

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

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

ORDER AND PUBLIC NOTICE

Adopted: May 17, 2018

Released: May 17, 2018

By the Chief, Media Bureau:

I. INTRODUCTION

1. In this Order, we grant petitions filed on behalf of ESPN, MSNBC, and Fox News for exemption from the Federal Communications Commission's (FCC or Commission) video description rules applicable to the top five national nonbroadcast networks. Because we conclude that ESPN, MSNBC, and Fox News provide less than 50 hours per calendar quarter of prime time programming that is not live or near-live, we grant their petitions. We also provide notice of changes to the list of top five national nonbroadcast networks subject to the video description requirements based on changes in ratings, taking into account the grant of ESPN's, MSNBC's, and Fox News' petitions for exemption. Beginning July 1, 2018, the top five national nonbroadcast networks will be USA, HGTV, TBS, Discovery, and History. Further, we take this opportunity to remind covered broadcast stations and multichannel video programming distributors (MVPDs) that, as of July 1, 2018, they must provide 87.5 hours of video description per calendar quarter on each "included network" that they carry.

1 Request of ESPN, Inc. for Further Exemption from List of Top Five Non-Broadcast Networks, MB Docket No. 11-43 (filed Mar. 5, 2018) (ESPN Petition). The Petition was filed jointly by ESPN and The Walt Disney Company, which owns 80 percent of ESPN. Id. at 1 & n.1.

2 Request of MSNBC for Exemption from List of Top Five Non-Broadcast Networks, MB Docket No. 11-43 (filed Mar. 9, 2018) (MSNBC Petition). The Petition was filed by NBCUniversal, LLC, which wholly owns MSNBC.

3 Request of 21st Century Fox, Inc. and Fox News Network, LLC for Exclusion from List of Top Five National Non-Broadcast Networks, MB Docket No. 11-43 (filed Mar. 9, 2018) (Fox News Petition). The Petition was filed jointly by 21st Century Fox, Inc. and Fox News Network, LLC.

4 47 CFR §§ 79.3(b)(1), (4); see also Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Report and Order, 32 FCC Rcd 5962, para. 1 (2017) (2017 Video Description Order). An "included network" is a network carried on a programming stream or channel on which a broadcaster or MVPD is required to provide video description. 2017 Video Description Order, 32 FCC Rcd at 5962, n.1.

## II. ORDER

### A. Background

2. Pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA),<sup>5</sup> the Commission reinstated rules in August 2011 requiring large-market affiliates of the top four broadcast networks and MVPD systems with 50,000 or more subscribers to provide video description for a portion of the video programming that they offer to consumers on television.<sup>6</sup> Video description is “[t]he insertion of audio narrated descriptions of a television program’s key visual elements into natural pauses between the program’s dialogue.”<sup>7</sup> This service makes video programming more accessible to persons who are blind or visually impaired.

3. In July 2017, the Commission adopted an Order expanding the required amount of video described programming on each “included network” carried by a covered broadcast station or MVPD, from 50 hours per calendar quarter to 87.5 hours per quarter beginning July 1, 2018.<sup>8</sup> Specifically, as of that date the Commission’s rules require commercial television broadcast stations that are affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC) and are located in the top 60 television markets to provide 50 hours of video description per calendar quarter during prime time or children’s programming, as well as an additional 37.5 hours of video description per calendar quarter between six a.m. and midnight, on each programming stream on which they carry one of the top four commercial television broadcast networks.<sup>9</sup> Similarly, MVPD systems that serve 50,000 or more subscribers must provide 50 hours of video description per calendar quarter during prime time or children’s programming, as well as an additional 37.5 hours of video description per calendar quarter between six a.m. and midnight, on each of the top five national nonbroadcast networks that they carry on those systems.<sup>10</sup> For the purposes of the rules, the top five national nonbroadcast networks are defined by an average of the national audience share during prime time of nonbroadcast networks that reach 50 percent or more of MVPD households and have at least 50 hours per quarter of prime time programming that is not live or near-live or otherwise exempt under the video description rules.<sup>11</sup> The nonbroadcast networks currently subject to the video description requirements are USA, TNT, TBS, History, and

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<sup>5</sup> Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010); 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>6</sup> 47 CFR § 79.3.

<sup>7</sup> *Id.* § 79.3(a)(3).

<sup>8</sup> See generally *2017 Video Description Order*; *supra* note 4.

<sup>9</sup> 47 CFR § 79.3(b)(1); see also *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 26 FCC Rcd 11847, 11849, para. 4 (2011) (*2011 Video Description Order*); *2017 Video Description Order*, 32 FCC Rcd at 5965, para. 7.

<sup>10</sup> 47 CFR § 79.3(b)(4); see also *2011 Video Description Order*, 26 FCC Rcd at 11849-50, para. 4; *2017 Video Description Order*, 32 FCC Rcd at 5965, para. 7. For a complete list of video description requirements, see *id.* § 79.3.

<sup>11</sup> 47 CFR § 79.3(b)(4); see also *2011 Video Description Order*, 26 FCC Rcd at 11854-55, paras. 12-15. “Live or near-live programming” is defined as programming performed either simultaneously with, or recorded no more than 24 hours prior to, its first transmission by a video programming distributor. 47 CFR § 79.3(a)(7). In the *2011 Video Description Order*, the Commission explained that it was adopting a proposal to “explicitly exclude from the top five any non-broadcast network that does not provide, on average, at least 50 hours per quarter of prime time nonexempt programming.” *2011 Video Description Order*, 26 FCC Rcd at 11854, para. 12.

Disney Channel.<sup>12</sup> As discussed below, ESPN and Fox News have each previously received exemptions from these requirements.<sup>13</sup>

4. The rules provide that the list of top five nonbroadcast networks will update at three-year intervals to account for changes in ratings, and that the second triennial update will occur on July 1, 2018, based on the 2016 to 2017 ratings year.<sup>14</sup> In anticipation of this update, the Media Bureau (Bureau) issued a Public Notice on January 12, 2018 announcing the top ten nonbroadcast networks for the 2016 to 2017 ratings year according to data provided by the Nielsen Company: Fox News, ESPN, USA, MSNBC, HGTV, TBS, Discovery, History, Hallmark, and TNT.<sup>15</sup> The Public Notice indicated that a program network could seek an exemption no later than 30 days after publication of the Public Notice, if it believed it should be excluded from the list of top five networks covered by the video description rules because it does not air at least 50 hours of prime time programming that is not live or near-live or is otherwise exempt.<sup>16</sup>

5. ESPN, MSNBC, and Fox News timely filed requests for exemption from the list of top five nonbroadcast networks.<sup>17</sup>

#### **B. Discussion**

6. As discussed below, based on the evidence presented in the record, we find that ESPN, MSNBC, and Fox News provide on average less than 50 hours per calendar quarter of prime time programming that is not live or near-live. Thus, we exempt these three networks from the Commission's video description requirements applicable to the top five national nonbroadcast networks.

7. *ESPN.* ESPN requests that the Commission extend ESPN's existing exclusion from the list of top five national nonbroadcast networks subject to the video description requirements because it does not provide at least 50 hours per quarter of prime time non-exempt programming.<sup>18</sup> The Commission previously excluded ESPN from the list of top five nonbroadcast networks when it reinstated the video description rules in 2011, and the Bureau did so again during the 2015 triennial update of covered nonbroadcast networks, based on a determination that ESPN did not provide at least 50 hours per quarter of prime time programming that is not live or near-live.<sup>19</sup> ESPN contends that given its mixture of live and near-live programming, ESPN is exactly the type of network that the CVAA intended to exempt

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<sup>12</sup> *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Order and Public Notice, 30 FCC Rcd 2071, 2073, para. 10 (MB 2015) (*2015 Video Description Exemption Order*).

<sup>13</sup> *2011 Video Description Order*, 26 FCC Rcd at 11855, para. 14; *see also 2015 Video Description Exemption Order*.

<sup>14</sup> 47 CFR § 79.3(b)(4); *see also 2011 Video Description Order*, 26 FCC Rcd at 11857, para. 18.

<sup>15</sup> Public Notice, *Media Bureau Announces National Nonbroadcast Network Rankings for Purposes of July 1, 2018 Update to Video Description Requirements*, MB Docket No. 11-43, 33 FCC Rcd 156 (2018) (Public Notice).

<sup>16</sup> *Id.* at 157. The Public Notice was published in the Federal Register on February 7, 2018. *See* Federal Communications Commission, *Video Description: Preliminary Nonbroadcast Network Rankings*, Notice, 83 Fed. Reg. 5424 (Feb. 7, 2018). Accordingly, petitions for exemption were due on March 9, 2018.

<sup>17</sup> *See generally* ESPN Petition, MSNBC Petition, and Fox News Petition.

<sup>18</sup> ESPN Petition at 1.

<sup>19</sup> *2011 Video Description Order*, 26 FCC Rcd at 11855, para. 14; *2015 Video Description Exemption Order*, 30 FCC Rcd at 2073, para. 9. In 2011, the Commission made this determination based on ESPN's comments, which indicated that "ESPN does not provide, on average, at least 50 hours per quarter of prime-time non-exempt programming," as well as a supporting affidavit and illustrative programming schedules. *Id.* The Bureau made this determination based on similar supporting evidence in 2015. *See 2015 Video Description Exemption Order*, 30 FCC Rcd at 2073, para. 8.

from video description regulation.<sup>20</sup> ESPN's programming contains a mixture of live sporting events, live studio sports reporting shows, and replays of recently-recorded studio sports programs, featuring college football, college basketball, the NBA, the NFL, and MLB, among others.<sup>21</sup> In particular, ESPN categorized its prime time content to determine whether it was live or near-live as defined by the FCC and found that for every one of the past six quarters, ESPN did not air more than 50 hours of non-exempt programming during prime time hours.<sup>22</sup> Over that six-quarter period, ESPN averaged 30 hours of non-exempt programming during prime time.<sup>23</sup> ESPN also submitted illustrative programming schedules from December 2017 to provide additional details with respect to the predominately live and near-live content of its programming schedule.<sup>24</sup> After reviewing the record, the Bureau finds that for the past six quarters, ESPN has not aired at least 50 hours of non-exempt prime time programming. As was the case in 2011 and 2015, ESPN continues to primarily air prime time programming that is live or near-live. Accordingly, we find that ESPN is excluded from the list of top five nonbroadcast networks and exempt from the Commission's video description requirements applicable to the top five national nonbroadcast networks.

8. *MSNBC*. MSNBC requests that the Commission exclude MSNBC from the list of top five national nonbroadcast networks subject to the video description requirements because it does not broadcast, on average, a sufficient amount of non-exempt prime time programming.<sup>25</sup> MSNBC contends that given the volume of the network's live programs, it should be excluded from the video description rules.<sup>26</sup> MSNBC's programming offers around-the-clock live news coverage, including breaking news, commentary, and live interview programs. MSNBC also airs live prime time programming, including *The Rachel Maddow Show*, *All In with Chris Hayes*, and *The Last Word with Lawrence O'Donnell*.<sup>27</sup> To support its request for exemption, MSNBC reviewed its recent and proposed programming line-ups for six quarters, from July 1, 2017 through December 31, 2018.<sup>28</sup> In particular, MSNBC identified its prime time content and noted whether it was live or near-live as defined by the Commission.<sup>29</sup> MSNBC submits that over the six-quarter period, it averaged only 42 hours of non-exempt programming during prime time.<sup>30</sup> Additionally, MSNBC submitted programming schedules from February 2018 to provide additional details with respect to MSNBC's extensive live programming offered throughout the day.<sup>31</sup> After reviewing the record, the Bureau finds that for the past six quarters, MSNBC has not aired, on average, at least 50 hours of non-exempt prime time programming. Accordingly, we find that MSNBC is excluded from the list of top five nonbroadcast networks and exempt from the Commission's video description requirements applicable to the top five national nonbroadcast networks.

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<sup>20</sup> ESPN Petition at 3.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 3 & Attach. A (declaration of Kenneth Gordon, Jr., Assistant Chief Counsel for ESPN); *see also* 47 CFR § 79.3(a)(7).

<sup>23</sup> *See id.* at Attach. A.

<sup>24</sup> *Id.* at 3 & Attach. B.

<sup>25</sup> MSNBC Petition at 1.

<sup>26</sup> *Id.* at 3.

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

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; *see also* 47 CFR § 79.3(a)(7).

<sup>30</sup> MSNBC Petition at 3-4 & Attach. A (affidavit of Angela Y. Ball, Senior Counsel for NBCUniversal). Ms. Ball explains that the network generally airs more non-live, long-form programming during the fourth quarter of the calendar year due to scheduled holiday breaks for its program hosts, which accounts for the greater hours of non-exempt prime time programming (64 hours) aired in the fourth quarter of 2017. *See id.*

<sup>31</sup> *Id.* at 4 & Attach. B.

9. *Fox News.* Fox News requests that the Commission exclude Fox News from the list of top five national nonbroadcast networks subject to the video description requirements because it does not provide, on average, at least 50 hours per quarter of non-exempt prime time programming.<sup>32</sup> As Fox News notes, the Commission previously excluded it from the list of top five networks in 2011 because it did not provide at least 50 hours per quarter of prime time programming that is not live or near-live.<sup>33</sup> Fox News is a 24/7 cable- and satellite-delivered news network, and its programming consists of a blend of news coverage and analysis, opinion commentary, and in-depth reporting featuring a variety of news anchors, correspondents, program hosts, and contributors.<sup>34</sup> Fox News contends that because its weekday prime time schedule consists entirely of live or near-live programming, and given that live or near-live programming makes up a substantial portion of its weekend prime time schedule, Fox News does not provide an average of at least 50 hours per quarter of non-exempt prime time programming.<sup>35</sup> To support its request for exemption, Fox News reviewed programming line-ups for six quarters, from July 1, 2016 through December 31, 2017.<sup>36</sup> It states that over the six quarter period, Fox News averaged only 45 hours of non-exempt programming during prime time.<sup>37</sup> Additionally, Fox News submitted illustrative programming schedules from that period to demonstrate that it presented nearly all live or near-live programming during prime time, including weekend prime time hours.<sup>38</sup> After reviewing the record, the Bureau finds that Fox News has not aired, on average, at least 50 hours of non-exempt prime time programming. Accordingly, we find that Fox News is excluded from the list of top five nonbroadcast networks and exempt from the Commission's video description requirements applicable to the top five national nonbroadcast networks.

### III. PUBLIC NOTICE

10. *Top Five Nonbroadcast Networks.* In the Public Notice announcing the national nonbroadcast network rankings for purposes of the July 2018 update to the video description requirements, the Bureau indicated that it would provide notice of any resulting revisions to the list of top five networks after evaluating requests for exemption.<sup>39</sup> Thus, we hereby announce that, as a result of ESPN's, MSNBC's, and Fox News' exemptions and Nielsen ratings for the 2016 to 2017 ratings year, the top five nonbroadcast networks that will be subject to the video description requirements as of July 1, 2018 are as follows: USA, HGTV, TBS, Discovery, and History.<sup>40</sup> As of July 1, 2018, MVPD systems that serve 50,000 or more subscribers must provide 87.5 hours of video description per calendar on

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<sup>32</sup> Fox News Petition at 1.

<sup>33</sup> *Id.* at 2; *2011 Video Description Order*, 26 FCC Rcd at 11855, para. 14. During the first update of covered nonbroadcast networks in 2015, Fox News was not listed in the top five nonbroadcast networks based on 2013-2014 network ratings. Therefore, it did not file a request for exclusion from the video description rules at that time. *See* Fox News Petition at 2.

<sup>34</sup> Fox News Petition at 2.

<sup>35</sup> *Id.* at 3, Exh. 1 (declaration of Paula Firestone, Vice President of Program Operations for Fox News). Fox News airs live or near-live content from at least 4 a.m. to 11:59 p.m. Monday through Friday, from at least 6 a.m. to 8 p.m. on Saturdays, and from at least 5 a.m. to 2 p.m. on Sundays. *Id.* Fox News also provides additional live coverage "[w]here appropriate to cover breaking news or for other events." *Id.*

<sup>36</sup> Supplement to Request of 21st Century Fox, Inc. and Fox News Network, LLC for Exclusion from List of Top Five National Non-Broadcast Networks, MB Docket No. 11-43, at 1-2, Exh. 2 (May 4, 2018).

<sup>37</sup> *Id.* Fox News indicates that it aired more than 50 hours of non-exempt programming in the third quarter of 2016 due to scheduled holiday breaks for its program hosts. *See id.* at Exh. 2, n.1.

<sup>38</sup> *Id.* at Exh. 2. *See also* Fox News Petition at 3, Exh. 2.

<sup>39</sup> Public Notice at 2.

<sup>40</sup> Although TNT and the Disney Channel are no longer in the top five nonbroadcast networks, we encourage them to continue providing video description for their programming, which will increase access by children and adults who are blind or visually impaired.

channels carrying each of these networks.<sup>41</sup>

11. *Video Description Hours Expansion.* In addition, we also take this opportunity to remind covered broadcast stations and MVPDs that the obligation to provide video description expands from 50 hours per calendar quarter to 87.5 hours per calendar quarter beginning July 1, 2018. As of this date, covered broadcast stations and MVPDs must provide 87.5 hours of video description per calendar quarter on each “included network” that they carry.<sup>42</sup> The rule requires that 50 hours per calendar quarter be provided during prime time or children’s programming, while the additional 37.5 hours may be provided at any time between 6 a.m. and 11:59 p.m. local time.<sup>43</sup>

#### IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and Sections 0.61, 0.283, and 79.3 of the Commission’s rules, 47 CFR §§ 0.61, 0.283, 79.3, this Order **IS ADOPTED**.

13. **IT IS FURTHER ORDERED** that, pursuant to Section 79.3 of the Commission’s rules, 47 CFR § 79.3, the petitions filed by ESPN, MSNBC, and Fox News requesting exemption from the Commission’s video description rules **ARE GRANTED**.

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey  
Chief, Media Bureau

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<sup>41</sup> 2017 Video Description Order, 32 FCC Rcd at 5962, para. 1.

<sup>42</sup> 47 CFR §§ 79.3(b)(1), (4); see also 2017 Video Description Order, 32 FCC Rcd at 5965, para. 7; *supra* note 4.

<sup>43</sup> See 47 CFR §§ 79.3(b)(1), (4); 2017 Video Description Order, 32 FCC Rcd at 5970, para. 15.