

FCC FACT SHEET*

Video Description Expansion
Report and Order – MB Docket No. 11-43

Background: Video description makes video programming accessible to individuals who are blind or visually impaired by aurally describing a television program’s key visual elements during pauses in the program’s dialogue. Through video description, individuals who are blind or visually impaired can independently enjoy and follow popular television programs.

Currently, the Commission’s video description rules require commercial broadcast television stations that are affiliated with ABC, CBS, Fox, or NBC and are located in the top 60 television markets and multichannel video programming distributor (MVPD) systems with 50,000 or more subscribers to provide 50 hours per calendar quarter of video described prime time or children’s programming. MVPDs must provide this required video description on each of the top five national nonbroadcast networks that they carry. Currently those nonbroadcast networks are USA, TNT, TBS, History, and Disney Channel. In a 2016 *Notice of Proposed Rulemaking (NPRM)*, the Commission proposed to increase the amount of video described programming that each covered broadcast station or MVPD must provide from 50 hours per calendar quarter to 87.5 hours.

What the Order Would Do:

- Adopt the proposal in the *NPRM* to increase the availability of video described programming by requiring each broadcast station and MVPD covered by our current video description rules to provide 87.5 hours of described programming per quarter on each stream or channel on which it carries an included network starting January 1, 2018.
- Find that the need for and benefits of the expanded hours requirement are greater than their technical and economic costs, as required by the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA).
- Provide more flexibility to covered entities by allowing some amount of non-prime time, non-children’s described programming to count toward the increased hours. Specifically, the additional 37.5 hours per quarter can be provided at any time between 6 A.M. and midnight.
- Ensure that Americans who are blind or visually impaired can be connected, informed, and entertained by television.

* This document is being released as part of a “permit-but-disclose” proceeding. Any presentations or views on the subject expressed to the Commission or its staff, including by email, must be filed in MB Docket No. 11-43, which may be accessed via the Electronic Comment Filing System (<https://www.fcc.gov/ecfs>). Before filing, participants should familiarize themselves with the Commission’s *ex parte* rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. See 47 CFR § 1.1200 *et seq.*

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

REPORT AND ORDER*

Adopted: []

Released: []

By the Commission:

I. INTRODUCTION

1. In this Report and Order, we expand the availability of video described programming on top-rated broadcast and nonbroadcast networks. Specifically, we adopt the proposal to increase the amount of described programming on each "included network" carried by a covered broadcast station or multichannel video programming distributor (MVPD), from 50 hours per calendar quarter to 87.5 hours per quarter. Covered broadcast stations and MVPDs must start providing the additional hours of video described programming on "included networks" in the calendar quarter beginning on January 1, 2018. We also provide more flexibility than exists under our current rules regarding when the additional hours of described programming may be aired. This update to our rules will help ensure that Americans who are blind or visually impaired can be connected, informed, and entertained by television.

II. BACKGROUND

2. In 2011, the Commission reinstated the video description regulations that previously were adopted in 2000, requiring certain television broadcast stations and MVPDs to provide video description on top-rated networks. Video description makes video programming accessible to individuals who are

*This document has been circulated for tentative consideration by the Commission at its July open meeting. The issues referenced in this document and the Commission's ultimate resolutions of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairman has determined that, in the interest of promoting the public's ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The Commission's ex parte rules apply and presentations are subject to "permit-but-disclose" ex parte rules. See, e.g., 47 CFR §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission's meeting. See 47 CFR §§ 1.1200(a), 1.1203.

1 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. Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Notice of Proposed Rulemaking, 31 FCC Rcd 2463, 2464, n.4 (2016) (NPRM). See infra para. {3}.

2 47 CFR § 79.3. See generally Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Report and Order, 26 FCC Rcd 11847 (2011) (Reinstatement Order). See also Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Notice of Proposed Rulemaking, 26 FCC Rcd 2975 (2011) (Reinstatement NPRM). Video description rules were initially adopted in 2000, but were struck down due to lack of authority. Implementation of Video Description of Video Programming, MM Docket No. 99-339, Report and Order, 15 FCC Rcd 15230 (2000) (2000 Order), recon.

(continued...)

blind or visually impaired through “[t]he insertion of audio narrated descriptions of a television program’s key visual elements into natural pauses between the program’s dialogue.”³ These rules play a key role in affording better access to television programs for individuals who are blind or visually impaired, “enabling millions more Americans to enjoy the benefits of television service and participate more fully in the cultural and civic life of the nation.”⁴

3. Currently, the Commission’s video description rules require commercial broadcast television stations that are affiliated with ABC, CBS, Fox, or NBC and are located in the top 60 television markets to provide 50 hours per calendar quarter of video described prime time or children’s programming.⁵ In addition, MVPD systems that serve 50,000 or more subscribers must provide 50 hours of video description per calendar quarter during prime time or children’s programming on each of the top five national nonbroadcast networks that they carry on those systems.⁶ The nonbroadcast networks currently subject to these video description requirements are USA, TNT, TBS, History, and Disney Channel.⁷ Any programming initially aired with video description must include video description if it is re-aired on the same station or MVPD channel, unless the station or MVPD is using the technology for another program-related purpose.⁸

4. In the Notice of Proposed Rulemaking in this proceeding (*NPRM*), we proposed revisions to our rules that would expand the availability of, and support consumer access to, video described programming.⁹ Among other proposals, we proposed to increase the amount of described programming on each included network carried by a covered broadcast station or MVPD, from 50 hours per calendar quarter to 87.5, and we sought comment on whether to provide more flexibility to covered entities by allowing some amount of non-prime time, non-children’s described programming to count toward the increased hours.¹⁰ We also sought comment on our tentative conclusion that the benefits of the proposed

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granted in part and denied in part, *Implementation of Video Description of Video Programming*, MM Docket No. 99-339, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1251 (2001), *vacated sub nom, Motion Picture Ass’n of Am., Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (*MPAA v. FCC*). The history of the Commission’s video description rules and their reinstatement under the CVAA, as well as the current requirements under those rules, are discussed in depth in both the 2014 Report to Congress and the Notice of Proposed Rulemaking in this proceeding. Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (CVAA); H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 19 (2010); S. Rep. No. 111-386, 111th Cong., 2d Sess. at 1 (2010); *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report to Congress, 29 FCC Rcd 8011 (2014) (*2014 Report*); 47 U.S.C. § 613(f)(3); *NPRM*, 31 FCC Rcd at 2464-67, paras. 3-7.

³ 47 CFR § 79.3(a)(3).

⁴ *Reinstatement Order*, 26 FCC Rcd at 11848, para. 1.

⁵ 47 CFR § 79.3(b)(1)-(2). *See also Reinstatement Order*, 26 FCC Rcd at 11849, 11855-56, paras. 4, 16.

⁶ 47 CFR § 79.3(b)(4). *See also Reinstatement Order*, 26 FCC Rcd at 11849-50, para. 4.

⁷ *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Order and Public Notice, 30 FCC Rcd 2071, 2071, para. 1 (2015). The list of the top five networks is updated every three years in response to any changes in ratings. 47 CFR § 79.3(b)(4). The next update will be in effect on July 1, 2018 based on the ratings for the time period from October 2016 to September 2017.

⁸ 47 CFR § 79.3(c)(3), 79.3(c)(4)(i)-(ii).

⁹ *See generally NPRM*.

¹⁰ *See id.* at 2471-72, paras. 18-19.

rules outweigh the costs, and on other issues such as appropriate timelines for the proposals.¹¹ We take no action on our other *NPRM* proposals at this time which remain pending.¹²

III. AUTHORITY

5. We conclude that we have the authority under the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) to increase the number of hours of described programming on each included network by 75 percent, from 50 hours per calendar quarter to 87.5 hours per quarter. This conclusion is consistent with Section 713(f)(4) of the Communications Act (“Continuing Commission Authority”),¹³ which states:

- (A) IN GENERAL – The Commission may not issue additional [video description] regulations unless the Commission determines, at least 2 years after completing the reports required in paragraph (3), that the need for and benefits of providing video description for video programming, insofar as such programming is transmitted for display on television, are greater than the technical and economic costs of providing such additional programming.
- (B) LIMITATION – If the Commission makes the determination under subparagraph (A) and issues additional regulations, the Commission may not increase, in total, the hour requirement for additional described programming by more than 75 percent of the requirement in the regulations reinstated under paragraph (1).

6. In the *NPRM*, we explained that our continuing authority is limited by the express requirement in Section 713(f)(4)(A) that the need for and benefits of any new or expanded regulations outweigh their costs, as well as by the express limitations set out in subsection (f)(4)(B) with respect to total described hours and subsection (f)(4)(C) regarding the expansion of video description requirements to additional designated market areas (DMAs).¹⁴ As noted in the *NPRM*, the statute provides that any new requirements must be limited to programming transmitted for display on television (that is, by broadcasters and MVPDs).¹⁵ In this Order, we conclude that the new requirements we adopt herein are consistent with the limitations in the statute. We note that, as required in subsection (f)(4)(A), more than two years have passed since the completion of the CVAA-mandated report to Congress on video description “in television programming” and “in video programming distributed on the Internet.”¹⁶ Further, the additional regulations adopted today apply only to “programming ... transmitted for display on television.”¹⁷ As discussed below, we also find that “the need for and benefits of” the regulations “are

¹¹ See *id.* at 2469, 2476, paras. 12, 30.

¹² We also sought comment in the *NPRM* on proposals to increase the number of included networks carried by covered distributors, from four broadcast and five nonbroadcast networks to five broadcast and ten nonbroadcast networks; adopt a no-backsliding rule; remove the threshold requirement that nonbroadcast networks reach 50 percent of pay-TV (or MVPD) households in order to be subject to inclusion; require that covered distributors provide dedicated customer service contacts who can answer questions about video description; and require that petitions for exemptions from the video description requirements, together with comments on or objections to such petitions, be filed with the Commission electronically. See *id.* at 2472-80, paras. 20-41.

¹³ Section 713 of the Act was amended by Section 202(a) of the CVAA and is codified at 47 U.S.C. § 613.

¹⁴ *NPRM*, 31 FCC Rcd at 2467, 2470-71, paras. 8, 13-15. The CVAA prohibits the Commission, until October 8, 2020, from phasing in additional DMAs outside the top 60. 47 U.S.C. § 613(f)(4)(C)(iii)-(iv).

¹⁵ *NPRM*, 31 FCC Rcd at 2471, para. 16.

¹⁶ 47 U.S.C. § 613(f)(4)(A). In particular, on June 30, 2014, the Commission submitted a report to Congress presenting its findings on the technical and creative issues, benefits, and financial costs of video description in television programming, as well as on the technical and operational issues, benefits, and costs of providing video description for IP-delivered video programming. See generally *2014 Report*. See also *NPRM*, 31 FCC Rcd at 2466-67, para. 7.

¹⁷ 47 U.S.C. § 613(f)(4)(A).

greater than the[ir] technical and economic costs” for the rules we adopt herein.¹⁸ Finally, consistent with subsection (f)(4)(B), the additional regulations do not increase the hour requirement “by more than 75 percent of the requirement in the regulations reinstated.”¹⁹

IV. INCREASED AVAILABILITY OF VIDEO DESCRIBED PROGRAMMING

A. Additional Hours

7. The CVAA provides that the Commission may increase “in total” the hour requirement by no more than 75 percent, up to a total of 87.5 hours per quarter, and we proposed to adopt such an increase in the *NPRM*.²⁰ Based on our analysis of the benefits and costs of the proposal as required under Section 713(f)(4)(A) of the Communications Act, we adopt our proposed increase in today’s Order.²¹ Thus, we will require each covered broadcast station and MVPD, on each stream or channel on which it carries an “included network,” to provide 87.5 hours of described programming, per quarter.²² Our decision to increase the number of required hours of video description per included network is supported by the record. Almost every commenter who addressed this issue supports the proposed increase to 87.5 hours per quarter,²³ and only one commenter opposes it.²⁴ Although this is the maximum increase permissible under the CVAA, the total number of hours required per included network will be limited, averaging less than one hour per day.²⁵ We find that implementing the maximum increase at this time, rather than a partial increase, will provide the most benefit to consumers without resulting in excessive costs. As discussed below, we also provide more flexibility than exists under our current rules regarding when the additional hours of described programming may be aired.²⁶

8. On any given day, the average American can choose to watch any program on any one of approximately 264 channels.²⁷ That adds up to roughly 6,000 hours of linear television options, from

¹⁸ See *infra* Section IV.

¹⁹ The requirement in the reinstated regulations is 50 hours of video description on each programming stream or channel per calendar quarter. 47 CFR § 79.3(b)(1)-(2), (4). 75 percent of those 50 hours is 37.5 hours. Accordingly, 87.5 hours per quarter represents a 75 percent increase in the number of hours of video description (50 + 37.5 = 87.5). We have not expanded the number of DMAs, which we conclude we may not do until 2020 at the earliest. 47 U.S.C. § 613(f)(4)(C)(iii)-(iv).

²⁰ *NPRM*, 31 FCC Rcd at 2471-72, para. 18. See also 47 U.S.C. § 613(f)(4)(B).

²¹ Absent Congressional action, the Commission does not have authority to further increase the number of hours of video described programming required per quarter on any specific network beyond the 87.5 hours adopted today. See *supra* Section III (Authority); *NPRM*, 31 FCC Rcd at 2470, para. 13. However, we encourage all networks to continue to expand their video described offerings.

²² Appendix A, Final Rules. See also *supra* para. {3}. We also delete what was formerly Section 79.3(b)(1) of the rules, which specified the video description requirements that were in effect prior to July 1, 2015, and were superseded on that date. This rule is obsolete and has no current effect, and its substance is now covered by the new subsection (b)(1) (what was formerly subsection (b)(2)). See Appendix A, Final Rules.

²³ See, e.g., MPAA Comments at 1; ACB Comments at 3; AFB Comments at 1; MCB Reply at 1; ABVI Reply at 1; Barlow Comments at 1; Grossman Comments at 1; Merriweather Comments at 1; Pinto Comments at 1; Zodrow Comments at 1; Swartz Reply at 1.

²⁴ See NAB Reply at 3-9. See also *infra* note {51}.

²⁵ Thirteen weeks per calendar quarter, seven days per week, means an average of 91 days per quarter. Given that the updated requirement calls for only 87.5 hours of described programming per quarter, this averages out to less than one hour per day of described programming on any given included network.

²⁶ See *infra* Section IV.B.

²⁷ *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices, 31 FCC Rcd 11498, 11508-09, Tbls. 4, 5 (2016) (showing an

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which that average American chooses about five hours of programming to watch over the course of the day.²⁸ Ideally, viewers who are blind or visually impaired would have the same range of options, including the same freedom to select and independently view and follow any of the programming for which they pay.²⁹ Instead, many find that “the current amount of available audio-described content [is] significantly below demand” and indicate that they have difficulty finding programs with video description.³⁰ Television programming is a shared piece of American culture³¹ that the blind and visually impaired community is unable to fully experience without video description.³² For people with blindness and visual impairments, video description has been shown not only to increase comprehension of television programming, but also to increase opportunities to discuss television programs with sighted people.³³ As a result of increased video description requirements, persons who are blind or visually impaired will be able to engage more fully in television viewing, increasing their social inclusion within community life. Nonetheless, as we noted in the *NPRM*, we must “seek to ensure that consumers are able to realize the benefits of video description” while “keeping in mind our Congressional directive to proceed judiciously with any expansion of the requirements.”³⁴

9. As required by the statute, we find that the benefits of increasing the required number of hours of described programming by 37.5 hours are greater than the costs. The costs are minimal and represent a very small percentage of total programming expenses and network revenues. Although the price for adding description to television programming can vary, based on filings in the docket we estimate that the maximum cost per hour is \$4,202.50.³⁵ Because a given hour of described programming

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increased average of 264.4 total available channels on the most subscribed tiers of service). Close to 90 percent of American television households subscribe to MVPD service. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 15-158, Seventeenth Report, 31 FCC Rcd 4472, 4514 (2016).

²⁸ John Koblin, *How Much Do We Love TV? Let Us Count the Ways*, N.Y. TIMES, June 30, 2016, available at <http://www.nytimes.com/2016/07/01/business/media/nielsen-survey-media-viewing.html>.

²⁹ Although over-the-air viewers have access to a smaller range of options, that is true regardless of whether they are blind or visually impaired. The virtue of equivalent access remains the same.

³⁰ ACB October 26, 2016 *Ex Parte*, *ACB Survey Finds Need for Increased Audio Description (ACB Survey)* (reporting that over 75% of survey respondents “strongly agree that a greater amount of audio-described programming is needed,” and that 45% of survey respondents “have difficulty in finding programs with audio description”).

³¹ See David Carr, *Barely Keeping Up in TV’s New Golden Age*, N.Y. TIMES, Mar. 9, 2014, available at <http://www.nytimes.com/2014/03/10/business/media/fenced-in-by-televisions-excess-of-excellence.html>.

³² *2014 Report*, 29 FCC Rcd at 8012, para. 2. See also *ACB Survey* (reporting that over 75% of survey respondents “strongly agree that a greater amount of audio-described programming is needed”).

³³ Emilie Schmeidler and Corinne Kirchner, *Adding Audio Description: Does it Make a Difference?*, *Journal of Visual Impairment and Blindness* 197 (2001).

³⁴ *NPRM*, 31 FCC Rcd at 2474, para. 24.

³⁵ NAB, in a 2013 submission, estimated that the cost of one hour of video description lies between \$2,500 and \$4,100. NAB Sept. 4, 2013 Comments at 4. Because producing video described programming is a labor intensive task, we adjust the reported costs to reflect the change in wages in the media industry. See <https://dcmp.org/ai/227/> (visited Oct. 17, 2016). We adjust this cost estimate by 2.5 percent because the mean wage in media occupations increased by 2.5 percent between 2013 and 2015. Adjusting the NAB estimates yields a range of \$2,562.50 to \$4,202.50, and we use this upper bound in our calculations throughout this item. See United States Department of Labor, Bureau of Labor Statistics, *Occupational Employment Statistics (2013, 2015)*, available at <http://www.bls.gov/oes/tables.htm>. On the other hand, one commenter noted that production costs have fallen in the past five years and are expected to continue to fall due to entry by firms into the video description industry because of increased demand for video description services, and therefore the estimates given above may be high. See Dicapta Comments at 1.

can be counted twice toward the requirements of the rules (once when initially aired, and once when rerun), any given included network would need a total of 175 new hours of described programming per year to comply with the expanded video description requirement adopted today.³⁶ For the nine networks required to provide 50 hours of video description per quarter, we estimate the cost of increasing the number of hours of described programming to 87.5 hours per quarter is approximately \$315,000 per year.³⁷ For each of these nine networks, \$315,000 per year represents a very small percentage of both their programming costs and their net revenues.³⁸

10. The benefits of additional description, while less easy to quantify than the relatively low costs of providing it, are nonetheless substantial. Longstanding evidence indicates that persons who are blind or visually impaired have television viewing habits that are comparable to those who are not.³⁹ Studies have also shown that persons who are blind or visually impaired subscribe to MVPD services in roughly the same proportion as other Americans.⁴⁰ Nothing in the current record suggests otherwise and, indeed, there is no reason to believe that those who are blind or visually impaired would not seek to access a medium of communications as central to American life and culture as television in the same way, and at the same rates, as other Americans. Estimates of the number of Americans who are blind or visually impaired range from seven million to over 21 million.⁴¹ Thus, the number of Americans who could benefit from video description is substantial.

³⁶ 87.5 hours per quarter x 4 quarters = 350 hours, divided in half (175) because each described hour can be counted twice.

³⁷ 37.5 additional hours per quarter x 4 quarters = 150, divided in half (75) because each described hour can be counted twice. 75 hours x \$4,202.50 per hour = \$315,187.5.

³⁸ For the currently included broadcast networks, the cost of the additional 37.5 hours of described programming per quarter would approximate one hundredth of one percent of their programming costs and net revenues. For the currently included nonbroadcast networks, the cost of the additional 37.5 hours of described programming per quarter would range from 0.02 to 0.09 percent of their programming costs, and from 0.01 to 0.04 percent of their net revenues. Programming expenses and net operating revenue come from SNL Kagan, *TV Network Profile and Economics* (2015). Programming expenses are defined by SNL Kagan as the direct cost of creating, acquiring, and distributing content and services. Programming expenses and net operating revenue are available for each of the four broadcast networks (ABC, NBC, CBS, and FOX) and the five nonbroadcast networks (USA, TNT, TBS, Disney Channel, and History) required to provide video description under the current rules. Programming expenses range from \$2.1 billion to \$3.7 billion for the broadcast networks and from \$357 million to \$1.3 billion for the nonbroadcast networks. Net operating revenue ranges from \$2.9 billion to \$4.9 billion for the broadcast networks and from \$838 million to \$3.1 billion for the nonbroadcast networks.

³⁹ Jaclyn Packer, Ph.D. & Corinne Kirchner, Ph.D., *Who's Watching? A Profile of the Blind and Visually Impaired Audience for Television and Video* (1997), available at <http://www.afb.org/info/programs-and-services/public-policy-center/technology-and-information-accessibility/whos-watching-a-profile-of-the-blind-and-visually-impaired-audience-for-television-and-video/1235> (*Who's Watching? Report*).

⁴⁰ *Id.* (“Blind and visually impaired people ... subscribe to cable television, to the same extent as other households.”).

⁴¹ The Census Bureau estimates the total blind or visually impaired population is 7,333,805. United States Census Bureau, American Communities Survey (2015), available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_1YR_B18103&prodType=table. According to the Center for Disease Control (CDC), 23.7 million Americans age 18 and older reported experiencing vision loss. American Foundation for the Blind, *Blindness Statistics, Facts and Figures on Adults with Vision Loss* (updated Jan. 2017) available at www.afb.org/info/blindness-statistics/adults/facts-and-figures/235 (citing CDC, National Center for Health Statistics, 2015 National Health Interview Survey). Of these 23.7 million, 14.4 million women and 9.3 million men report experiencing significant vision loss. *Id.* The National Eye Institute (NEI) estimates the blind or visually impaired population over 40 years old is 12,440,000. Varma et al., *Visual Impairment and Blindness in Adults in the United States, Demographic and Geographic Variations from 2015 to 2050*, 134 (7) *JAMA Ophthalmology* 802-809 (2016).

11. Commenters who are blind or visually impaired emphasize the need for greater amounts of video described programming,⁴² as well as the substantial benefits of this service.⁴³ There is considerable evidence that video description of television programming significantly enhances the value of television programming to individuals who are blind or visually impaired. Many television programs contain visual elements that are crucial to understanding what is happening, and are missed by those who are blind or visually impaired.⁴⁴ The Commission's *2014 Report* found that video description greatly enhances the experience of viewing video programming because viewers who are blind or visually impaired no longer miss critical visual elements of television programming and, therefore, can fully understand and enjoy the program without having to rely on their sighted family members and friends to narrate these visual elements.⁴⁵ Commenters express that this ability to watch video programming independently is an incredibly important benefit of video description.⁴⁶ The Described and Captioned

⁴² See AFB Comments at 2 (“[D]emand for, and interest in, described TV is overwhelming and can only be expected to grow.”); ACB Comments at 1 (noting that, as the “incidence of blindness” continues to significantly increase, this will “continue[] to create an increase in demand for accessible video programming”); ACB Reply at 1 (explaining that, while a wide breadth of programming is closed captioned for individuals who are deaf or hard of hearing, “the blindness community is relegated to a handful of hours each week during prime-time, or at odd intervals”). See also, e.g., Brack Reply at 1 (offering support for expanding the amount of video description because only “[a] relatively small portion of shows has description”); Correia Reply at 1 (stating that “most of my favorite shows are still not available with audio description” and that the proposed increase “will mean that I will be able to enjoy many more of my favorite programs”); Crawford Reply at 1 (“There is no question that the amount of programming I watch would increase if I had a larger selection of choices [that are video described].”); Crumley Reply at 1 (stating that video description “should be expanded as much as possible”); Huffman Reply at 1 (“The number of audio-described programs remains low.”); Hunsinger Reply at 1 (urging the FCC to make more video description available); Getz Reply at 1 (“I very much enjoy the television programming [that] is currently being described, however, the shows I am able to fully enjoy is[sic] much too limited at this time.”); Latorre Reply at 1 (“Currently, only a small fraction of all television programming is required to be audio described.”); Lieberg Reply at 1 (“[W]ho rely on description have very few hours per week and very few programs from which to choose.”); Pimley Reply at 1 (noting that there are “only very, very few hours of video description”); Swartz Reply at 1 (imploing the FCC “in the strongest possible terms” to increase the number of programs with video description); Zaken Reply at 1 (requesting that the FCC make more video description available on television so “that I will be able to listen to more programs”).

⁴³ See, e.g., Brack Reply at 1 (explaining that “[t]he added value of description to television shows for a person who is blind is immeasurable” and “it offers a night-and-day difference in both understanding and enjoying programming”); Doane Reply at 1 (“[V]ideo description gives blind and visually impaired people knowledge that we can share with others in conversation and allows us to make informed opinions on the programming”); Edwards Reply at 1 (noting that “[t]here is clearly a huge benefit to be gained” by increasing the number of hours of video description by 75 percent); Grenevitch Reply at 1 (“It is hard for me to put into words what audio description adds to programming for a visually impaired individual. You do not realize how many important details you have been missing until you hear a program described.”); Hasley Reply at 1 (“Increasing availability of such description will allow greater access to the entertainment, education, and information provided by television programming, for a large population of viewers”); Strzalkowski Reply at 1 (“Audio description makes it possible to understand what is happening and to feel a part of the cultural experience that is television.”); Tobin Reply at 1 (stating that the “importance of audio description in my life cannot be overstated” and “the impact . . . is profound, as the narrative elements of the description make television . . . come alive for me”).

⁴⁴ *Who's Watching? Report* (“People who have experienced video description feel that it affords important benefits, which fall into the categories of enhanced viewing, learning, and social experiences”; “The vast majority of blind and visually impaired people who have experienced description say that it is important to their enjoyment of programming”).

⁴⁵ *2014 Report*, 29 FCC Rcd at 8017-18, paras. 14-15. See also *NPRM*, 31 FCC Rcd at 2467-68, paras. 9-10.

⁴⁶ *2014 Report*, 29 FCC Rcd at 8018, para. 15. See, e.g., Smith Comments at 1 (explaining that video description benefits individuals who are blind because it gives them greater independence and the ability to understand television programs); Zodrow Comments at 1 (“Having video description now is very beneficial for me as a totally

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Media Program (DCMP) and the American Council of the Blind (ACB) also note the benefits of video description to children and individuals on the autism spectrum, because it can help with the development of vocabulary.⁴⁷

12. Through its enactment of the CVAA, Congress acknowledged the value of video description. Indeed, the importance of accessibility of video programming to persons who are blind or visually impaired underlies several provisions of the CVAA. Congress mandated not only that the Commission require video description, but also that emergency information contained in video programming, as well as the user interfaces on navigation devices and other digital apparatus that allow users to navigate video programming, be made accessible to those who are blind or visually impaired.⁴⁸ Furthermore, in addition to its considerable benefits to the millions of individuals who are blind or visually impaired today, television programming that is produced with video description now will continue to benefit the growing population of people with blindness or a visual impairment when it is shown again in the future, thus increasing its value. The National Eye Institute estimates that the blind or visually impaired population will double by 2050.⁴⁹

13. Although we do not assign a specific monetary value to the benefits these additional hours of described programming will provide to the millions of persons who are blind or visually impaired,⁵⁰ we find that the benefits exceed the relatively low costs.⁵¹

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blind person because now I don't have to rely on someone else that's sighted [to] explain to me what is happening on the screen. . . . I can now understand what's going on during a TV program and know what the characters are doing."); Latorre Reply at 1 ("It means enjoying a program or movie with your spouse or family as an equal rather than someone who needs an explanation of what is happening."); Sorenson Reply at 1 ("Watching tv with audio description gives me more understanding about the action on the screen").

⁴⁷ DCMP and ACB, *Listening Is Learning*, http://listeningislearning.org/background_description-no-bvi.html (last visited Oct. 12, 2016).

⁴⁸ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751.

⁴⁹ Varma et al. *supra* note {41}.

⁵⁰ It is difficult to quantify in monetary terms the intrinsic benefits of video description for people who are blind or visually impaired, and there are no quantitative estimates of the value of an additional hour of video described television programming for a blind or visually impaired individual. *See, e.g.*, Brack Reply at 1 ("The added value of description to television shows for a person who is blind is immeasurable."). Even very low estimates of the value indicate that it would take only a small number of viewers who are blind or visually impaired to get more benefit from described programming than the cost of describing it. NCTA promotes on its website an estimate of the "viewing value by the hour" of cable programming. This estimate -- \$0.26 per hour -- reflects the price for enjoying each hour of cable video service, which presumably is an estimate of its value. *See* <https://www.ncta.com/industry-data>. Viewers who are blind or visually impaired get some value from television programming even without video description. Assuming conservatively that, without the benefit of video description, such viewers get 75% of the enjoyment of a sighted viewer (or \$0.195 per hour), adding video description might add \$0.065 of value per hour, per viewer (to equal \$0.26, NCTA's estimate of the total value of an hour of programming). As discussed above, we estimate the highest potential cost for describing an hour of programming to be \$4,202.50. *See supra* note {35}. At \$0.065 per person, 64,654 viewers equal \$4,202.51. Various governmental estimates place the number of persons who are blind or visually impaired at between 7,333,805 and 23,700,000. *See supra* note {41}. Thus, even accepting NCTA's low estimate of the value of an hour of programming for the sake of argument, benefits that reached only a fraction of citizens who are blind or visually impaired -- 0.3 to 0.9 percent depending on the estimate -- would nonetheless outweigh costs. And this calculation does not even take into account the benefits to the friends and family of persons who are blind or visually impaired, or the benefits to networks and distributors of increases in viewership.

⁵¹ NAB argues that the preliminary cost-benefit analysis in the *NPRM* forms an insufficient basis for the adoption of any new rules. NAB Reply at 3-9. As always, however, we do not adopt any rules based on the analysis in the

(continued....)

B. Increased Flexibility

14. In addition to increasing the required hours of video described programming, we also provide more flexibility than exists under our current rules regarding when the additional hours of described programming may be aired. Several industry commenters argue without opposition that “[t]he Commission should incorporate flexibility into any rules increasing the number of hours.”⁵² MPAA argues that we should consider “whether to allow additional types of programming to count toward the hourly video description requirement if the requirement is moved from 50 hours to 87.5 hours per quarter.”⁵³ Time Warner “agrees with other commenters that additional flexibility is essential” if the Commission adopts such an increase.⁵⁴ While commenters generally did not respond to the Commission’s inquiry about changing the rule to allow some or all described programming to air between 6 A.M. and midnight, industry commenters agreed that the “Commission should [] consider allowing additional types of programming to count toward the rule.”⁵⁵

15. We will provide flexibility regarding when the additional required hours may be aired, but retain our current rule with respect to the existing hour requirement. Specifically, although we will continue to require included networks to provide 50 hours per quarter of video described programming during prime time or children’s programming,⁵⁶ we will permit the additional 37.5 hours per quarter to be provided at any time between 6 A.M. and midnight.⁵⁷ We noted in the *NPRM* that, while we have “no evidence of compliance difficulties for covered distributors or the currently-included networks”⁵⁸ operating under the current rules, we recognize that some parties may not have sufficient eligible prime time and children’s programming to meet our increased hour requirement.⁵⁹ Commenters provide some examples of situations in which, they claim, certain programmers would be unable to comply with the expanded hour obligation by describing prime time or children’s programming, even if they described all

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NPRM. As discussed throughout this Order, our finding that “the need for and benefits of” the new rules “are greater than the technical and economic costs” is based on a comprehensive analysis of the available facts in the record. NAB has submitted no sound basis to reach a different conclusion here. As stated above, the total number of described hours required under our revised rules is modest (requiring an average of less than one hour of described programming per day) and accordingly will not impose a significant burden on included networks. We have designed our rules to further minimize the burden on included networks by providing flexibility on when the additional hours of described programming may be aired and allowing a given hour of described programming to be counted twice, once when initially aired and once when rerun. We thus reject NAB’s argument that the new rules are not sufficiently supported by a cost-benefit analysis.

⁵² NCTA Comments at 14-15.

⁵³ MPAA Comments at 10, 12.

⁵⁴ Time Warner Reply at 4. *See also* NAB Reply at 18.

⁵⁵ NAB Reply at 19.

⁵⁶ 50 hours/quarter in prime time or children’s programming is the amount required under the current rules. 47 CFR § 79.3(b).

⁵⁷ To avoid ambiguity, the rule refers to 11:59 P.M. rather than midnight. *See Times of Day FAQs*, National Institute of Standards and Technology, *available at* <https://www.nist.gov/pml/time-and-frequency-division/times-day-faqs>.

⁵⁸ *NPRM*, 31 FCC Rcd at 2471-72, para. 18.

⁵⁹ *Id.* at 2472, para. 19.

such non-exempt programming.⁶⁰ The added flexibility provided under our new rules should alleviate this concern.⁶¹

16. Commenters suggest a number of additional ways to provide included networks with more flexibility to satisfy the increased hour requirement. We find that these suggested measures are unnecessary in light of the timing flexibility we are providing, as well as ill-advised. NCTA suggests permitting distributors to average their compliance across multiple quarters.⁶² This could mean, in practice, that a network could air a year's worth of described programming in one quarter, and none at all the rest of the year. We find that the ability to vary compliance with the hour requirement in this manner would have the potential to upset consumer expectations and significantly undermine the value of video description to those who rely upon it. It would not serve the needs of individuals who are blind or visually impaired to have no video described programming on a channel for an entire quarter. NAB suggests increasing the number of times a program and its reruns can be counted toward the hour requirement, from twice to "three or four or more" times.⁶³ This would ultimately reduce the overall amount of described programming available to consumers, because some networks might rerun the same described programming over and over. At the same time, the majority of top networks that air primarily first-run programming in prime time would continue to need to produce the same amount of new described programming, meaning this change would not give them additional flexibility. Time Warner proposes that we permit networks to count described hours provided on affiliated networks to satisfy the hour requirement for the primary network.⁶⁴ This, too, would undermine the purpose of the rules, which are designed to ensure that programming on the most popular networks is described.⁶⁵ While we appreciate the desire for flexibility reflected in these proposals, we decline to adopt them for the reasons explained above.

17. We recognize, however, that some networks may have a difficult time meeting the new hour requirement in specific calendar quarters, even with the additional flexibility we are providing. For example, Time Warner argues that TNT, an included network, carried a significant amount of live programming in prime time in the second quarter of 2016, and as a result just barely met the existing 50 hour quarterly requirement.⁶⁶ In addition to the increased flexibility we provide to programmers to meet our hour requirement, distributors and included networks continue to be permitted to petition for waivers if needed. Some commenters argue that "potentially frequent waiver requests" under an "ad hoc waiver process" are insufficient to resolve certain problems that need to be considered "at the outset" to avoid impacting program scheduling.⁶⁷ Parties made the same arguments prior to the reinstatement of the video

⁶⁰ See, e.g., Time Warner Reply at 4 (a significant amount of programming was aired with description, but had been previously aired with description and counted toward the requirements more than once); NAB Comments at 18-19 (a network carries little children's programming); NCTA September 19, 2016 *Ex Parte* (all programming was described reruns).

⁶¹ To the extent that any individual network has problems satisfying the new hour requirement even with this flexibility, it may file a waiver request with the Media Bureau. 47 CFR §§ 1.3, 0.283.

⁶² NCTA Comments at 15. See also Time Warner Reply at 5.

⁶³ NAB Reply at 18.

⁶⁴ Time Warner Reply at 5.

⁶⁵ Other proposals are less problematic but are rendered unnecessary given the approach we have adopted. For instance, NCTA proposes to create a categorical exemption if all eligible programming in a quarter is described. NCTA Comments at 15. This does not seem likely to occur now that 18 hours a day of programming are eligible to count toward the description requirement, but, as discussed in paragraph {18} below, if it does occur we will consider that circumstance when deciding whether to grant a waiver.

⁶⁶ Time Warner Reply at 4.

⁶⁷ See, e.g., NCTA Comments at 14; Time Warner Reply at 4-5.

description rules.⁶⁸ As we observed in the *NPRM*, however, not a single waiver request has been filed in the more than four years since the rules became effective, and under the rules we adopt today, included networks will not need to provide any more description during prime time or children's programming than they do under the reinstated rules. Therefore, we do not foresee that the new rules will create any problems with program scheduling or that regulatees will have difficulty complying with our revised rules. Nonetheless, we continue to emphasize that waiver requests may be filed if our requirements are infeasible or prove to be unduly burdensome under particular circumstances.

18. Although the record does not suggest that either broadcast stations or MVPDs will typically have difficulty complying with our revised rules, it does suggest that compliance problems could arise in two atypical circumstances.⁶⁹ First, a network may be carrying an unusually large amount of live or near-live programming due to special events during a single calendar quarter (the Olympics, March Madness, etc.).⁷⁰ Second, a network may be airing an unusually large number of video-described reruns during a particular quarter. Bearing these concerns in mind, we will look favorably upon waiver requests demonstrating that:

- 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 rules⁷¹; and
- The petitioner commits to provide additional hours of video description in calendar quarters other than the one for which it is seeking the waiver,⁷² or commits to provide the additional hours of video description in the same calendar quarter but on an affiliated network.⁷³

If both of these conditions are met, we believe that it is more likely than not that consumer needs will still be met at the level contemplated by these rules without unduly burdening the industry.

⁶⁸ *Reinstatement Order*, 26 FCC Rcd at 11869-70, para. 46.

⁶⁹ See, e.g., Time Warner Reply at 4-5; NCTA Comments at 14; NCTA September 19, 2016 *Ex Parte*.

⁷⁰ See Time Warner Reply at 4. However, we note that some live programming has been provided with video description. See, e.g., *NPRM*, 31 FCC Rcd at 2469, n.47 (citing articles about NBC's video-described production of 'The Wiz Live!').

⁷¹ Although we received no comments on this issue, we recognize that broadcast networks do not program a broadcast station's full day. Broadcast stations also program part of the broadcast day independently of their network, airing locally originated programming and syndicated programming. Therefore, in the case of waiver requests from broadcasters or broadcast networks, we will also look favorably on waiver requests demonstrating that all non-"live or near-live" programs provided in hours programmed by the broadcast network are described.

⁷² If a waiver were granted, the petitioners would shift some hours of video described programming to a different quarter than the one in which they would otherwise be counted. As a result, there should be no additional burden on covered parties. Although description is most beneficial when it is consistently available, additional description always provides value to consumers, both in the quarter when it airs and whenever the programming is rerun with description. 47 CFR § 79.3(c)(3),(4). Finally, this potential waiver condition is distinguishable from the NCTA proposal to permit distributors to average their compliance across multiple quarters, both because it will be of limited duration and because it depends on Commission review and approval rather than the discretion of regulatees, and will consequently be easier to monitor and enforce. See *supra* para. {16}. It also is distinguishable from the NCTA proposal because it is unlikely to lead to a scenario where a network airs no or very little video described programming during a quarter, which could happen under NCTA's proposal. That proposal would place no limits on the circumstances in which a network could move video described programming to a different calendar quarter, and would not require that any video described programming at all be aired in a particular quarter. See *id*.

⁷³ 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.

C. Timing.

19. The revised rule will be effective 30 days after publication in the Federal Register, and covered broadcast stations and MVPDs must start providing the additional hours of video described programming on “included networks” in the calendar quarter beginning on January 1, 2018. We sought comment in the *NPRM* on an appropriate compliance deadline for the rule. In particular, we noted that when we reinstated the video description rules in 2011, the time from their release to the full compliance date was approximately ten months, and we asked whether we should allow a similar amount of time for distributors to come into compliance.⁷⁴ Some commenters argue for compliance to be required as soon as possible,⁷⁵ while others either support a longer period to come into compliance or were silent on the issue.⁷⁶ To provide sufficient time for distributors to ensure that included networks provide an additional 37.5 hours of described programming per quarter, we will give covered entities approximately six months to come into compliance. As noted, the reinstated rules gave newly covered networks approximately ten months to begin the process of providing video description and to fully comply with the Commission’s new requirements. Given that currently covered networks already have processes in place for creating and complying with the video description requirements, we believe that giving them a six-month period to provide an additional 37.5 hours of video described programming per quarter is reasonable.⁷⁷ We therefore will require the additional hours of described programming be provided by the four broadcast and five nonbroadcast networks covered by the rules in the calendar quarter beginning January 1, 2018.

V. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

20. As required by the Regulatory Flexibility Act of 1980 (“RFA”),⁷⁸ the Commission has prepared a Final Regulatory Flexibility Analysis (“FRFA”) relating to the Second Report and Order. The FRFA is set forth in Appendix B.

B. Final Paperwork Reduction Act of 1995 Analysis

21. This Report and Order does not contain information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), the Commission previously sought specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

⁷⁴ *NPRM*, 31 FCC Rcd at 2476, para. 30.

⁷⁵ *See* Zodrow Comments at 2; Grossman Comments at 1. *See also* ABVI Comments at 2 (arguing for all of these rules to go into effect within one month for currently included networks).

⁷⁶ *See, e.g.*, AT&T Comments at 1 (stating that July 1, 2018 should be the “effective date for the modified video description network and hours requirements” to coincide with the start of the next three-year cycle for covered non-broadcast networks); NAB Comments at 16 (suggesting a compliance period of two years from the effective date of the rules); NCTA Comments at 19 (requesting an 18-month compliance period). *See also* MPAA Comments at 14 (stating that “any significant changes in the video description rules will require additional time to implement”). Of note, the compliance timeframes cited in the aforementioned comments are based on the assumption that the Commission would adopt all of the proposals set forth in the *NPRM*, including the proposed expansion to new networks. Because the Commission has chosen to take an incremental approach, and this Order adopts only one of those proposals – an increased hours requirement for currently covered broadcast stations and MVPDs – we do not agree that an extended compliance period of one to two years is necessary.

⁷⁷ Because a given hour of described programming can be counted twice toward the requirements of the rules (once when initially aired, and once when rerun), the total number of new hours of described programming per year needed to comply with the expanded video description requirement is actually 75. *See supra* n. {37}.

⁷⁸ *See* 5 U.S.C. § 604.

C. Additional Information.

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

VI. ORDERING CLAUSES

23. **IT IS ORDERED** that, pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751, and the authority contained in Section 713 of the Communications Act of 1934, as amended, 47 U.S.C. § 613, this **SECOND REPORT AND ORDER** is **HEREBY ADOPTED**.

24. **IT IS FURTHER ORDERED** that Part 79 of the Commission's rules, 47 C.F.R. Part 79, is **AMENDED** as set forth in Appendix A, and such rule amendments shall be effective 30 days after the date of publication in the Federal Register.

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

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

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

Part 73 – 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, 330, 544a, 613, 617.

2. Amend § 79.3 (b)-(c) to read as follows:**§79.3 Video description of video programming.**

(b) ***

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

~~(2)~~ Beginning July 1, 2015, commercial television broadcast stations that are affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC), and that are licensed to a community located in the top 60 DMAs, as determined by The Nielsen Company as of January 1, 2015, must provide 50 hours of video description per calendar quarter, either during prime time or on children's programming, **and, beginning January 1, 2018, 37.5 additional hours of video description per calendar quarter between 6 A.M. and 11:59 P.M. local time**, on each programming stream on which they carry one of the top four commercial television broadcast networks. If a station in one of these markets becomes affiliated with one of these networks after July 1, 2015, it must begin compliance with these requirements no later than three months after the affiliation agreement is finalized;

(2) [Reserved]

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

(4) Multichannel video programming distributor (MVPD) systems that serve 50,000 or more subscribers must provide 50 hours of video description per calendar quarter during prime time or children's programming, **and, beginning January 1, 2018, 37.5 additional hours of video description per calendar quarter between 6 A.M. and 11:59 P.M. local time**, on each channel on which they carry one of the top five national nonbroadcast networks, as defined by an average of the national audience

share during prime time of nonbroadcast networks that reach 50 percent or more of MVPD households and have at least 50 hours per quarter of prime time programming that is not live or near-live or otherwise exempt under these rules. Initially, the top five networks are those determined by The Nielsen Company, for the time period October 2009-September 2010, and will update at three year intervals. The first update will be July 1, 2015, based on the ratings for the time period October 2013-September 2014; the second will be July 1, 2018, based on the ratings for the time period October 2016-September 2017; and so on; and

(5) [Reserved]

~~(5)~~(6) Multichannel video programming distributor (MVPD) systems of any size:

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

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

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

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

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

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

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA)⁷⁹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking* in this proceeding.⁸⁰ The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.⁸¹

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

2. This *Report and Order*, adopts the proposal to increase the amount of video described programming on each “included network” carried by a covered broadcast station or multichannel video programming distributor (MVPD), from 50 hours per calendar quarter to 87.5 hours per quarter.⁸² Covered broadcast stations and MVPDs must start providing the additional hours of described programming on “included networks” in the calendar quarter beginning on January 1, 2018. The *Report and Order* also provides more flexibility than exists under the current rules regarding when the additional hours of described programming may be aired. In particular, the additional 37.5 hours per quarter of described programming can be provided at any time between 6 A.M. and midnight. This update to our rules will help ensure that Americans who are blind or visually impaired can be connected, informed, and entertained by television.

B. Legal Basis

3. The authority for the action taken in this rulemaking is contained in the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751, and Section 713 of the Communications Act of 1934, as amended, 47 U.S.C. § 613.

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

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

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

5. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted.⁸³ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small government jurisdiction.”⁸⁴ In addition, the term “small business” has the same

⁷⁹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (CWAAA).

⁸⁰ *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43, Notice of Proposed Rulemaking, 31 FCC Rcd 2463 (2016) (*NPRM*).

⁸¹ See 5 U.S.C. § 604.

⁸² 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. *NPRM*, 31 FCC Rcd at 2464, n.4.

⁸³ 5 U.S.C. § 603(b)(3).

⁸⁴ *Id.* § 601(6).

meaning as the term “small business concern” under the Small Business Act.⁸⁵ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁸⁶

6. *Television Broadcasting.* This economic census category “comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.”⁸⁷ The SBA has created the following small business size standard for Television Broadcasting firms: those having \$14 million or less in annual receipts.⁸⁸ The Commission has estimated the number of licensed commercial television stations to be 1,390.⁸⁹ In addition, according to Commission staff review of the BIA Advisory Services, LLC’s *Media Access Pro Television Database* on March 28, 2012, about 950 of an estimated 1,300 commercial television stations (or approximately 73 percent) had revenues of \$14 million or less.⁹⁰ We therefore estimate that the majority of commercial television broadcasters are small entities.

7. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included.⁹¹ 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. 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 does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

8. There are also 2,344 LPTV stations, including Class A stations, and 3689 TV translator stations.⁹² Given the nature of these services, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

⁸⁵ *Id.* § 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).

⁸⁶ 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.

⁸⁷ U.S. Census Bureau, *2012 NAICS Definitions: 515120 Television Broadcasting*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515120&search=2012> <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515120&search=2012> (last visited Mar. 6, 2014). U.S. Census Bureau, *2012 NAICS Definitions: 515120 Television Broadcasting*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515120&search=2012> <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515120&search=2012> (last visited Mar. 6, 2014).

⁸⁸ 13 CFR § 121.201 (NAICS code 515120) (updated for inflation in 2010).

⁸⁹ See FCC News Release, Broadcast Station Totals as of March 31, 2015 (rel. Apr. 8, 2015).

⁹⁰ We recognize that BIA’s estimate differs slightly from the FCC total given the information provided above.

⁹¹ “[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 the power to control both.” 13 CFR § 121.103(a)(1).

⁹² See FCC News Release, Broadcast Station Totals as of March 31, 2015 (rel. Apr. 8, 2015)

9. *Wired Telecommunications Carriers.* The North American Industry Classification System (“NAICS”) defines “Wired Telecommunications Carriers” 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. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”⁹³ The SBA has developed a small business size standard for wireline firms for the broad economic census category of “Wired Telecommunications Carriers.” Under this category, a wireline business is small if it has 1,500 or fewer employees.⁹⁴ Census data for 2007 shows that there were 3,188 firms that operated for the entire year.⁹⁵ Of this total, 3,144 firms had fewer than 1,000 employees, and 44 firms had 1,000 or more employees.⁹⁶ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

10. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which category is defined above.⁹⁷ The SBA has developed a small business size standard for this category, which is: All such businesses having 1,500 or fewer employees.⁹⁸ Census data for 2007 shows that there were 3,188 firms that operated for the entire year.⁹⁹ Of this total, 3,144 firms had fewer than 1,000 employees, and 44 firms had 1,000 or more employees.¹⁰⁰ Therefore, under this size standard, we estimate that the

⁹³ U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. Examples of this category are: broadband Internet service providers (e.g., cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television (“CCTV”) services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (“DTH”) services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (“MMDS”).

⁹⁴ 13 CFR § 121.201; NAICS code 517110.

⁹⁵ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ5; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml><http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁹⁶ *Id.* With respect to the latter 44 firms, there is no data available that shows how many operated with more than 1,500 employees.

⁹⁷ See also U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch><http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁹⁸ 13 CFR § 121.201; NAICS code 517110.

⁹⁹ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ5; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml><http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

¹⁰⁰ *Id.* With respect to the latter 44 firms, there is no data available that shows how many operated with more than 1,500 employees.

majority of businesses can be considered small entities.

11. *Cable Companies and Systems.* The Commission has 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.¹⁰¹ Industry data shows that there are currently 660 cable operators.¹⁰² Of this total, all but ten cable operators nationwide are small under this size standard.¹⁰³ In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers.¹⁰⁴ Current Commission records show 4,629 cable systems nationwide.¹⁰⁵ Of this total, 4,057 cable systems have less than 20,000 subscribers, and 572 systems have 20,000 or more subscribers, based on the same records. Thus, under this standard, we estimate that most cable systems are small entities.

12. *Cable System Operators (Telecom Act Standard).* 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."¹⁰⁶ There are approximately 54 million cable video subscribers in the United States today.¹⁰⁷ Accordingly, an operator serving fewer than 540,000 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.¹⁰⁸ Based on available data, we find that all but ten incumbent cable operators are small entities under this size standard.¹⁰⁹ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual

¹⁰¹ 47 CFR § 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 Cable Television Consumer Protection And Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, MM Docket No. 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408, para. 28 (1995).

¹⁰² NCTA, Industry Data, Number of Cable Operators and Systems, <http://www.ncta.com/Statistics.aspx> (visited Oct. 13, 2014). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505-06, para. 24 (2013) ("15th Annual Competition Report").

¹⁰³ See SNL Kagan, "Top Cable MSOs – 12/12 Q"; available at <http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2012Q4&sortcol=subscribersbasic&sortorder=desc> <http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2012Q4&sortcol=subscribersbasic&sortorder=desc>.

¹⁰⁴ 47 CFR § 76.901(c).

¹⁰⁵ The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on October 10, 2014. A cable system is a physical system integrated to a principal headend.

¹⁰⁶ 47 U.S.C. § 543(m)(2); see 47 CFR § 76.901(f) & nn.1-3.

¹⁰⁷ See NCTA, Industry Data, Cable's Customer Base, <http://www.ncta.com/industry-data> (visited Oct. 13, 2014).

¹⁰⁸ 47 CFR § 76.901(f); see *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

¹⁰⁹ See NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), <http://www.ncta.com/industry-data> (visited Aug. 30, 2013).

revenues exceed \$250 million.¹¹⁰ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

13. *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,¹¹¹ which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.¹¹² Census data for 2007 shows that there were 3,188 firms that operated for that entire year.¹¹³ Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.¹¹⁴ Therefore, under this size standard, the majority of such businesses can be considered small entities. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled “Cable and Other Program Distribution.” As of 2002, the SBA defined a small Cable and Other Program Distribution provider as one with \$12.5 million or less in annual receipts.¹¹⁵ Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.¹¹⁶ Each currently offers subscription services. DIRECTV and DISH Network 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 under the superseded SBA size standard would have the financial wherewithal to become a DBS service provider.

¹¹⁰ 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 CFR § 76.901(f).

¹¹¹ *See* 13 CFR § 121.201, 2012 NAICS code 517110. This category of Wired Telecommunications Carriers 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. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.” (*Emphasis added to text relevant to satellite services.*) U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers,” at [http://www.census.gov/cgi-bin/sssd/naics/naicsrch](http://www.census.gov/cgi-bin/sssd/naics/naicsrchhttp://www.census.gov/cgi-bin/sssd/naics/naicsrch).

¹¹² 13 CFR § 121.201; 2012 NAICS code 517110.

¹¹³ U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ5; available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

¹¹⁴ *Id.*

¹¹⁵ *See* 13 CFR § 121.201, NAICS code 517510 (2002).

¹¹⁶ *See 15th Annual Competition Report*, 28 FCC Rcd at 10507, para. 27. As of June 2012, DIRECTV is the largest DBS operator and the second largest MVPD in the United States, serving approximately 19.9 million subscribers. DISH Network is the second largest DBS operator and the third largest MVPD, serving approximately 14.1 million subscribers. *Id.* at 10507, 10546, paras. 27, 110-11.

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

14. In this section, we describe the reporting, recordkeeping, and other compliance requirements adopted in the *Report and Order* and consider whether small entities are affected disproportionately by these requirements.

15. *Reporting Requirements.* The *Report and Order* does not adopt reporting requirements.

16. *Recordkeeping Requirements.* The *Report and Order* does not adopt recordkeeping requirements.

17. *Other Compliance Requirements.* The *Report and Order* does adopt other compliance requirements. Specifically, the new rules require each covered broadcast station and MVPD, on each stream or channel on which it carries an “included network,” to provide 87.5 hours of described programming, per quarter.¹¹⁷ Covered broadcast stations and MVPDs must start providing the additional hours of described programming on “included networks” in the calendar quarter beginning on January 1, 2018. Currently, the Commission’s video description rules require commercial television broadcast stations that are affiliated with ABC, CBS, Fox, or NBC and are located in the top 60 television markets to provide 50 hours per calendar quarter of video described prime time or children’s programming.¹¹⁸ In addition, MVPD systems that serve 50,000 or more subscribers must provide 50 hours of video description per calendar quarter during prime time or children’s programming on each of the top five national nonbroadcast networks that they carry on those systems.¹¹⁹ We do not believe that this compliance requirement will disproportionately affect small entities, but we have described ways in which the Commission’s rules will minimize the impact on such entities (see discussion below in Section F of this FRFA).

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

18. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹²⁰

19. The obligation to provide 87.5 hours of video described programming per quarter applies to commercial television broadcast stations that are affiliated with ABC, CBS, Fox, or NBC and are located in the top 60 television markets, as well as MVPD systems that serve 50,000 or more subscribers. Thus, the rules adopted in this *Second Report and Order* may have an economic impact on small entities. In formulating the final rules, however, the Commission has considered methods to minimize the economic impact on small entities. In particular, the *Report and Order* provides more flexibility than exists under the current rules regarding when the additional hours of described programming may be aired

¹¹⁷ 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. *NPRM*, 31 FCC Rcd at 2464, n.4.

¹¹⁸ 47 CFR § 79.3(b)(1)-(2).

¹¹⁹ *Id.* § 79.3(b)(4). The nonbroadcast networks currently subject to these video description requirements are USA, TNT, TBS, History, and Disney Channel.

¹²⁰ 5 U.S.C. § 603(c)(1) – (c)(4).

to reduce any potential burden that covered entities may encounter in scheduling video described programming. The new rule allows covered broadcast stations and MVPDs to provide the additional 37.5 hours per quarter of described programming at any time between 6 A.M. and midnight. The *Report and Order* also emphasizes that waiver requests may be filed if our requirements are infeasible or prove to be unduly burdensome under particular circumstances. This process will allow the Commission to address the impact of the rules on individual entities, including smaller entities, on a case-by-case basis and to modify the application of the rules to accommodate individual circumstances, which can reduce the costs of compliance for these entities.

20. Overall, we believe we have appropriately considered both the interests of individuals with disabilities and the interests of the entities who will be subject to the rules, including those that are smaller entities, consistent with Congress' goal to "update the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming."¹²¹

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

21. None.

H. Report to Congress

22. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.¹²² In addition, the Commission will send a copy of the *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The *Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register.¹²³

¹²¹ H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 19 (2010); S. Rep. No. 111-386, 111th Cong., 2d Sess. at 1 (2010).

¹²² See 5 U.S.C. § 801(a)(1)(A).

¹²³ See 5 U.S.C. § 604(b).