

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

MEMORANDUM OPINION AND ORDER

Adopted: October 7, 2019

Released: October 7, 2019

By the Chief, Media Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a petition filed by NBCUniversal, LLC (NBCUniversal), on behalf of its wholly owned nonbroadcast programming network, USA Network (USA), for limited waiver of the Commission’s video description rules applicable to the top five national nonbroadcast networks.1 Specifically, NBCUniversal requests that the Commission grant USA a limited waiver of section 79.3 of the Commission’s rules,2 provided that the network airs at least 1,000 hours of described programming each quarter without regard to the number of repeats and describes at least 75 percent of any newly produced, non-live programming that is aired between 6:00 a.m. and midnight per quarter.3 Because NBCUniversal has made a commitment to provide a substantial amount of video described programming on USA Network that exceeds the current quarterly requirement during the waiver period, and the Petition has the support of advocates for the blind and visually impaired, we grant the requested waiver for USA, subject to the conditions described below. However, we decline to grant NBCUniversal’s proposed safe harbor from the video description requirements for other similarly situated, top five nonbroadcast networks.

II. BACKGROUND

2. 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.”4 This service makes video programming more accessible to people who are blind or visually impaired. Pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA),5 the Commission

1 Request of USA Network for Limited Waiver of Video Description Rules, MB Docket No. 11-43 (filed May 3, 2019) (Petition).

2 47 CFR § 79.3.

3 Petition at 2-3.

4 47 CFR § 79.3(a)(3).

5 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).

requires large-market affiliates of the top four broadcast networks and multichannel video programming distributor (MVPD) systems with 50,000 or more subscribers (collectively, covered entities) to provide video description for a portion of the video programming that they offer to consumers on television.⁶

3. In 2017, the Commission adopted an *Order* expanding the availability of video described programming by increasing the amount of described programming covered entities must provide from 50 hours per calendar quarter to 87.5 hours per quarter.⁷ Specifically, section 79.3(b)(4) of the Commission's rules now requires covered MVPDs to provide 50 hours of video description per calendar quarter, either during prime time or on children's programming, and an additional 37.5 hours of video description per calendar quarter between 6 a.m. and 11:59 p.m. local time,⁸ on each of the top five national nonbroadcast networks that they carry.⁹ For 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.¹⁰ The list of top five networks is updated every three years; the current list has been in effect since July 1, 2018 (based on the ratings for the period October 2016-September 2017) and will remain in effect until June 30, 2021.¹¹ USA is currently among the top five national nonbroadcast networks.¹²

4. To meet the quarterly requirement, covered MVPDs may count each program they air with video description no more than twice on a given channel—this allows MVPDs to count the first airing of a described episode and one repeat of that episode toward the requirement.¹³ NBCUniversal claims the repeat rule allows only a small fraction of the hours of video described programming USA provides each calendar quarter to be credited in determining compliance with the quantitative video description requirements.¹⁴ NBCUniversal explains that this limitation on repeats presents special challenges for networks such as USA that do not regularly air scheduled children's programming and

⁶ See 47 CFR § 79.3.

⁷ *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 32 FCC Rcd 5962 (2017) (*2017 Order*).

⁸ *Id.*

⁹ 47 CFR § 79.3(b)(4). See also *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 26 FCC Rcd 11847, 11849-50, para. 4 (2011) (*2011 Video Description Order*). In addition, MVPD systems of any size must pass through video description provided by a broadcast station or nonbroadcast network, if the channel on which the MVPD distributes the station or programming has the technical capability necessary to do so and if that technology is not being used for another purpose related to the programming. 47 CFR §§ 79.3(b)(5)(i)-(ii). See also *2011 Video Description Order*, 26 FCC Rcd at 11850, 11858-59, paras. 4, 20. For a complete list of video description requirements, see 47 CFR § 79.3.

¹⁰ 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).

¹¹ See *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Order and Public Notice, 33 FCC Rcd 4915, 4919-20, para. 10 (2018) (*2018 Video Description Order*). The top five networks were initially those determined by The Nielsen Company for the period October 2009 through September 2010.

¹² Petition at 4-5. HGTV, TBS, Discovery, and History are also among the current top five rated national nonbroadcast networks. *2018 Video Description Order*, 33 FCC Rcd 4915, 4919-20, para. 10.

¹³ 47 CFR § 79.3(c)(2).

¹⁴ Petition at 2, 5-6.

build their programming schedules on a combination of repeats and new programming.¹⁵

5. In its Petition, NBCUniversal requests that the Commission grant USA a limited waiver of section 79.3 for the remainder of the current ratings period ending in June 2021, subject to the conditions that it (1) airs at least 1,000 hours of described programming each quarter without regard to the number of times a single program has aired¹⁶ and (2) describes at least 75 percent of any newly produced, non-live programming that is aired between 6:00 a.m. and midnight per quarter.¹⁷ NBCUniversal also requests that the Commission extend the limited waiver to any other top five ranked nonbroadcast network that meets the proposed safe harbor conditions during the waiver period.¹⁸

6. On June 13, 2019, the Media Bureau issued a Public Notice seeking comment on NBCUniversal's Petition.¹⁹ No commenters oppose granting limited waiver to USA alone. NCTA – The Internet and Television Association (NCTA) filed comments in full support of NBCUniversal's request.²⁰ The American Council of the Blind (ACB), an organization advocating for individuals who are blind and visually impaired, opposes the creation of a safe harbor for all nonbroadcast networks, but otherwise supports granting a limited waiver of the video description requirements for USA, subject to the conditions NBCUniversal proposes in the Petition.²¹ An individual commenter, while reiterating the importance of video description in making programming accessible to the visually impaired community and expressing disappointment in the amount of described programming currently offered, did not specifically oppose granting NBCUniversal's waiver request.²²

7. We evaluate NBCUniversal's waiver request pursuant to the general waiver authority in section 1.3 of the Commission's rules.²³ To waive a requirement for good cause, we must (1) explain why deviating from the general requirement serves the public interest, and (2) explain the nature of the

¹⁵ *Id.* Although the Commission's rules place video description requirements on programming distributors (*i.e.*, broadcasters and MVPDs), as NBCUniversal notes in its Petition, "the programming networks actually procure and supply the video description in the secondary audio programming channel of the programming services provided to distributors." *Id.* at 5.

¹⁶ See 47 CFR § 79.3(c)(2) ("In order to meet its quarterly requirement, a broadcaster or MVPD may count each program it airs with video description no more than a total of two times on each channel on which it airs the program.").

¹⁷ Petition at 2-3.

¹⁸ *Id.* at 3; Reply Comments of USA Network, MB Docket No. 11-43, at 5 (July 26, 2019) (USA Reply) ("any other network seeking to rely on the proposed safe harbor would file its own request demonstrating that it meets the relevant criteria and that a waiver would be in the public interest"). See *supra* note 14 (any possible waiver would be granted to MVPDs, not to programmers).

¹⁹ *Media Bureau Seeks Comment on USA Network's Petition for Limited Waiver of Video Description Requirements*, Public Notice, MB Docket No. 11-43, 34 FCC Rcd 4859 (MB 2019).

²⁰ Comments of NCTA – The Internet and Television Association Comments, MB Docket No. 11-43 (July 12, 2019) (NCTA Comments).

²¹ Comments of the American Council of the Blind, MB Docket No. 11-43, at 2 (July 12, 2019) (ACB Comments).

²² Connie Scheu Comments, MB Docket No. 11-43 (June 26, 2019).

²³ 47 CFR § 1.3 ("The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative

(continued....)

special circumstances.²⁴

III. DISCUSSION

8. We find that there is good cause to grant NBCUniversal's unopposed request for limited waiver of the video description rules for the remainder of the current ratings period for top five nonbroadcast networks ending on June 30, 2021, subject to the conditions that USA (1) airs at least 1,000 hours of described programming each quarter without regard to the number of repeats and (2) describes at least 75 percent of any newly produced, non-live programming that is aired between 6:00 a.m. and midnight per quarter. As an initial matter, although NBCUniversal describes the Petition as a request for the USA Network, we reiterate that our rules apply to MVPDs carrying USA, rather than to USA itself. As a result, this limited waiver applies to every covered MVPD nationwide, with respect to the channel on which it carries USA.

9. While we emphasize the importance of video description in expanding the accessibility of video programming, we recognize that compliance with the prohibition on counting repeats presents unique difficulties for USA because its schedule is built on a large amount of repeat programming.²⁵ We find that granting limited and conditional relief from the repeat rule in the circumstances NBCUniversal presents with respect to USA supports the public's interest in the provision of video description with programming, while providing flexibility to accommodate successful programming models.

10. NBCUniversal's demonstration that in past years USA has greatly surpassed the required amount of described programming, without regard to the number of repeats, and its commitment to do so during the waiver period, are key considerations in our decision to grant the requested waiver. As outlined in the Petition, from January 1, 2018 through December 31, 2018, USA had a quarterly average of more than 1,600 hours of described programming and described approximately 78 percent of any newly produced, non-live quarterly programming that it aired between the hours of 6:00 a.m. and midnight.²⁶ We also find it is particularly noteworthy that NBCUniversal collaborated with advocates from the blind and visually impaired communities prior to filing its Petition²⁷ and that ACB has commented in support of granting the limited waiver for MVPD systems carrying USA. We agree with ACB that granting NBCUniversal's Petition would recognize the commitment of USA to provide video description for its content, and it has the potential to increase the total amount of described content available to viewers.²⁸

11. We decline, however, to extend this waiver to all top five nonbroadcast networks as requested in the Petition and supported by NCTA.²⁹ First, no evidence in the record suggests that MVPDs are unable to comply with the Commission's video description rules with respect to other top five nonbroadcast networks and no other network has commented to that effect. Further, the conditions of this

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Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”).

²⁴ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁵ Petition at 2; NCTA Comments at 1 (“the Commission’s current method for determining compliance with its rules is unduly restrictive and disadvantages popular non-broadcast networks whose program lineups rely in part on repeat airings of programming consumers know and love”).

²⁶ Petition at 8-9.

²⁷ USA Reply Comment at 3.

²⁸ ACB Comments at 2.

²⁹ Petition at 3; NCTA Comments at 1-4.

limited waiver are uniquely tailored to the programming model and demonstrations made by USA.³⁰ Finally, we note that parties seeking relief from the Commission's video description rules may submit an individual waiver request, which will be evaluated on its own merits, pursuant to the general waiver authority in section 1.3 of the Commission's rules.³¹ As mentioned in the *2017 Order*,³² the Bureau will look favorably upon waiver requests demonstrating that (1) all pre-recorded programming between 6 A.M. and midnight in the relevant calendar quarter is being described, even if not all of it can be counted toward the rules and (2) the petitioner commits to provide additional hours of video description in calendar quarters other than the one for which it is seeking the waiver, or commits to provide the additional hours of video description in the same calendar quarter but on an affiliated network.³³

12. For the aforementioned reasons, we find good cause to grant a limited waiver of section 79.3(b)(4) of the Commission's video description rules for MVPDs carrying USA for the remainder of the ratings period ending on June 30, 2021, subject to the conditions described above.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in Sections 4(i), 4(j), and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 613, and Sections 0.61, 0.283, and 1.3 of the Commission's rules, 47 CFR §§ 0.61, 0.283, and 1.3, this Memorandum Opinion and Order **IS ADOPTED**.

14. **IT IS FURTHER ORDERED** that the petition for waiver of Section 79.3(b)(4) of the Commission's rules, 47 CFR § 79.3(b)(4), filed by NBCUniversal, LLC **IS GRANTED IN PART**, subject to the conditions described herein, and **DENIED IN PART**.

15. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

FEDERAL COMMUNICATIONS COMMISSION

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³⁰ See ACB Comments at 2 (supporting the commitment made by USA Network, but observing that other nonbroadcast networks "have not collaborated with the disability community" or "demonstrated the same commitment to producing audio described content as USA Network").

³¹ 47 CFR § 1.3. See *supra* note 21.

³² *2017 Order*, 32 FCC Rcd at 5972.

³³ The Commission will evaluate whether the affiliated network receives MVPD coverage and viewership sufficient to make it an adequate substitute for the network on which video description is required to be provided. *Id.*