Commission must promulgate rules within six months of the submission of the VPAAC Report, it does not specify the timeframe by which those regulations must become effective.<sup>191</sup> Additionally, while the VPAAC Report recommends timeframes by which closed captioning must be made available, it does not address the timeframe on which devices must become compliant.<sup>192</sup> It notes that one group suggested that a minimum of 24 months would be required to implement the features discussed above, but that others thought this time period was too long.<sup>193</sup> We seek comment on the appropriate timeframe to implement closed captioning technical requirements pursuant to Section 203 of the CVAA. Should features or device classes be phased in, accelerating the deployment of devices for which the addition of closed captioning is easy, while allowing more time for those parties that need it? We note that the Commission allowed slightly less than 24 months for device manufacturers to design and build DTV closed captioning display functionality into their products.<sup>194</sup> Is this timeframe appropriate in light of the current electronics manufacturing process? Would it be an appropriate timeframe if we define “apparatus” to include software? If we adopt the compliance schedule for VPPs/VPDs discussed above (varying from six to 18 months, depending on the nature of the programming),<sup>195</sup> should we also ensure that some or all devices that will be used to access those services

<sup>189</sup> Pub L. No. 111-260, § 203(e).

<sup>190</sup> See ¶ 55, *supra*.

<sup>191</sup> Pub L. No. 111-260, § 203(d).

<sup>192</sup> VPAAC Report at 34.

<sup>193</sup> *Id.*

<sup>194</sup> See *DTV Receiver Closed Captioning Order*, 15 FCC Rcd at 16808. (The order was adopted on July 21, 2000, released on July 31, 2000, and published in the Federal Register on September 29, 2000. The rules became effective on July 1, 2002.)

<sup>195</sup> See Section III.B., *supra*.

will be capable of decoding closed captions when they are available?

## V. CONCLUSION

61. In conclusion, in this *NPRM*, we seek comment on proposed rules that would require IP-delivered video programming to include closed captions if that programming is shown on television with captions after the effective date of our new rules. We further seek comment on proposed rules that would require this capability for nearly all devices that consumers use to access IP-delivered video programming. These proposals seek to further the intent of Congress to give individuals who are deaf or hard of hearing better access to IP-delivered video programming.

## VI. PROCEDURAL MATTERS

### A. Initial Regulatory Flexibility Act Analysis

62. As required by the Regulatory Flexibility Act of 1980 (“RFA”),<sup>196</sup> the Commission has prepared an Initial Regulatory Flexibility Analysis (“IRFA”) relating to this *NPRM*. The IRFA is attached to this *NPRM* as Appendix B.

### B. Paperwork Reduction Act

63. This document contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995.<sup>197</sup> In addition, pursuant to the Small Business Paperwork Relief Act of 2002,<sup>198</sup> we seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”<sup>199</sup>

### C. Ex Parte Rules

64. Permit-But-Disclose. The proceeding this *NPRM* initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>200</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the

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<sup>196</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (“CWAAA”).

<sup>197</sup> Pub. L. No. 104-13.

<sup>198</sup> Pub. L. No. 107-198.

<sup>199</sup> 44 U.S.C. § 3506(c)(4).

<sup>200</sup> 47 C.F.R. §§ 1.1200 *et seq.*

Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

#### D. Filing Requirements

65. Comments and Replies. Pursuant to Sections 1.415 and 1.419 of the Commission's rules,<sup>201</sup> interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System ("ECFS"), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.<sup>202</sup> **We strongly encourage commenters to indicate which portions of their comments and reply comments pertain to Section 202 of the CVAA, and which portions of their comments and reply comments pertain to Section 203 of the CVAA.**

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12<sup>th</sup> St., SW, Room TW-A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. The filing hours are 8:00 a.m. to 7:00 p.m.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, SW, Washington DC 20554.

66. Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

67. Accessibility Information. To request information in accessible formats (Braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: <http://www.fcc.gov>.

<sup>201</sup> See *id.* §§ 1.415, 1.419.

<sup>202</sup> See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

68. Additional Information. For additional information on this proceeding pertaining to Section 202 of the CVAA, contact Diana Sokolow, [Diana.Sokolow@fcc.gov](mailto:Diana.Sokolow@fcc.gov), of the Policy Division, Media Bureau, (202) 418-2120. For additional information on this proceeding pertaining to Section 203 of the CVAA, contact Jeffrey Neumann, [Jeffrey.Neumann@fcc.gov](mailto:Jeffrey.Neumann@fcc.gov), of the Engineering Division, Media Bureau, (202) 418-7000.

#### VII. ORDERING CLAUSES

69. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i), 4(j), 303, 330(b), 713, and 716 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303, 330(b), 613, and 617, this Notice of Proposed Rulemaking IS ADOPTED.

70. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## Proposed Rule Changes

The Federal Communications Commission proposes to amend Part 79 and Part 15 of Title 47 of the Code of Federal Regulations (CFR) as set forth below:

## 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. Add § 79.4 to read as follows:

§ 79.4 Closed captioning of video programming delivered using Internet protocol.

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

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

(2) *Full-length video programming.* Video programming that is not video clips or outtakes.

(3) *Video programming distributor or video programming provider.* Any entity that makes available directly to the end user video programming through a distribution method that uses Internet protocol.

(4) *Video programming owner.* Any person or entity that owns the copyright of the video programming delivered to the end user through a distribution method that uses Internet protocol.

(5) *Internet protocol.* Includes Transmission Control Protocol and any successor protocol or technology to Internet protocol.

(6) *Closed captioning.* The visual display of the audio portion of video programming.

(7) *Live programming.* Video programming that is shown on television substantially simultaneously with its performance.

(8) *Near-live programming.* Video programming that is substantively recorded and produced within 12 hours of its distribution to television viewers.

(9) *Prerecorded programming.* Video programming that is not “live” or “near-live.”

(10) *Edited for Internet distribution.* Video programming whose television version is substantially edited prior to its Internet distribution.

(11) *Consumer-generated media.* Content created and made available by consumers to online websites and services on the Internet, including video, audio, and multimedia content.

(12) *Video clips.* Small sections of a larger video programming presentation.

(13) *Outtakes.* Content that is not used in an edited version of video programming shown on television.

(14) *Nonexempt programming.* Video programming that is not exempted under paragraph (e) of this section and, accordingly, is subject to closed captioning requirements set forth in this section.

(b) *Requirements for closed captioning of Internet protocol-delivered video programming.* All nonexempt full-length video programming delivered using Internet protocol must be provided with closed captions if the programming was published or exhibited on television in the United States with captions after [insert effective date of the rule], in accordance with the following schedule:

(1) As of [insert date six months after the rule is published in the Federal Register], all prerecorded programming that is not edited for Internet distribution must be provided with captions.

(2) As of [insert date 12 months after the rule is published in the Federal Register], all live and near-live programming must be provided with captions.

(3) As of [insert date 18 months after the rule is published in the Federal Register], all prerecorded programming that is edited for Internet distribution must be provided with captions.

(c) *Obligations of video programming owners, distributors and providers.*

(1) *Obligations of video programming owners.* Video programming owners must:

(i) Send program files to video programming distributors and providers either with captions as required by this section, or with a dated certification that captions are not required for a specified reason.

(ii) Provide video programming distributors and providers with any revised certifications and newly required captions (if captions were not previously delivered) within seven days of the underlying change.

(2) *Obligations of video programming distributors and providers.* Video programming distributors and providers must:

(i) Enable the rendering or pass through of all required captions to the end user.

(ii) Retain all certifications received from video programming owners pursuant to Section 79.4(c)(1)(i)-(ii) for so long as the video programming distributor or provider makes the certified programming available to end users through a distribution method that uses Internet protocol and thereafter for at least one calendar year.

(iii) Make required captions available within five days of the receipt of an updated certification pursuant to Section 79.4(c)(1)(ii).

(3) A video programming provider or owner's *de minimis* failure to comply with this section shall not be treated as a violation of the requirements.

(4) A video programming distributor, provider, or owner may meet the requirements of this section through alternate means if the requirements of this section are met, as determined by the Commission.

(d) *Determination of compliance.* To be considered captioned, the quality of the captioning of IP-delivered video programming must be at least equal to the quality of the captioning of that programming when shown on television. In evaluating quality, the Commission may consider such factors as completeness, placement, accuracy, and timing.

(e) *Procedures for exemptions based on economic burden.*

(1) A video programming provider or owner may petition the Commission for a full or partial exemption from the closed captioning 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 for closed captioning of video programming delivered via Internet protocol 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 closed captioning of Internet protocol-delivered video programming would be economically burdensome:

- (i) The nature and cost of the closed captions for the programming;
- (ii) The impact on the operation of the video programming provider or owner;
- (iii) The financial resources of the video programming provider or owner; and
- (iv) The type of operations of the video programming provider or owner.

(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 alternatives that might constitute a reasonable substitute for the closed captioning requirements of this section including, but not limited to, text or graphic display of the content of the audio portion of the programming. The Commission will evaluate economic burden with regard to the individual outlet or programming.

(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 closed captioning requirements of this section. The Commission shall act to deny or approve any such petition, in whole or in part, within 6 months after the Commission receives such

petition, unless the Commission finds that an extension of the 6-month period is necessary to determine whether such requirements are economically burdensome.

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

(f) *Complaint procedures.*

(1) Complaints concerning an alleged violation of the closed captioning requirements of this section shall be filed with the Commission. A complaint must be in writing and must include:

(i) The name and address of the complainant;

(ii) The name and postal address, website, or email address of the video programming distributor, provider, and/or owner against whom the complaint is alleged, and information sufficient to identify the video programming involved;

(iii) Information sufficient to identify the software or device used to view the program;

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

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

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

(2) The Commission will forward complaints to the named video programming distributor, provider, and/or owner, as well as to any other video programming distributor, provider, and/or owner that Commission staff determines may be involved. The video programming distributor, provider, and/or owner must respond to the complaint in writing, to the Commission and the complainant, within the time that the Commission specifies when forwarding the complaint, generally within thirty (30) days. The Commission may specify response periods longer than 30 days on a case-by-case basis.

(3) In response to a complaint, video programming distributors, providers, and/or owners shall file with the Commission sufficient records and documentation to prove that the responding entity was (and remains) in compliance with the Commission's rules. Conclusory or insufficiently supported assertions of compliance will not carry a video programming distributor's, provider's, or owner's burden of proof.

(4) The Commission will review all relevant information provided by the complainant and the subject video programming distributors, providers, and/or owners, as well as any additional information the Commission deems relevant from its files or public sources. The Commission may request additional information from any relevant parties when, in the estimation of Commission staff, such information is needed to investigate the complaint or adjudicate potential violation(s) of Commission rules. When the Commission requests additional information, parties to whom such requests are addressed must provide the requested information within the time period the Commission specifies.

(5) To demonstrate closed captioning compliance, video programming distributors or providers may rely on certifications from video programming owners, as provided for in Section 79.4(c)(1)(i)-(ii), unless, at any time, the video programming distributor or provider seeking to rely upon the certification knew or should have known that the certification was false or erroneous. The Commission may take enforcement action against video programming distributors, providers, or owners with respect to false or erroneous certifications.

(6) If the Commission finds that a video programming distributor, provider, or owner has violated the closed captioning requirements of this section, it may employ the full range of sanctions and remedies available under the Act against any or all of the violators.

(g) *Private rights of action 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.

#### PART 15 – Radio Frequency Devices

1. Revise the authority citation for Part 15 to read as follows:

AUTHORITY: 47 U.S.C. 154, 302(a), 303, 304, 307, 330, 336, 544a, 549, and 617.

2. Renumber § 15.119(a) to § 15.119(a)(1).

3. Add § 15.119(a)(2) to read as follows:

(a) \* \* \*

(2) Effective [insert effective date of the rule], all television receivers shipped in interstate commerce, manufactured, assembled, or imported from any foreign country into the United States shall comply with the provisions of this section, except for television receivers with picture screens measuring less than 13 inches diagonally for which this is not achievable.

\* \* \* \* \*

4. Revise § 15.122(a)(1) to read as follows:

(a)(1) Effective [insert effective date of the rule], all digital television receivers and all separately sold DTV tuners shipped in interstate commerce, manufactured or imported for use in the United States shall comply with the provisions of this section, except for digital television receivers with picture screens measuring less than 13 inches diagonally for which this is not achievable.

\* \* \* \* \*

5. Add § 15.125 and § 15.126 to read as follows:

#### § 15.125 Closed caption decoder requirements for video devices

(a) Effective [insert effective date of the rule], all apparatus designed to receive or play back video programming transmitted simultaneously with sound manufactured or imported for use in the United States and not subject to Section 15.119 or Section 15.122 of these rules, or is not a display-only video monitor with no playback capability shall comply with the provisions of this section.

(b) *Specific Technical Capabilities.* All apparatus subject to subsection (a), except exempt apparatus and apparatus with picture screens measuring less than 13 inches for which these requirements are not achievable, shall have the following technical capabilities:

- (1) All apparatus shall implement “pop-on,” “roll-up,” and “paint-on” presentation of captions.
- (2) All apparatus shall make available semantically significant formatting, such as italics, text color and underlining.
- (3) All apparatus shall implement consumer selectability of caption availability, including turning captions on and off, selecting font size, selecting style, selecting color, and selecting background color and background opacity.
- (4) All apparatus shall provide for the user selection of language, where available multiple languages or caption versions are available.
- (5) All apparatus shall preserve original caption information regarding position, font, formatting, color, style, background, opacity, and presentation mode and display captions with such attributes where consumer selection of alternative attributes has not occurred or where consumer selection of default attributes has occurred.
- (6) All apparatus shall maintain user selection among video viewing session and provide the ability to preview selection of options in this section.

§ 15.126 Closed caption requirements for video recording devices

(a) Effective [insert effective date of the rule], all apparatus designed to record video programming transmitted simultaneously with sound manufactured or imported for use in the United States and not subject to Section 15.119 or Section 15.122 of these rules shall comply with the provisions of this section, if achievable.

(b) All devices must enable the rendering of captions consistent with Section 15.125 or enable the pass-through of closed-captioning data utilizing closed-captioning standards for transmission or closed-captioning capable interconnection mechanisms.

## APPENDIX B

## Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),<sup>1</sup> the Commission has prepared this present Initial Regulatory Flexibility Analysis (“IRFA”) concerning the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (“NPRM”). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the *NPRM*. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).<sup>2</sup> In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rule Changes**

2. The Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”) requires the Federal Communications Commission (“Commission”) to revise its regulations to mandate closed captioning on certain video programming delivered using Internet protocol (“IP”).<sup>4</sup> In the *NPRM*, we initiate a proceeding that will fulfill this requirement. We seek comment on proposals that would better enable individuals who are deaf or hard of hearing to view IP-delivered video programming, by requiring that programming be provided with closed captions if it was shown on television with captions after the effective date of the rules adopted pursuant to this proceeding. We also seek comment on requirements for the devices that are subject to the CVAA’s new closed captioning requirements.<sup>5</sup> Our goal is to require the provision of closed captions with IP-delivered video programming in the manner most helpful to consumers, while ensuring that our regulations do not create undue economic burdens for the distributors, providers, and owners of online video programming.

3. Closed captioning is an assistive technology that provides individuals who are deaf or hard of hearing with access to television programming. Closed captioning displays the audio portion of a television signal as printed words on the television screen. Existing regulations require the use of closed captioning on television.<sup>6</sup> Until now, however, closed captioning has not been required for IP-delivered video programming. That changed with the enactment of the CVAA. Specifically, Section 202(b) of the CVAA revised Section 713 of the Communications Act of 1934, as amended, to require the Commission to “revise its regulations to require the provision of closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of such regulations.”<sup>7</sup>

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<sup>1</sup> 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. 857 (1996).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See *id.*

<sup>4</sup> Pub. L. No. 111-260, 124 Stat. 2751, § 202(b) (2010). See also Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA).

<sup>5</sup> See Pub. L. No. 111-260, § 203.

<sup>6</sup> See 47 C.F.R. § 79.1 (setting forth the requirements for closed captioning of video programming on television).

<sup>7</sup> 47 U.S.C. § 613(c)(2)(A).

4. The CVAA also required the Chairman of the Commission to establish an advisory committee known as the Video Programming Accessibility Advisory Committee (“VPAAC”).<sup>8</sup> Section 201(e)(1) of the CVAA required the VPAAC to submit a report on closed captioning to the Commission six months after its first meeting, or by July 13, 2011.<sup>9</sup> The VPAAC submitted this report on July 12, 2011.<sup>10</sup> By statute, within six months of the submission of the VPAAC Report, the Commission must issue final regulations to require the provision of closed captioning on IP-delivered video programming.<sup>11</sup> Accordingly, the Commission must revise its regulations by January 12, 2012.<sup>12</sup> By the same date, pursuant to Section 203 of the CVAA, the Commission must revise its regulations to include any technical standards, protocols, and procedures needed for the transmission of closed captioning delivered using IP, to ensure that certain apparatus are capable of rendering, passing through, or otherwise permitting the display of closed captions for end users.<sup>13</sup>

5. The *NPRM* considers revisions to our rules that would implement the requirements of Sections 202(b) and 203 of the CVAA, as well as the conforming amendment set forth in Section 202(c) of the CVAA. These proposals could fulfill Congress’ goal of enabling consumers who are deaf or hard of hearing to access IP-delivered video programming. The *NPRM* seeks comment on rule changes that would:

- Specify the obligations of entities subject to Section 202(b) by:
  - Requiring video programming owners to send required caption files for IP-delivered video programming to video programming distributors and video programming providers along with program files;
  - Requiring video programming distributors and video programming providers to enable the rendering or pass through of all required captions to the end user; and
  - Requiring the quality of all required captioning of IP-delivered video programming to be of at least the same quality as the captioning of the same programming when shown on television;<sup>14</sup>
- Create a schedule of deadlines by which:
  - All prerecorded and unedited programming subject to the new requirements must be captioned within six months of publication of the rules in the Federal Register;
  - All live and near-live programming subject to the new requirements must be captioned within 12 months of publication of the rules in the Federal Register; and

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<sup>8</sup> Pub. L. No. 111-260, § 201(a).

<sup>9</sup> *Id.*, § 201(e)(1).

<sup>10</sup> See First Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010: Closed Captioning of Video Programming Delivered Using Internet Protocol, July 12, 2011, available at [http://transition.fcc.gov/cgb/dro/VPAAC/First\\_VPAAC\\_Report\\_to\\_the\\_FCC\\_7-11-11\\_FINAL.pdf](http://transition.fcc.gov/cgb/dro/VPAAC/First_VPAAC_Report_to_the_FCC_7-11-11_FINAL.pdf) (“VPAAC Report”).

<sup>11</sup> 47 U.S.C. § 613(c)(2)(A).

<sup>12</sup> See *id.*

<sup>13</sup> Pub L. No. 111-260, § 203(a)-(b), (d).

<sup>14</sup> See *NPRM*, Section III.A.

- All prerecorded and edited programming subject to the new requirements must be captioned within 18 months of publication of the rules in the Federal Register;<sup>15</sup>
- Craft procedures by which video programming providers and video programming owners may petition the Commission for exemptions from the new requirements based on economic burden;<sup>16</sup>
- Establish a mechanism to make information about video programming subject to the CVAA available to video programming providers and distributors, by requiring video programming owners to provide programming for IP delivery either with captions, or with a certification that captions are not required for a stated reason;<sup>17</sup>
- Decline to adopt particular technical standards for IP-delivered video programming;<sup>18</sup>
- Decline to treat a *de minimis* failure to comply with the new rules as a violation, and permit entities to comply with the new requirements by alternate means;<sup>19</sup> and
- Adopt procedures for complaints alleging a violation of the new requirements.<sup>20</sup>

Additionally, we seek comment on the appropriate requirements for devices subject to the closed captioning requirements of Section 203.<sup>21</sup>

#### **B. Legal Basis**

6. The proposed action is authorized pursuant to Sections 4(i), 4(j), 303, 330(b), 713, and 716 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303, 330(b), 613, and 617.

#### **C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

7. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>22</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>23</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>24</sup> A small business

<sup>15</sup> See *id.*, Section III.B.

<sup>16</sup> See *id.*, Section III.C.

<sup>17</sup> See *id.*, Section III.D.

<sup>18</sup> See *id.*, Section III.E.

<sup>19</sup> See *id.*, Section III.F.

<sup>20</sup> See *id.*, Section III.G.

<sup>21</sup> See *id.*, Section IV.

<sup>22</sup> 5 U.S.C. § 603(b)(3).

<sup>23</sup> 5 U.S.C. § 601(6).

<sup>24</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 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.” 5 U.S.C. § 601(3).

concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>25</sup> Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

8. *Small Businesses, Small Organizations, and Small Governmental Jurisdictions.* Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards.<sup>26</sup> First, nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA.<sup>27</sup> In addition, a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”<sup>28</sup> Nationwide, as of 2007, there were approximately 1,621,315 small organizations.<sup>29</sup> Finally, the term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”<sup>30</sup> Census Bureau data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States.<sup>31</sup> We estimate that, of this total, as many as 88,506 entities may qualify as “small governmental jurisdictions.”<sup>32</sup> Thus, we estimate that most governmental jurisdictions are small.

9. *Cable Television Distribution Services.* 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.”<sup>33</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007, which supersede data contained in the 2002 Census, show that

<sup>25</sup> 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission’s statistical account of television stations may be over-inclusive.

<sup>26</sup> See 5 U.S.C. §§ 601(3)–(6).

<sup>27</sup> See SBA, Office of Advocacy, “Frequently Asked Questions,” <http://web.sba.gov/faqs> (last visited May 6, 2011; figures are from 2009).

<sup>28</sup> 5 U.S.C. § 601(4).

<sup>29</sup> INDEPENDENT SECTOR, THE NEW NONPROFIT ALMANAC & DESK REFERENCE (2010).

<sup>30</sup> 5 U.S.C. § 601(5).

<sup>31</sup> U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, Table 427 (2007).

<sup>32</sup> The 2007 U.S. Census data for small governmental organizations are not presented based on the size of the population in each such organization. There were 89,476 small governmental organizations in 2007. If we assume that county, municipal, township and school district organizations are more likely than larger governmental organizations to have populations of 50,000 or less, the total of these organizations is 52,125. If we make the same assumption about special districts, and also assume that special districts are different from county, municipal, township, and school districts, in 2007 there were 37,381 special districts. Therefore, of the 89,476 small governmental organizations documented in 2007, as many as 89,506 may be considered small under the applicable standard. This data may overestimate the number of such organizations that has a population of 50,000 or less. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2011, Tables 427, 426 (Data cited therein are from 2007).

<sup>33</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers,” (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110> (last visited Oct. 21, 2009).

there were 1,383 firms that operated that year.<sup>34</sup> 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 such firms can be considered small.

10. *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.<sup>35</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.<sup>36</sup> In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.<sup>37</sup> 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.<sup>38</sup> Thus, under this second size standard, most cable systems are small.

11. *Cable System Operators.* The Communications Act of 1934, as amended, 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."<sup>39</sup> 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.<sup>40</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.<sup>41</sup> 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,<sup>42</sup> and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

<sup>34</sup> 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](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-lang=en).

<sup>35</sup> 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).

<sup>36</sup> 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.

<sup>37</sup> 47 C.F.R. § 76.901(c).

<sup>38</sup> 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.

<sup>39</sup> 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

<sup>40</sup> 47 C.F.R. § 76.901(f); see Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

<sup>41</sup> 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.

<sup>42</sup> 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. See 47 C.F.R. § 76.909(b).

12. *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,"<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> 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).<sup>46</sup> Each currently offers subscription services. DIRECTV<sup>47</sup> and EchoStar<sup>48</sup> 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.

13. *Satellite Telecommunications Providers.* Two economic census categories address the satellite industry. The first category has a small business size standard of \$15 million or less in average annual receipts, under SBA rules.<sup>49</sup> The second has a size standard of \$25 million or less in annual receipts.<sup>50</sup>

14. The category of Satellite Telecommunications "comprises establishments primarily engaged in providing 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."<sup>51</sup> Census Bureau data for 2007 show that 512 Satellite Telecommunications firms operated for that entire year.<sup>52</sup> Of this total, 464 firms had annual receipts of

<sup>43</sup> 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 9, above.

<sup>44</sup> 13 C.F.R. § 121.201, NAICS code 517110 (2007).

<sup>45</sup> See [http://www.factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-skip=600&-ds\\_name=EC0751SSSZ5&-lang=en](http://www.factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=600&-ds_name=EC0751SSSZ5&-lang=en).

<sup>46</sup> 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).

<sup>47</sup> 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.

<sup>48</sup> 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.

<sup>49</sup> 13 C.F.R. § 121.201, NAICS code 517410.

<sup>50</sup> 13 C.F.R. § 121.201, NAICS code 517919.

<sup>51</sup> U.S. Census Bureau, 2007 NAICS Definitions, "517410 Satellite Telecommunications."

<sup>52</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-skip=900&-ds\\_name=EC0751SSSZ4&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=900&-ds_name=EC0751SSSZ4&-lang=en).

under \$10 million, and 18 firms had receipts of \$10 million to \$24,999,999.<sup>53</sup> Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by our proposed action.

15. The second category, *i.e.* “All Other Telecommunications” comprises “establishments 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.”<sup>54</sup> For this category, Census Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year.<sup>55</sup> Of this total, 2,346 firms had annual receipts of under \$25 million and 37 firms had annual receipts of \$25 million to \$49,999,999.<sup>56</sup> Consequently, the Commission estimates that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

16. *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.<sup>57</sup> Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.”<sup>58</sup> The Commission has estimated the number of licensed commercial television stations to be 1,390.<sup>59</sup> 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<sup>60</sup> 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.<sup>61</sup> We note, however, that, in assessing whether a

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<sup>53</sup> *See id.*

<sup>54</sup> <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2007%20NAICS%20Search>.

<sup>55</sup> *See* [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-skip=900&ds\\_name=EC0751SSSZ4&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=900&ds_name=EC0751SSSZ4&-lang=en).

<sup>56</sup> *See id.*

<sup>57</sup> *See* 13 C.F.R. § 121.201, NAICS Code 515120 (2007).

<sup>58</sup> *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.

<sup>59</sup> *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](http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0211/DOC-304594A1.pdf).

<sup>60</sup> We recognize that this total differs slightly from that contained in *Broadcast Station Totals*, *supra*, note 59; however, we are using BIA’s estimate for purposes of this revenue comparison.

<sup>61</sup> *See Broadcast Station Totals*, *supra*, note 59.

business concern qualifies as small under the above definition, business (control) affiliations<sup>62</sup> 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.

17. 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.

18. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.<sup>63</sup> 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.<sup>64</sup> The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,<sup>65</sup> OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”<sup>66</sup> 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.<sup>67</sup> In addition, we note that the Commission has certified some OVS operators, with some now providing service.<sup>68</sup> Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.<sup>69</sup> 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.<sup>70</sup> Affiliates of

<sup>62</sup> “[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).

<sup>63</sup> See 47 U.S.C. § 573.

<sup>64</sup> 47 U.S.C. § 571(a)(3)-(4). See *13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

<sup>65</sup> See 47 U.S.C. § 573.

<sup>66</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>67</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-fds\\_name=EC0700A1&-geo\\_id=&-skip=600&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en).

<sup>68</sup> A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsr.html>.

<sup>69</sup> 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.

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 that may be affected by the rules and policies adopted herein.

19. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis . . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.”<sup>71</sup> To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, which supersedes data from the 2002 Census, there were 396 firms that in 2007 were engaged in production of Cable and Other Subscription Programming. Of these, 386 operated with less than 1,000 employees, and 10 operated with more than 1,000 employees. However, as to the latter 10 there is no data available that shows how many operated with more than 1,500 employees. Thus, under this category and associated small business size standard, the majority of firms can be considered small.<sup>72</sup>

20. *Motion Picture and Video Production.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials.”<sup>73</sup> We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data currently available from the U.S. Census for the year 2007. The size standard established by the SBA for this business category is that annual receipts of \$29.5 million or less determine that a business is small.<sup>74</sup> According to the 2007 Census, there were 9,095 firms that in 2007 were engaged in Motion Picture and Video Production. Of these, 8,995 had annual receipts of \$24,999,999 or less, and 100 had annual receipts ranging from not less than \$25,000,000 to \$100,000,000 or more.<sup>75</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small.

21. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in acquiring distribution rights and

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(...continued from previous page)

<sup>70</sup> See <http://www.fcc.gov/mb/ovs/csovsccer.html> (current as of February 2007).

<sup>71</sup> U.S. Census Bureau, 2007 NAICS Definitions, “515210 Cable and Other Subscription Programming”; <http://www.census.gov/naics/2007/def/ND515210.HTM#N515210>.

<sup>72</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-fds\\_name=EC0700A1&-geo\\_id=&-skip=600&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en).

<sup>73</sup> U.S. Census Bureau, 2007 NAICS Definitions, NAICS Code 512110, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=512110&search=2007%20NAICS%20Search>.

<sup>74</sup> 13 C.F.R. § 121.201, NAICS Code 512110.

<sup>75</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-skip=200&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=200&-ds_name=EC0751SSSZ5&-lang=en).

distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors.”<sup>76</sup> We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. To gauge small business prevalence in the Motion Picture and Video Distribution industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Based on the SBA size standard of annual receipts of 29.5 million dollars,<sup>77</sup> and according to that 2007 Census source, which supersedes data from the 2002 Census, there were 450 firms that in 2007 were engaged in Motion Picture and Video Distribution. Of that number, 434 received annual receipts of \$24,999,999 or less, and 16 received annual receipts ranging from \$25,000,000 to \$100,000,000 or more. Thus, under this category and associated small business size standard, the majority of firms can be considered small.<sup>78</sup>

22. *Small Incumbent Local Exchange Carriers (LECs).* We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a “small business” under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”<sup>79</sup> The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not “national” in scope.<sup>80</sup> We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

23. *Incumbent Local Exchange Carriers (Incumbent LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>81</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 or more. According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.<sup>82</sup> Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.<sup>83</sup> Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by the rules and policies proposed in the *NPRM*. Thus under this category and the associated small business size

<sup>76</sup> See U.S. Census Bureau, 2007 NAICS Definitions, NAICS Code 512110, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=512110&search=2007%20NAICS%20Search>.

<sup>77</sup> 13 C.F.R. 121.201, NAICS Code 512110.

<sup>78</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-skip=200&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=200&-ds_name=EC0751SSSZ5&-lang=en).

<sup>79</sup> 15 U.S.C. § 632.

<sup>80</sup> Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (“Small Business Act”); 5 U.S.C. § 601(3) (“RFA”). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

<sup>81</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>82</sup> See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (“*Trends in Telephone Service*”).

<sup>83</sup> See *id.*

standard, the majority of these incumbent local exchange service providers can be considered small providers.<sup>84</sup>

24. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>85</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers can be considered small entities.<sup>86</sup> According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.<sup>87</sup> Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.<sup>88</sup> In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.<sup>89</sup> In addition, 72 carriers have reported that they are Other Local Service Providers.<sup>90</sup> Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees.<sup>91</sup> Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by rules adopted pursuant to the *NPRM*.

25. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment."<sup>92</sup> The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees. According to Census Bureau data for 2007, there were a total of 939 establishments in this category that operated for part or all of the entire year. According to Census bureau data for 2007, there were a total of 919 firms in this category that operated for the entire year. Of this total, 771 had less than 100 employees

<sup>84</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-fds\\_name=EC0700A1&-geo\\_id=&-skip=600&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en).

<sup>85</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>86</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-fds\\_name=EC0700A1&-geo\\_id=&-skip=600&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en).

<sup>87</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>88</sup> See *id.*

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

<sup>92</sup> The NAICS Code for this service 334220. See 13 C.F.R § 121.201. See also [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-fds\\_name=EC0700A1&-geo\\_id=&-skip=300&-ds\\_name=EC0731SG2&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=300&-ds_name=EC0731SG2&-lang=en).

and 148 had more than 100 employees.<sup>93</sup> Thus, under that size standard, the majority of firms can be considered small.

26. *Audio and Video Equipment Manufacturing.* The SBA has classified the manufacturing of audio and video equipment under in NAICS Codes classification scheme as an industry in which a manufacturer is small if it has less than 750 employees.<sup>94</sup> Data contained in the 2007 U.S. Census indicate that 491 establishments operated in that industry for all or part of that year. In that year, 376 establishments had between 1 and 19 employees; 80 had between 20 and 99 employees; and 35 had more than 100 employees.<sup>95</sup> Thus, under the applicable size standard, a majority of manufacturers of audio and video equipment may be considered small.

27. *Internet Publishing and Broadcasting and Web Search Portals.* The Census Bureau defines this category to include “. . . establishments primarily engaged in 1) publishing and/or broadcasting content on the Internet exclusively or 2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals). The publishing and broadcasting establishments in this industry do not provide traditional (non-Internet) versions of the content that they publish or broadcast. They provide textual, audio, and/or video content of general or specific interest on the Internet exclusively. Establishments known as Web search portals often provide additional Internet services, such as e-mail, connections to other web sites, auctions, news, and other limited content, and serve as a home base for Internet users.”

28. In this category, the SBA has deemed an Internet publisher or Internet broadcaster or the provider of a web search portal on the Internet to be small if it has fewer than 500 employees.<sup>96</sup> For this category of manufacturers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 2,705 such firms that operated that year.<sup>97</sup> Of those 2,705 firms, 2,682 (approximately 99%) had fewer than 500 employees and, thus, would be deemed small under the applicable SBA size standard.<sup>98</sup> Accordingly, the majority of establishments in this category can be considered small under that standard.

29. *Closed Captioning Services.* These entities would be indirectly affected by our proposed action. The SBA has developed two small business size standards that may be used for closed captioning services. The two size standards track the economic census categories, “Teleproduction and Other Postproduction Services” and “Court Reporting and Stenotype Services.”

30. The first category of *Teleproduction and Other Postproduction Services* “comprises establishments primarily engaged in providing specialized motion picture or video postproduction services, such as editing, film/tape transfers, subtitling, credits, closed captioning, and animation and special effects.” The relevant size standard for small businesses in these services is an annual revenue of less than \$29.5 million.<sup>99</sup> For this category, Census Bureau Data for 2007 indicate that there were 1,605

<sup>93</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-skip=4500&-ds\\_name=EC0731SG3&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=4500&-ds_name=EC0731SG3&-lang=en).

<sup>94</sup> 13 CFR § 121.201, NAICS Code 334310.

<sup>95</sup> [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-skip=300&-ds\\_name=EC073111&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=300&-ds_name=EC073111&-lang=en).

<sup>96</sup> 13 C.F.R. § 121.201, NAICS Code 519130.

<sup>97</sup> U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 519130 (rel. Nov. 19, 2010); <http://factfinder.census.gov>.

<sup>98</sup> *Id.*

<sup>99</sup> U.S. Census Bureau, 2002 NAICS Definitions, “512191 Teleproduction and Other Postproduction Services”; <http://www.census.gov/epcd/naics02/def/NDEF512.HTM>. The size standard is \$29.5 million.

firms that operated in this category for the entire year. Of that number, 1,597 had receipts totaling less than \$29,500,000.<sup>100</sup> Consequently we estimate that the majority of Teleproduction and Other Postproduction Services firms are small entities that might be affected by our proposed actions.

31. The second category of *Court Reporting and Stenotype Services* “comprises establishments primarily engaged in providing verbatim reporting and stenotype recording of live legal proceedings and transcribing subsequent recorded materials.” The size standard for small businesses in these services is an annual revenue of less than \$7 million.<sup>101</sup> For this category, Census Bureau data for 2007 show that there were 2,706 firms that operated for the entire year. Of this total, 2,590 had annual receipts of under \$5 million, and 19 firms had receipts of \$5 million to \$9,999,999.<sup>102</sup> Consequently, we estimate that the majority of Court Reporting and Stenotype Services firms are small entities that might be affected by our proposed action.

#### **D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

32. The *NPRM* proposes requiring video programming owners (“VPOs”) to send program files to video programming distributors (“VPDs”) and video programming providers (“VPPs”) either with captions, or with a dated certification that captions are not required for a reason stated in the certification.<sup>103</sup> When a program newly becomes subject to the captioning requirements, the *NPRM* proposes requiring VPOs to provide VPDs/VPPs with any revised certifications and newly required captions (if captions were not previously delivered) within seven days of the underlying change.<sup>104</sup> VPDs/VPPs would be required to retain all such VPO certifications for so long as they make the certified programming available to end users through a distribution method that uses IP, and for at least one calendar year thereafter.<sup>105</sup>

33. The *NPRM* proposes creating a process by which VPPs and VPOs may petition the Commission for a full or partial exemption of the requirements for closed captioning of IP-delivered video programming, which the Commission may grant upon a finding that the requirements would be economically burdensome.<sup>106</sup> The *NPRM* also proposes adopting procedures for complaints alleging a violation of the IP closed captioning rules.<sup>107</sup>

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

34. 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

<sup>100</sup> [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-\\_skip=300&-ds\\_name=EC0751SSSZ5&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=300&-ds_name=EC0751SSSZ5&-_lang=en).

<sup>101</sup> U.S. Census Bureau, 2002 NAICS Definitions, “561492 Court Reporting and Stenotype Services”; <http://www.census.gov/epcd/naics02/def/NDEF561.HTM>. The size standard is \$7 million.

<sup>102</sup> [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-\\_skip=400&-ds\\_name=EC0756SSSZ4&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=400&-ds_name=EC0756SSSZ4&-_lang=en).

<sup>103</sup> See *NPRM*, Section III.D.

<sup>104</sup> See *id.*

<sup>105</sup> See *id.*

<sup>106</sup> See *NPRM*, Section III.C.

<sup>107</sup> See *id.*, Section III.G.

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.<sup>108</sup>

35. We note that our discussion of alternatives is circumscribed because of the specificity of Sections 202(b), (c) and 203 of the CVAA. The CVAA does, however, recognize the special concerns of small entities by creating an exemption process where compliance with the rules would be economically burdensome. In furtherance of this statutory requirement, the *NPRM* proposes procedures enabling the Commission to grant exemptions to the rules governing closed captioning of IP-delivered video programming, where a petitioner has shown it would be an economic burden (*i.e.*, a significant difficulty or expense).<sup>109</sup> This exemption process would allow the Commission to address the impact of the rules on individual entities, including smaller entities, and modify the rules to accommodate individual circumstances. The exemption procedures proposed in the *NPRM* were specifically designed to ameliorate the impact of the rules for closed captioning of IP-delivered video programming in a manner consistent with the objective of increasing the availability of captioned programming.

36. Overall, in proposing rules governing the closed captioning of IP-delivered video programming, we believe that we have appropriately balanced the interests of individuals who are deaf or hard of hearing against the interests of the entities who will be subject to the rules, including those that are smaller entities. Our efforts are consistent with Congress' goal of "updat[ing] the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming."<sup>110</sup>

**F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule**

37. None.

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<sup>108</sup> 5 U.S.C. § 603(c)(1)-(c)(4).

<sup>109</sup> See *NPRM*, Section III.C.

<sup>110</sup> See S. Rep. No. 111-386, 111<sup>th</sup> Cong., 2d Sess. at 1 (2010); H.R. Rep. No. 111-563, 111<sup>th</sup> Cong., 2d Sess. at 19 (2010).