

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: August 18, 2021

Released: August 18, 2021

By the Chief, Media Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address an unopposed petition filed by WarnerMedia, LLC (WarnerMedia), on behalf of its wholly owned nonbroadcast programming network, TBS (collectively, TBS), for a limited waiver of the Commission’s audio description rules applicable to the top five nonbroadcast networks.1 Specifically, WarnerMedia requests that the Commission grant TBS, one of the top five nonbroadcast networks, a limited waiver of section 79.3(b)(4) of the Commission’s audio description rules.2 It proposes that this waiver be conditioned on the network airing at least 1,000 hours of audio described programming (and more than 1,400 hours of audio described programming on average) during any quarter in which it is unable to meet the minimum hour threshold in our rules, without regard to the number of repeats.3 Additionally, WarnerMedia asserts that it will provide audio description for 100 percent of newly produced, non-live programming aired during certain core hours on TBS, TNT, and TruTV.4 Because WarnerMedia has made a commitment to provide a substantial amount of audio description on TBS, and other commonly owned networks, that exceeds the current quarterly requirement, and the unopposed Petition has the support of advocates for blind and visually impaired consumers, we grant the limited waiver for TBS, subject to the conditions described below.

II. BACKGROUND

2. Audio description5 makes video programming6 more accessible to individuals who are blind or visually impaired through “[t]he insertion of audio narrated descriptions of a television program’s

1 Request of TBS for Limited Waiver of Audio Description Rule, MB Docket No. 11-43 (filed Mar. 31, 2021) (Petition).

2 47 CFR § 79.3(b)(4).

3 Petition at 2.

4 Id.

5 The Commission recently modernized the terminology in part 79 of the Commission’s rules to use the more common and widely understood term “audio description” rather than “video description.” Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Report and Order, 35 FCC Rcd 12577 (Oct. 27, 2020) (2020 Audio Description Order). The Commission has long considered the terms “video description” and “audio description” to be synonymous. See, e.g., 47 CFR § 79.3(a)(3).

6 “Video programming” refers to programming provided by, or generally considered comparable to programming provided by, a television broadcast station but does not include consumer-generated media. 47 U.S.C. § 613(h)(2); 47 CFR § 79.3(a)(4).

key visual elements into natural pauses between the program’s dialogue.”⁷ The Commission’s audio description rules, adopted pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA),⁸ require MVPDs that serve 50,000 or more subscribers to provide 87.5 hours of audio description per calendar quarter on channels carrying each of the top five national nonbroadcast networks.⁹ To meet the quarterly requirement, covered entities may count each program they air with audio description no more than twice on a given channel (commonly referred to as the “repeat rule”).¹⁰

3. The top five national nonbroadcast networks are defined by an average of the national audience share during prime time among 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 audio description rules.¹¹ The Media Bureau (Bureau) updates the list of top five national nonbroadcast networks every three years to account for changes in ratings, and the third triennial update occurred on July 1, 2021, based on the 2019 to 2020 ratings year.¹² TBS is currently a top five national nonbroadcast network subject to the audio description rules.¹³

4. The Bureau has previously waived its audio description rules and applied alternative audio description requirements with respect to a top five national nonbroadcast network in certain, limited circumstances. In 2019, the Bureau granted USA Network a limited waiver of the Commission’s audio description rules, subject to the conditions that the network air at least 1,000 hours of audio described programming each quarter without regard to the number of repeats and provide audio descriptions for at least 75 percent of any newly produced, non-live programming aired between 6:00 a.m. and midnight per quarter.¹⁴ At the time, USA Network was a top five national nonbroadcast network, and the limited waiver granted to USA covered the remainder of the triennial period ending on June 30, 2021.¹⁵ When granting the limited waiver, the Bureau declined NBCUniversal’s invitation to extend the limited waiver to all top five nonbroadcast networks noting that “the conditions of this limited waiver are uniquely

⁷ 47 CFR § 79.3(a)(3).

⁸ 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).

⁹ 47 CFR § 79.3(b)(4). The rule requires that 50 hours per calendar quarter be provided in prime time or during 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. *Id.*

¹⁰ 47 CFR § 79.3(c)(2).

¹¹ 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 at 11854-55, paras. 12-15 (2011) (*2011 Audio Description Order*). “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).

¹² 47 CFR § 79.3(b)(4); *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Order and Public Notice, MB Docket No. 11-43, DA 21-281, para. 1 (MB 2021) (*2021 Triennial Nonbroadcast Order and Public Notice*).

¹³ *See 2021 Triennial Nonbroadcast Order and Public Notice* (granting exemptions to Fox News, MSNBC, CNN, and ESPN, on the basis that each provides less than 50 hours per calendar quarter of prime time programming that is not live or near-live, and announcing TLC, HGTV, Hallmark, History, and TBS as the top five national nonbroadcast networks as of July 1, 2021).

¹⁴ *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43, Memorandum Opinion and Order, 34 FCC Rcd 9335, para. 1 (MB 2019) (*USA Network Order*).

¹⁵ *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43, Order and Public Notice, 33 FCC Rcd 4915, 4919-20, para. 10 (MB 2018) (*2018 Triennial Nonbroadcast Order and Public Notice*).

tailored to the programming model and demonstrations made by USA,” and that “parties seeking relief from the Commission’s [audio] 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.”¹⁶

5. In its Petition, TBS requests a limited waiver of section 79.3 from April 1, 2021 through June 30, 2024, which is the end date of the current triennial period that commenced on July 1, 2021.¹⁷ As described more below, TBS claims the repeat rule results in “only a small fraction of the hours of [audio] described programming that TBS provides each calendar quarter” counting towards the audio description requirement.¹⁸ TBS requests the limited waiver subject to the conditions that it “(1) air at least 1,000 hours of audio described programming each quarter (and more than 1,400 hours of audio described programming on average per quarter over the entire waiver period) without regard to the number of repeats, and (2) provide audio description for 100 percent of newly produced, non-live programming aired between 6:00 a.m. and midnight Eastern Time within three (3) business days of its receipt from a production company.”¹⁹ This alternative minimum threshold would apply “for MVPDs carrying TBS programming that are unable to meet the current Threshold in any calendar quarter” during the covered time period.²⁰ WarnerMedia additionally “commits that TNT and TruTV, TBS sister networks, will also in the future provide audio descriptions for 100 percent of newly produced, non-live programming aired between 6:00 a.m. and midnight ET within three (3) business days of receipt.”²¹

6. On April 29, 2021, the Bureau issued a Public Notice seeking comment on WarnerMedia’s Petition.²² No commenter opposed WarnerMedia’s request. The American Council of the Blind (ACB), an advocacy organization for the blind and visually impaired, filed comments in full support of WarnerMedia’s request.²³ An individual commenter also expressed full support for the TBS

¹⁶ *USA Network Order*, 34 FCC Rcd at 9338-39, at para. 11. The Bureau also restated previous Commission guidance that it “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 audio 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.” *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43, Report and Order, 32 FCC Rcd 5962, 5972 (2017) (*2017 Order*).

¹⁷ Petition at 2.

¹⁸ *Id.* at 5. For instance, although TBS aired 1,483 hours of audio described programming, without regard for repeats, in the fourth quarter of 2020, only 88.8 hours were eligible to be counted for the purposes of compliance with the Commission’s audio description rules. *Id.* (citing Declaration of Brad Kramer at para. 3 (Declaration)).

¹⁹ *Id.* at 2. Notably, TBS’s commitments exceed NBCUniversal’s 2019 commitments. *USA Network Order*, 34 FCC Rcd at 9337, para. 5. According to the Petition, TBS aired an average of nearly 67 hours of non-live, newly produced programming per quarter during 2020, for a total of 267.4 hours, and audio described 79 percent, or 212.3 hours, of that programming. Declaration at para. 4.

²⁰ Petition at 2.

²¹ *Id.* at 8. In a subsequent ex parte filing, WarnerMedia clarified that TBS, TNT, and TruTV, will audio describe 100 percent of newly produced, non-live programming aired between 6:00 a.m. and midnight *local time*, rather than Eastern Time, within three business days of its receipt from a production company. Letter from Robert Vitanza, Asst. Vice President – Senior Legal Counsel, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 11-43 (filed Aug. 3, 2021) (Vitanza Letter).

²² *Media Bureau Seeks Comment on TBS’s Petition for Limited Waiver of Audio Description Requirements*, MB Docket No. 11-43, Public Notice, DA 21-497 (MB 2021).

²³ American Council of the Blind Comments at 1 (rec. June 1, 2021) (ACB Comments). In addition to commending WarnerMedia for engaging disability advocates, ACB expressed its support for WarnerMedia’s expansion of audio description to HBO Max programming and TBS’s sister networks, TNT and TruTV. *Id.* at 1-2.

Petition.²⁴ In its reply comments, WarnerMedia argued that support from the ACB illustrated the Petition's potential to serve the public interest.²⁵ In an ex parte letter filed on August 3, 2021, WarnerMedia indicated that it no longer sought a limited waiver with respect to the quarter beginning on April 1, 2021, and ending on June 30, 2021, because TBS met the Commission's current section 79.3(b)(4) minimum audio description threshold during that quarter.²⁶

7. We evaluate WarnerMedia's waiver request pursuant to the general waiver authority in section 1.3 of the Commission's rules.²⁷ To waive a requirement for good cause, we must explain (1) why deviating from the general requirement serves the public interest, and (2) the nature of the special circumstances.²⁸

III. DISCUSSION

8. We find that there is good cause to grant WarnerMedia's unopposed request for a limited waiver of the audio description rules through the current triennial period beginning on July 1, 2021 and ending on June 30, 2024. We grant TBS's waiver subject to the condition that, in any quarter in which TBS cannot meet the hours threshold established by our rules, it will be subject to an alternative minimum audio description requirement that it (1) airs at least 1,000 hours of audio described programming each quarter (and more than 1,400 hours of audio described programming on average per quarter over the entire waiver period) without regard to the number of repeats, and (2) audio describes all newly produced, non-live programming aired between 6:00 a.m. and 11:59 p.m. local time within three business days of its receipt from a production company.²⁹ Additionally, WarnerMedia will provide audio description for 100 percent of newly produced, non-live programming on commonly-owned networks, TNT and TruTV, aired between 6:00 a.m. and 11:59 p.m. local time within three business days of receipt.³⁰ This limited waiver applies to every covered MVPD across the country, with respect to the channel on which it carries TBS.

9. As we emphasized in the 2019 *USA Network Order*, we continue to recognize the importance of audio description in making video programming more accessible.³¹ According to TBS, its programming schedule includes limited hours of original or once-repeated content that can count toward the quarterly programming requirement for audio description.³² TBS asserts that the rule "presents a significant and growing challenge" to its programming model, which features repeat content and live or

²⁴ Fred Brack Comments (rec. April 30, 2021).

²⁵ WarnerMedia Reply at 2 (rec. June 14, 2021).

²⁶ See Vitanza Letter.

²⁷ 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 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.").

²⁸ *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).

²⁹ See Petition at 2.

³⁰ See Vitanza Letter.

³¹ *USA Network Order*, 34 FCC Rcd at 9338, para. 9.

³² Petition at 5. TBS claims that, due in part to the repeat rule, it has been a challenge to comply with the audio description rules since the Commission's quarterly hours threshold increased to 87.5, despite airing on average more than 5,000 hours of audio described programming annually from 2018 to 2020 without regard to repeats and adding audio description to 100 percent of its newly produced programming in the first and fourth quarters of 2020. *Id.* at 4-5.

near-live coverage inside and outside of prime time.³³ TBS further contends that the limited waiver will allow it “greater flexibility to account for expected future changes in the programming mix, which could include more repeat programming, less newly produced programming, and more live and near-live programming, including during prime time, such as a new Major League Baseball game on Tuesday nights.”³⁴ We find that WarnerMedia has sufficiently detailed the unique challenge that the repeat rule poses for TBS based on its programming strategy, which includes substantial repeat, live, and near-live programming.³⁵ Therefore, we find that granting TBS limited and conditional relief from the audio description rules serves the public interest by allowing TBS to continue to evolve its programming model while ultimately increasing the amount of audio description available on television.

10. WarnerMedia’s commitment to providing a significant amount of audio described programming is a significant factor in our decision to grant a limited waiver here. TBS has exceeded the required hours of audio description without regard to repeats in recent quarters and explains that it remains committed to surpassing the typical quarterly threshold in the future. From 2018 through 2020, TBS aired an annual average of more than 5,000 hours of audio described programming without regard to repeats.³⁶ As WarnerMedia states, this annual average exceeds the total required by ten times.³⁷ Furthermore, last year, TBS aired more than 6,000 hours of audio described programming and more than 1,500 hours on average per quarter.³⁸ Based on the conditions proposed by WarnerMedia, and adopted here, TBS will exceed the *USA Network Order* alternative minimum threshold as needed, including by describing 100 percent of newly produced, non-live programming aired during core hours on TBS, TNT, and TruTV.³⁹ Moreover, we take notice of the fact that WarnerMedia worked collaboratively with disability advocates in order to advance its Petition.⁴⁰ ACB’s comments in support of WarnerMedia’s limited waiver request are notable and persuasive,⁴¹ and we agree with ACB that granting WarnerMedia’s Petition, with the aforementioned conditions, has the potential to expand accessible content for viewers who are blind or visually impaired.⁴²

11. For these reasons, we find good cause to grant WarnerMedia a limited waiver of section 79.3(b)(4) of the Commission’s audio description rules for MVPDs carrying TBS for the period beginning on July 1, 2021, and ending on June 30, 2024, subject to the conditions described above.

³³ *Id.* at 4-5.

³⁴ *Id.* at 5, n.13. TBS also airs other live or near-live programming, such as the Screen Actors Guild Awards and the NCAA men’s basketball tournament, and the Major League Baseball playoffs. *Id.* at 3, 5.

³⁵ *Id.* at 1-6, 9.

³⁶ *Id.* at 4 (citing Declaration at para. 2).

³⁷ *Id.*

³⁸ *Id.* (citing Declaration at para. 2-3).

³⁹ *Id.* at 8 (citing Declaration at para. 6). Had this commitment been in place in 2020, it would have resulted in an additional 55.1 hours of audio description that year on TBS alone. *See* Declaration at para. 4.

⁴⁰ *Id.* at 2, 8-9 (describing discussions prior to filing the Petition between AT&T, on behalf of WarnerMedia, and representatives of ACB, National Federation for the Blind, American Foundation for the Blind, and American Printing House for the Blind, and noting that all organizations “expressed their support”).

⁴¹ ACB Comments at 1-2.

⁴² *Id.* at 1; Petition at 4 (“TBS is an established leader among nonbroadcast networks in providing audio-described content . . .”); Petition at 8 (“[TBS’s alternative audio described programming minimum requirement] will result in much more [audio] described programming.”).

IV. ORDERING CLAUSES

12. 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**.

13. **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 WarnerMedia, LLC is **GRANTED**, subject to the conditions described herein.

14. 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).

FEDERAL COMMUNICATIONS COMMISSION

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