

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

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

NOTICE OF PROPOSED RULEMAKING

Adopted: March 2, 2011
2011

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By the Commission:

I. INTRODUCTION

1. In compliance with the recently enacted Twenty-First Century Communications and Video Accessibility Act of 2010 (the “Communications and Video Accessibility Act” or “CVAA”),¹ this *Notice of Proposed Rulemaking* proposes and seeks comment on reinstatement of the video description rules adopted by the Commission in 2000.² “Video description,” which is the insertion of audio narrated descriptions of a television program's key visual elements into natural pauses in the program's dialogue,³ makes video programming more accessible to individuals who are blind or visually impaired. The United States Court of Appeals for the District of Columbia Circuit vacated the Commission's video description rules due to insufficient authority soon after their initial adoption.⁴ The CVAA now directs the Commission to reinstate those rules with certain modifications.⁵ We anticipate that the revised and reinstated rules will afford better access to television programs for individuals who are blind or visually impaired,

¹ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010).

² The CVAA directs us to “reinstate [our] video description regulations” with certain modifications. CVAA §202(a), Pub L. No. 111-260, 124 Stat. 2751(2010) (to be codified at 47 U.S.C. § 613). The regulations were promulgated in *Implementation of Video Description of Video Programming*, MM Docket No. 99-339, Report and Order, 15 FCC Rcd 15230 (2000) (“*2000 Report and Order*”), recon. granted in part and denied in part, 16 FCC Rcd 1251 (2001) (“*Recon*”) (attached at Appendix C) and were codified at 47 C.F.R. § 79.3.

³ CVAA at Title II, sec. 202(a), § 713(h)(1). Video description is sometimes referred to as “audio description.”

⁴ *Motion Picture Ass'n of America, Inc. v. Federal Communications Comm.*, 309 F.3d 796 (D.C. Cir. 2002).

⁵ CVAA at Title II, sec. 202(a), § 713(f)(1-2).

enabling millions more Americans to enjoy the benefits of television service and participate more fully in the cultural and civic life of the nation.

2. The Commission's rules required large-market broadcast affiliates of the top four national networks and multichannel video programming distributors ("MVPDs") with more than 50,000 subscribers to provide video description.⁶ Covered broadcasters were required to provide 50 hours of video-described prime time or children's programming, per quarter, and covered MVPDs were required to provide the same number of hours on each of the five most popular nonbroadcast networks.⁷ The rules also required that all network-affiliated broadcasters (commercial or non-commercial) and all MVPDs pass through any video description provided with programming they carried, to the extent that they are technically capable of doing so.⁸ As required under the CVAA, we propose to reinstate these rules, with the modifications required by the law, on October 8, 2011, and to require broadcast stations and MVPDs subject to our rules to begin providing the requisite number of hours of programming with video description beginning in the first quarter of 2012.

3. We seek comment on the modifications to the rules required by the CVAA. Notably, these modifications include the exemption of "live or near-live" programming from the rules. We seek comment on the definition of "near-live," and propose that programs produced within 24 hours of their first airing be considered "near-live" under the rules. We also seek information about the number of hours of non-exempt programming provided by the top nonbroadcast programming networks to enable us to identify which networks will be subject to our rules.

II. BACKGROUND

4. In 1996, at Congress's direction, the Commission issued a report on the use of video description in video programming.⁹ In 2000, the Commission adopted rules requiring certain broadcasters and MVPDs to carry programming with video description.¹⁰ The Commission found that the record demonstrated the importance of video description, stating, for example, that

[t]he comments of the American Council of the Blind contained more than 250 e-mails and letters of support for rules, which explained how video description enhances the understanding of blind and low vision people of television programming and cultural behavior such as body language, and gives them a

⁶ 47 C.F.R. § 79.3(b).

⁷ *Id.* at § 79.3(b)(1), (3).

⁸ *Id.* at § 79.3(b)(2), (4).

⁹ 47 U.S.C. § 613 (this section, Video Programming Accessibility, was added to the Communications Act by Section 305 of the Telecommunications Act of 1996); *see also Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility*, MM Docket No. 95-176, Report, 11 FCC Rcd 19214 (1996) ("Report"). The Commission had initiated the inquiry in 1995, before enactment of the 1996 Act. *Closed Captioning and Video Description of Video Programming*, MM Docket No. 95-176, Notice of Inquiry, 11 FCC Rcd 4912 (1995).

¹⁰ 2000 Report and Order, *supra* note 2.

feeling of independence. One commenter said that ... “[w]hether entertaining, educational or cultural, television has become an integral part of American life. I, and other blind and visually impaired people, have always participated in television viewing, but with [video description], we are finally participating equally.” Helen Harris, founder of a description service, says that “[v]ideo description effectively bridges the gap between the blind and mainstream society by creating a shared experience which leaves the blind with an increased sense of normalcy in their lives.”¹¹

Five months after the rules went into effect, they were vacated by the United States Court of Appeals for the District of Columbia Circuit on the ground that the Commission lacked sufficient authority to promulgate video description rules.¹² Nonetheless, some broadcast and nonbroadcast networks have voluntarily continued to provide this important service; for instance, CBS, Fox, PBS, TCM, and TNT all provide description of selected programming. We commend these networks and all others that are voluntarily offering described programming, for recognizing the importance of video description to the members of their audiences who are blind or visually impaired.

5. On October 8, 2010, President Obama signed the CVAA,¹³ which increases the access of persons with disabilities to modern communications services and technologies and gives the Commission express authority to adopt video description rules. The statute directs the Commission, as an initial step, to reinstate the previously adopted video description rules, with certain modifications.¹⁴ To fulfill our statutory mandate, we begin the process with requests for comment in this Notice of Proposed Rulemaking. The CVAA imposes other requirements with respect to video description. For example, we are required to submit a report within two years of phasing in the reinstated rules, discussing the status, benefits, and costs of video description on television and Internet-provided video programming.¹⁵ We must file a second report, nine years after the enactment of the CVAA, that provides a detailed review of the video description market and the potential need for expansion of the description mandates.¹⁶ The CVAA also gives us authority to expand the video description hour requirements and the number of markets in which broadcasters are required to provide description if we determine that the benefits of televised description outweigh its costs.¹⁷ We will address these additional requirements and potential expansions in a separate proceeding.

¹¹ 2000 Report and Order, *supra* note 2, at ¶ 4 (internal citations omitted).

¹² *Motion Picture Ass’n of America, Inc. v. Federal Communications Comm.*, 309 F.3d 796 (D.C. Cir. 2002).

¹³ Communications and Video Accessibility Act, *supra* note 1.

¹⁴ *Id.* at Title II, sec. 202(a), § 713(f)(1) (requiring reinstatement of the rules one year after the date of enactment of the CVAA).

¹⁵ *Id.* at § 713(f)(3).

¹⁶ *Id.* at § 713(f)(4)(C)(iii).

¹⁷ *Id.* at § 713(f)(4)(A), (B), (C)(i), (iv).

III. DISCUSSION

A. Reinstated Rules

6. Section 713(f)(1) of the Communications Act, as added by the CVAA, states that the Commission shall, after a rulemaking, reinstate its video description regulations contained in the Implementation of Video Description of Video Programming Report and Order (15 F.C.C.R. 15,230 (2000)), recon. granted in part and denied in part, (16 F.C.C.R. 1251 (2001)), modified as provided in paragraph (2).¹⁸

Consistent with Congress' directive, we will reinstate the Commission's 2000 rules on October 8, 2011 with the modifications required by the CVAA.¹⁹ The most significant elements of those rules are:

- Affiliates of the top four national networks²⁰ located in the top 25 television markets²¹ must provide 50 hours per calendar quarter of video-described prime time²² and/or children's programming.²³ MVPDs with 50,000 or more subscribers must provide 50 hours per calendar quarter of video-described prime time and/or children's programming on each of the top five non-broadcast networks²⁴ that they carry.
- To count toward the requirement, the programming²⁵ must not have been previously aired with video description, on that particular MVPD channel or broadcast station, more than once.²⁶

¹⁸ *Id.* at § 713(f)(1). See also *id.* at § 713(f)(2) ("Such regulations shall be modified only as follows...").

¹⁹ See generally *2000 Report and Order* and *Recon.*, *supra* note 2. See also Appendix C. We incorporate the discussion of these rules in the *2000 Report and Order* and *Reconsideration Order* into the record of this proceeding.

²⁰ For the purpose of the video description rules, these are ABC, CBS, Fox, and NBC. 47 C.F.R. § 79.3(b)(1).

²¹ Markets are ranked by Nielsen based on their total number of television households. TVB Market Profiles at http://www.tvb.org/market_profiles/131627.

²² For this purpose, prime time means 8-11 pm Monday through Saturday, and 7-11 pm on Sunday, except that these times are an hour earlier in the central time zone, and stations in the mountain time zone may choose which "prime time" period to adopt for the purpose of these rules. 47 C.F.R. § 79.3(a)(6).

²³ We propose to define this as programming directed at children 16 years of age and younger. See *infra* ¶ 32 and Appendix A.

²⁴ Our ranking of the Top 5 will be based on Nielsen national prime time audience share, the number of subscribers reached, and amount of non-exempt programming. See *infra* ¶ 12.

²⁵ The CVAA defines "video programming" in the video description context as "programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media (as defined in section 3)." CVAA at Title II, sec. 202(a), § 713(h)(2). Section 3 of the Communications Act, as amended in the CVAA, defines consumer-generated media as "content created and made available by consumers to online websites and services on the Internet, including video, audio, and multimedia content." CVAA at Title I, sec. 101(1), § 3 (54). The proposed rules adopt the CVAA definition of video programming. See *infra* Appendix A.

- Any broadcast station, regardless of its market size, affiliated or otherwise associated with any television network, must “pass through” video description when the network provides it and the station has the technical capability necessary to do so.²⁷ Similarly, any MVPD, regardless of its number of subscribers, must “pass through” video description when a broadcast station or nonbroadcast network provides it, if it has the technical capability necessary to do so on the channel on which it distributes the broadcast station or nonbroadcast network programming.²⁸ Any programming aired with description must always include description if re-aired on the same station or MVPD channel.²⁹
- Complaints alleging a failure to comply with these rules may be filed with the Commission by any viewer, and the Commission will act to resolve such complaints in consultation with the video programming distributor.³⁰

B. Identifying Stations Required to Provide Video Description

7. As discussed above, under the reinstated rules, certain broadcast stations and MVPDs will have an obligation to provide video description of some of the programming they provide. Specifically, affiliates of ABC, CBS, Fox, and NBC that are located in the 25 television markets with the largest number of television households must provide 50 hours per calendar quarter of video-described programming during prime time, or at any time if it is children’s programming. To count toward this 50-hour requirement, video-described programming must be airing either the first or second time on the station; that is, a video described program may be counted toward the 50 hours when it is originally aired and once more when it is re-run. Although we anticipate that much of the programming aired with video description will be newly produced, we propose that the reinstated rules permit stations to count any program that they are airing for the first or second time with video description after the reinstated rules become effective, even if the program has previously been aired on that station. Similarly, a station may count programming toward its 50 hour obligation even if that programming has aired elsewhere with description, so long as it is airing with description for the first or second time on that station. The rules are identical for MVPDs with 50,000 or more subscribers, except that they apply to the programming of each of the top five national non-broadcast networks³¹ carried by the MVPDs.

8. Although the CVAA requires reinstatement of the rules largely as adopted by the Commission in 2000, the Commission does have some discretion in determining the stations,

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²⁶ 47 C.F.R. § 79.3(c)(2); *see also* Recon, *supra* note 3, at fn. 74 (“Broadcast stations and MVPDs can count a repeat of a previously aired program in the same quarter or in a later quarter, but only once altogether”).

²⁷ 47 C.F.R. § 79.3(b)(2); *see infra* ¶¶ 14-16.

²⁸ 47 C.F.R. § 79.3(b)(4); *see infra* ¶¶ 14-16.

²⁹ 47 C.F.R. § 79.3(c)(3); *see also* Recon, *supra* note 2, at ¶ 27 and fn. 83.

³⁰ 47 C.F.R. § 79.3(e).

³¹ Our ranking of the Top 5 will be based on Nielsen national prime time audience share, the number of subscribers reached, and amount of non-exempt programming. *See infra* ¶ 12.

MVPDs, and networks to which they apply. We therefore seek comment on these issues, as discussed below.

1. Broadcast Stations

9. As established in the 2000 rules, the broadcast stations subject to the requirement to provide video description³² were those “[c]ommercial television broadcast stations that [were] affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC), as of September 30, 2000, and that [were] licensed to a community located in the top 25 DMAs, as determined by Nielsen Media Research, Inc. for the year 2000.”³³ We propose to reinstate the rules insofar as they designate ABC, CBS, Fox, and NBC as the broadcast networks affected.³⁴ Although the original rule refers only to “commercial television broadcast stations,” the *2000 Report and Order* is unclear about whether this requirement was intended to be limited to full-power commercial stations, or to apply to commercial low power stations as well. We seek comment on the appropriate scope of the requirement to provide description. The CVAA directs us to “update the list of the top 25 designated market areas.”³⁵ We propose to apply the rules to the Top 25 markets as determined by Nielsen as of January 1, 2011 (*i.e.*, the 2010-2011 DMA rankings), and, within those markets, to require stations affiliated with ABC, CBS, Fox, or NBC to provide video description, regardless of when the affiliation begins. We seek comment on this proposal.

10. The relative size of markets often changes over time. We want to ensure that the rules apply to the top 25 markets, as required by the CVAA. At the same time, we seek to ensure that regulatees and the public at large have adequate advance notice regarding which broadcast stations will be subject to the requirement to provide video description, and to avoid undue disruption for audiences who come to rely upon video described programming. Further, we recognize that a significant amount of video described programming (potentially all the programming required under the rules) will be provided by national network programmers and passed through by local stations, even in the top 25 markets. Because of the “pass-through” obligations of network stations outside the top 25 markets, discussed below, there may be little to no difference in the amount of video described programming available from affiliates of the top 4 networks in larger and smaller markets.³⁶ In light of these considerations, we seek comment on whether we should reconsider the ranking of the top 25 markets at certain intervals to reflect current market conditions better and, if so, what those intervals should be.

11. The CVAA mandates that the Commission extend the video description requirements to the top 60 markets after filing a report to Congress on the state of the video description market, as discussed above,³⁷ and no later than six years after the enactment date of

³² 47 C.F.R. § 79.3(b)(1), (3) (requirement to provide description).

³³ 47 C.F.R. § 79.3(b)(1). Nielsen Media Research, Inc. (“Nielsen”) is now known as The Nielsen Company.

³⁴ *Id.*

³⁵ CVAA, Title II, sec. 202(a), § 713(f)(2)(B).

³⁶ *See infra* ¶ 14.

³⁷ *Id.* at § 713(f)(4)(C)(i-ii). *See supra* ¶ 5 (we anticipate that the Report will be submitted to Congress no later than January 1, 2014).

the CVAA (*i.e.*, October 8, 2016). If, as we propose in this Notice, the first phase is complete on January 1, 2012, the Report will be submitted to Congress no later than January 1, 2014. Should we identify now the date to be used to determine the top 60 markets and a compliance deadline for stations in markets 26-60, or should we set those dates following the required report to Congress?

2. Top Five National Nonbroadcast Networks

12. In order to implement the requirement that MVPDs provide video description, we must also update the “top 5 national nonbroadcast networks that have at least 50 hours per quarter of prime time programming that is not exempt.”³⁸ The prior rules determined the top nonbroadcast networks using “an average of the national audience share during prime time of nonbroadcast networks, as determined by Nielsen Media Research, Inc., for the time period October 1999–September 2000, that reach 50 percent or more of MVPD households.”³⁹ Those rules did not contemplate that any programming would be exempt, which made identification of those networks more straightforward than under the new statutory requirements.⁴⁰ We propose to update the definition’s time period to October 2009 – September 2010,⁴¹ and to explicitly exclude from the top five any non-broadcast network that does not provide, on average, at least 50 hours per quarter of prime time non-exempt programming, *i.e.*, programming that is not live or near-live.⁴² We seek comment regarding this proposal, and particularly seek detailed information from any network that believes it should be excluded from the top five covered networks due to an insufficient amount of non-exempt programming. We note that Nielsen treats some nonbroadcast “channels” as more than one “network” for ratings purposes; for example, Nickelodeon/Nick at Nite and Cartoon Network/Adult Swim.⁴³ We seek comment as to how we should take this into account when determining which networks are subject to the requirement to provide video description for 50 hours per quarter of prime time or children’s programming. Any network that believes it should be excluded from the top five due to an insufficient amount of nonexempt programming should provide notice in the Record before the close of the Comment period. The network’s Comments should be accompanied by an affidavit stating how many hours of nonexempt programming it typically airs per quarter (including how many hours of live programming and how many hours of near-live programming, as we propose

³⁸ CVAA, Title II, sec. 202(a), § 713(f)(2)(B). “Exempt” programming includes “live or near-live programming.” *See infra* ¶ 21.

³⁹ 47 C.F.R. § 79.3(b)(3).

⁴⁰ *See infra* ¶ 20, *et seq.*

⁴¹ These dates cover the 2009-2010 television season, which will be the most recent full television season from which ratings will have been calculated and be available when the rules are adopted.

⁴² *See infra* ¶ 21.

⁴³ According to staff analysis of Nielsen data for the 2009-2010 television season, the top 5 national nonbroadcast networks, based on an average of the national audience share during prime time of nonbroadcast networks, are USA, the Disney Channel, ESPN, TNT, and Nickelodeon’s Nick at Nite. FCC Staff Analysis based on data provided by the Nielsen Company. Additional networks, some of which are tied for audience share during the 2009-2010 television season, which have the potential to be covered under the statute if any of the top 5 do not provide the requisite hours of non-exempt programming, include Fox News, TBS, A&E, History, the Cartoon Network’s Adult Swim, the Family Channel, and HGTV. *Id.*

to define those terms), as well as supporting documentation such as program schedules. Parties that wish to challenge any such claims may do so in their Reply Comments. If the Media Bureau determines that the information submitted is insufficient to determine whether a particular network has at least 50 hours per quarter of non-exempt prime time programming, we authorize the Bureau to seek additional information from the network or networks, consistent with the requirements of the Paperwork Reduction Act.⁴⁴

13. Ratings of nonbroadcast networks often change over time. We want to ensure that the rules apply to the top five national nonbroadcast networks, as required by the CVAA. At the same time, we also want to ensure that regulatees and the public at large have adequate advance notice regarding which networks will be subject to the rules, and to avoid undue disruption for audiences who will come to rely upon video described programming. In light of these considerations, we seek comment on whether we should reconsider the ranking of the top five nonbroadcast networks at certain intervals to better reflect current market conditions and, if so, what those intervals should be.

C. Pass-Through of Video Described Programming

14. As noted above, under our previous video description rule, broadcasters affiliated with any network and all MVPDs were required to pass through any video description that they received from a broadcast or cable network or, in the case of MVPDs, from a broadcast station they carried, whenever they had the technical capability on the relevant channel to pass through the video description, unless they were using the technology necessary to provide such video description for another purpose related to the programming that would conflict with providing the video description.⁴⁵ We propose to reinstate this rule without revision. Although the original rule refers to all “television broadcast stations,” the *2000 Report and Order* is unclear about whether this requirement was intended to include low power stations. We seek comment on the appropriate scope of the obligation to pass through description. This obligation is distinct from the requirement to provide video description that we propose to impose on certain broadcasters and MVPDs. First, it applies to all MVPDs and network-affiliated broadcast stations (including non-commercial stations), rather than a subset of large-market entities.⁴⁶ Second, broadcast stations and MVPDs with the obligation to provide 50 hours of description must continue to pass through any video description that they receive even after they have provided the 50 required hours of description.⁴⁷

⁴⁴ See *infra* note 56.

⁴⁵ 47 C.F.R. § 79.3(b)(2), (4). We also note that the must carry provision of the Communications Act requires cable operators to carry “the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers.” 47 U.S.C. § 534(b)(3), 47 C.F.R. § 76.62(e), (f) (cable); 47 U.S.C. § 338(j), 47 C.F.R. § 76.66(j) (DBS). See also *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission’s Rules and Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, ¶¶ 60-61 (2001).

⁴⁶ *2000 Report and Order*, *supra* note 2, at ¶ 30.

⁴⁷ *Recon*, *supra* note 2, at ¶ 14 (The National Association of Broadcasters recognized that entities that had met their 50 hour obligation were still required to pass description through to viewers). Broadcast stations and MVPDs that (continued....)

15. In the *2000 Report and Order*, the Commission required any station or MVPD with the “technical capability” to do so to pass through video description.⁴⁸ We said that we would “consider broadcast stations and MVPDs to have the technical capability necessary to support video description if they have virtually all necessary equipment and infrastructure to do so, except for items that would be of minimal cost.”⁴⁹ On reconsideration, the Commission adopted an exception to this requirement. When the secondary audio program (“SAP”) equipment and channel was being used to provide another program-related service, a station or MVPD did not have to stop providing that service in order to pass through the video description. This was based on the fact that the SAP channel could not be used to provide two services simultaneously.⁵⁰ In the analog world, the SAP channel gave an entity the technical capability to pass through video description, but the inherent limitations of the technology meant that the entity could not provide video description simultaneously with another secondary audio track. Digital transmission, however, enables broadcasters and MVPDs to provide numerous audio channels for any given video stream. Unlike with SAP, therefore, digital technology allows simultaneous transmission of a variety of program-related secondary audio tracks.⁵¹ Given this flexibility, is it necessary or appropriate to apply the “other program-related service” exception to digital transmissions?

16. Transmission of multiple audio tracks, even digitally, may require the use of additional equipment by broadcasters and MVPDs. We seek comment on what is needed for broadcast stations and MVPDs to have the “technical capability necessary” to pass through video description of digital programming, the extent to which affected entities already have any necessary equipment or have incentives to upgrade to this equipment for other purposes, and the cost of such equipment and any other necessary upgrades. Specifically, we seek comment on the costs of providing additional audio tracks once an entity is technically capable of providing a secondary digital audio track. What standards should we use to take these costs into account when determining whether a distributor has “the technical capability necessary to pass through the video description”?

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pass through video-described programming from a network can count that programming toward their 50 hour obligation, so long as it is either aired during prime time or is children’s programming, and has not been previously aired more than once since the adoption of our rules. We note that, historically, most video described programming has been provided by the broadcast and non-broadcast networks to the broadcast stations and MVPDs, which pass it through and make it available to consumers.

⁴⁸ *2000 Report and Order*, *supra* note 2, at ¶ 30.

⁴⁹ *Id.*

⁵⁰ *Id.* at ¶ 15. For the same reason, the Commission also adopted this “other program-related service” exception in subsections (c)(3) and (4) of the video description rules (subsequent airings of described programming). 47 C.F.R. §§ 79.3(c)(3), (4).

⁵¹ See MPEG Compression Standard ISO/IEC 13818-1; Advanced Television Systems Committee A/53, A/52 Standards (digital video signals can have an enormous number of alternative audio tracks; although as a practical matter that number may be limited by the amount of bandwidth allocated to the programming stream, digital programming can technically include more than three audio tracks).

D. Phase-In

17. The CVAA requires us to reinstate the revised video description rules “on the day that is 1 year after the date of enactment,”⁵² to provide “an appropriate phased schedule of deadlines for compliance,”⁵³ and to determine “the beginning calendar quarter for which compliance shall be calculated.”⁵⁴ We propose to adopt and publish modified rules before October 8, 2011 (the date one year after enactment) that will be effective thirty days after publication,⁵⁵ except for those requirements subject to Office of Management and Budget (OMB)⁵⁶ approval or that are phased-in as described below. We seek comment on this proposed timeline.

18. We propose that on January 1, 2012, 85 days after the reinstatement of the rules,⁵⁷ affiliates of the top four networks located in the top 25 markets begin providing 50 hours per calendar quarter of video-described prime time and/or children’s programming. Similarly, we propose that on January 1, 2012,⁵⁸ MVPDs with 50,000 or more subscribers begin providing 50 hours per calendar quarter of video-described prime time and/or children’s programming on each of the top five non-broadcast networks that they carry. We propose that, should any MVPD not serving at least 50,000 subscribers on the effective date of the rules begin to do so at a later date, it must provide video description on the top five non-broadcast networks, in the same manner as MVPDs currently serving 50,000 or more subscribers, beginning no more than three months after reaching 50,000 subscribers. Given that an MVPD should be aware in advance that it is approaching the 50,000 subscriber threshold, we believe three months is adequate time to ensure that it will be able to comply with this requirement. We further propose that compliance with the “50-described hours” requirement be calculated for these broadcasters and MVPDs beginning in the first calendar quarter of 2012.⁵⁹ We also propose that broadcasters and MVPDs comply with the pass-through requirement⁶⁰ commencing January 1, 2012.

19. We seek comment on these phase-in proposals. Will this compliance schedule provide sufficient time for covered entities to begin providing and passing through video described programming? Given the limited number of hours of video description required at this stage, we do not expect any significant delay in compliance as a result of a need to negotiate with

⁵² CVAA, Title II, sec. 202(a), § 713(f)(1).

⁵³ *Id.* at § 713(f)(2)(F).

⁵⁴ *Id.* at § 713(f)(2)(B).

⁵⁵ The Administrative Procedure Act requires that “[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date,” with certain exceptions. 5 U.S.C. § 553(d).

⁵⁶ The Paperwork Reduction Act requires that any new regulation imposing a paperwork burden be reviewed and approved by OMB before it becomes effective. The Paperwork Reduction Act of 1995 (“PRA”), Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

⁵⁷ The effective date of rules requiring OMB approval may be later.

⁵⁸ The effective date of rules requiring OMB approval may be later.

⁵⁹ The first quarter of measured compliance with any rules requiring OMB approval may be later.

⁶⁰ *See supra* ¶¶ 14-16.

rights holders. We seek comment on this conclusion. We note that although the CVAA deferred certain implementation issues to the Commission, to a great extent the entities that will be subject to our reinstated rules have been aware of the pending requirements since at least the enactment of the CVAA on October 8, 2010.

E. Exemptions

20. The CVAA recognizes the unique difficulties of providing video description for programming that is produced live or shortly before it is first aired, i.e., programming that is “live or near-live.” As a result, the statute explicitly states that the regulations we adopt “shall not apply to live or near-live programming”, and directs us to take this exemption into consideration when determining whether a non-broadcast network is covered by the video description rules.⁶¹ The CVAA also gives the Commission authority to provide certain other categorical or individual exemptions, and we seek comment on whether and how such exemptions should be provided.

1. Live or Near-Live Programming

21. Section 713(f)(2)(E) of the Communications Act, as added by the CVAA, states that: “[t]he regulations shall not apply to live or near-live programming.”⁶² We believe that “live” programming is, self-evidently, programming aired substantially simultaneously with its performance. This programming is often non-scripted, and would include, for example, many sporting events and news programs.⁶³ We are, however, unaware of an accepted definition of “near-live programming.” Some television programs, even if not aired “live,” are filmed and produced just hours before they are first aired. In addition, we understand that some programs aired live on the East Coast are aired three hours later on the West Coast. By including “near-live” programming within the exemption, Congress apparently wished to exempt programs produced such a short time before airing that there is not sufficient time for the creation of video descriptions. We therefore seek comment on a definition of “near-live programming” that will ensure that programming is not covered by the reinstated rules unless there is ample time to create and insert video descriptions in the programming before it is aired. We propose that programming performed and recorded less than 24 hours prior to the time it is first aired be deemed “near-live,” and seek comment on this proposal. We seek comment on how long it takes to produce video descriptions, and request that those who prefer a shorter or longer window for near-live programming support their alternative proposals with information regarding the length of time needed to produce video descriptions. How should our rule address the situation where a program is substantially completed before the beginning of the “near-live” window, but edited during that window in ways which do not change the basic content? How commonly does this occur in the production of major network prime time programming? We note that we may modify our definition of “near-live programming” in the future as broadcasters, MVPDs, and programming producers gain experience with integrating video description into their production

⁶¹ CVAA, Title II, sec. 202(a), § 713(f)(2)(B), (E).

⁶² *Id.* at § 713(f)(2)(E).

⁶³ See, e.g., Merriam-Webster Dictionary *available at* <http://www.merriam-webster.com/dictionary/live> (“broadcast directly at the time of production”).

and transmission cycle and it becomes feasible to incorporate video descriptions closer to the time of transmission of the programming.

2. Other Exemptions

22. Section 713(f)(2)(C) of the Communications Act, as added by the CVAA, states that

[t]he regulations may permit a provider of video programming or a program owner to petition the Commission for an exemption from the requirements of [the video description provisions] upon a showing that the requirements contained in this section be[sic] economically burdensome.⁶⁴

We propose to reinstate the previously adopted process for requesting an exemption from our rules. We also propose to replace the term “undue burden” in the rules with “economically burdensome,” as described in the CVAA, and propose that we use the same factors as applied to the undue burden standard.⁶⁵ This will allow the video description rules to mirror the “economically burdensome” standard currently used in the closed captioning context.⁶⁶ We seek comment on this proposal.

23. The Commission previously determined in the closed captioning context that compliance would constitute an “undue burden” for an entity, therefore justifying an individual exemption from the rule, upon a showing that the captioning requirements would result in “significant difficulty or expense” for the petitioner.⁶⁷ What are the circumstances under which the video description rules might be, or might become, “economically burdensome” for covered entities? What are the necessary costs for broadcasters, MVPDs, and the producers of

⁶⁴ *Id.* at § 713(f)(2)(C). We note that Section 713(f)(2)(C) is expressed in permissive terms (e.g., “the regulations may permit”), rather than the mandatory language that appears in other subsections of the legislation. Compare 713(f)(2)(A) (“the regulations shall apply”). Accordingly, under subsection (C), the Commission may permit exemptions based on the ‘economically burdensome’ standard, but is not required to do so.

⁶⁵ In the closed captioning context, the Commission has previously found the standards to be quite “closely related.” *Closed Captioning and Video Description of Video Programming, et al*, MM Docket No. 95-176, Report and Order, 13 FCC Rcd 3272, ¶ 143 (1997); *but see* ¶ 168 (noting the paucity of useful legislative history).

⁶⁶ In the CVAA, Congress revised Section 713(d)(3) of the Communications Act, dealing with closed captioning exemptions, to remove the reference to the “undue burden” standard and replace it with a reference to the “economically burdensome” standard. CVAA, Title II, sec. 202(c). The Senate Commerce Committee report, in discussing this provision of the CVAA, states that the Committee “encourages the Commission, in its determination of ‘economically burdensome’ to use the factors listed in section 713(e).” S. Rep. 111-386, at 14 (2010). Section 713(e) of the Communications Act, which was not amended by the CVAA, lists the factors to be considered when determining if the closed captioning rules create an “undue burden” on a party (these factors are repeated in the Commission’s rules at 47 C.F.R. § 79.1(f)(2); *see infra* note 69). Thus, the Committee appears to consider the two standards to be interchangeable, at least in the closed captioning context.

⁶⁷ Commission rules explain that such exemptions may be granted for “a channel of video programming, a category or type of video programming, an individual video service, a specific video program or a video programming provider.” 47 C.F.R. § 79.1(f)(1). The factors to be taken into consideration when making an exemption determination under this section are: (1) the nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner. 49 C.F.R. § 79.1(f)(2). *See also* 47 U.S.C. 613(e) and *supra* note 68.

programming to begin providing 50 hours per calendar quarter of video described programming? How are these costs different in digital than in analog transmission? Specifically, are there any considerations unique to particular MVPD delivery technologies, such as DBS or IPTV, that might justify a partial exemption or delay?⁶⁸

24. What are the anticipated ongoing costs, per program or hour described? What, on average, is the total cost to produce a single program or hour of prime time programming on the major networks covered by the requirement to provide video description? Will this requirement add any ongoing costs other than the description itself? Comments from both the purchasers and producers of video description would be of great value in understanding these costs.

25. For those entities subject to the requirement to provide (and not merely pass through) video description, we find it unlikely that the modest requirement of 50 hours per quarter will be economically burdensome; as discussed above, in the first phase this requirement only applies to the top broadcast network affiliates in the biggest markets, MVPDs serving more than 50,000 subscribers, and the most popular nonbroadcast networks. Are there any particular concerns regarding the economic burden of pass-through obligations, which will apply to a much larger number of entities than the requirement to provide video description? We seek comment on these issues.

26. Section 713(f)(2)(D) of the Communications Act, as added by the CVAA, provides that

[t]he Commission may exempt from the regulations... a service, class of services, program, class of programs, equipment, or class of equipment for which the Commission has determined that the application of such regulations would be economically burdensome for the provider of such service, program, or equipment.⁶⁹

We are unaware of a need to exempt any such categories at this time, beyond the exemption for “live or near-live” programming discussed above. The Commission will be actively studying the impact of our video description rules over the next several years, as part of our continuing Congressional reporting obligations.⁷⁰ As a result, we anticipate that there will be ample opportunity to resolve any problems that impact an entire class of “service, program, or equipment” in future Orders in this proceeding. We seek comment on our proposal not to adopt new categorical exemptions, and on whether there are any classes of “service, program, or equipment” that should be so exempted.

⁶⁸ For the purposes of this proceeding, we consider Internet Protocol delivery only to the extent it is used by an MVPD. The Act directs the Commission to initiate a future inquiry about video description in video programming distributed via the Internet. CVAA, Title II, sec. 202(a), § 713(f)(3)(B).

⁶⁹ *Id.* at § 713(f)(2)(D).

⁷⁰ *Id.* at § 713(f)(3), (4)(C)(iii).

F. Digital Format

27. Section 713(f)(2)(A) of the Communications Act, as added by the CVAA, states that “[t]he regulations shall apply to video programming, as defined in subsection (h), insofar as such programming is transmitted for display on television in digital format.”⁷¹ When the video description rules were originally adopted in 2000, digital television was in its relative infancy, and those rules explicitly did not extend to digital transmission of programming.⁷² At the time, the Commission indicated that it expected to extend the rules to cover digital broadcasting “after there has been further experience with both digital broadcasting and video description.”⁷³ On June 12, 2009 full-power television broadcasters nationwide completed their transition to digital-only broadcasting,⁷⁴ and a number of digital broadcasters and digitally transmitted nonbroadcast networks have been providing video description to viewers for even longer.⁷⁵ We propose, therefore, to extend the reinstated rules to cover all video programming, including that transmitted for display on television in digital format. We seek comment on this proposal.

28. A separate issue, exclusive to digital broadcasting, is the ability of digital television broadcasters to transmit multiple streams of programming on a single channel. We propose to consider only programming on the primary programming stream when measuring a broadcast station’s compliance with the “50 described hours” requirement, unless the station carries a top-four national network on another stream. How should we apply the rules when a station is affiliated with more than one network? In situations in which a broadcast station carries another top-four network’s programming on a secondary stream, we propose to apply the rules in the same manner as if the network programming were carried by a separate station. We seek comment on this proposal. We also propose to impose the pass-through requirement, discussed above, on all network-provided programming carried on all of an affiliated station’s programming streams. This approach would ensure the availability of described programming to the widest possible audience.⁷⁶ We seek comment on these proposals.

G. Other Issues

29. *Quality Standards.* We seek comment on whether we should adopt quality standards for video description. Although some quality issues might be subjective (dealing with the content of the narration) and therefore difficult to enforce, others might be addressed in an objective standard. For example, the Commission could adopt a standard requiring that video

⁷¹ *Id.* at § 713(f)(2)(A). *See also id.* at § 713(h)(2) (“The term ‘video programming’ means programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media (as defined in section 3).”); *see also id.* at Title I, sec. 101, § 3(54) (“The term ‘consumer generated media’ means content created and made available by consumers to online websites and services on the Internet, including video, audio, and multimedia content.”).

⁷² *2000 Report and Order*, *supra* note 2, at ¶ 7; *Recon*, *supra* note 2, at ¶ 18.

⁷³ *Id.*

⁷⁴ Press Release, Federal Communications Commission, Full-Power TV Broadcasters Go All-Digital (June 13, 2009).

⁷⁵ *See supra* ¶ 4.

⁷⁶ In particular, this requirement would ensure that those who subscribe to an MVPD service that only carries the broadcast station’s primary stream would have access to described programming.

description not conflict with dialogue or other important audio in the program. Additionally, the Commission could require video description to be synchronous with the action it is describing. Is it necessary for the Commission to adopt these or other standards? If so, what standards would be necessary or appropriate? Does the Commission have authority to adopt such standards and could we do so consistent with the First Amendment? Commenters who support adoption of such quality standards should also propose either standards or existing sources that could serve as the basis for standards. Whether or not the Commission adopts mandatory standards, are there existing sources of such standards? Should the industry develop a list of best practices? We solicit input on what some of these practices might be.

30. *Program Selection.* For informational purposes, we also seek comment on how programs are likely to be chosen for description. Do entities plan to determine which shows to describe based on popularity or input from community advisory groups, or the degree to which a particular program would be enhanced by video description, or do they anticipate taking a different approach to choosing programs for video description? Do the costs or benefits of description change with different types or formats of program? How do entities intend to publicize the availability of video description? Only a subset of programming will contain video description. Therefore, should the Commission require that the availability of video description on certain programs be publicized in a certain manner, and if so, what is the best way to do so and does the Commission have authority to require the covered entities to publicize this information? We seek comment on these questions.

31. *Updated A/53 Standard.* The Commission's Rules incorporate the ATSC digital broadcast standard by reference, but have not been updated to reflect the 2010 revisions to the A/53 standard.⁷⁷ The 2007 standard currently in effect under our rules includes two options for transmission of the Visually Impaired ("VI") audio service that would typically carry video descriptions. The first option is compatible with all DTV receivers. The second option requires support in DTV receivers that is rarely implemented. In the latest version of A/53 Part 5 adopted by ATSC, the second option has been eliminated.⁷⁸ We propose to update our rules to incorporate A/53 Part 5: 2010 in order to ensure that video description can be received by all DTV receivers. We seek comment on this proposal.

32. *Children's Programming.* Under the proposed rules, broadcast stations and MVPDs required to provide 50 hours of video described programming per quarter may do so during prime time or children's programming.⁷⁹ The proposed rules define "prime time" for

⁷⁷ 47 C.F.R. 73.682(d).

⁷⁸ ATSC Digital Television Standard, Document A/53 Part 5: 2010 (July 6, 2010).

⁷⁹ As the Commission explained in the *2000 Report and Order*,

Prime time programming is the most watched programming, and so programming provided during this time will reach more people than programming provided at any other time. In addition, as we noted in the *Notice*, the several thousand dollars per hour cost to describe programming is a very small portion of the production budget for the typical prime time program. At the same time, as we noted in the *Notice*, programming with video description may provide a benefit not only to children who are visually disabled, but also to those who are learning disabled. Programming with video description has both audio description and visual appeal, and so has the potential to capture the attention of learning disabled children and enhance their information processing skills. Requiring broadcast stations and MVPDs to provide children's or prime time programming with video

(continued....)

video description purposes.⁸⁰ The Commission’s rules define “children’s programming” differently in different contexts. For instance, we impose limits on commercial advertising in programming “produced and broadcast primarily for an audience of children 12 years old and younger.”⁸¹ Our processing guidelines regarding “educational and informational” programming for children, on the other hand, apply to programming that “furthers the educational and informational needs of children 16 years of age and under.”⁸² Because older children with vision or other impairments can benefit from video description, we propose to define children’s programming in this context as programming directed at children 16 years of age and under. We seek comment on this proposal.

33. *Subsection G.* Section 713(f)(2)(G) of the Communications Act, as added by the CVAA, says that

[t]he Commission shall consider extending the exemptions and limitations in the reinstated regulations for technical capability reasons to all providers and owners of video programming.⁸³

We propose not to take any action under this provision. We seek comment on this proposal.

34. *Non-Substantive Revisions.* In addition to the proposals above, we intend to make necessary non-substantive revisions to the rules. These include revisions and additions to the Definitions section of the prior rules,⁸⁴ changes to the second paragraph of the Procedures for Exemptions section⁸⁵ to reflect that they apply to video programming “providers” rather than just video programming “distributors,”⁸⁶ updates to the Complaint Procedures⁸⁷ to reflect the valid current address and name of the Consumer and Governmental Affairs Bureau, and non-substantive wording changes intended to make the meaning of the rules clearer. We seek comment on any other necessary technical revisions to the reinstated rules.

35. *Other Comments Requested.* Finally, we invite comment on any other issues relating to the reinstatement and modification of our Video Description rules.

(Continued from previous page) _____

description thus ensures that the programming reaches the greatest portion of the audience it is intended to benefit the most. Permitting broadcast stations and MVPDs to select between the two provides them flexibility without compromising that goal.

2000 Report and Order, *supra* note 2, at ¶ 36 (internal citations omitted).

⁸⁰ *Supra* note 22; *see also* Appendix A.

⁸¹ 47 C.F.R. 73.670, note 2.

⁸² 47 C.F.R. 73.671(c).

⁸³ CVAA, Title II, sec. 202(a), § 713(f)(2)(G).

⁸⁴ 47 C.F.R. § 79.3(a). At a minimum, this will include a definition of “Live or Near-live Programming”; *see* Appendix A.

⁸⁵ 47 C.F.R. § 79.3(d)(2).

⁸⁶ The *Recon* changed the scope of the undue burden exemption so that it applied to “providers” rather than just to “distributors,” but while 47 C.F.R. § 79.3(d)(1) was updated to reflect this change, 47 C.F.R. § 79.3(d)(2) was not.

⁸⁷ 47 C.F.R. § 79.3(e).

IV. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Analysis

36. With respect to the *Notice of Proposed Rulemaking*, an Initial Regulatory Flexibility Analysis (“IRFA”), *see generally* 5 U.S.C. § 603, is contained in Appendix B. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice of Proposed Rulemaking* specified *supra*. The Commission will send a copy of the *Notice of Proposed Rulemaking*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.⁸⁸

B. Initial Paperwork Reduction Act of 1995 Analysis

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

C. Ex Parte Rules

38. *Permit-But-Disclose*. This proceeding will be treated as a “permit-but-disclose” proceeding subject to the “permit-but-disclose” requirements under Section 1.1206(b) of the Commission’s rules.⁸⁹ *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.⁹⁰ Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

D. Filing Requirements

39. Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission’s Electronic Comment Filing System (ECFS), (2) the Federal Government’s eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

⁸⁸ See 5 U.S.C. § 603(a). In addition, the *Notice of Proposed Rulemaking* and the IRFA (or summaries thereof) will be published in the Federal Register.

⁸⁹ See 47 C.F.R. § 1.1206(b); *see also* 47 C.F.R. §§ 1.1202, 1.1203.

⁹⁰ See 47 C.F.R. § 1.1206(b)(2).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/> or the Federal eRulemaking Portal: <http://www.regulations.gov>.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

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

- Effective December 28, 2009, all hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. The filing hours are 8:00 a.m. to 7:00 p.m.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: 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 & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

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

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

42. *Additional Information.* For additional information on this proceeding, contact John Norton, John.Norton@fcc.gov, or Lyle Elder, Lyle.Elder@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

V. ORDERING CLAUSES

43. **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 Sections 1, 2(a), 4(i), 303, and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 303, and 613, **COMMENT IS HEREBY SOUGHT** on the proposals described and rules set forth in this *Notice Of Proposed Rulemaking*.

44. **IT IS ORDERED** that the Reference Information Center, Consumer and Governmental Affairs Bureau, shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Proposed Rules¹

We propose to amend Part 73 of Title 47 of the Code of Federal Regulations as follows:

Part 73 – Radio Broadcast Services

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, 334, 336, and 339.

2. Section 73.682 is amended by revising subsection (d) to read as follows:

(d) *Digital broadcast television transmission standard.* Effective May 29, 2008 transmission of digital broadcast television (DTV) signals shall comply with the standards for such transmissions set forth in ATSC A/52: “ATSC Standard Digital Audio Compression (AC–3)” (incorporated by reference, see §73.8000), ATSC A/53, Parts 1–**4** and 6: 2007 “ATSC Digital Television Standard,” (January 3, 2007), **and ATSC A/53, Part 5: 2010 “ATSC Digital Television Standard,” (July 6, 2010)**, except for section 6.1.2 (“Compression Format Constraints”) of A/53 Part 4: 2007 (“MPEG–2 Video Systems Characteristics”) and the phrase “see Table 6.2” in section 6.1.1 Table 6.1 and section 6.1.3 Table 6.3 (incorporated by reference, see §73.8000), and ATSC A/65C: “ATSC Program and System Information Protocol for Terrestrial Broadcast and Cable, Revision C With Amendment No. 1 dated May 9, 2006,” (January 2, 2006) (incorporated by reference, see §73.8000). Although not incorporated by reference, licensees may also consult ATSC A/54A: “Recommended Practice: Guide to Use of the ATSC Digital Television Standard, including Corrigendum No. 1,” (December 4, 2003, Corrigendum No. 1 dated December 20, 2006, and ATSC A/69: “Recommended Practice PSIP Implementation Guidelines for Broadcasters,” (June 25, 2002) (Secs. 4, 5, 303, 48 Stat., as amended, 1066, 1068, 1082 (47 U.S.C. 154, 155, 303)). ATSC A/54A and ATSC A/69 are available from Advanced Television Systems Committee (ATSC), 1750 K Street, NW., Suite 1200, Washington, DC 20006, or at the ATSC Web site: <http://www.atsc.org/standards.html> .

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

Part 79 – Closed Captioning and Video Description of Video Programming

1. The authority citation for Part 79 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 613.

2. Section 79.3 is replaced to read as follows:

¹ Additions are indicated in **bold**.

§ 79.3 Video description of video programming.

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

(1) *Designated Market Areas (DMAs).* Unique, county-based geographic areas designated by Nielsen Media Research, a television audience measurement service, based on television viewership in the counties that make up each DMA.

(2) *Video programming provider.* Any video programming distributor and any other entity that provides video programming that is intended for distribution to residential households including, but not limited to, broadcast or nonbroadcast television networks and the owners of such programming.

(3) *Video description.* The insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue.

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

(5) *Video programming distributor.* Any television broadcast station licensed by the Commission and any multichannel video programming distributor (MVPD), and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission.

(6) *Prime time.* The period from 8:00 to 11:00 p.m. Monday through Saturday, and 7:00 to 11:00 p.m. on Sunday local time, except that in the central time zone the relevant period shall be between the hours of 7:00 and 10:00 p.m. Monday through Saturday, and 6:00 and 10:00 p.m. on Sunday, and in the mountain time zone each station shall elect whether the period shall be 8:00 to 11:00 p.m. Monday through Saturday, and 7:00 to 11:00 p.m. on Sunday, or 7:00 to 10:00 p.m. Monday through Saturday, and 6:00 to 10:00 p.m. on Sunday.

(7) *Live or near-live programming.* Programming performed either simultaneously with, or recorded no more than 24 hours prior to, its first transmission by a video programming distributor.

(8) *Children's Programming.* Television programming directed at children 16 years of age and under.

(b) The following video programming distributors must provide programming with video description as follows:

(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 Nielsen Media Research, Inc. 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;

(2) 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;

(3) Multichannel video programming distributors (MVPDs) 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 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, as determined by Nielsen Media Research, Inc., for the time period October 2009–September 2010, 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; and

(4) Multichannel video programming distributors (MVPDs) 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 January 1 through March 31, 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.

(3) Once a commercial television broadcast station as defined under paragraph (b)(1) of this section has aired a particular program with video description, it is required to include video description with all subsequent airings of that program on that same broadcast station, 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) Once an MVPD as defined under paragraph (b)(3) of this section:

(i) has aired a particular program with video description on a broadcast station it carries, it is required to include video description with all subsequent airings of that program on that same broadcast station, 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; or

(ii) has aired a particular program with video description on a nonbroadcast network it carries, it is required to include video description with all subsequent airings of that program on that same nonbroadcast network, 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.

(5) In evaluating whether a video programming distributor has complied with the requirement to provide video programming with video description, the Commission will consider showings that any lack of video description was de minimis and reasonable under the circumstances.

(d) *Procedures for exemptions based on economic burden.* (1) A video programming provider may petition the Commission for a full or partial exemption from the video description requirements of this section, which the Commission may grant upon a finding that the requirements would be economically burdensome.

(2) The petitioner must support a petition for exemption with sufficient evidence to demonstrate that compliance with the requirements to provide programming with video description would be economically burdensome. The term “economically burdensome” means imposing significant difficulty or expense. The Commission will consider the following factors when determining whether the requirements for video description would be economically burdensome:

- (i) The nature and cost of providing video description of the programming;
- (ii) The impact on the operation of the video programming provider;
- (iii) The financial resources of the video programming provider; and
- (iv) The type of operations of the video programming provider.

(3) In addition to these factors, the petitioner must describe any other factors it deems relevant to the Commission's final determination and any available alternative that might constitute a reasonable substitute for the video description requirements. The Commission will evaluate economic burden with regard to the individual outlet.

(4) The petitioner must file an original and two (2) copies of a petition requesting an exemption based on the economically burdensome standard, and all subsequent pleadings, in accordance with §0.401(a) of this chapter.

(5) The Commission will place the petition on public notice.

(6) Any interested person may file comments or oppositions to the petition within 30 days of the public notice of the petition. Within 20 days of the close of the comment period, the petitioner may reply to any comments or oppositions filed.

(7) Persons that file comments or oppositions to the petition must serve the petitioner with copies of those comments or oppositions and must include a certification that the petitioner was served with a copy. Parties filing replies to comments or oppositions must serve the commenting or opposing party with copies of such replies and shall include a certification that the party was served with a copy.

(8) Upon a finding of good cause, the Commission may lengthen or shorten any comment period and waive or establish other procedural requirements.

(9) Persons filing petitions and responsive pleadings must include a detailed, full showing, supported by affidavit, of any facts or considerations relied on.

(10) The Commission may deny or approve, in whole or in part, a petition for an economic burden exemption from the video description requirements.

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

(e) Complaint procedures.

(1) A complainant may file a complaint concerning an alleged violation of the video description requirements of this section by transmitting it to the Consumer and Governmental Affairs Bureau at the Commission by any reasonable means, such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, audio-cassette recording, and Braille, or some other method that would best accommodate the complainant's disability. Complaints should be addressed to: Consumer and Governmental Affairs Bureau, 445 12th Street, SW, Washington, DC 20554. A complaint must include:

(i) The name and address of the complainant;

(ii) The name and address of the broadcast station against whom the complaint is alleged and its call letters and network affiliation, or the name and address of the MVPD against whom the complaint is alleged and the name of the network that provides the programming that is the subject of the complaint;

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

(iv) the specific relief or satisfaction sought by the complainant;

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

(vi) a certification that the complainant attempted in good faith to resolve the dispute with the broadcast station or MVPD against whom the complaint is alleged.

(2) The Commission will promptly forward complaints satisfying the above requirements to the video programming distributor involved. The video programming distributor must respond to the complaint within a specified time, generally within 30 days. The Commission may authorize Commission staff either to shorten or lengthen the time required for responding to complaints in particular cases. The

answer to a complaint must include a certification that the video programming distributor attempted in good faith to resolve the dispute with the complainant.

(3) The Commission will review all relevant information provided by the complainant and the video programming distributor and will request additional information from either or both parties when needed for a full resolution of the complaint.

(i) The Commission may rely on certifications from programming suppliers, including programming producers, programming owners, networks, syndicators and other distributors, to demonstrate compliance. The Commission will not hold the video programming distributor responsible for situations where a program source falsely certifies that programming that it delivered to the video programming distributor meets our video description requirements if the video programming distributor is unaware that the certification is false. Appropriate action may be taken with respect to deliberate falsifications.

(ii) If the Commission finds that a video programming distributor has violated the video description requirements of this section, it may impose penalties, including a requirement that the video programming distributor deliver video programming containing video description in excess of its requirements.

(f) *Private rights of action are prohibited.* Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

APPENDIX B

Initial Regulatory Flexibility Analysis

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

A. Need for, and Objectives of, the Proposals

2. This *Notice* proposes and seeks comment on reinstatement of the Commission’s video description rules, which make television programming more accessible to persons with visual disabilities. The United States Court of Appeals for the District of Columbia Circuit vacated the rules due to insufficient authority soon after initial adoption.⁴ With its enactment, the CVAA now directs the Commission to reinstate the rules with certain modifications.⁵ The proposed rules require large-market broadcast affiliates of the top four national networks and multichannel video programming distributors (“MVPDs”) with more than 50,000 subscribers to provide video description.⁶ Covered broadcasters are required to provide 50 hours of video-described prime time or children’s programming, per quarter, and covered MVPDs are required to provide the same number of hours on each of the five most popular nonbroadcast networks.⁷ This requirement to provide description will effect few, if any, small entities. The rules also require, to the extent technically possible, that all network-affiliated broadcasters (commercial or non-commercial) and all MVPDs pass through any video description provided with programming they carried.⁸ This pass-through requirement will effect any small MVPDs and network-affiliated broadcasters. As required under the CVAA, we propose to reinstate these rules on October 8, 2011, and to require broadcast stations and MVPDs subject to our rules to begin full compliance in the first quarter of 2012. We also propose to make certain

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ Motion Picture Ass’n of America, Inc. v. Federal Communications Comm., 309 F.3d 796 (D.C. Cir. 2002).

⁵ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (“CVAA”) at Title II, sec. 202(a), § 713(f)(1-2).

⁶ 47 C.F.R. § 79.3(b).

⁷ *Id.* at § 79.3(b)(1), (3).

⁸ *Id.* at § 79.3(b)(2), (4).

modifications to the rules, as directed by the CVAA. Notably, these modifications include the exemption of “live or near-live” programming from consideration under the rules. We seek comment on the definition of “near-live,” propose that programs produced within 24 hours of their first airing be considered “near-live” in the context of video description, and also seek comment on other possible grounds for exemption from the rules.

B. Legal Basis

3. The authority for the action proposed 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 Sections 1, 2(a), 4(i), 303, 307, 309, 310, and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 303, 307, 309, 310, and 613.

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

4. 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.⁹ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹⁰ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹¹ 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 Small Business Administration (SBA).¹² The rule changes proposed herein will directly affect small television broadcast stations and small multichannel video program distributors (MVPDs), which include cable operators and satellite video providers. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

5. *Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than \$14.0 million in annual receipts.¹³ Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.”¹⁴ The Commission has estimated the number of licensed commercial television

⁹ 5 U.S.C. § 603(b)(3).

¹⁰ 5 U.S.C. § 601(b).

¹¹ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 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.”

¹² 15 U.S.C. § 632.

¹³ See 13 C.F.R. § 121.201, NAICS Code 515120 (2007).

¹⁴ *Id.* This category description continues, “These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or (continued....)”

stations to be 1,392.¹⁵ According to Commission staff review of the BIA/Kelsey, MPro Television Database (“BIA”) as of April 7, 2010, about 1,015 of an estimated 1,380 commercial television stations¹⁶ (or about 74 percent) have revenues of \$14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 390.¹⁷ We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations¹⁸ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

6. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

7. **Satellite Telecommunications.** Since 2007, the SBA has recognized satellite firms within this revised category, with a small business size standard of \$15 million.¹⁹ The most current Census Bureau data are from the economic census of 2007, and we will use those figures to gauge the prevalence of small businesses in this category. Those size standards are for the two census categories of “Satellite Telecommunications” and “Other Telecommunications.” Under the “Satellite Telecommunications” category, a business is considered small if it had \$15 million

(Continued from previous page) —————

from external sources.” Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

¹⁵ See News Release, “Broadcast Station Totals as of December 31, 2009,” 2010 WL 676084 (F.C.C.) (dated Feb. 26, 2010) (“*Broadcast Station Totals*”); also available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296538A1.pdf.

¹⁶ We recognize that this total differs slightly from that contained in *Broadcast Station Totals*, *supra*, note 83; however, we are using BIA's estimate for purposes of this revenue comparison.

¹⁷ See *Broadcast Station Totals*, *supra*, note 83.

¹⁸ “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 121.103(a)(1).

¹⁹ See 13 C.F.R. § 121.201, NAICS code 517410.

or less in average annual receipts.²⁰ Under the “Other Telecommunications” category, a business is considered small if it had \$25 million or less in average annual receipts.²¹

8. The first category of Satellite Telecommunications “comprises establishments primarily engaged in providing point-to-point telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”²² For this category, Census Bureau data for 2007 show that there were a total of 512 firms that operated for the entire year.²³ Of this total, 464 firms had annual receipts of under \$10 million, and 18 firms had receipts of \$10 million to \$24,999,999.²⁴ Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by rules adopted pursuant to the Notice.

9. The second category of Other Telecommunications consists of firms “primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.”²⁵ For this category, Census Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year.²⁶ Of this total, 2,346 firms had annual receipts of under \$25 million.²⁷ Consequently, we estimate that the majority of Other Telecommunications firms are small entities that might be affected by our action.

10. *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,”²⁸ which was

²⁰ *Id.*

²¹ See 13 C.F.R. § 121.201, NAICS code 517919.

²² U.S. Census Bureau, 2007 NAICS Definitions, “517410 Satellite Telecommunications”.

²³ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

²⁴ . http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en

²⁵ U.S. Census Bureau, 2007 NAICS Definitions, “517919 Other Telecommunications”, <http://www.census.gov/naics/2007/def/ND517919.HTM>.

²⁶ See 13 C.F.R. § 121.201, NAICS code 517919.

²⁷ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517919” (issued Nov. 2010).

²⁸ See 13 C.F.R. § 121.201, NAICS code 517110 (2007). The 2007 NAICS definition of the category of “Wired Telecommunications Carriers” is in paragraph 7, above.

developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.²⁹ To gauge small business prevalence for the DBS service, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with more than 1,000 employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees. Based on this data, the majority of these firms can be considered small.³⁰ Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and EchoStar Communications Corporation (“EchoStar”) (marketed as the DISH Network).³¹ Each currently offers subscription services. DIRECTV³² and EchoStar³³ each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

11. **Fixed Microwave Services.** Fixed microwave services include common carrier,³⁴ private operational-fixed,³⁵ and broadcast auxiliary radio services.³⁶ At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer

²⁹ 13 C.F.R. § 121.201, NAICS code 517110 (2007).

³⁰ See http://www.factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

³¹ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 580, ¶ 74 (2009) (“13th Annual Report”). We note that, in 2007, EchoStar purchased the licenses of Dominion Video Satellite, Inc. (“Dominion”) (marketed as Sky Angel). See Public Notice, “Policy Branch Information; Actions Taken,” Report No. SAT-00474, 22 FCC Rcd 17776 (IB 2007).

³² As of June 2006, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. See *13th Annual Report*, 24 FCC Rcd at 687, Table B-3.

³³ As of June 2006, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. *Id.* As of June 2006, Dominion served fewer than 500,000 subscribers, which may now be receiving “Sky Angel” service from DISH Network. See *id.* at 581, ¶ 76.

³⁴ See 47 C.F.R. §§ 101 *et seq.* (formerly, Part 21 of the Commission’s Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

³⁵ Persons eligible under parts 80 and 90 of the Commission’s Rules can use Private Operational-Fixed Microwave services. See 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee’s commercial, industrial, or safety operations.

³⁶ Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission’s Rules. See 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

employees.³⁷ The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

12. **Cable and Other Program Distribution.** Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."³⁸ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.³⁹ According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.⁴⁰ Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.⁴¹ Thus, under this size standard, the majority of firms can be considered small and may be affected by rules adopted pursuant to the Notice.

13. **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.⁴² Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.⁴³ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.⁴⁴ Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999

³⁷ See 13 C.F.R. § 121.201, NAICS code 517210.

³⁸ U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

³⁹ 13 C.F.R. § 121.201, NAICS code 517110 (2007).

⁴⁰ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

⁴¹ See *id.*

⁴² See 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. See *Implementation of Sections of the 1992 Cable Television Consumer Protection and Competition Act: Rate Regulation*, MM Docket Nos. 92-266, 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 para. 28 (1995).

⁴³ These data are derived from R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

⁴⁴ See 47 C.F.R. § 76.901(c).

subscribers.⁴⁵ Thus, under this second size standard, most cable systems are small and may be affected by rules adopted pursuant to the Notice.

14. Cable System Operators. The Act 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.”⁴⁶ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.⁴⁷ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.⁴⁸ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,⁴⁹ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

15. Open Video Services. The open video system (“OVS”) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.⁵⁰ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,⁵¹ OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”⁵² The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, there were a total of 3,188 firms in this previous category that operated for the entire year.⁵³ Of this total, 3,144 firms had

⁴⁵ WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, “U.S. Cable Systems by Subscriber Size,” page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

⁴⁶ 47 U.S.C. § 543(m)(2); *see also* 47 C.F.R. § 76.901(f) & nn.1–3.

⁴⁷ 47 C.F.R. § 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).

⁴⁸ These data are derived from R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

⁴⁹ 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.

⁵⁰ 47 U.S.C. § 571(a)(3)–(4). *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, 24 FCC Rcd 542, 606 para. 135 (2009) (“Thirteenth Annual Cable Competition Report”).

⁵¹ *See* 47 U.S.C. § 573.

⁵² U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

⁵³ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.⁵⁴ Thus, under this size standard, most cable systems are small and may be affected by rules adopted pursuant to the Notice. In addition, we note that the Commission has certified some OVS operators, with some now providing service.⁵⁵ Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.⁵⁶ The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

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

16. The *Notice* seeks comment on rules that would affect small television broadcast stations and MVPDs by requiring them to pass through a secondary audio track, containing video description, with any described programming that is provided by a network. The description need not be passed through if the station or MVPD does not have the technical capability to pass it through, or if the entity is already using all of the secondary audio capacity associated with that program for other program-related material. If any small entities are subject to the separate requirement to “provide” video description, we anticipate that they will do so by passing description through to viewers. This separate requirement will thus impose no distinct burden on small broadcasters or MVPDs. These requirements may in some cases result in the need for engineering services. The *Notice* seeks comment, in part, on whether the rules could require the purchase of additional equipment.

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

17. 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.⁵⁷ We seek comment on the applicability of any of these alternatives to affected small entities.

18. The requirements proposed in the *Notice*, including those affecting small broadcasters and MVPDs, are largely mandated by Congress. They would in most cases create minimal economic impact on small entities, and could provide positive economic impact by

⁵⁴ *See id.*

⁵⁵ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsceer.html>.

⁵⁶ *See Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606-07 para. 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

⁵⁷ 5 U.S.C. § 603(c)(1) – (c)(4).

increasing viewership by persons with visual impairments. The Commission has statutory authority to determine the effective date of the rules, and to exempt parties or classes from operation of any or part of the proposed rules. We invite small entities to submit comment on the impact of the proposed rules, and on how the Commission could further minimize potential burdens on small entities if the proposals provided in the *Notice*, or those submitted into the record, are ultimately adopted.

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

19. None.

APPENDIX C

2000 Report and Order and Order on Reconsideration

Federal Communications Commission

FCC 00-258

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

In the Matter of)
) MM Docket No. 99-339
)
Implementation of Video Description of)
Video Programming)
)

REPORT AND ORDER

Adopted: July 21, 2000

Released: August 7, 2000

By the Commission: Commissioner Ness issuing a statement; Commissioners Furchtgott-Roth and Powell concurring in part, dissenting in part, and issuing separate statements.

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I. INTRODUCTION

1. In this *Report and Order*, we adopt rules designed to bring the benefits of video description to the commercial video marketplace. Video description is the description of key visual elements in programming, inserted into natural pauses in the audio of the programming. It is designed to make television programming more accessible to the many Americans who have visual disabilities. As we have noted in this proceeding and elsewhere, television is the primary source of news and information for the majority of Americans, and provides hours of entertainment each week. The Commission has already adopted rules to make the important medium of television more accessible to persons with hearing disabilities.⁴ Today we adopt initial video description rules to make television more accessible to persons with visual disabilities.

2. Public broadcasting has developed and refined the process of producing and distributing programming with video description over the last ten years, but virtually no commercial market has followed. Descriptive Video Service (DVS), associated with the noncommercial broadcast station WGBH, has described more than 2000 PBS programs, and more than 80 films for the Turner Classic Movies channel.² Currently, DVS provides “closed” video description – which runs on the Second Audio Program (SAP) channel and so can be heard at the discretion of the viewer – for four daily programs, several weekly programs, selected episodes of other series, and selected specials.³ Some commercial broadcasters also have the technical ability to provide “closed” video description but none have done so. Some cable systems have the capability to provide programming with video description, but do so only on very limited channels, such as the Turner Classic Movies channel, and little if any of this programming is available without the assistance of public funding.⁴ As a result, only a very small fraction of programming contains video description.

3. This *Report and Order* follows Commission review and study of video description for nearly five years, including three notices on the matter, and two reports to Congress. The Commission issued its first *Notice of Inquiry* on video description in 1995.⁵ Section 713(f) of the Communications Act,⁶ added by the Telecommunications Act of 1996, directed the Commission to commence an inquiry on video description, and report to Congress on its findings. Using the record developed in response to the *First*

¹ See Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility, MM Docket No. 95-176, *Report and Order*, 13 FCC Rcd 3272 (1997), *recon. granted in part and denied in part*, 13 FCC Rcd 19973 (1998) (adopting closed captioning rules). See also *Second Report and Order*, FCC 00-136 (released April 14, 2000) (adopting rules to enhance the accessibility of emergency information for persons with hearing disabilities).

² WGBH at 2. The commenters and reply commenters in this proceeding, and the abbreviations by which they are referred to in this document, are set forth in Appendix A.

³ “PBS Schedule” (visited June 15, 2000) <www.wgbh.org/wgh/access/dvs/dvspbs.html>.

⁴ With financial assistance from the U.S. Department of Education, the Narrative Television Network also provides “open” video description (*i.e.*, as discussed below, the video description cannot be turned off) for the Good Life TV Network. In addition, Kaleidoscope Television, the cable programming network devoted to the lifestyles of persons with disabilities, provides “open” description of movies each week.

⁵ Closed Captioning and Video Description of Video Programming, MM Docket No. 95-176, *Notice of Inquiry*, 11 FCC Rcd 4912 (1995) (*First NOI*).

⁶ 47 U.S.C. § 613(f).

NOI, the Commission issued the required report to Congress in 1996.⁷ The Commission then issued a second *Notice of Inquiry* in 1997,⁸ and submitted more information to Congress on video description in its 1997 annual report on competition in the markets for the delivery of video programming.⁹ Given the importance of enhancing the accessibility of video programming to persons with visual disabilities, and the fact that commercial broadcast stations and MVPDs had not developed video description further during our periods of review, we issued our *Notice of Proposed Rulemaking* last year in 1999.¹⁰

4. The record demonstrates the importance of video description to persons with visual disabilities, although support for our proposal was not unanimous among blind and low vision commenters.¹¹ Margaret Pfanstiehl, a pioneer in the field of video description and who herself has low vision, explains that “when plays, movies, films . . . are professionally described, a wealth of information becomes available. Blind children and adults are amazed at the prevalence and importance of body language in transmitting non-verbal messages.”¹² The comments of the American Council of the Blind contained more than 250 e-mails and letters of support for rules, which explained how video description enhances the understanding of blind and low vision people of television programming and cultural behavior such as body language, and gives them a feeling of independence.¹³ One commenter said that “[w]hether or not one still defines the medium as a ‘vast wasteland,’ there is no denying that TV is the mechanism we Americans turn to, to define ourselves and one another. Blind people have just as much need as any other Americans to experience this medium.”¹⁴ A user of WGBH’s DVS echoes similar views: “[w]hether entertaining, educational or cultural, television has become an integral part of American life. I, and other blind and visually impaired people, have always participated in television viewing, but with DVS, we are finally participating equally.”¹⁵ Helen Harris, founder of a description service, says that “[v]ideo description effectively bridges the gap between the blind and mainstream society by creating a shared

⁷ Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility, MM Docket No. 95-176, *Report*, 11 FCC Rcd 19214 (1996) (*Video Accessibility Report*).

⁸ Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141, *Notice of Inquiry*, 12 FCC Rcd 7829 (1997).

⁹ Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141, *Fourth Annual Report*, 13 FCC Rcd 1034 (1998) (*Fourth Annual Report*).

¹⁰ Implementation of Video Description of Video Programming, MM Docket No. 99-339, *Notice of Proposed Rulemaking*, 14 FCC Rcd 19845 (1999) (*Notice*).

¹¹ The American Council of the Blind, the American Foundation of the Blind, and many persons with visual disabilities filed comments supporting the Commission requiring some programming to contain video description.

The National Federation of the Blind and a number of its members, however, filed comments asking the Commission to take steps to enhance the accessibility of text-based information in video programming (such as emergency information, the names of speakers, and contact information in advertisements), instead of requiring a limited amount of programming to contain video description. We address these requests below.

¹² Metropolitan Washington Ear at 7.

¹³ ACB at Appendix A.

¹⁴ ACB at Appendix A (e-mail of Penny Reeder).

¹⁵ “DVS Viewer Comments” (visited June 15, 2000), <www.wgbh.org/wgbh/access/dvs/dvscomments.html>.

experience which leaves the blind with an increased sense of normalcy in their lives.”¹⁶

5. Government officials and industry members have supported video description as well. Several members of Congress have submitted letters to the Commission in support of our proposals, and at least one industry member has submitted a letter in support of video description.¹⁷

6. Today we adopt initial video description rules, designed to benefit persons with visual disabilities, but not impose an undue burden on the programming production and distribution industries. As explained below, we conclude that we have the authority to adopt video description rules, and require the top broadcast stations and multichannel video programming distributors (MVPDs) to provide programming with video description on the top programming networks. This will ensure that the broadcast stations and MVPDs that reach the most people will provide video description for the most watched programming. We also adopt rules to enhance the accessibility of emergency information for people with visual disabilities. Specifically, we adopt rules as follows:

- We require affiliates of the top four commercial broadcast TV networks in the top 25 TV markets to provide 50 hours per calendar quarter of prime time and/or children’s programming with video description.
- We also require MVPDs with 50,000 or more subscribers to provide 50 hours per calendar quarter of prime time and/or children’s programming with video description on each of the top five national nonbroadcast networks they carry.
- In addition, we require any broadcast station, regardless of its market size, to “pass through” any video description it receives from a programming provider, if the broadcast station has the technical capability necessary to do so, and we require any MVPD, regardless of its number of subscribers, to “pass through” any video description it receives from a programming provider, if the MVPD has the technical capability necessary to do so on the channel on which it distributes the programming of the programming provider.
- The first calendar quarter these rules will be effective will be April-June 2002.
- We also require broadcast stations and MVPDs that provide local emergency information through a regularly scheduled newscast, or an unscheduled newscast that interrupts regularly scheduled programming, to make the critical details of that information accessible to persons with visual disabilities in the affected local area. We also require broadcast stations and MVPDs that provide local emergency information through another manner, such as a “crawl” or “scroll,” to accompany that information with an aural tone to alert persons with visual disabilities that they are providing emergency information. These rules relating to emergency information will become effective upon approval by the Office of Management and Budget.

7. The rules we adopt today mark a starting point for further development of video description,

¹⁶ RPI at 2.

¹⁷ Letter from Rep. Wayne T. Gilchrest to William E. Kennard, Chairman, FCC (March 22, 2000); Letter from Rep. Gerald D. Kleczka to William E. Kennard, Chairman, FCC (March 22, 2000); Letter from Sen. John F. Kerry to William E. Kennard, Chairman, FCC (July 1, 1999); Letter from R.E. Turner, Vice Chairman, Time Warner, to William E. Kennard, Chairman, FCC (May 4, 1999).

depending on the efficacy of, and consumer demand for, video description implemented as a result of this *Report and Order*. We expect the experience of the broadcast stations, MVPDs, and networks affected by our rules to guide the industry, the public, and the Commission on whether, how, and when we should phase in more broadcast stations and MVPDs, as well as more programming. Although the rules we adopt today do not apply to digital broadcasts, we expect ultimately to require digital television broadcasts to contain video description. We believe, however, that the decision on how and when to develop those requirements should come after there has been further experience with both digital broadcasting and video description.

II. BACKGROUND

A. Audience for Video Description

8. Video description is designed to make television programming more accessible to persons with visual disabilities, and enable them to “hear what they cannot see.”¹⁸ Thus, the primary audience for video description is persons with visual disabilities. Estimates of the number of persons with visual disabilities are as high as twelve million.¹⁹ This estimate includes persons with a problem seeing that cannot be corrected with ordinary glasses or contact lenses, with a range in severity.²⁰

9. A disproportionate number of persons with visual disabilities are seniors. The National Center for Health Statistics reports that eye problems are the third leading cause, after heart disease and arthritis, of restricting the normal daily activities of persons 65 years of age or older.²¹ While only 2-3% of the population under 45 years of age has visual disabilities, 9-14% of the population 75 years of age or older does.²² This means that as the population ages, more and more people will become visually disabled.²³

10. Secondary audiences for video description exist as well. For example, at least one and a half million children between the ages of 6 and 14 with learning disabilities²⁴ may benefit from video description. Because the medium has both audio description and visual appeal, it has significant potential to capture the attention of learning disabled children and enhance their information processing skills.

¹⁸ *First NOI*, 11 FCC Rcd at 4913, ¶ 1 (*NOI*) (citing Telecommunications Reform, Hearings on S. 1822 Before the Committee on Commerce, Science, and Transportation, 103rd Cong., 2d Sess. (1994) (statement of Margaret R. Pfanstiehl, President of the Metropolitan Washington Ear)).

¹⁹ *Notice*, 14 FCC Rcd at 19847, ¶ 5 (citing Letter from Larry Goldberg, Director, CPB-WGBH National Center for Accessible Media, to Meryl Iove, FCC 2 (Nov. 4, 1998) (*NCAM Letter*)). See also AFB at 1 (10 million “blind or visually” impaired Americans); U.S. Dept. of Commerce, Economics & Statistics Admin., Bureau of the Census, Statistical Abstract of the U.S. 149 (1998) (8 million).

²⁰ *Notice*, 14 FCC Rcd at 19847, ¶ 5 (citing NCAM Letter at 5). NFB states that approximately one million people are legally blind. NFB at 1.

²¹ *Notice*, 14 FCC Rcd at 19847, ¶ 6 (citing NCAM Letter at 5-6).

²² 1998 Statistical Abstract of the U.S. at 149.

²³ Jaclyn Parker and Corrine Kirchner, *Who’s Watching? A Profile of the Blind and Visually Impaired Audience for Television and Video* at v (1997).

²⁴ 1998 Statistical Abstract of the U.S. at 150.

Described video programming capitalizes on the different perceptual strengths of learning-disabled children, pairing their more-developed modality with their less-developed modality to reinforce comprehension of information.²⁵

B. Process of Providing Video Description

11. WGBH's DVS states that its process of describing programming begins with a describer viewing a program, and writing a script to describe key visual elements. The describer times the placement and length of the description to fit within natural pauses in the dialogue. The narration is recorded and mixed with the original program audio to create a full audio track with video description. That audio track is then laid back to the master on a spare channel if the programming is intended for broadcast, and to a separate master if it is intended for distribution by home video.²⁶ When the audio track with video description is provided on a separate audio channel for broadcast, viewers decide whether they wish to hear the video description. Viewers who wish to hear the description must activate the Second Audio Program (SAP) channel on their TV sets or VCRs. "Closed" video description refers to the process of providing video description on the SAP channel.²⁷ SAP reception is a standard feature of most TV sets and VCRs built since 1990.²⁸ SAP-capable TV sets and VCRs can be relatively inexpensive – less than \$150 – and converter boxes are also available for use with TV sets and VCRs that are not SAP-capable.²⁹

12. WGBH describes programming for approximately \$4000 per hour, and the Narrative Television Network, which also currently describes programming, does so for approximately \$2000 per hour.³⁰ Given that PBS' programming budgets are around \$1.5 million per hour for dramas, and \$750,000 per hour for documentaries,³¹ WGBH's current cost of describing programming is less than 1% of the production budget of PBS documentaries and dramas. WGBH, as well as the Narrative Television Network, state that the production schedules for video description are similar to those for closed captioning, and that the process has been refined over the twenty years that closed captioning, and the ten years that video description, has been provided.³²

13. Programming providers that wish to distribute programming on the SAP channel typically need the capability to support three audio channels at all points in the distribution process. This is because two audio channels are used to support left and right stereo, so that a third audio channel is necessary to support a monaural mix of the main audio and the video description. The programming provider transmits both audio tracks as part of its main signal. Networks, broadcast stations, and MVPDs that do

²⁵ Notice, 14 FCC Rcd at 19848, ¶ 7 (citing NCAM Letter at 6).

²⁶ "Frequently Asked Questions about Descriptive Video Service," (visited June 15, 2000) <www.wgbh.org/wgbh/access/dvs/dvsfaq.html>.

²⁷ By contrast, "open" video description refers to the process of providing video description as part of the main audio track.

²⁸ WGBH at 2.

²⁹ Notice, 14 FCC Rcd at 19849, ¶ 12 (citing NCAM Letter at 12).

³⁰ NTN at 2-3; WGBH at 17.

³¹ WGBH at 16.

³² NTN Reply at 2; WGBH Reply at 27.

not have the capability to support three channels of audio generally need to upgrade equipment and plant wiring to do so. The cost depends on the amount and nature of the equipment that needs to be upgraded. According to WGBH, 169 public TV stations have installed the necessary equipment to provide programming with video description via SAP,³³ and the one-time routing and transmission costs of doing so ranged from \$5,000 to \$25,000.³⁴

14. A number of commercial broadcast and nonbroadcast networks have provided programming with Spanish language as a second audio program. Each of the top four commercial broadcast TV networks has provided a Spanish language soundtrack as a second audio program, on at least an occasional basis. At least thirty-three ABC affiliates have the capability to pass through a second soundtrack on the SAP channel; at least twenty-three Fox affiliates do; and approximately twenty NBC affiliates do.³⁵ Some nonbroadcast networks, such as HBO and Showtime, also have offered a Spanish language soundtrack as a separate audio program,³⁶ and, as noted above, Turner Classic Movies has provided a soundtrack with video description as a separate audio program. Some MVPDs that carry their programming provide the audio on the SAP channel. Information submitted by the NAB and NCTA suggest that the cost for any network that cannot currently support a third audio channel to upgrade its facilities to do so on a consistent basis ranges from \$100,000 to over \$1 million.³⁷

³³ WGBH at 15.

³⁴ Notice, 14 FCC Rcd at 19855, 26 (citing NCAM Letter at 10). In its formal comments, NAB also provided some information on costs: it stated that one major network estimated that it would cost its affiliated stations \$800,000 to upgrade their satellite receiver facilities, and that it would cost its owned and operated stations \$400,000 to upgrade their studios. NAB at 16-18. NAB does not identify the network, or the number of the network's affiliated and owned and operated stations that need to upgrade their facilities. Therefore, it is not possible to use the information to determine a per-station cost.

One week before the Commission issued the Sunshine Notice in this proceeding, the NAB submitted an *ex parte* presentation which indicated that it would cost stations on average \$160,000 per station to support video description. See Letter from Jack N. Goodman, NAB to Magalie R. Salas, FCC 1 & App. at 6 (July 7, 2000) (NAB July 7 *Ex Parte*). NAB still did not provide any detailed support for these cost figures. In evaluating the parties' cost data, we give WGBH's greater weight because they are represented to be based on the actual experience of noncommercial stations that have upgraded to support programming with video description.

³⁵ "Monday Night Football on SAP" (August 6, 1999) <www.abcmnf.go.com/news/news19990803.page.html> (identifying ABC affiliates in at least 33 markets where SAP is available); "FOX Sports to broadcast 70th All-Star Game" (visited June 1, 2000) <www.majorleag...1999/allstar/news/foxbroadcast.html> (noting that 23 Fox affiliates have the technical capability to carry SAP); Elizabeth Jensen, "Networks See Benefits of Becoming Bilingual" (August 9, 1999) <www.nabe.org/press/reprints/990809e.html> (stating that fewer than 20 NBC affiliates have SAP technology). Although Commission staff has not been able to locate any information identifying the number of CBS affiliates with SAP capability, the CBS network has provided Spanish language audio for the SAP channel. *Id.*

³⁶ HBO at 5; NCTA Reply at 9-10.

³⁷ NAB at 15-16; NCTA at 14-15. Although as noted each of the top four commercial networks already provides some Spanish language audio for the SAP channel, NAB states that an unidentified major network estimates that it would cost over \$1 million to upgrade its network origination center and satellite distribution system to support a third audio channel on a consistent basis. NAB at 15-16. NCTA estimates that it would cost between \$100,000 and \$200,000 for cable networks that cannot currently support a third audio channel to upgrade their facilities to do so. NCTA at 14-15.

C. Commission Activities

15. The Commission first considered video description when it issued a *Notice of Inquiry* on closed captioning and video description on December 4, 1995.³⁸ Several months later, the Telecommunications Act of 1996 became law. Section 305(f) of the 1996 Act added new section 713 to the Communications Act of 1934.³⁹ Section 713(f) directed the Commission to commence an inquiry on video description, and report to Congress on its findings, including an assessment of “appropriate methods and schedules for phasing video descriptions into the marketplace, technical and quality standards for video descriptions, a definition of programming for which video descriptions would apply, and other technical and legal issues that the Commission deems appropriate.”

16. On July 29, 1996, the Commission released the required report.⁴⁰ The Commission suggested that “[i]nitial requirements for video description should be applied to new programming that is widely available through national distribution services and attracts the largest audiences, such as prime time entertainment series. . . . Lower priority for video description should be given to programming that is primarily aural in nature, including newscasts and sports events.”⁴¹ The Commission concluded that it should monitor the service and seek more information in the context of its annual report on competition in the market for the delivery of video programming.⁴²

17. On January 13, 1998, we released our second report on video description, as part of our annual report to Congress on competition in the market for the delivery of video programming.⁴³ We stated that “any requirements for video description should begin with only the largest broadcast stations and programming networks that are better able to bear the costs involved. . . . For example, a minimal amount of video description could be required to be provided by the larger broadcast stations in the larger markets, and by the larger video programming networks.”⁴⁴ The Commission also suggested that “a period of trial and experimentation would be beneficial so that more specific information would be available as to the types of programming that would most benefit from description, the costs of providing video description, and other matters.”⁴⁵

18. In November of last year, we adopted a *Notice of Proposed Rulemaking* in this docket, given that video description had not become more widely available in the commercial video marketplace. As set forth in greater detail below, we outlined in the *Notice* a kind of proposal that we envisioned as a starting point for our initial video description rules. Consistent with our observations in the reports to Congress, we proposed to require the larger broadcast stations and MVPDs to provide video description for the

³⁸ *First NOI*, 11 FCC Rcd 4912.

³⁹ 47 U.S.C. § 613.

⁴⁰ *Video Accessibility Report*, 11 FCC Rcd 19214.

⁴¹ 11 FCC Rcd at 19270, ¶ 140.

⁴² 11 FCC Rcd at 19271, ¶ 142.

⁴³ *Fourth Annual Report*, 13 FCC Rcd at 1034. The Commission had previously released a notice on video description, among other things, to develop a record for this report. See *Second NOI*, 12 FCC Rcd 7829.

⁴⁴ 11 FCC Rcd at 1170, ¶ 271.

⁴⁵ 11 FCC Rcd at 1170, ¶ 271.

most-watched and widely distributed programming. We received more than 100 comments and reply comments in response to the *Notice*.⁴⁶

III. ENTITIES TO PROVIDE PROGRAMMING WITH VIDEO DESCRIPTION

A. Broadcast Stations in Top 25 DMAs

19. Background. In the *Notice*, we proposed to hold broadcast stations in the top 25 DMAs and affiliated with the four largest commercial broadcast networks responsible for providing programming with video description.⁴⁷ We sought comment on our proposal, and on the costs associated with both producing and distributing described programming.⁴⁸ Although NAB argued against any rules (suggesting among other things that it would be costly to provide video description), it supported our proposal to limit the rules to affiliates of the top four networks in the top 25 DMAs if we established rules.⁴⁹ Other commenters, however, asked that we require affiliates of other networks, such as PAX, UPN, and WB, to provide programming with video description.⁵⁰ Some commenters also asked that we require stations in DMAs beyond the top 25 to provide programming with video description now, and that we adopt a schedule to phase in stations in all DMAs.⁵¹

20. Discussion. We adopt our proposal to require broadcast stations in the top 25 DMAs affiliated with the top four commercial broadcast networks (ABC, CBS, Fox, and NBC) to provide programming with video description.⁵² Our goal in this proceeding is to adopt rules designed to enhance the availability of video description, but not impose an undue burden on programming producers and distributors. Broadcast stations in the top 25 DMAs reach approximately 50% of U.S. TV households.⁵³ Those affiliated with the top four broadcast networks provide the highest-rated programming, *i.e.*, the most-watched, and therefore the most-advertiser-supported, programming. Some affiliates of the top four networks in the top 25 DMAs already have the technical capability necessary to provide programming with video description. Those that do not are likely to have the resources to acquire that capability without being unduly burdened. Indeed, NAB survey data suggests that between one-third and one-half of the broadcast stations in the top 25 DMAs

⁴⁶ The commenters and reply commenters, and the abbreviations by which they are referred to in this document, are set forth in Appendix A.

⁴⁷ 14 FCC Rcd at 19854, ¶ 25.

⁴⁸ 14 FCC Rcd at 19855, ¶ 26.

⁴⁹ NAB Reply at 7.

⁵⁰ ACB at 4-5; MATP at 2; NTVAC at 7; WGBH at 3.

⁵¹ Clive at 2 (top 35 markets initially); NTVAC at 5 (top 35 markets initially); WGBH at 3, 4-5, 9, 11 (top 33 DMAs initially).

⁵² Implicit in our decision to hold the largest broadcast stations (and larger MVPDs, as defined below) responsible for providing programming with video description is the decision to hold programming distributors, as opposed to programming producers, responsible for compliance with our rules.

⁵³ Nielsen Media Research, Inc., Media Research Services Group, "U.S. Television Household Estimates," (Sept. 1999).

already broadcast on the SAP channel.⁵⁴ Although we might require more broadcast stations to provide video description over time, depending on the efficacy of, and consumer demand for, video description implemented as a result of this *Report and Order*, we believe that we should postpone adopting a phase-in schedule until after the broadcast stations and MVPDs that are subject to our initial rules have gained some experience providing video description. This experience can provide the industry, the public, and the Commission with an informed basis upon which to propose such a schedule.

21. In order to help us determine which stations we should require to provide video description, we sought comment in the *Notice* on the number of broadcast stations that have SAP capability, and the cost to become so equipped.⁵⁵ No commenter provided data on the number of commercial broadcast stations that have the capability to broadcast on the SAP channel.⁵⁶ As noted above, however, each of the top four commercial broadcast TV networks has provided Spanish language audio on a second soundtrack, and a number of their affiliates have carried that soundtrack. ABC has advertised that it provides Spanish language for the entire season of Monday Night Football, and that affiliates in at least thirty-three markets transmit that audio on the SAP channel.⁵⁷ Many of these affiliates are in the top 25 DMAs. Fox has also provided Spanish language audio for several programs, and at least twenty-three affiliates have the capability to broadcast that audio on the SAP channel.⁵⁸ NBC has provided Spanish audio for several programs, and approximately twenty NBC affiliates have the capability to broadcast that audio on the SAP channel. CBS has also provided Spanish language audio on the SAP channel.⁵⁹ Other broadcast networks, such as PAX, UPN, and WB, however, do not appear currently to offer Spanish language audio on the SAP channel.

22. The NAB suggests that the networks and their affiliates that have offered Spanish language audio have employed *ad hoc*, only temporary solutions to do so, and that it is altogether different – and may cost one “major network” over \$1 million, and its affiliates (in the aggregate) hundreds of thousands of dollars – to support a third audio channel on a consistent basis.⁶⁰ Aside from the fact that NAB does not document or explain these costs in any detail, the simple fact that the networks and their affiliates have provided Spanish language as a second audio program – with one network providing several hours per week for an entire season – indicates that it can be done in a cost-effective manner. In addition, WGBH states that the PBS network did not spend anywhere near \$1 million to upgrade its origination center and satellite distribution system to support video description.⁶¹ As we observed in the *Notice*, WGBH also points out that it cost PBS

⁵⁴ NAB submitted survey data that shows that: 45% of stations in DMAs 1-10 equipped to broadcast on the SAP channel in fact do so, and 35% in DMAs 11-25 do so. NAB App. at 6.

⁵⁵ 14 FCC Rcd at 19855, ¶ 26.

⁵⁶ NAB did not provide any information in its comments on the number of commercial broadcast stations that have the capability to broadcast on the SAP channel. As part of a later *ex parte* presentation, however, NAB indicated that approximately 70% of broadcast stations in the top 50 DMAs have the capability to broadcast on the SAP channel. NAB July 7 *Ex Parte* at App. at 2.

⁵⁷ “Monday Night Football on SAP” (Aug. 6, 1999) <abcmnf.go.com/news/news19990803.page.html>.

⁵⁸ “Fox Sports to broadcast 70th All-Star Game” (visited June 1, 2000) <www.majorleaguebaseball.com/1999/allstar/news/foxbroadcast.html>.

⁵⁹ Elizabeth Jensen, “Networks See Benefits of Becoming Bilingual” (Aug. 9, 1999) <www.nabe.org/press.reprints/990809e.html>.

⁶⁰ NAB at 15-19.

⁶¹ WGBH Reply at 17.

member stations only around \$5000-\$25,000 to upgrade their stations to acquire the technical capability to support video description.⁶² In addition, WGBH offers a variety of technical solutions at every point in the distribution process to suggest that the cost of supporting a third audio channel is far less than NAB claims.⁶³ WGBH further suggests that the revenues of the largest broadcast stations are more than sufficient to offset any costs associated with upgrading.⁶⁴ The annual advertising revenues of the primary affiliates of the top four commercial networks in the top 25 DMAs range from \$28 million to \$315 million.⁶⁵

23. NAB suggests that any equipment that is upgraded to support a third audio channel will become obsolete when the networks and the stations fully convert to DTV.⁶⁶ WGBH suggests, however, the equipment to support more audio channels will be necessary for DTV, such that any money spent now will not be wasted.⁶⁷ According to WGBH, our video description rules therefore will work in tandem with the transition to DTV.

B. Multichannel Video Programming Distributors with At Least 50,000 Subscribers

24. Background. In the *Notice*, we proposed to require the “larger MVPDs” to provide programming with video description on nonbroadcast networks that reach 50% or more MVPD households.⁶⁸ We sought comment on how to define larger MVPDs, and on our proposal.⁶⁹ NTVAC and WGBH both suggested that MVPDs that serve 500,000 or more subscribers should qualify as larger MVPDs, and WGBH explained that eighteen multiple system operators (MSOs) would so qualify.⁷⁰ NCTA suggests, however, that any cut-off for larger cable operators should take into account the size of each system, since a large MSO may have

⁶² 14 FCC Rcd at 19855, ¶ 26. As noted above, NAB submitted an *ex parte* presentation one week before the Commission issued its “Sunshine Notice,” which suggested that it would cost stations on average \$160,000 to upgrade their facilities to support video description. NAB July 7 *Ex Parte* at 1 & App. 6. As explained above, we give WGBH’s cost figures greater weight.

⁶³ WGBH Reply at 18-22. WGBH describes possibilities and solutions for every point in the distribution process. WGBH explains that all major professional tape formats used by networks and studios support four channels of audio. It identifies common solutions for routing multiple channels of audio around a network or studio plant. It states that standard microwave technology (used by a network between its origination center and uplink facilities, or by the station between its studio and downlink facilities or transmitter) has supported multiple audio channels for years. It also states that a single satellite transponder can support many services, including multiple audio channels.

WGBH also describes an alternative, inexpensive solution, where additional audio is inserted into the vertical blanking interval (VBI), which renders rewiring and some other upgrading unnecessary. WGBH states that the necessary encoder costs \$2,150 and the necessary decoder costs \$1,700. WGBH at 21.

⁶⁴ WGBH Reply at 24.

⁶⁵ BIA Research Inc., Media Access Pro Database, July 11, 2000.

⁶⁶ NAB at 19.

⁶⁷ WGBH Reply at 28.

⁶⁸ 14 FCC Rcd at 19854-19855, ¶ 25.

⁶⁹ 14 FCC Rcd at 19854-19855, ¶ 25.

⁷⁰ NTVAC at 7; WGBH at 10.

systems around the country that vary greatly in size.⁷¹ NCTA also points out that more than 40 cable networks serve 50% or more of MVPD households,⁷² and that a cable system would need to associate SAP capability with each channel on which it seeks to provide programming with video description.⁷³ NCTA suggested that only 5-15% of the channels of a typical cable system currently have such equipment, and that it would cost several thousand dollars per channel to acquire it, and an additional several thousand dollars to upgrade satellite receiving equipment.⁷⁴ DirecTV suggests that DBS operators should not qualify as "larger MVPDs" because of the "unique burdens" that providing programming with video description would place on them, particularly in providing the programming of local broadcast stations.⁷⁵

25. Discussion. We require MVPDs that serve 50,000 or more subscribers to provide programming with video description on each of any of the top five nonbroadcast networks they carry, as defined by prime time audience share, as well as the programming of broadcast stations and other networks they carry, under certain circumstances, as described below. We believe this result is consistent with our goal of enhancing the availability of video description without imposing an undue burden on the programming production and distribution industries. The "larger MVPDs" as we define them include approximately 275 cable systems that serve approximately 50% of MVPD households,⁷⁶ and two DBS systems that serve 12 million customers. The top five nonbroadcast networks as we define them include those with the most-watched programming during prime time.

26. As NCTA explains,⁷⁷ cable systems and other MVPDs must have the capability to support a third audio channel for each channel on which they intend to provide programming with video description. This suggests that, while it might not be burdensome for many nonbroadcast networks to provide programming with video description, it might be burdensome for cable systems and other MVPDs to retransmit programming with video description on many nonbroadcast networks. We have therefore decided to limit the number of nonbroadcast networks for which "larger MVPDs" must provide video description to a smaller number than we proposed. We select the top five nonbroadcast networks. Given that we below require MVPDs to provide programming with video description during prime time,⁷⁸ we define the top five nonbroadcast networks in terms of prime time audience share, as determined by an average of Nielsen prime time ratings for the time period October 1, 1999-September 30, 2000. We recognize, of course, that the top five nonbroadcast networks, as measured by audience share, do not typically have as high an audience share as the top four broadcast networks, or even the broadcast networks that are not subject to our rules, as several

⁷¹ NCTA Reply at 14.

⁷² NCTA at 23.

⁷³ NCTA at 15-17.

⁷⁴ NCTA at 15-16.

⁷⁵ DirecTV at 5-6, 9. For example, DirecTV explains that it is a national service that carries the programming of many broadcast stations affiliated with the top four networks in the top 25 DMAs, with the result that a requirement to carry video description of these stations alone would require it to carry video description on 100 channels. DirecTV at 6.

⁷⁶ "Cable Industry at a Glance: Systems and Subscribers by Number of Subscribers in System" (visited May 23, 2000) <[ncta.cyberserv.com/qs/user_pages/dev\(num.ofsubs\).cfm](http://ncta.cyberserv.com/qs/user_pages/dev(num.ofsubs).cfm)>.

⁷⁷ NCTA at 23.

⁷⁸ MVPDs may instead provide video description for children's programming if they prefer.

commenters point out.⁷⁹ These nonbroadcast networks, however, have substantial resources, and our underlying goal in this proceeding is to enhance the availability of video description without imposing an undue burden on the television programming production and distribution industries.

27. The per-channel costs for MVPDs also suggests that the cut-off for “larger MVPDs” should be based on cable system size, not MSO size. No commenter, however, suggested a particular system size. We have decided to apply our rules to systems with more than 50,000 subscribers. These systems include approximately 275 cable systems that reach approximately 50% of cable subscribers, just as our rules affect broadcast stations that reach approximately 50% of U.S. TV households. NCTA suggests that the maximum costs for cable systems to upgrade equipment would be around \$3000 per channel (\$2000 per channel to add a stereo generator with SAP capability, and \$1200 per channel to add additional decoders or sound processing capabilities, or to upgrade satellite receivers).⁸⁰ These costs appear to be more than offset, however, by revenues. If each subscriber pays an average of approximately \$45/month for cable service⁸¹ provided by a system with 50,000 subscribers, the smallest cable system subject to our rules would appear to collect \$2.25 million per month, or \$27 million per year. These revenues do not include those from other sources.⁸²

28. Our decision to apply our rules to MVPDs that serve at least 50,000 subscribers will also include two DBS systems that together reach an additional 12 million subscribers. DirecTV indicates that it would need to modify its network in order to support three audio channels, and that it would cost “tens of millions of dollars” to do so even if it were required to provide programming with video description on just a few channels.⁸³ DirecTV, however, had more than 8.5 million customers as of May 2000,⁸⁴ and DBS’ average programming price was \$30 per month.⁸⁵ This means that DirecTV subscriber revenues appear to be over \$250 million per month, or over \$3 billion per year. Although EchoStar, the other major DBS carrier, did not file comments in this proceeding, we note that it had more than 4 million subscribers as of May 2000,⁸⁶ such that its subscriber revenues appear to be at least \$120 million per month, or nearly \$1.5 billion per year.

C. Equipped Broadcast Stations and MVPDs

⁷⁹ A&E at 18-19; NCTA at 17-18.

⁸⁰ NCTA at 15-17.

⁸¹ Paul Kagan Assocs., Inc., “The Cable TV Financial Databook 1999” 11 (1999).

⁸² Cable operators also receive revenue from advertising, customer equipment, leased access fees, and non-video services, such as Internet and cable telephony. See In the Matter of 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 Services, and Equipment, MM Docket No. 92-266, *Report on Cable Industry Practices*, FCC 00-214, ¶ 34 (released June 15, 2000).

⁸³ DirecTV at 6-7.

⁸⁴ “US DTH Subscribers,” (visited July 27, 2000), <www.skyreport.com/skyreport/dth_us.html>.

⁸⁵ In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 99-230, *Sixth Annual Report*, FCC 99-418, ¶¶ 70, 73 (released January 14, 2000).

⁸⁶ “US DTH Subscribers,” (visited July 27, 2000), <www.skyreport.com/skyreport/dth_us.html>.

29. Background. In the *Notice*, we proposed to require larger MVPDs to “pass through” the SAP channel audio containing video description of any broadcast station they carried.⁸⁷ We also proposed *not* to require noncommercial educational (NCE) stations to provide programming with video description, based on the financial difficulties they face, particularly as they transition to DTV.⁸⁸ A number of commenters suggested that we should require broadcast stations, including NCE stations, and MVPDs that can “pass through” the SAP channel audio to do so.⁸⁹ Although APTS supported our proposal to exempt NCE stations,⁹⁰ several other commenters did not,⁹¹ with WGBH suggesting that NCE stations, supported by taxpayers, have a particular obligation to air programming that is accessible to all.⁹²

30. Discussion. We will require all broadcast stations, including NCE stations, that have the technical capability necessary to “pass through” any second audio program containing video description that they receive from their affiliated networks. Similarly, we will require all MVPDs that have the technical capability necessary to “pass through” any secondary audio program containing video description that they receive from a broadcast station or nonbroadcast network. We believe this requirement is consistent with our approach to enhance the availability of video description, but not impose an undue burden on programming producers and distributors. WGBH states that 169 PBS member stations already have SAP capability and currently provide video description,⁹³ and our rule should not impose any significant burden on them. In addition, since our requirement will only affect other broadcast stations and MVPDs that already have the technical capability necessary to support video description, we do not believe our rule will impose any burden on the affected stations and MVPDs. We will consider broadcast stations and MVPDs to have the technical capability necessary to support video description if they have virtually all necessary equipment and infrastructure to do so, except for items that would be of minimal cost. To the extent our rule imposes an undue burden on any particular broadcast station or MVPD, it is free to seek an exemption pursuant to the standards we develop and set forth below in section VI.

IV. PROGRAMMING TO CONTAIN VIDEO DESCRIPTION

A. Amount of Programming

31. Background. In the *Notice*, we proposed to require broadcast stations and MVPDs subject to our initial rules to provide at least fifty hours per quarter (roughly four hours per week) of programming with video description.⁹⁴ Several commenters supported our proposal.⁹⁵ Others supported more hours of

⁸⁷ 14 FCC Rcd at 19852-19853, ¶ 20.

⁸⁸ 14 FCC Rcd at 19855, ¶ 25.

⁸⁹ NTN at 3-4; NTVAC at 6; WGBH at 3, 4-5, 9, 11.

⁹⁰ APTS at 3.

⁹¹ MATP at 2; NTVAC at 6; WGBH at 3-4, 15.

⁹² WGBH at 4, 15.

⁹³ WGBH at 15.

⁹⁴ 14 FCC Rcd at 19855, ¶ 29.

⁹⁵ Adaptive Environments at 1; NTVAC at 10 (for Year 1 in their proposed phase-in schedule); TDI at 4.

programming initially, and/or a schedule to phase in more programming in later years.⁹⁶ In the *Notice*, we also noted that the Commission had previously observed that some networks provide Spanish language audio on the SAP channel. We sought comment on the extent to which other languages compete for use of the channel, the impact (if any) of our proposal on these uses, and how any conflicts could be avoided.⁹⁷

32. Discussion. We adopt our proposal to require the broadcast stations and MVPDs subject to quarterly compliance requirements to provide at least fifty hours per calendar quarter of programming with video description.⁹⁸ Our goal in this proceeding is to bring the benefits of video description to the commercial video marketplace, while at the same time not impose an undue burden on the broadcast stations and MVPDs subject to our initial rules. We believe that requiring these broadcast stations and MVPDs to provide fifty or more hours per calendar quarter of programming with video description satisfies this goal. Although we might require more broadcast stations and MVPDs to provide more programming with video description over time, depending on the efficacy of, and consumer demand for, video description implemented as a result of this *Report and Order*, we continue to believe that we should postpone adopting such a phase-in schedule until after the broadcast stations and MVPDs subject to our initial rules have gained some experience in providing video description. This experience can provide the industry, the public, and the Commission with an informed basis upon which to propose such a schedule.

33. We clarify, as suggested by several commenters,⁹⁹ that the broadcast stations and MVPDs may not count toward their 50-hour quarterly requirement programming that they have previously aired with video description, once the rules go into effect. In other words, a broadcast station or MVPD may not count toward its 50-hour quarterly requirement any programming it aired with video description after the effective date of the rules when that same broadcast station or MVPD repeats the same programming later. Broadcast stations and MVPDs may, however, count any programming they air after the effective date in excess of their quarterly requirements, and that they repeat later. In addition, they may count any programming with video description they air *before* the effective date of the rule, and that they later repeat after the effective date. We also clarify, as suggested by several commenters, that once a broadcast station or MVPD has aired a particular program with video description, all of that broadcast station's or MVPD's subsequent airings of that program should contain video description, unless another use is being made of the SAP channel. We impose this requirement because it should not impose any burden on any broadcast station or MVPD subject to our rules, or on their programming suppliers. This is because the cost of both describing programming, and upgrading equipment and infrastructure to distribute it, generally should be a one-time fixed cost. At the same time, we will allow programming providers to repeat programming without video description, if they wish to make another use of the SAP channel, such as Spanish language audio.

34. We also believe that our decision to require that 50 hours per quarter, or roughly 4 hours per week,

⁹⁶ See, e.g., ACB at 3, 5 (250 hours/quarter initially, followed by phasing in all children's programming within 3 years); AFB at 7 (20% of each network's series initially, followed by an additional 20% within 5 years); MATP (10 hours/week initially, phasing in more within 3-5 years); NTN at 4 (phase in all prime time programming within 7 years); NTVAC 10 (4 hours/week initially, followed by phasing in all prime time programming within 7 years, and all children's programming until 3 hours/week); RPI (50 hours/quarter inadequate); WGBH (phase in all prime time programming within 7 years, and all children's programming until 3 hours/week is reached).

⁹⁷ 14 FCC Rcd at 19856, ¶ 30.

⁹⁸ However, non-program minutes, such as advertisements and public service announcements, aired during a described program need not be described.

⁹⁹ NTN at 4; NTVAC at 11; WGBH at 14.

of programming with video description will avoid any conflicts between competing uses of the SAP channel. Some networks use the SAP channel to provide Spanish audio or other services.¹⁰⁰ Although as some commenters point out there is not a technical solution to allow two uses of the SAP channel simultaneously,¹⁰¹ as others point out most networks that use the SAP channel to provide Spanish language audio do so on a limited basis.¹⁰² Those few networks that provide more extensive Spanish language audio are not among the networks that will be affected by our rules.¹⁰³ Thus, we believe that our rules will not create conflicts between Spanish language audio and video description for use of the SAP channel. Although some commenters believe that occasional uses of the SAP channel for different purposes will create viewer confusion,¹⁰⁴ we believe any such confusion can be corrected through viewer education.

B. Prime Time vs. Other Types of Programming

35. Background. In the *Notice*, we proposed to require the broadcast stations and MVPDs subject to our initial rules to provide programming with video description during prime time, or to provide children's programming with video description. We sought comment on our proposal.¹⁰⁵ Several commenters supported our proposal.¹⁰⁶ Others suggested that we should not require certain types of programming to contain video description, or that we should require broadcast stations and MVPDs to provide both children's and prime time programming with video description.¹⁰⁷ In the *Notice*, we also sought comment on how people with visual disabilities will know when programming with video description is scheduled.¹⁰⁸

36. Discussion. We adopt our proposal to require that the described programming must either be shown

¹⁰⁰ HBO at 5; LULAC at 2; NAB at 21; NCTA at 12-13; NCTA Reply at 9-10. According to LULAC, some portion of the programming of the following networks contains Spanish: ABC, CBS, Fox, NBC, Bravo, Cartoon Network, Cinemax, Comedy Central, Encore, HBO, The Movie Channel, Romance Channel, Sci-Fi Channel, Showtime, Starz!, TNT, and USA. LULAC at 2.

In addition to providing Spanish audio, NCTA states that those cable networks that have the capability to support a third audio channel also use the channel to provide supplementary audio information, such as local weather or world news; enhanced TV commentary, such as commentary from a movie's director; and cue tones, or signals to alert head-end equipment to breaks in national programming for insertion of local advertisements. NCTA at 12-13.

¹⁰¹ NAB at 20.

¹⁰² WGBH at 18.

¹⁰³ Approximately 85% of the programming of HBO, The Movie Channel, and Showtime, and 50% of the programming of Encore, contain Spanish audio. HBO at 5; NCTA Reply at 9-10. We do not expect these networks to be among the top five nonbroadcast networks subject to our rules.

¹⁰⁴ DirecTV; HBO at 6; NCTA at 12-13.

¹⁰⁵ 14 FCC Rcd at 19855, ¶ 29.

¹⁰⁶ Adaptive Environments at 1; WGBH at 17.

¹⁰⁷ Clive at 3 (video programming distributors should do both children's and prime time programming); NTVAC at 10 (the ratio of prime programming to children's programming should be 3-to-1); RPI at 4,6 (FCC should not choose programming); TDI at 4 (75% of programming should be prime time).

¹⁰⁸ 14 FCC Rcd at 19855, ¶ 29.

during prime time or be children's programming. Prime time programming is the most watched programming, and so programming provided during this time will reach more people than programming provided at any other time. In addition, as we noted in the *Notice*, the several thousand dollars per hour cost to describe programming is a very small portion of the production budget for the typical prime time program. At the same time, as we noted in the *Notice*, programming with video description may provide a benefit not only to children who are visually disabled, but also to those who are learning disabled.¹⁰⁹ Programming with video description has both audio description and visual appeal, and so has the potential to capture the attention of learning disabled children and enhance their information processing skills.¹¹⁰ Requiring broadcast stations and MVPDs to provide children's or prime time programming with video description thus ensures that the programming reaches the greatest portion of the audience it is intended to benefit the most. Permitting broadcast stations and MVPDs to select between the two provides them flexibility without compromising that goal.

37. In order to help the public identify the broadcast stations and MVPDs that are required to provide programming with video description, and the programming for which they are doing so, we encourage broadcast stations and MVPDs that provide programming with video description to take steps to educate and inform the public about the service. We encourage broadcast stations and MVPDs to promote the service in their programming and on their websites, and provide the relevant information to magazines and newspapers that follow their programming schedules, as some commenters suggest.¹¹¹

38. We note that the National Federation of the Blind and many of its individual members suggest that we should focus not on entertainment programming, but rather on the accessibility of text information aired on TV, such as emergency information, the identity of speakers on news and talk shows, and telephone numbers or other contact information in advertisements.¹¹² We agree with NFB that the accessibility of this type of information is important, and address the accessibility of emergency information in particular below in section VIII. We believe, however, that a secondary audio program may not be the appropriate vehicle to provide text-based information. However, we do encourage producers of programming with text information to provide that information aurally, by announcing the names of speakers. Advertisers should have a commercial incentive to provide contact information aurally.

V. EFFECTIVE DATE OF NEW RULES

39. Background. We proposed in the *Notice* to require broadcast stations and MVPDs subject to our rules to begin providing programming with video description starting eighteen months after the effective date of our rules. One commenter supported our proposal.¹¹³ Several commenters suggested that broadcast stations and MVPDs should begin providing described programming earlier, with many suggesting within

¹⁰⁹ 14 FCC Rcd at 19848, ¶ 7.

¹¹⁰ 14 FCC Rcd at 19848, ¶ 7.

¹¹¹ Adaptive Environments at 2; MATP at 3; NTVAC at 13.

¹¹² NFB at 4-5.

¹¹³ Adaptive Environments at 1.

twelve months.¹¹⁴ MPAA claimed that any requirement to begin providing programming with video description within twelve months would be inconsistent with the Commission's approach in closed captioning, and with existing programming contracts.¹¹⁵ NAB suggested that any requirement should coincide with the beginning of the first TV season eighteen months or more after the effective date of the rules.¹¹⁶

40. Discussion. We require the broadcast stations and MVPDs subject to our rules to begin providing programming with video description during the first calendar quarter that is eighteen months after the adoption date of this *Report and Order*, i.e., April-June 2002.¹¹⁷ Although we appreciate the desire of many to have programming with video description earlier, we wish to give the affected broadcast stations, MVPDs, and networks the time that may be necessary to make arrangements to describe the programming, and to upgrade their equipment and infrastructure. We believe that giving the affected parties until April 2002 is ample time. We decline to make our effective date coincide with the beginning of the TV season for broadcast networks because our rules also affect nonbroadcast networks, which may or may not use the same schedule to introduce new programs as broadcast networks do. We encourage parties that seek to make the beginning of their new programming seasons coincide with starting date of their providing video description to make the necessary arrangements to do so, within the time frame to meet their first quarterly compliance requirement in April-June 2002.

VI. EXEMPTIONS

41. Background. In the *Notice*, we proposed to adopt procedures to exempt parties from our video description rules, if compliance would result in an undue burden.¹¹⁸ We noted that, in the closed captioning context, Congress deemed certain factors relevant to showing that compliance would result in an undue burden, and sought comment on whether these procedures should be applied to our video description rules.¹¹⁹ Although not many parties commented on procedures or standards for waiver, WGBH supported adopting the procedures and standards we use for closed captioning for video description.¹²⁰

42. Discussion. We adopt the "undue burden" exemption procedures and standards that we use in the closed captioning context.¹²¹ We therefore will exempt any affected broadcast station or MVPD that can

¹¹⁴ American Council of the Blind at 3, 5; Clive at 2; MATP at 2; NTN at 4; NTVAC at 9; WGBH at 6, 16. One commenter suggested that we should require broadcast stations and MVPDs to begin providing programming with video description immediately. RPI at 2, 22, 27.

¹¹⁵ MPAA Reply at 19-21.

¹¹⁶ NAB at 25-26; WGBH Reply at 34-35.

¹¹⁷ As set forth below in section VIII, the effective date of our emergency rules will be earlier, upon approval by the Office of Management and Budget.

¹¹⁸ 14 FCC Rcd at 19857, ¶ 33.

¹¹⁹ 14 FCC Rcd at 19857, ¶ 33.

¹²⁰ WGBH at 19.

¹²¹ The procedures and standards we use to assess "undue burden" in the closed captioning context are set forth at 47 C.F.R. § 79.1(f).

demonstrate through sufficient evidence that compliance would result in an “undue burden,” which means significant difficulty or expense. We will consider the following factors: the nature and cost of providing video description of the programming; the impact on the operation of the broadcast station or MVPD; the financial resources of the broadcast station or MVPD; the type of operations of the broadcast station or MVPD; any other factors the petitioner deems relevant; and any available alternatives to video description.¹²²

43. We exempted categories of programming and providers from our closed captioning rules, and many commenters ask that we do the same for video description.¹²³ Given the limited nature of our initial video description rules, we decline to exempt any particular categories of programming or class of programming providers. We will consider these issues when we consider extending the entities that must provide programming with video description, and the amount they must provide.

VII. ENFORCEMENT

44. Background. In the *Notice*, we proposed to adopt procedures to enforce our initial video description rules. We noted that, in the closed captioning context, the Commission did not adopt reporting requirements, but rather simply adopted pleadings requirements and timetables.¹²⁴ We sought comment on the relevance of these procedures to our initial video description rules.¹²⁵ Those commenters that addressed the issue asked us to adopt an informal complaint procedure,¹²⁶ but one that is less onerous than the one we established for closed captioning, and does not involve quality standards.¹²⁷ Commenters suggested that any entity that violates our rules should be required to provide more programming with video description,¹²⁸ perhaps make a payment, or, in the case of a broadcast station, have their license revoked.¹²⁹

45. Discussion. We adopt enforcement procedures as follows. A complaint alleging a violation of this section may be transmitted to the Commission by any reasonable means, such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, audio-cassette recording, and Braille, or some

¹²² We also adopt the filing and other procedures we use to assess “undue burden” in the closed captioning context. Appendix B sets forth our initial video description rules, and therefore includes these procedures.

¹²³ For example, commenters asked that we exempt certain categories of programming, such as foreign language programming produced outside the United States (Grupo Televisa at 3-8; International Cable Channels Partnership at 3-7), game shows (GSN at 7-8), home shopping programming and infomercials (MPAA at 32; QVC at 4-11), live programming (MPAA at 32; NCTA at 17-20; Weather Channel at 3-5), music programming (MPAA at 32; NCTA at 17-20), news and public affairs programming (C-SPAN at 2-5; MPAA at 32; RTNDA at 2-4), and sports programming (MPAA at 32).

Commenters also asked that we exempt certain classes of programming providers, such as DBS operators (DirecTV Reply at 9), IITS licensees (WCA at 2-3), and “wireless broadband MVPDs” (WCA at 4-5).

¹²⁴ 14 FCC Rcd at 19857, ¶ 33.

¹²⁵ 14 FCC Rcd at 19857, ¶ 33.

¹²⁶ ACB at 7-8.

¹²⁷ WGBH at 20; WGBH Reply at 16.

¹²⁸ WGBH at 20.

¹²⁹ AFB at 8.

other method that would best accommodate a complainant's disability. A complaint shall include the name and address of the complainant. The complaint shall include the name of the broadcast station or MVPD against whom the complaint is alleged. A complaint against a broadcast station should include the name and address of the station, and its call letters and network affiliation. A complaint against an MVPD should include the name and address of the MVPD, and the name of the network that provides the programming that is the subject of the complaint. Complaints should include a statement of facts sufficient to show that the broadcast station or MVPD has violated or is violating the Commission's rules, and, if applicable, the date and time of the alleged violation; the specific relief or satisfaction sought by the complainant; and the complainant's preferred format or method of response to the complaint (such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, or some other method that would best accommodate a complainant's disability). Complaints should be sent to the Commission's Consumer Information Bureau. That bureau will forward formal complaints to the Commission's Enforcement Bureau, and we delegate authority to the Enforcement Bureau to act on and resolve any complaints in a manner consistent with this *Report and Order*.

46. Complaints satisfying the requirements described above will be promptly forwarded by Commission staff to the broadcast station or MVPD involved, which shall be called on to answer the complaint within a specified time, generally within 30 days. To ensure fair and meaningful enforcement of our video description requirements, we will authorize the staff to either shorten or lengthen the time required for responding to complaints in particular cases. For example, if a complaint alleges that the video description disappeared during a program, we believe that it is appropriate to require the broadcast station or MVPD to respond within 10 days after being notified of the complaint in order to minimize the risk of repeat or recurring problems. If, on the other hand, a complaint alleges that a broadcast station or MVPD has not met its quarterly requirements, it may not be appropriate to require the broadcast station or MVPD to respond until the end of the quarter that is the subject of the complaint. However, recurring complaints or a pattern of such complaints against a particular broadcast station or MVPD may warrant a more immediate response to ensure that quarterly requirements are being addressed by the broadcast station or MVPD in manner consistent with their intended purposes. Commission staff will manage our complaint processes to reflect these and other case specific differences. The burden of proof of compliance in response to a complaint is on the broadcast station or MVPD, and they must maintain records sufficient to show their compliance with our rules.

47. Commission staff will review all relevant information provided by the complainant and defendant broadcast station or MVPD and may request additional information from either or both parties when needed for a full resolution of the complaint. Certifications of compliance from programming suppliers, including programming producers, programming owners, networks, syndicators and other distributors, may be relied on by broadcast stations and MVPDs to defend against claims of noncompliance. As a general matter, distributors will not be held responsible for situations where a program source falsely certifies that programming delivered to the distributor meets our video description requirements and the distributor did not know and could not have reasonably ascertained that the certification was false. However, we expect broadcast stations and MVPDs to establish appropriate policies and procedures to safeguard against such false certifications. Commission staff will scrutinize complaints to ensure that broadcast stations and MVPDs vigilantly adhere to our video description requirements. If we determine that a violation has occurred, we will use our considerable discretion under the Act to tailor sanctions and remedies to the individual circumstances of a particular violation. For example, in egregious cases or cases demonstrating a pattern or practice of noncompliance, sanctions may include a requirement that the video programming distributor deliver video programming containing video description in excess of its requirements.

VIII. EMERGENCY INFORMATION

48. Background. In the *Notice*, we observed that public safety messages that scroll across the TV screen are not accessible to persons with visual disabilities, and sought comment on a proposal to require an aural tone to accompany the messages to alert such persons to turn on a radio, the SAP channel, or a designated digital channel.¹³⁰ We sought comment on the proposal, and any other effective approaches, such as whether these messages could be provided via “open” video description.¹³¹ The NFB and some of its members that filed comments supported the Commission taking steps to enhance the accessibility of emergency information.¹³² Some other commenters suggested that we consider this issue in a different proceeding.¹³³

49. Discussion. Consistent with our recent decision to require any broadcast station or MVPD that provides emergency information to make the critical details of that information accessible to persons with hearing disabilities,¹³⁴ we require any broadcast station or MVPD that provides local emergency information to make the critical details of that information accessible to persons with visual disabilities. Our rule applies to all broadcast stations and MVPDs that provide emergency information, as opposed to just those in the largest TV markets or with the largest number of subscribers. We believe this is appropriate both because of the importance of emergency information and because it does not involve the kinds of technical issues involved in using a SAP channel. We envision that affected broadcast stations and MVPDs will aurally describe the emergency information in the main audio as part of their ordinary operations. This would be similar to providing “open” video description. We define emergency information to be that which is intended to protect life, health, safety, and property, *i.e.*, critical details about an emergency and how to respond to the emergency. Examples of the types of emergencies covered include tornadoes, hurricanes, floods, tidal waves, earthquakes, icing conditions, heavy snows, widespread fires, discharge of toxic gases, widespread power failures, industrial explosions, civil disorders, school closings and changes in school bus schedules resulting from such conditions, and warnings and watches of impending changes in weather. These examples are intended to provide guidance as to what is covered by the rule and are not intended to be an exhaustive list. We do not believe an exhaustive list of examples is necessary to convey what is covered by the rule. Our definition of emergency information will include the provision of critical details in an accessible manner. Critical details could include, among other things, specific details regarding the areas that will be affected by the emergency, evacuation orders, detailed descriptions of areas to be evacuated, specific evacuation routes, approved shelters or the way to take shelter in one’s home, instructions on how to secure personal property, road closures, and how to obtain relief assistance.

50. The rule will require broadcast stations and MVPDs that provide local emergency information to make that information accessible to viewers who are blind or have visual disabilities in the affected local area through aural presentation whenever such information is provided during regularly scheduled newscasts, unscheduled newscasts that preempt regularly scheduled programming or during continuing

¹³⁰ 14 FCC Rcd at 19856-19857, ¶ 32.

¹³¹ 14 FCC Rcd at 19856-19857, ¶ 32.

¹³² NFB at 4-5. *See also* Dunnam, Sanders, Walker.

¹³³ NTVAC at 13; WGBH at 19.

¹³⁴ In the Matter of Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Accessibility of Emergency Programming, MM Docket No. 95-176, *Second Report and Order*, FCC 00-136 (released April 14, 2000).

coverage of a situation. As a result of our rule, persons with visual disabilities will have access to the same critical information to which other viewers have access. Under this rule, broadcast stations and MVPDs are not required to provide in an accessible format all of the information about an emergency situation that they are providing to viewers visually, only the visual information intended to further the protection of life, health, safety, and property. In determining whether particular details need to be made accessible, we will permit programmers to rely on their own good faith judgments.

51. We believe that our requirement that broadcast stations and MVPDs make the critical details of emergency information available during regularly scheduled newscasts and newscasts that are sufficiently urgent to interrupt regular programming will generally ensure that the critical details of emergency information will be accessible to persons with visual disabilities. This is because we expect that broadcast stations and MVPDs will provide emergency information of an extremely urgent nature by interrupting their regularly scheduled programming with a newsbreak, and we require them to make the critical details of this information accessible. To the extent, however, that a broadcast station or MVPD does not interrupt its regular programming to provide emergency information but rather does so through another manner, such as a “crawl” or “scroll,” during that programming, we require them to accompany that information with an aural tone, as referenced in the *Notice*.¹³⁵

52. The new rules regarding emergency information will be effective upon approval by the Office of Management and Budget. We adopt an earlier effective date for this rule because of the importance of emergency information, and because there should be little if any equipment and infrastructure costs associated with compliance.

IX. JURISDICTION

53. Background. In the *Notice*, we sought comment on whether we have the statutory authority to adopt video description rules.¹³⁶ We noted the general purpose of the Act in establishing the Commission, as well as the Commission’s general jurisdiction and rulemaking powers.¹³⁷ We also noted that Congress has expressed the goal of increasing the accessibility of communications services for persons with disabilities.¹³⁸ We further noted that Title III of the Act requires the Commission to find that the “public interest, convenience, and necessity” will be served by the grant, renewal, or transfer of a license authorized pursuant to that title.¹³⁹ Finally, we observed that Congress had directed the Commission to conduct an inquiry and issue a report on video description.¹⁴⁰

54. Discussion. We conclude that we have the authority to adopt video description rules. Section 1 of the Act (codified as 47 U.S.C. § 151) established the Commission “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all

¹³⁵ 14 FCC Rcd at 19856, ¶ 32.

¹³⁶ 14 FCC Rcd at 19857-19859, ¶¶ 34-39.

¹³⁷ 14 FCC Rcd at 19857, ¶ 35.

¹³⁸ 14 FCC Rcd at 19858, ¶ 36.

¹³⁹ 14 FCC Rcd at 19858, ¶ 37.

¹⁴⁰ 14 FCC Rcd at 19858, ¶ 38.

the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service. . . .” (emphasis added). Section 1 also established the Commission “for the purpose of promoting safety of life and property through the use of wire and radio communication.” Section 2(a) of the Act (codified as 47 U.S.C. § 152(a)) states that “[t]he provisions of this act shall apply to all interstate and foreign communication by wire or radio” and “all persons engaged within the United States in such communication.” Section 4(i) (codified as 47 U.S.C. § 154(i)) states that “[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions” and section 303(r) (codified as 47 U.S.C. § 303(r)) states that “the Commission from time to time, as public convenience, interest, or necessity requires shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. . . .”

55. Congress has thus authorized the Commission to make available to all Americans a radio and wire communication service, and to promote safety and life through such service, and to make such regulations to carry out that mandate, that are consistent with the public interest and not inconsistent with other provisions of the Act or other law. In other words, as the Commission has previously explained, “[t]he courts have consistently held that the Commission has broad discretion so long as its actions further the legislative purposes for which the Commission was created and are not contrary to the basic statutory scheme.”¹⁴¹ Thus, in considering the Commission’s power to create the universal service fund (for which at the time there was no explicit statutory authority), the U.S. Court of Appeals for the D.C. Circuit relied, solely, on sections 1 and 4(i) of the statute, holding: “As the Universal Service Fund was proposed in order to further the objective of making communication service available to all Americans at reasonable charges, the proposal was within the Commission’s statutory authority.”¹⁴²

56. We disagree with those parties that contend that video description rules would be inconsistent with other provisions in the Act or other law. Specifically, some parties contend that video description rules are inconsistent with sections 624 and 713 of the Act, and the First Amendment. Others suggest that the rules interfere with the rights of copyright holders. We address each of these below.

57. *Section 713.* Some commenters contend that section 713(f) of the Act, codified as 47 U.S.C. § 613(f), only authorizes the Commission to conduct an inquiry, and thus forecloses a rulemaking, on video description.¹⁴³ Section 713(f) of the Act states, in its entirety:

Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall commence an inquiry to examine the use of video descriptions on video programming in order to ensure the accessibility of video programming to persons with visual impairments, and report to Congress on its findings. The Commission’s report shall assess the appropriate methods and schedule for phasing video descriptions into the marketplace, technical and quality standards for video descriptions, a definition of programming for which video descriptions would apply, and other technical and legal issues that the Commission deems appropriate.

Section 713(f) is silent with respect to – and thus by itself neither authorizes nor precludes – a rulemaking.

¹⁴¹ Amendment of Part 67 of the Commission’s Rules and Establishment of a Joint Board, CC Docket No. 80-286, *Decision and Order*, 96 FCC 2d 781, 787 n.15 (1984).

¹⁴² *Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1315 (1988).

¹⁴³ A&E at 6; DirecTV at 4; HBO at 1; Lifetime at 3; MPAA at 3; NAB at 2-4; NCTA at 4.

In other words, section 713(f) does not change the purpose for which the Commission was created, as expressed in section 1 of the Act, nor does it derogate the general rulemaking powers the Commission has, as expressed in sections 4(i) and 303(r) of the Act.

58. We recognize, as some commenters point out,¹⁴⁴ that the legislative history to section 713 indicates that Congress considered, but did not enact, language explicitly referencing a rulemaking proceeding. The Conference Report indicates that the House amendment to the Senate bill contained language explicitly referencing a rulemaking proceeding: “Following the completion of this inquiry the Commission may adopt regulations it deems necessary to promote the accessibility of video programming to persons with visual impairments.”¹⁴⁵ The conferees agreed, however, to remove such language: “The agreement deletes the House provision referencing a Commission rulemaking with respect to video description.”¹⁴⁶ While this history indicates that section 713 should not be construed to authorize a Commission rulemaking, the history does not indicate that section 713 should be construed to prohibit such a rulemaking, given our otherwise broad powers to make rules, as expressed in sections 4(i) and 303(r) of the Act. Had Congress intended to limit our general authority, it could have expressly done so, as it has elsewhere in the Act.¹⁴⁷

59. NAB suggests that a general canon of statutory construction – the “specific governs the general” – precludes our reliance on the general jurisdictional sources of sections 4(i) and 303(r) when the specific language and legislative history of section 713 do not authorize a Commission rulemaking.¹⁴⁸ We agree that if section 713 prohibited us from adopting video description rules we could not rely on our general rulemaking authority to do so. As discussed above, however, section 713 does not limit our authority. NAB’s argument, therefore, is misplaced. Congress did not enact section 713 as freestanding legislation, but rather as part of the Telecommunications Act of 1996, and in particular as part of the portion of that legislation that amended the Communications Act. Just last term, the Supreme Court made clear that the action of incorporating portions of the 1996 Act into the Communications Act means that those portions are subject to the Commission’s general rulemaking powers.¹⁴⁹ “[W]e think that what the later statute contemplates is best determined . . . by the clear fact that the 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence part of, an Act which said that ‘[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.’ [One] cannot plausibly assert that the 1996 Congress was unaware of the general grant of the rulemaking authority contained within the Communications Act. . . .”¹⁵⁰

60. A number of commenters suggest that the difference in treatment in section 713 between closed

¹⁴⁴ A&E at 7-8; HBO at 2; MPAA at 3-4; NAB at 4-6; NCTA at 4-5.

¹⁴⁵ H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 183 (1996).

¹⁴⁶ H.R. Conf. Rep. at 184.

¹⁴⁷ See, e.g., 47 U.S.C. § 152(b) (stating that “nothing in this Act shall be construed to apply to or give the Commission jurisdiction with respect to” certain items).

¹⁴⁸ NAB at 7-10.

¹⁴⁹ *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377-378 (1999).

¹⁵⁰ *Id.* at 378 n.5 (1999). The Supreme Court was interpreting the legal effect of general provision in section 201(b) of the Act on the more specific provisions in section 251 and 252, which the Telecommunications Act of 1996 added as amendments to the Communications Act. The language of section 201(b) (set forth in the text) is quite similar to the language in section 4(i) and 303(r).

captioning and video description indicates that Congress did not intend the Commission to adopt video description rules,¹⁵¹ and that this difference precludes the Commission from adopting such rules.¹⁵² Subsections (a)-(e) of section 713 deal with closed captioning. Subsection (a) directs the Commission to conduct an inquiry on closed captioning, and submit a report to Congress, and subsections (b)-(e) include a requirement that the Commission adopt rules, and set forth certain parameters for those regulations. Subsection (f) deals with video description, and as stated above, only requires the Commission to conduct an inquiry and submit a report to Congress. However, as the Supreme Court recently held in resolving similar statutory issues elsewhere in the Communications Act: “There is undeniably a lack of parallelism here, but it seems to us adequately explained by the fact that [one provision] specifically requires the Commission to promulgate regulations implementing that provision, where [a subsection of another provision] does not. It seems to us not peculiar that the mandated regulations should be specifically referenced, where regulations permitted pursuant to the Commission’s [more general] authority are not. In any event, the mere lack of parallelism is surely not enough to displace that explicit authority.”¹⁵³ In other words, the difference in treatment between closed captioning and video description simply means that Congress intended the Commission not to have any discretion on whether to adopt closed captioning rules, but left it to the Commission to decide whether to adopt video description rules. The difference in treatment does not displace the Commission’s more general rulemaking powers, as expressed in sections 4(i) and 303(r). In sum, section 713 does not preclude the Commission from adopting video description rules.

61. *Section 624(f)*. Some commenters also contend that, absent express authority to conduct a rulemaking on video description elsewhere in the Act, section 624(f) of the Act precludes the Commission from adopting video description rules for cable operators.¹⁵⁴ Section 624(f) states that “[a]ny Federal agency . . . may not impose requirements regarding the provision or content of cable services, except as expressly provided in [Title VI].” The U.S. Court of Appeals for the D.C. Circuit has interpreted this section to forbid “rules requiring cable companies to carry particular programming.”¹⁵⁵ The video description rules we adopt today are not content-based, and as such, do not require cable companies (or any other distributor of video programming) to carry particular programming. Rather, our rules simply require that, if a distributor chooses to carry the programming of the largest networks, it must provide a small amount of programming with video description.

62. *First Amendment*. Some commenters argue that requiring video description is inconsistent with the First Amendment, because it compels speech, or otherwise is content-based regulation.¹⁵⁶ Other commenters, however, contend that our rules are content-neutral regulations, similar to time, place, and manner regulations, and under the applicable test, are consistent with the First Amendment.¹⁵⁷ The Supreme Court has held that “[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government’s purpose is the controlling

¹⁵¹ A&E at 6-7; DirecTV at 4; MPAA at 3-4; NAB at 6-7; NCTA at 5.

¹⁵² A&E at 6-7; DirecTV at 4; MPAA at 4.

¹⁵³ *Iowa Utilities Bd.*, 525 U.S. at 384-385.

¹⁵⁴ A&E at 8-9; NCTA at 5-6.

¹⁵⁵ *United Video, Inc. v. FCC*, 890 F.2d 1173, 1188 (1989).

¹⁵⁶ C-SPAN at 5-8; Lifetime at 3; MPAA at 10-16; RTNDA at 5-6.

¹⁵⁷ AFB Reply at 2-4; NTVAC Reply at 11, 18-19; WGBH Reply at 10-12.

consideration. A regulation that serves purposes unrelated to free expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.¹⁵⁸ The purpose of our video description rules is to enhance the accessibility of video programming to persons with disabilities, and is not related to content.

63. The fact that our rules will require, as opposed to restrict, speech does not change the analysis.¹⁵⁹ As a number of commenters explain, a mandate to provide video description does not require a programmer to express anything other than what the programmer has already chosen to express in the visual elements of the program.¹⁶⁰ Our rules simply require a programmer to express what it has already chosen to express in an alternative format to enhance the accessibility of the message. As such, our rules are comparable to a requirement to translate one's speech into another language in other contexts.¹⁶¹ A requirement to provide programming with video description is most similar to our existing requirements to provide programming with closed captioning, which, as several commenters point out,¹⁶² has not been challenged on First Amendment grounds. Indeed, the U.S. Court of Appeals for the D.C. Circuit concluded nearly twenty years ago that any requirement to provide programming with closed captioning would not violate the First Amendment.¹⁶³

64. Given that our video description rules are content-neutral regulations, the applicable test for reviewing their constitutionality is whether the regulations promote an important government purpose, and whether they do not burden substantially more speech than necessary.¹⁶⁴ As indicated above, our purpose in adopting our rules is to enhance the accessibility of television programming to persons with visual disabilities. As we observed in the *Notice*, television programming shapes American culture and public opinion in myriad ways, because it is our principal source of news and information, and provides hours of entertainment weekly.¹⁶⁵ Millions of Americans have visual disabilities and have difficulty following the visual elements in television programming, which can be overcome through video description. We believe this is an important government purposes in the context of the First Amendment, and believe that other legislation designed to enhance the accessibility of communications to persons with disabilities supports our conclusion.

65. We also believe that video description will not burden any more speech than necessary. As described above, video description is in effect the translation of the visual elements of programming into

¹⁵⁸ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations omitted).

¹⁵⁹ A number of commenters claim that our rules will compel or force speech. A&E at 12-13; C-SPAN at 5-8; Lifetime at 3; MPAA at 8-16; NAB at 10-13; NCTA at 6-7; RTNDA at 5-6.

¹⁶⁰ AFB Reply at 2-4; WGBH Reply at 11-12.

¹⁶¹ For example, NTVAC notes that the District of Columbia courts require eviction notices to be presented in both English and Spanish. NTVAC Reply at 19.

¹⁶² NTVAC Reply at 11; WGBH Reply at 11.

¹⁶³ *Gottfried v. FCC*, 655 F.2d 297, 311 n.54 (1981), *rev'd in part*, 459 U.S. 498 (1983). The Supreme Court decision did not disturb the dictum of the D.C. Circuit Court of Appeals regarding the constitutionality of closed captioning rules.

¹⁶⁴ *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997).

¹⁶⁵ *Notice*, 14 FCC Rcd at 19845, ¶ 1.

another language to provide functional equivalency for the blind. Our rules will require only a limited amount of programming to contain video description. To the extent the video description is distracting to viewers who do not wish to hear it, they can simply listen to the main audio instead of the SAP channel.

66. *Copyright.* Some commenters also suggest that our video description rules are in tension with copyright law.¹⁶⁶ MPAA explains that the video description of a program requires the creation of a second script, which is a derivative work that itself enjoys copyright protection, and that video description could only be undertaken with the consent of the holder of the copyright to the program, for all stages of the production and distribution of the program.¹⁶⁷ WGBH, however, which actually describes programming, states that in more than ten years of doing so, no copyright issues have arisen that prevented it from describing programming.¹⁶⁸ WGBH explains that video description always occurs with the consent of the copyright holder (as does closed captioning), and that copyright holders are willing to permit the video description of their programs because they continue to hold the copyright and the video description adds value to their programs.¹⁶⁹ While MPAA points out that WGBH's apparent success in obtaining the necessary copyright clearances occurred in a voluntary environment,¹⁷⁰ we believe that the limited nature of our video description rules does not change this environment in such a dramatic fashion that copyright problems will become an obstacle for those responsible to provide video description to in fact do so. Rather, we envision copyright holders and distributors working as NTVAC suggests:¹⁷¹ just as a broadcast network, in negotiating the rights to air a movie, may request copyright holders to change a program in order to comply with indecency restrictions, so may it request copyright holders to provide video description of the program. Should the distributors that are subject to our rules be unable to obtain the necessary clearances from copyright holders, they are free to bring those difficulties to our attention, and seek appropriate relief.

X. CONCLUSION

67. Today we adopt rules to enhance the accessibility of the important medium of television to persons with visual disabilities. We do not impose an undue burden on the programming production and distribution industries. Our rules will require only the largest broadcast stations and MVPDs – which provide television programming to the majority of the public – to provide a limited amount of programming with video description. These broadcast stations and MVPDs will provide programming with video description on the largest networks they carry – which provide the most watched television programming. Our rules will thus create a benefit to the greatest number of persons with visual disabilities but at the same time impose a cost on the least number of broadcast stations and MVPDs. As the industry and the public gain greater experience with video description, we hope that more broadcast stations and MVPDs will provide video description, and those that do so will provide more hours of programming with video description.

¹⁶⁶ Lifetime at 3-4; MPAA at 16-22; NAB at 23-24.

¹⁶⁷ MPAA at 16.

¹⁶⁸ WGBH at 18-19.

¹⁶⁹ WGBH at 19, 32-34.

¹⁷⁰ MPAA Reply at 25-26.

¹⁷¹ NTVAC at 15-16.

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XI. ADMINISTRATIVE MATTERS

68. This document is available to individuals with disabilities requiring accessible formats (electronic ASCII text, Braille, large print, and audiocassette) by contacting Brian Millin at (202) 418-7426 (voice), (202) 418-7365 (TTY), or by sending an email to access@fcc.gov.

69. Final Paperwork Reduction Act Analysis. This *Report and Order* contains information collection requirements that the Commission is submitting to the Office of Management and Budget requesting clearance under the Paperwork Reduction Act of 1995.

70. Final Regulatory Flexibility Certification. Pursuant to the Regulatory Flexibility Act of 1980, as amended, 5 U.S.C. § 601 *et seq.*, the Commission's Final Regulatory Certification in this *Report and Order* is attached as Appendix C.

71. Additional Information. For additional information, please contact Eric J. Bash, Policy and Rules Division, Mass Media Bureau, (202) 418-2130 (voice), (202) 418-1169 (TTY), or ebash@fcc.gov, or Meryl S. Icove, Disabilities Rights Office, Consumer Information Bureau, (202) 418-2372 (voice), 418-0178 (TTY), or micove@fcc.gov.

XII. ORDERING CLAUSES

72. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, 310, and 713 of the Communications Act, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, 310, 613, Part 79 of the Commission's rules are amended as set forth in Appendices B and C.

73. IT IS FURTHER ORDERED that the rules set forth in Appendix B that revise section 79.2 of the Commission's rules, 47 C.F.R. § 79.2, SHALL BECOME EFFECTIVE upon approval from the Office of Management and Budget, and the rules set forth in Appendix B that add section 79.3 to the Commission's rules, 47 C.F.R. § 79.3, SHALL BECOME EFFECTIVE on April 1, 2002.

74. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

75. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A**COMMENTS**

A&E Television Networks, Inc. (A&E)
Adaptive Environments
Akamine, Anthony (Akamine)
American Council of the Blind (ACB)
American Foundation for the Blind (AFB)
Association of America's Public Television Stations (APTS)
Braille Institute Library Services (BILS)
Brandt, Dorothy
C-SPAN and C-SPAN 2 (C-SPAN)
Clive, Alan (Clive)
Council of Organizational Representatives (COR)
DIRECTV, Inc. (DirecTV)
Enders, William H.
Feigenblatt, Dr. R.I.
Game Show Network, L.P. (GSN)
Grupo Televisa, S.A. (GT)
Indiana Protection and Advisory Services (IPAS)
International Cable Channels Partnership (ICCP)
Massachusetts Assistive Technology Partnership (MATP)
Metropolitan Washington Ear (MWE)
Motion Picture Association of America (MPAA)
Narrative Television Network (NTN)
National Association of Broadcasters (NAB)
National Cable Television Association (NCTA)
National Federation of the Blind (NFB)
National Television Video Access Coalition (NTVAC)
QVC, Inc. (QVC)
R.P. International (RPI)
Satellite Broadcasting and Communications Association (SBCA)
Short, Charles and Maureen
Short, Charles Jr.
Telecommunications for the Deaf, Inc. (TDI)
WGBH Educational Foundation (WGBH)
Wireless Communications Association International, Inc. (WCA)

REPLY COMMENTS

A&E Television Networks (AETN Reply)
Alabama Council of the Blind (Alabama Council)
Allen, Seville (Allen)
American Council of the Blind (ACB Reply)
American Foundation for the Blind (AFB Reply)
Baker, Rob (Baker)
Benson, Stephen (Benson)
Blinded Veterans Association (BVA)
Brandt, Dorothy (Brandt Reply)
Brown, Deborah (Brown)

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Carcione, Tracy (Carcione)
Chong, Curtis (Chong)
Chorney, Marla (Chorney)
Cumings, Cheryl (C. Cumings)
Cumings, Thomas (T. Cumings)
DIRECTV, Inc. (DirecTV Reply)
Dunnam, Jennifer (Dunnam)
Elliott, Peggy Pinder (Elliott)
Freeman, Michael (Freeman)
Gardner, Ronald J. (Gardner)
Grupo Televisa, S.A. (Grupo Televisa Reply)
Home Box Office (HBO)
Jacobson, Shawn (Jacobson)
Koeng, Sheila (Koeng)
League of United Latin American Citizens and the National Council of La Raza (LULAC)
Lifetime Entertainment Services (Lifetime)
Maine Independent Living Services, Inc. (MILS)
Massachusetts Association for Parents of the Visually Impaired (MAVPI)
Mayo, Shawn (Mayo)
Motion Picture Association of America (MPAA Reply)
Narrative Television Network (NTN Reply)
National Association of Broadcasters (NAB Reply)
National Cable Television Association (NCTA Reply)
National Federation of the Blind of Colorado (NFB-CO)
National Federation of the Blind of Maryland (NFB-MD)
National Federation of the Blind of Ohio (NFB-OH)
National Television Video Access Coalition (NTVAC Reply)
Oliver, Philip (Oliver)
Pease, J.M. (Pease)
Pietrolungo, Al
QVC, Inc. (QVC Reply)
Radio-Television News Directors Association (RTNDA)
RPI International, Inc. (RPI Reply)
Sanders, Judy (Sanders)
Sanfilippo, John (Sanfilippo)
Scanlan, Joyce (Joyce Scanlan)
Scanlan, Thomas
Sutton, Jennifer
VIPs of Attleboro (VIPs)
WGBH Educational Foundation (WGBH Reply)
Wales, Nathanael (Wales)
Walhof, Ramona (Walhof)
Walker, Barbara (Walker)
Weather Channel, Inc. (Weather Channel)
West Virginia Department of Education and the Arts, Division of Rehabilitation Services (WV Dep't of Education and the Arts)
Zweifel, Clyde (Zweifel)

APPENDIX B**RULES**

Part 79 of Title 47 of the U.S. Code of Federal Regulations is amended by revising it to read as follows:

Part 79—CLOSED CAPTIONING OF VIDEO PROGRAMMING

1. The authority citation for Part 79 is revised to read as follows:

AUTHORITY: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 613.

2. The title of Part 79 is revised to read as follows:

Part 79—CLOSED CAPTIONING AND VIDEO DESCRIPTION OF VIDEO PROGRAMMING

3. Section 79.2 is amended by revising paragraph (a) (1) and (b) (1) and (3) to read as follows:

§ 79.2 Accessibility of Programming Providing Emergency Information.**(a) Definitions.**

- (1) For purposes of this section, the definitions in Sections 79.1 and 79.3 apply.

* * * * *

(b) Requirements for accessibility of programming providing emergency information.

- (1) Video programming distributors must make emergency information, as defined in paragraph (a) of this section, accessible as follows:

- (i) Emergency information that is provided in the audio portion of the programming must be made accessible to persons with hearing disabilities by using a method of closed captioning or by using a method of visual presentation, as described in § 79.1 of this part;

- (ii) Emergency information that is provided in the video portion of a regularly scheduled newscast, or newscast that interrupts regular programming, must be made accessible to persons with visual disabilities; and

- (iii) Emergency information that is provided in the video portion of programming that is not a regularly scheduled newscast, or a newscast that interrupts regular programming, must be accompanied with an aural tone.

- (2) * * *

- (3) Video programming distributors must ensure that:

- (i) Emergency information should not block any closed captioning and any closed captioning should not block any emergency information provided by means other than closed captioning; and

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(ii) Emergency information should not block any video description and any video description provided should not block any emergency information provided by means other than video description.

* * * * *

4. Part 79 is amended by adding new Section 79.3 to read as follows:

§ 79.3 Video description of video programming.

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

(1) Designated Market Areas (DMAs). Unique, county-based geographic areas designated by Nielsen Media Research, a television audience measurement service, based on television viewership in the counties that make up each DMA.

(2) Second Audio Program (SAP) channel. A channel containing the frequency-modulated second audio program subcarrier, as defined in, and subject to, the Commission's OET Bulletin No. 60, Revision A, "Multichannel Television Sound Transmission and Processing Requirements for the BTSC System," February 1986.

(3) Video description. The insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue.

(4) Video programming. Programming provided by, or generally considered comparable to programming provided by, a television broadcast station that is distributed and exhibited for residential use.

(5) Video programming distributor. Any television broadcast station licensed by the Commission and any multichannel video programming distributor (MVPD), and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission.

- (b) The following video programming distributors must provide programming with video description as follows:

(1) Commercial television broadcast stations that are affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC), as of September 30, 2000, and that are licensed to a community located in the top 25 DMAs, as determined by Nielsen Media Research, Inc. for the year 2000, must provide 50 hours of video description per calendar quarter, either during prime time or on children's programming;

(2) 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;

(3) Multichannel video programming distributors (MVPDs) that serve 50,000 or more subscribers, as of September 30, 2000, must provide 50 hours of video description per calendar quarter during prime time or on children's programming, 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, as determined by Nielsen Media Research, Inc., for the time period October 1999-September 2000; and

(4) Multichannel video programming distributors (MVPDs) 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; 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.

(c) Responsibility for and determination of compliance:

(1) The Commission will calculate compliance on a per channel, calendar quarter basis, beginning with the calendar quarter April 1--June 30, 2002.

(2) Programming with video description will count toward a broadcaster's or MVPD's minimum requirement for a particular quarter only if that programming has not previously been counted by that broadcaster or MVPD towards its minimum requirement for any quarter.

(3) Once an entity has aired a particular program with video description, it is required to include video description with all subsequent airings of that program, unless the entity uses the SAP channel in connection with the program for a purpose other than providing video description.

(4) In evaluating whether a video programming distributor has complied with the requirement to provide video programming with video description, the Commission will consider showings that any lack of video description was *de minimis* and reasonable under the circumstances.

(d) Procedures for exemptions based on undue burden.

(1) A video programming distributor may petition the Commission for a full or partial exemption from the video description requirements of this section, which the Commission may grant upon a finding that the requirements will result in an undue burden.

(2) The petitioner must support a petition for exemption with sufficient evidence to demonstrate that compliance with the requirements to provide programming with video description would cause an undue burden. The term "undue burden" means significant difficulty or expense. The Commission will consider the following factors when determining whether the requirements for video description impose an undue burden:

(i) The nature and cost of providing video description of the programming;

(ii) The impact on the operation of the video programming distributor;

(iii) The financial resources of the video programming distributor; and

(iv) The type of operations of the video programming distributor.

(3) In addition to these factors, the petitioner must describe any other factors it deems relevant to the Commission's final determination and any available alternative that might constitute a reasonable substitute for the video description requirements. The Commission will evaluate undue burden with regard to the individual outlet.

(4) The petitioner must file an original and two (2) copies of a petition requesting an exemption based on the undue burden standard, and all subsequent pleadings, in accordance with § 0.401(a) of this chapter.

(5) The Commission will place the petition on public notice.

(6) Any interested person may file comments or oppositions to the petition within 30 days of the public notice of the petition. Within 20 days of the close of the comment period, the petitioner may reply to any comments or oppositions filed.

(7) Persons that file comments or oppositions to the petition must serve the petitioner with copies of those comments or oppositions and must include a certification that the petitioner was served with a copy. Parties filing replies to comments or oppositions must serve the commenting or opposing party with copies of such replies and shall include a certification that the party was served with a copy.

(8) Upon a showing of good cause, the Commission may lengthen or shorten any comment period and waive or establish other procedural requirements.

(9) Persons filing petitions and responsive pleadings must include a detailed, full showing, supported by affidavit, of any facts or considerations relied on.

(10) The Commission may deny or approve, in whole or in part, a petition for an undue burden exemption from the video description requirements.

(11) During the pendency of an undue burden determination, the Commission will consider the video programming subject to the request for exemption as exempt from the video description requirements.

(e) Complaint procedures.

(1) A complainant may file a complaint concerning an alleged violation of the video description requirements of this section by transmitting it to the Consumer Information Bureau at the Commission by any reasonable means, such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, audio-cassette recording, and Braille, or some other method that would best accommodate the complainant's disability. Complaints should be addressed to: Consumer Information Bureau, 445 12th Street, SW, Washington, DC 20554. A complaint must include:

(i) the name and address of the complainant;

(ii) the name and address of the broadcast station against whom the complaint is alleged and

its call letters and network affiliation, or the name and address of the MVPD against whom the complaint is alleged and the name of the network that provides the programming that is the subject of the complaint;

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

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

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

(2) The Commission will promptly forward complaints satisfying the above requirements to the video programming distributor involved. The video programming distributor must respond to the complaint within a specified time, generally within 30 days. The Commission may authorize Commission staff to either shorten or lengthen the time required for responding to complaints in particular cases.

(3) The Commission will review all relevant information provided by the complainant and the video programming distributor and will request additional information from either or both parties when needed for a full resolution of the complaint.

(i) The Commission may rely on certifications from programming suppliers, including programming producers, programming owners, networks, syndicators and other distributors, to demonstrate compliance. The Commission will not hold the video programming distributor responsible for situations where a program source falsely certifies that programming that it delivered to the video programming distributor meets our video description requirements if the video programming distributor is unaware that the certification is false. Appropriate action may be taken with respect to deliberate falsifications.

(ii) If the Commission finds that a video programming distributor has violated the video description requirements of this section, it may impose penalties, including a requirement that the video programming distributor deliver video programming containing video description in excess of its requirements.

(f) Private rights of action are prohibited. Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

APPENDIX C

FINAL REGULATORY FLEXIBILITY ACT CERTIFICATION

The Regulatory Flexibility Act (RFA)¹ requires that an agency prepare a regulatory flexibility analysis for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."² The *Notice of Proposed Rulemaking (Notice)*³ published in this proceeding proposed rules to provide video description on video programming in order to ensure the accessibility of video programming to persons with visual impairments.

In an abundance of caution, the Commission published an Initial Regulatory Flexibility Analysis (IRFA) in the *Notice*,⁴ even though the Commission was reasonably confident that the proposed rules would not have the requisite "significant economic impact" on a "substantial number of small entities." The IRFA sought written public comment on the proposed rules. No written comments were received on the IRFA, nor were general comments received that raised concerns about the impact of the proposed rules on small entities.

The rules adopted in this *Report and Order* requiring stations to provide video descriptions on video programming will affect at most five small broadcasters, which are affiliates of the top four networks in the top 25 Nielsen Designated Market Areas, in the amount of \$5,000 to \$25,000 each. We recognize that the upper end of the possible economic impact might constitute a significant impact for some small broadcasters, but, as noted, this impact will reach, at most, five entities, and we have provided an exemption (upon application) for those small entities for which the cost is burdensome. The pass through of programming will have no significant economic impact on small entities because they are required to pass through programming with video description only if they already have the technical capability necessary to do so. The Commission believes that the emergency notification requirement will have a negligible effect on small entities as well. In addition, if this requirement should prove burdensome to small entities, they may apply for an exemption.

The Commission therefore certifies, pursuant to the RFA, that the rules adopted in the present *Report and Order* will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Report and Order*, including a copy of this final certification, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Report and Order*, including a copy of this final certification, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, a copy of the *Report and Order* and this final certification will be published in the Federal Register. *See* 5 U.S.C. § 605(b).

¹ *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² *See* 5 U.S.C. § 605(b).

³ *See Notice of Proposed Rule Making, In the Matter of Implementation of Video Description of Video Programming*, MM Docket No. 99-339, 14 FCC Rcd 19845 (1999) (*Notice*).

⁴ *See id.* at 19862-69.

SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS

In re: Report and Order, In the Matter of Implementation of Video Description of Video Programming,
MM Doc. No. 99-339

All Americans – including those with visual disabilities – should have meaningful access to video programming. That is the noble goal of this Report and Order. In celebrating the tenth anniversary of the Americans with Disabilities Act, we all should strive to help those with disabilities participate fully in the cultural fabric of our society. Moreover, this Commission has a legal and moral responsibility to ensure that all Americans have access to emergency information, especially concerning their health and safety.

While I would have preferred more explicit delegation from Congress, I believe that Congress did not preclude us from taking the steps that we have adopted today to make programming available to those with visual disabilities. Also, while on balance I support this item, I have significant reservations regarding our implementation of these well-intentioned goals. The item reflects what was a spotty record in many respects, especially concerning the cost, technical feasibility, and demand for this service. But by limiting the application of our entertainment programming requirements to only the largest program providers and only the largest television stations and cable systems, and by requiring only a modest number of hours to be video described, we have an opportunity to gain valuable experience and answers to these questions before we undertake any expansion of these requirements.

Emergency Information

This Order requires broadcasters and multichannel video programming distributors (MVPDs) to make emergency information accessible to those who have visual disabilities – an action I unequivocally support. The Commission's responsibility is to ensure accessibility to communications, "to all people of the United States" for the purpose of "promoting safety of life and property."¹ The Order we adopt today addresses this fundamental tenet of the Telecommunications Act by requiring that all broadcasters and MVPDs which provide emergency information make the critical details of that information accessible to those with visual disabilities. In contrast to the record on video entertainment description, the record reflects unanimous agreement that meaningful access to emergency information is vital. I am especially pleased that we have expedited the effective date of this requirement.

The Order begins but does not fully address the needs expressed by the visual disabilities community for access to emergency information. For example, consumers will still find it frustrating to hear a tone which precedes written weather, news, or sports information scrolled across the bottom of the television screen, but will not have oral access to that information. In addition, the National Federation of the Blind notes that many new Secondary Audio Programming (SAP)-equipped televisions require navigating menus to access the SAP channel but that such menus are visual and therefore inaccessible to those with visual disabilities.² The Commission should use its good offices to bring together representatives of the consumer electronics industry and advocates for those with visual disabilities to generate practical solutions to this problem.

¹ 47 U.S.C. § 151.

² See Letter from Bonnie J.K. Richardson, Vice President, Trade and Federal Affairs, Motion Picture Association of America, to Magalie Roman Salas, Secretary, Federal Communications Commission, MM Doc. No. 99-339, at 1 (July 13, 2000).

Video Programming Description

The issues raised by the video entertainment description requirements of the Order are more problematic. Commenters raised legitimate questions about the demand for, cost, and feasibility of video description. To what extent will visually impaired consumers avail themselves of video described prime time and children's programming? Do many even have access to SAP-enabled television receivers? Does it make sense to video describe all categories of programming? Will broadcasters and MVPDs be forced to supplant Spanish language programming on the SAP channel with video description? These questions are not fully answered.

Every regulation that government imposes has a cost associated with it. Inevitably, consumers pay that cost. We therefore must ensure that any requirements we impose are as narrowly tailored as are necessary to address the public need. The limited rollout of video description that we order today will enable us to assess the efficacy of, and consumer demand for, this service. We will carefully evaluate that experience before expanding upon the requirements adopted today.

Conclusion

We are all mindful of our responsibility to follow the law in carrying out our duties, including our efforts to ensure that all Americans have meaningful access to video programming. While I have concerns about the record in this proceeding, the limited scope of our rules will enable us to assess the efficacy and consumer demand for descriptive video service before we entertain further expansion.

STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH,
CONCURRING IN PART AND DISSENTING IN PART

In the Matter of Implementation of Video Description of Video Programming,
MM Docket No. 99-339

It is with regret that I dissent from the portion of this Order adopting rules requiring video description. I understand well the concerns of those who support this item, and it is more than apparent to me that their views are deeply and personally held. At the same time, however, such factors cannot trump the clear limits on our statutory authority. In short, as much as I might like to support this item in its entirety, I am unable to read the Communications Act as authorizing rules requiring video description.¹

I. Statutory Authority

In the Notice of Proposed Rulemaking in this matter, we specifically sought comment on the question whether the Commission possesses statutory authority to require broadcasters, cable operators, and satellite companies to provide video description. See 14 FCC Rcd. 19845 at para. 39 (1999). I have reviewed carefully the comments on this issue and had hoped there to find persuasive arguments for authority. I can only conclude that the legal arguments in favor of jurisdiction can be described as weak, at best.

The argument for authority here is grounded in the theory of ancillary jurisdiction under sections 1 and 4(i) of the Communications Act. See *Order* at paras. 54-55. While it is true that the Supreme Court and the D.C. Circuit have upheld the Commission's exercise of that type of jurisdiction, this case is distinguishable from those in one very important regard: in none of those cases had Congress expressly addressed the Commission's duties with respect to the regulated area at issue. For example, in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), there were no preexisting statutory provisions regarding the Commission's oversight of the cable industry. Similarly, in *Rural Telephone Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988), Title 47 was silent on the question of federal funding for universal service.

Here, by contrast, Congress has clearly delineated our duties with respect to video description. In section 713(f) of the Act, Congress directed the Commission to commence an inquiry and issue a report on the matter. This has been done; there is no more authority that can be wrung out of that section. Indeed, the fact that section 713(f) requires a report and no more suggests that Congress was not prepared to, and purposefully intended not to, go any further. Juxtaposition of this section with the contemporaneously enacted one concerning closed captioning, see section 713(b), only strengthens this inference of purposeful limitation. That section, which requires both a report *and* a rulemaking on closed captioning, makes clear that Congress understood the difference between a study and a rulemaking and that Congress knew how to take the additional step of mandating rules regarding television services for the disabled.²

¹ I concur, however, in the adoption of the emergency information rules. I do so on the theory of jurisdiction laid out in Part II of the separate statement of Commissioner Powell.

² If independent confirmation of these textual implications were necessary, one need only briefly review the legislative history of section 713(f). That history shows that Congress originally included and then, in conference, removed a rulemaking requirement from the section. See *Telecommunications Act of 1996*, S. Conf. Rep. 104-230 at 411 ("The [conference] agreement deletes the House provision referencing a Commission rulemaking with respect to video description."). This Commission today (continued....)

To say that section 713(f) does not *prohibit* rules requiring video description, as the Order does, *see R&O* at para. 58, is not enough to *establish* jurisdiction here.³ As the item itself acknowledges, that the provision does not authorize such rules, and so can provide no affirmative support for this action. Further, as discussed above, the “negative pregnant” of its text is that anything more than the issuance of a report would be in excess of that authority.

The Commission is not long delayed by these statutory points. On its view of administrative law, Congress must expressly prohibit the Commission from going further than a particular provision authorizes it to go in order to make the textual limits of any provision stick. In an administrative scheme based on delegated powers -- where the Commission possesses only those powers granted by Congress, not all powers except those forbidden by Congress -- this approach to jurisdiction is clearly erroneous.

II. Comments Regarding the Rules

Notably, not all those in the blind community are supportive of these rules. Of course, as with all people grouped together on the basis of a common physical, immutable trait, blindness is no guarantor of monolithic thinking on matters of public policy. In fact, some of the philosophical divisions among the blind on questions such as education and assimilation are profound and have been so for many, many years.

Yet one would have to be particularly astute, even psychic, to glean this fact from the Order. *See R&O* at paras. 4 & n. 11, 38. While discussing extensively the comments from groups for the blind in support of video description, no mention is made of the express opposition of the National Federation of the Blind (NFB), the largest and most historically significant force of and for the blind.⁴ I fear that because NFB’s philosophy of blindness and of the way its members can best achieve their life goals differs from that held by other disability groups, as well as some people at the Commission, its views have not been given the respect they deserve. In other words, I am concerned about the possibility that because NFB does not believe what others think they should about what is best for its members, it has been marginalized in this discussion.⁵ I thus intend to air NFB’s opinions fully.

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adopts rules that Congress consciously chose not to require.

³ With respect to cable operators, there may indeed be a provision of the Communications Act that prohibits video description rules. Section 624(f) states that no federal agency may “impose requirements regarding the provision or content of cable services, except as expressly provided in [Title VI].” Whether or not video description rules concern “content,” they surely regulate the “provision” of cable services. To be sure, *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989), contains some broad dictum regarding the overall effect of section 624(f). But that case did not squarely address, and no party appeared to argue, the meaning of the provision prong of the statutory language.

⁴ NFB was founded in 1940 and has over 50,000 members, with affiliates in all 50 fifty states and over 700 local chapters. *See* www.NFB.org. According to a web site dedicated to serving the blind, NFB “has become by far the most significant force in the affairs of the blind today.” <http://www.blind.net/bwholead.htm> (page entitled “Who Are the Blind, Who Lead the Blind”). Contrary to the suggestion of some in this proceeding, NFB is not some sort of outlier in the blind community, but rather the oldest and largest group composed of and for the blind.

⁵ Generally, NFB believes that with adequate education and opportunity, the blind can participate in society as well as any sighted person; in short, they wish to be treated like any other person, no better (continued,...)

In its comments, NFB states unequivocally: “We oppose the imposition of audio description as a federal mandate.” Comments of NFB at 1 (filed Feb. 23, 2000). As to the level of actual demand for this service among the blind, they remark: “Some like the service. . . ; some dislike it; many are frankly indifferent.” *Id.* They further describe the blind population as “ambivalent” about video description. *Id.* This is so, they say, because of differences between those who are born blind and those who lose their vision later in life. For the congenitally blind, the description of events in essentially visual terms – *i.e.*, “the woman wore a red dress” – provides them no benefit whatsoever. And on a philosophical level, NFB argues that “undue emphasis on entertainment as an issue for the blind draws attention away from the real and cruel forms of economic discrimination and exclusion of blind people from normal integration into society.” *Id.* at 2.

This potential lack of demand for the service creates a mismatch between the means and ends of the regulations. As an initial matter, it is unclear whether these rules benefit the targeted population in general. And if the benefits of video description accrue largely to those who become blind later in life and those with diminished vision due to aging (not the congenitally blind), then it makes little sense to allow complete fulfillment of the video description requirement with children’s programming. *See R & O* at para. 36. The bulk of those with visual disabilities consist of an older population, not the audience for children’s television.

This means-ends misfit undermines the legitimacy of these rules under a potential First Amendment analysis. Even if one accepts as permissible the Commission’s content-based selection of children’s programming as a category for description, the regulations’ non-furtherance of the interests of the primary beneficiaries of the rules is a vexing problem. Furthermore, when a large segment of the very people that the Commission purports to help actively opposes these regulations, one wonders why the Commission is so insistent upon pushing the statutory envelope.

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and no worse. Often, this philosophy results in NFB’s taking a position against what it perceives as special or preferential policies for the blind. For instance, the NFB supported the Americans with Disabilities Act on the ground that it include what is now section 501 of that Act, which states that “[n]othing in this Act shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.” NFB’s theory was “that, although blind people should have help when needed, imposed help can be and is one of the most degrading parts of the discrimination we suffer as a group.” <http://www.blind.net/bg600010.htm> (page entitled “The Right to Refuse Help”). For a full exposition of NFB’s principles, *see* <http://NFB.org>.

III. Conclusion

Video description may be a wonderful idea whose time has come; its current absence in programming may indeed represent the sort of true market failure that justifies government intervention; and its benefits to society may outweigh its costs. But those assertions, even if true, cannot overcome the threshold question of statutory authority for this Commission to act in the area. Contrary to the assumption of this item -- that Congress must prohibit a rulemaking before we lack authority to undertake it -- this Commission has only those powers affirmatively vested in it by Congress. However compelling the underlying subject matter, we may not transgress the larger scheme of laws that governs this agency's actions.

**SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL,
CONCURRING IN PART AND DISSENTING IN PART**

In The Matter of Implementation of Video Description of Video Programming, MM Docket No. 99-339,
Report and Order

This item represents another worthy effort by the Commission to improve the disability community's access to communications services. Proudly, this is an area that has received significant attention by both Congress and this Commission, remedying many years of neglect. I applaud the government's continuing focus on these issues.

The item is noteworthy, however, for another reason that I find much less laudable. Though for a very worthy purpose, the Commission yet again is extending its reach beyond a specific statutory provision by availing itself of ancillary jurisdiction under the broad provisions of sections 4(i) and 303(r) of the Communications Act.¹ While the Commission certainly may act on ancillary authority in the absence of a specific statutory provision, it cannot and should not do so where Congress has spoken specifically on an issue or where there is a clear contrary congressional intention. Because I find Congress spoke to video description in section 713(f) of the Act, and purposely limited the Commission to studying the issue and reporting to Congress, I dissent to the adoption of video description rules under ancillary jurisdiction. I do, however, support that portion of the *Order* that provides for emergency text information in audio form.

I. The Statute Does Not Allow For Video Description Rules

A. The Text of the Statute Does Not Authorize Rules

Congress comprehensively considered the issue of access to video programming by the blind and deaf communities in drafting the Telecommunications Act of 1996. The result was section 713, entitled "Video Programming Accessibility." 47 U.S.C. § 613. The provisions contained in section 713(a)-(e) deal with closed captioning for the deaf. They direct the Commission to "prescribe such regulations as are necessary" to implement closed captioning.²

Section 713(f) addresses video description for the visually impaired, a service that is roughly analogous to closed captioning.³ In stark contrast to closed captioning, Congress did not mandate video

¹ Section 4(i) reads, "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Section 303(r) of the Act provides, in pertinent part, "the Commission from time to time, as public convenience, interest, or necessity requires shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . ." 47 U.S.C. § 303(r).

² The Commission did issue closed captioning rules in 1997. *See In the Matter of Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Accessibility of Emergency Programming*, MM Docket No. 95-17, *Report and Order*, 13 FCC Rcd 3272 (1997), *on recon.*, 13 FCC Rcd 19973 (1998).

³ Video description "means the insertion of audio narrated *descriptions* of a television program's key visual elements into natural pauses between the program's dialogue." 47 U.S.C. § 613(g) (emphasis added). Closed captioning is "[t]he visual *display* of the audio portion of video programming contained in line 21 of the vertical (continued....)"

description, nor did it direct the Commission to prescribe regulations.⁴ Congress only directed the Commission to conduct an inquiry on video description and to report its findings to Congress.⁵ When subsections (a) and (f) of section 713 are viewed together (one mandating rules and one not), it is fairly plain that by negative implication Congress did not wish to legally require video description, but instead it wished to consider the matter more fully, after receiving a report from the FCC.⁶ Indeed, in 1996, and again in 1998, the FCC did issue reports, but Congress elected not to take action. *See* n.5 *supra*.

Yet, as evidenced by its *Order* today, the majority is unfazed and undeterred by the negative implication of section 713(f) and the stark contrast with closed captioning. In its view, Congress may not have directed the FCC to draft rules, but it did not tell them they could not either. The majority insists that it can advance video description rules under section 4(i)'s general authorization to "make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i).⁷ This sweeping authority is invoked to carry out the equally broad purpose in section 1 of the Communications Act to "make available, so far as possible, to all the people of the United States . . . [a] world-wide wire and radio communication service." 47 U.S.C. § 151.

Unquestionably, Congress conferred very broad authority on the Commission under section 4(i), and the courts have sanctioned the exercise of that authority on occasion. *See, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *Rural Tel. Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988). But this broad residual authority is not unrestrained. *See United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). It surely can be supplanted by subsequent, more specific acts of Congress. If, as is the case here, Congress considers and speaks directly to an issue, the Commission should be bound to that specific judgment and not chart a different course that it prefers, riding section 4(i).

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blanking interval (VBI) pursuant to the technical specifications set forth in [the Commission's rules] or the equivalent thereof." 47 C.F.R. § 79.1(a)(4) (1999) (emphasis added).

⁴ The juxtaposition is quite telling. *See National Rifle Assoc. v. Reno*, 2000 WL 800830 (D.C. Cir. July 11, 2000), at *7 ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. U.S.*, 464 U.S. 16, 23 (1983)).

⁵ The Commission has in fact reported to Congress on two occasions. In both instances, Congress neither considered nor took action on video description. *See, e.g., In the Matter of Closed Captioning and Video Description of Video Programming*, MM Docket No. 95-176, *Report*, 11 FCC Rcd 19214, 19222, 19271 (1996) (report recommended "the best course is for the Commission to continue to monitor the deployment of video description and the development of standards for new video technologies that will afford greater accessibility of video description"); *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, *Fourth Annual Report*, 13 FCC Rcd 1034 (1998).

⁶ The specific criteria for the report suggests Congress wanted the Commission to study at a detailed level the issues surrounding video description, in order for it to have a more substantial record on which to consider the propriety of taking government action. The report had to include an assessment of the "appropriate methods and schedules for phasing video descriptions into the marketplace, technical and quality standards for video description, a definition of programming for which video descriptions would apply, and other technical and legal issues that the Commission deemed appropriate." 47 U.S.C. § 613(f).

⁷ The Commission also cites section 303(r), which is nearly identical to 4(i). *Compare* 47 U.S.C. § 303(r) with 47 U.S.C. § 154(i).

The majority would probably agree with this canon of statutory interpretation on its face. Nonetheless, it seems to think that even where Congress considers the very same issue and promulgates a statutory directive, it can exceed the scope of that directive if Congress fails to specifically prohibit the Commission from acting. Here, Congress comprehensively considered the issue of video description. It passed a law directing the Commission to conduct an inquiry and submit a report of its findings. It did not authorize the Commission to issue rules. But, because Congress did not specifically say the FCC could not issue rules, the majority feels free to do so under its general authority.

The majority's approach is breathtaking, for it suggests the Commission can favor its preferences over those of Congress (as long as its actions are within the expansive scope of section 1), if Congress fails to affirmatively prohibit it from acting. Apparently, in the majority's view, it is not enough for Congress to simply pass a law of limited scope. This view turns the notion of a delegated agency on its head. The Commission can act only where it is *authorized* to do so. It is not free to act unless expressly *prohibited* from doing so. See *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161 (4th Cir. 1998) ("We begin with the basic proposition that agency power is 'not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'") (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14) (1976)). I recognize that Congress granted the Commission its broad authority in section 4(i). But, in doing so it surely did not obligate itself in the future to the Herculean task of specifically prohibiting any possible action by the Commission when it crafts new laws in any area within the scope of section 1. Congress cannot possibly, nor should it be required to, proscribe FCC action every time a legislative enactment falls in the scope of "making available to all the people of the United States a wire and radio service."⁸ In section 713(f) Congress told the Commission to produce a report. The completion of that task should have ended the matter, unless and until Congress acted further.

B. *The Legislative History Squarely Shows Congress Rejected Giving The FCC Discretion to Promulgate Rules.*

I understand the impulse not to accept the negative inference of section 713(f)'s reporting requirement (though it is more troubling when compared to mandatory closed captioning rules). One might accept, as does the majority, that section 713(f) is insufficiently clear, or specific, to rob the Commission of section 4(i) authority. But, a review of the legislative history closes the door on any suggestion that Congress was not adverse to FCC mandated rules, though unwilling to mandate video description itself.

In the 103rd and 104th Congresses, both houses introduced telecommunications bills. In the House of Representatives, H.R. 3636, section 206, as reported out of the subcommittee, *mandated* video description.⁹ In full committee, Congressman Carlos Moorhead of California offered an amendment (which was adopted) that allowed the FCC to promulgate video description rules at its *discretion*, rather than statutorily requiring such rules. The amendment read:

⁸ Section 1 of the Communications Act of 1934, as amended (paraphrased).

⁹ See H.R. 3636, § 206 (the Telecommunications and Finance subcommittee draft mandated that the Commission "*shall*, within 1 year after enactment of the [video programming accessibility] section, *prescribe* such regulations as are necessary to ensure that all video programming is fully accessible to individuals with disabilities through the provision of closed captioning service *and* video description." (emphases added)).

Following the completion of such inquiry, the Commission *may adopt* regulation it deems necessary to promote the accessibility of video programming to persons with visual impairments.¹⁰

The amended bill was reintroduced in the 104th Congress as H.R. 1555, and passed by the House of Representatives.¹¹ The Senate version of this bill, S. 652, directed the Commission only to submit a report to Congress and did not contain language mandating video description, or delegating discretion to the FCC to do so through a rulemaking.¹² Both versions of the bill, however, mandated closed captioning and specifically directed the Commission to implement the mandate by promulgating closed caption rules.

The Senate and House bills ultimately were sent to the conference committee to resolve conflicting provisions. One of which, of course, was the discrepancy on video description, with the House bill allowing the FCC to promulgate video description rules at its discretion and the Senate bill only authorizing a report. When the conference agreement was announced the committee had stricken the House language in favor of the Senate's reporting requirement:

The conference agreement adopts the House provision with modifications which are incorporated as new section 713 of the Communications Act. The agreement deletes the House provision referencing a Commission rulemaking with respect to video description.¹³

This version of the bill ultimately was passed by the Congress and signed into law by the President.¹⁴

By the chronology of the legislative drafting and the actions of the conference, it is abundantly clear that Congress specifically considered granting discretionary authority to the FCC to promulgate video description rules and elected not to do so. It is well-established that "[a] contrast in statutory language is 'particularly telling' when it represents a decision by a conference committee to resolve a dispute in two versions of a bill, and the committee's choice is then approved by both Houses of Congress." *See Goncalves v. Reno*, 144 F.3d 110, 132 (1st Cir. 1998) (citation omitted). *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199-200 (1974) (deletion of a provision by a Conference Committee "mitigates against a judgment that Congress intended a result that it expressly declined to enact"). I am at a complete loss to understand how the Commission can hold that section 713(f), though not mandating rules, nonetheless permits the Commission the discretion to put forth rules against this legislative backdrop. Congress squarely considered and rejected the very permissive adoption of rules the Commission now embarks upon.¹⁵

¹⁰ Amendment no. 8, offered by Congressman Carlos Moorhead, to H.R. 3636 in March 16, 1994 Full Committee Mark-up was agreed to by a voice vote. The Moorhead amendment was subsequently incorporated the version passed by full committee. *See* H.R. 3636, § 206(f); H.R. Rep. No. 103-560 at 88 (1994).

¹¹ *See* H.R. 1555, § 204(f); H.R. Rep. No. 104-204, Part I at 140 (1995). *See also* H.R. Conf. Rep. No. 104-458 at 184 (1996).

¹² *See* H.R. Conf. Rep. No. 104-458 at 184 (1996).

¹³ *See id.*

¹⁴ *See* Pub. L. No. 104-104, 110 Stat. 56 (1996).

¹⁵ I cannot help noting that the FCC has been repeatedly and badly bruised by a Congress that believes this agency is disrespectful of its judgments and willing to ignore congressional intent in favor of its own favored policies. *See* Mark Wigfield, *Budget Cuts, Miscues Boost Tensions Between FCC, Congress*, Wall St. J., July 3, (continued,...)

It is important to emphasize that section 4(i) is not a stand-alone basis of authority and cannot be read in isolation. It is more akin to a "necessary and proper" clause. Section 4(i)'s authority must be "reasonably ancillary" to other express provisions.¹⁶ And, by its express terms, our exercise of that authority cannot be "inconsistent" with other provisions of the Act.¹⁷ The reason for these limitations is plain: Were an agency afforded *carte blanche* under such a broad provision, irrespective of subsequent congressional acts that did not squarely prohibit action, it would be able to expand greatly its regulatory reach.¹⁸

It is for this reason that I believe the courts often scrutinize carefully an agency's attempt to expand the scope of its jurisdiction. As the D.C. Circuit has noted, "[w]hen an agency's assertion of power into new arenas is under attack . . . courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue." *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987). Such scrutiny in this matter reveals an unambiguous congressional intent not to mandate rules, or to authorize the Commission discretionary authority to do so, thereby supplanting any reliance on the catchall provision of section 4(i).

For this reason, I cannot support the *Order's* adoption of rules mandating video description.¹⁹

II. The Statute Does Allow for Audio Description of Emergency Text Information

I can, however, support our adoption today of rules that require broadcasters and multi-channel video programming distributors ("MVPDs") to provide audio description of scrolling emergency text

(Continued from previous page) _____

2000, at B6. Actions such as this, ignoring congressional choice, and pushing ahead based on ancillary jurisdiction, partly explain Congress' ire.

¹⁶ See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (the Court sanctioned the Commission's general jurisdiction of interstate communications, to the extent that the regulations were "reasonably ancillary to the effective performance of the Commission's various responsibilities . . .") (emphasis added); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1479 (D.C. Cir. 1994); *Capital Network Sys. v. FCC*, 3 F.3d 1526, 1527 (D.C. Cir. 1993).

¹⁷ 47 U.S.C. § 154(i).

¹⁸ Indeed, it would be difficult to maintain that the legislative power of the United States rested exclusively with Congress, as it constitutionally must.

¹⁹ My concerns about the Commission's assertion of ancillary jurisdiction are not newfound. In July 1999, I dissented in part to the Section 255 implementation *Order* because of my "grave concern" of the Commission's reliance on the "use of 'ancillary jurisdiction' to extend the accessibility requirements of Section 255 to providers of voicemail and interactive menu services, as well as to manufacturers of telecommunications equipment and CPE which perform such functions." See Implementation of Section 255 of the Telecommunications Act of 1996—Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities, *Report and Order and Notice of Inquiry* (WT Docket No. 96-198) (Separate Statement of Michael K. Powell, Commissioner, Federal Communications Commission) [available on the World Wide Web at <<http://www.fcc.gov/commissioners/powell>>].

information. Those of us who are sighted have experienced that "beep, beep, beep" while watching television that alerts us to the presence of a critical warning that then scrolls across the screen for us to view. The blind, however, after hearing the beeps, are unable to learn the substance of the alert, since it scrolls across the screen silently. This poses a serious and unnecessary threat to the blind community and should be remedied.

While I have continuing concerns about ancillary jurisdiction as a basis for rulemaking generally, I believe requiring emergency text that is scrolled on television to be read is an appropriate use of section 4(i). Section 1 states that a central purpose of the Communications Act and the FCC is "promoting safety of life and property through the use of wire and radio communication." 47 U.S.C. § 151. Moreover, for many years the Commission, by rule, has required the operation of an Emergency Alert System ("EAS") designed to provide wide dissemination of emergency information. 47 C.F.R. Part 11, § 73.1250 (1999).²⁰ Additionally, emergency information is simply a more compelling justification for policy action than video description of entertainment programming.

Unlike with video description, Congress has not expressed a desire that we not act in this area. Section 713(f) deals with video description that is the "insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue." 47 U.S.C. § 613(g). Scrolled emergency text that is inserted without regard to the original program by the broadcast station or MVPD operator is not a "key visual element" of the program that is airing, and it is not inserted into "natural pauses between the program's dialogue." *Id.* Thus, I am confident that section 713 does not cover the action we take today with respect to such information. Consequently, the legislative history that shows Congress did not wish us to advance video description rules also is inapplicable. As a result, I am comfortable that the general authority of 4(i) and 303(r) has not been supplanted by a more specific statutory provision.

Congress has not denied us authority in this area. Indeed, it appears to have recognized and ratified the invocation of our general authority for emergency information purposes. For example, section 624(g) of the Act states that "each cable operator shall comply with such standards as the Commission shall prescribe to ensure that viewers of video programming on cable systems are afforded the same emergency information as is afforded by the emergency broadcasting system." 47 U.S.C. § 544(g). The Emergency Broadcasting System (now known as the Emergency Alert System) was initially developed over 40 years ago and its specific provisions and scope are a product of Commission rulemaking, resting on sections 4(i), 303(r) and other broad provisions. For these reasons, I can support the emergency text portion of today's *Order*.

III. Other Infirmities of this Order

In addition to jurisdiction, I believe this *Order* attempts to gain weight from the admittedly high purpose of helping a segment of the disability community gain access to video programming. But, I

²⁰ 47 C.F.R. § 73.1250 reads, in relevant part:

(a) Emergency situations in which the broadcasting of information is considered as furthering the safety of life and property include, but are not limited to the following: Tornadoes, hurricanes, floods, tidal waves, earthquakes, icing conditions, heavy snows, widespread fires, discharge of toxic gasses, widespread power failures, industrial explosions, civil disorders and school closing and changes in school bus schedules resulting from such conditions.

believe the benefits are substantially less than celebrated in the *Order*. Moreover, I believe the *Order* is faulty in several key respects. I will list some of these points briefly:

First, I would note that the blind community is not unanimous in its support for video description rules. The National Federation of the Blind ("NFB"), representing 55,000 blind individuals, is the largest and oldest organization of the blind. NFB filed comments in which it stated unequivocally, "[w]e oppose the imposition of audio description as a federal mandate."²¹ True, others support the action, but we should not brush aside the opposing views of such a substantial portion of the blind community simply because they are inconsistent with our notion of what is best for blind people.

Second, the *Order* seems to suggest that government intervention is required because a market has failed to develop for video described programming. However, there is some evidence that suggests that the market has failed because there is not substantial demand by the blind community for such programming. For example, video described tapes have been available in the market for years, but as the Motion Picture Association of America notes, there has been very limited demand for these films.²²

Third, the *Order* wrongly analogizes the ease of video description to closed captioning. It is important to note that video description is a creative work. It requires a producer to evaluate a program, write a script, select actors, decide what to describe, decide how to describe it and choose what style or what pace. In contrast, closed captioning is a straight translation of dialogue into text. The same can be said for foreign language translations. Consequently, video description is more elaborate (and more costly) than closed captioning. Additionally, video description is overlaid onto an existing audio track. Some programs that are rich in dialogue or description, such as a news broadcast or a sports play-by-play program, may not benefit from additional description and in fact may be ruined for blind consumers. Also, some programs, like music videos or live events, may move too quickly to afford an opportunity for an adequate description in the pauses of the program. The point is that the viability and benefits of this service can vary widely based on the nature of the program. Yet, the Commission makes no categorical exemptions for programming types (as it did in closed captioning), nor does its waiver standard contemplate any of these bases for a waiver.

Fourth, access to video description is only obtained through the Secondary Audio Programming ("SAP") channel. As of 1998, only 59% of televisions sold had SAP functionality.²³ Moreover, before 1990 very few sets had this feature at all and many of those sets remain in the homes of consumers. With closed captioning, Congress mandated that television manufacturers include that functionality in television sets. No such command runs to manufacturers for SAP functionality. Thus, I question the reach or benefits of this service. Additionally, SAP functionality is an analog signal function. Because we are in the midst of a transition to digital television ("DTV"), it is highly likely that what benefits this

²¹ See National Federation of the Blind, Comments on Notice of Proposed Rulemaking in the Matter of Video Description of Video Programming, MM Docket No. 99-339 (filed Feb. 23, 2000) at 1 (In the first paragraph of comments, NFB unequivocally opposes "the imposition of audio description as a federal mandate").

²² See Motion Picture Association of America, Comment on Notice of Proposed Rulemaking in the Matter of Video Description of Video Programming, MM Docket No. 99-339 (filed Feb. 23, 2000) at 25-26 (citing J. Packer & C. Kirchner, American Foundation for the Blind, *Who's Watching? A Profile of the Blind and Visually Impaired Audience for Television and Video*, at Table 2, p.9 (1997)).

²³ *Id.* at 20 (citing Consumer Electronics Manufacturers Association data).

service affords may be short lived.²⁴

Fifth, I am unimpressed with the *Order's* evaluation of the costs. The item suggests that the revenues of the large commercial broadcast networks (and their affiliates) and the "larger MVPDs" are more than sufficient to account for any video description upgrade.²⁵ The item, however, only looks at total revenues without considering any other operating costs (especially the enormous costs associated with the transition to digital).²⁶ The issue of revenues cannot be considered in a vacuum, without reference to expenditures for utilities, personnel, programming, etc. To do so would be like considering a person's ability to shoulder an additional financial burden based on his overall income without regard to his existing burdens (*e.g.*, rent or mortgage, tuition, car and insurance payments). Moreover, the *Order* also fails to consider rigorously the costs of production, which might vary depending on the type of program and will be passed on in programming costs. As I mentioned above, there is a need for writers to draft video described scripts, actors to describe the scenes, directors to direct and producers to produce. These personnel resources also contribute to the overall costs of programming, at a time when there is already an initial concern about the escalating costs of premium primetime and sports programming.²⁷

Finally, one should not lightly dismiss the limitations on free speech that may result from these new rules. I question the majority's conclusion that its action is content-neutral. Video description is a creative work. It requires artistic and editorial judgment. Moreover, it is only one form of blind accessible programming. A programmer, if free to, might choose instead to introduce more dialogue or sound cues in the original soundtrack, rather than to have the program secondarily described. In addition, there are other uses for the SAP channel, such as Spanish language translation, that a provider must forgo in order to comply with the Commission's mandate. We are mandating a particular form of programming and I doubt the infringement is merely a secondary effect of improving access for the visually impaired.

These difficulties with the item reflect some of the challenges of mandating video description. It also may explain Congress' decision to evaluate the issue further, rather than requiring, or allowing, the Commission to require rules in this area.

²⁴ The *Order* seems to embrace WGBH's view that digital television will require additional audio tracks and, thus, SAP functionality will not be wasted. We have no real confirmation of this view. One should note that we are adopting digital closed captioning rules in a separate proceeding today, and likely would have to reevaluate video description for DTV.

²⁵ See Report at ¶¶ 22, 27, 28.

²⁶ The Report also assumes SAP equipment capability from newspaper articles, not from comments or other authoritative industry resources. See *id.* at ¶ 21 nn. 57-59.

²⁷ See, *e.g.*, Kyle Pope, *Network Makes \$850 Million Deal with Warner Bros.*, Wall St. J., Jan. 15, 1998, at B1 (NBC strikes "a record \$850 million deal to keep the nation's top-rated show, ER"); *NFL Buyers, Sellers Could Butt Heads on Rates*, Multichannel News, Jan. 26, 1998, at 28 ("Fox Broadcasting, ABC, CBS and ESPN will shell out a combined \$17.6 billion across eight [NFL] seasons."); John M. Higgins, *Cable Operators Blast ESPN for NFL Megabid*, Broadcasting & Cable, Jan. 19, 1998, at 10 (Of \$17.6 billion total, ESPN "agreed to pay \$600 million per season for 18 Sunday night games"); See *Disney Offer Would Triple NHL's Current TV Deal*, Palm Beach Post, Aug. 6, 1998, at 8C (Walt Disney Co. offered "to pay the [NHL] almost \$600 million for exclusive U.S. broadcast rights for five years" . . . the deal "would triple the amount Fox Sport and ESPN [paid] the league" under the previous deal).

IV. Conclusion

I wish I could support this *Order* more fully. I share my colleague's passion in wanting to help the visually impaired. It is discomfoting not to support a service for so deserving a community. But, it is precisely when the end is noble that the rule of law is most severely tested. I personally cannot read the law conveniently, even for so worthy a constituency.

Federal Communications Commission

FCC 01-7

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

In the Matter of)	
)	
Implementation of Video Description of)	MM Docket No. 99-339
Video Programming)	

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: January 4, 2001

Released: January 18, 2001

By the Commission: Commissioners Furchtgott-Roth and Powell dissenting and issuing separate statements.

I. INTRODUCTION AND BACKGROUND

1. On August 7, 2000, the Commission adopted rules requiring broadcasters and other video programming distributors to provide video description and to make emergency information more accessible to visually impaired viewers. In this *Order*, we grant in part and deny in part eight petitions seeking reconsideration¹ of the *Report and Order*.² We also provide clarification on certain issues related to the video description rules.³ As we have noted throughout this proceeding, television is the primary source of news and information and provides hours of entertainment each week to American homes. Video description is the description of key visual elements in a television program, inserted into the natural pauses in the program's audio. The video description rules are designed to make television programming more accessible to the many Americans who are visually impaired without imposing an undue burden on the programming production and distribution industries.

2. The Commission has reviewed and studied video description for five years, issuing three notices on the matter,⁴ two reports to Congress,⁵ and the *Report and Order*. The newly adopted rules

¹ Petitioners include DIRECTV, Inc. (DIRECTV), EchoStar Satellite Corporation (EchoStar), Home Box Office (HBO), the Motion Picture Association of America, Inc. (MPAA), the National Association of Broadcasters (NAB), the National Cable Television Association (NCTA), the National Federation of the Blind (NFB), and Turner Broadcasting System, Inc. (TBS). The A&E Television Networks (A&E), the League of United Latin American Citizens (LULAC), and the National Council of La Raza (NCLR) filed comments in support of certain issues raised in the petitions. The American Council of the Blind (ACB), the American Foundation for the Blind (AFB), NCTA, the National Television Video Access Coalition (NTVAC), and the Media Access Group at the WGBH Educational Foundation (WGBH) filed responses partially opposing and partially supporting the petitions. Four petitioners filed replies: DIRECTV, EchoStar, HBO, and MPAA.

² In the Matter of Video Description of Video Programming, MM Docket No. 99-339, *Report and Order*, 15 FCC Rcd 15230 (2000) (*Video Description Report and Order*).

³ No parties sought reconsideration of the rules regarding emergency information.

⁴ The Commission issued the first notice in 1995, Closed Captioning and Video Description of Video Programming, MM Docket No. 95-176, *Notice of Inquiry*, 11 FCC Rcd 4912 (1995), and the second in 1997, (continued....)

require affiliates of ABC, CBS, Fox, and NBC in the top 25 Designated Market Areas (DMAs) to provide 50 hours per calendar quarter of prime time or children's programming with video description. Multichannel video programming distributors (MVPDs) with 50,000 or more subscribers must provide 50 hours of video described programming each quarter on each of the top five national nonbroadcast networks they carry. All broadcast stations and MVPDs that have the technical capability to do so, regardless of market size or number of subscribers, must "pass through" any video description received from a programming provider. The *Report and Order* also adopted "undue burden" exemption procedures as well as enforcement procedures under which complaints alleging violations would be filed with the Commission. The video description rules become effective April 1, 2002. In addition, under new rules that become effective upon approval from the Office of Management and Budget broadcast stations and MVPDs that provide local emergency information must make the critical details of that information accessible to persons with visual disabilities through aural presentation or accompany a "crawl" or "scroll" with an aural tone to alert persons with disabilities to an emergency situation.

3. In this *Order*, we generally affirm the decisions made in the *Report and Order*. We continue to believe that requiring video description will make television more accessible to the many Americans who are visually impaired and that we have the authority to adopt video description requirements. Although petitioners argue that the rules should be modified, if not eliminated,⁶ we note that approximately 600 individuals submitted personal responses to the petitions,⁷ describing their frustration over trying to "see the story without sight" and generally opposing any changes to the rules.⁸ (Continued from previous page)

Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141, *Notice of Inquiry*, 12 FCC Rcd 7829 (1997). The third notice, the *Notice of Proposed Rulemaking* released in 1999, initiated the instant proceeding. In the Matter of Video Description of Video Programming, *Report and Order*, MM Docket No. 99-339, *Notice of Proposed Rulemaking*, 14 FCC Rcd 19845 (1999) (*Notice*).

⁵ The Commission released the first report in 1996, *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, MM Docket No. 95-176, *Report*, 11 FCC Rcd 19214 (1996), and the second in 1998, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, *Fourth Annual Report*, 13 FCC Rcd 1034 (1997).

⁶ For example, the NFB filed a petition asking the Commission to repeal the newly adopted rules and start again.

⁷ See e.g., Letter from Rhea Collett to Magalie Salas, Secretary, FCC (Nov. 7, 2000); Letter from Phyllis Cottle to Magalie Salas, Secretary, FCC (Nov. 3, 2000); Letter from Ray Crowder to Magalie Salas, Secretary, FCC (Nov. 9, 2000); Letter from Carol Ann Ewing to Magalie Salas, Secretary, FCC (Nov. 1, 2000); Electronic Message from Seymour Hoffman to the FCC (Nov. 1, 2000); Letter from Mary M. Jern to Magalie Salas, Secretary, FCC (Nov. 8, 2000); Letter from Mrs. Norma F. Krajczar to Magalie Salas, Secretary, FCC (Nov. 12, 2000); Electronic Message from Retired USAF Colonel Richard L. Klass to the FCC (Oct. 31, 2000); Electronic Message from Cynthia E. Lynn RN to the FCC (Nov. 1, 2000); Letter from Jeffrey J. Moyer to the FCC (Nov. 8, 2000); Letter from James M. Oyer, Job Counselor, The Franklin County Bd. Of Mental Retardation and Development Disabilities to the FCC (Nov. 7, 2000); Electronic Message from Daniel Stabe to the FCC (Nov. 10, 2000); Electronic Message from Val Taylor to the FCC (Nov. 1, 2000); Letter from Kenneth M. Watterson to Magalie Salas, Secretary, FCC (Nov. 8, 2000).

⁸ For example, Jonathan Avila states that "[t]he July vote on this issue was a giant step towards equality for all Americans. ... I support video description on television programming because as a legally blind American I am able to receive crucial and essential information that I could not access in the past." Letter from Jonathan Avila, Manager of Training and Technical Staff for Bartimaeus Group to Magalie Salas, Secretary, FCC (Nov. 14, 2000). With respect to the petitions, Mr. Avila asks the Commission to "[p]lease stand strong in your decision to not let (continued....)

After careful consideration of the record, we continue to believe that the public interest benefits of requiring video description outweigh the costs of complying with the rules.

4. We do make certain changes to and clarifications of our rules. We amend our rules to define the top five nonbroadcast networks as those that are ranked in the top five as defined by national audience share and that also reach 50 percent or more of MVPD households. We amend the rules to allow broadcast stations and MVPDs to count previously aired programming one time toward quarterly requirements. We clarify that once a broadcast station or MVPD that is required under our rules to provide video description has aired a particular program with video description, all subsequent airings of that program by that broadcast station or MVPD on the *same* network or channel must contain the video description. We further clarify that broadcast stations and MVPDs may use the SAP channel to provide services other than video description when subsequently airing a video described program, as long as those services, such as foreign language translations, are program-related. Similarly, we establish an exception to our pass-through requirements, allowing broadcast stations and MVPDs to use the SAP channel to provide program-related services other than video description when airing a program that contains video description. We amend our rules to allow programming providers, in addition to programming distributors, to file waivers for exemptions. We will allow consumers to bring informal complaints to the Commission at any time. We amend the rules, however, to require consumers to certify in any formal complaint to the Commission, and distributors to certify in their answers, that they have attempted to resolve the dispute prior to filing the complaint with the Commission. Finally, we adopt a definition of “prime time” and clarify the definition of “technical error” for purposes of determining compliance with the rules. We believe that these modifications promote our goal of not imposing an undue burden on programming producers or distributors, while enhancing the availability of video description to the visually impaired segment of our society.

II. DISCUSSION

A. Entities to Provide Programming with Video Description

1. Distributors and Programmers

5. In the *Report and Order*, we adopted a rule that requires broadcast stations in the top 25 DMAs affiliated with the top four commercial broadcast networks, ABC, CBS, Fox, and NBC, as well as “larger” MVPDs, MVPDs that serve 50,000 or more subscribers, to provide programming with video

(Continued from previous page)

blind and visually impaired Americans become second rate citizens.” *Id.*; see Letter from Hannah K. McGinnis to Magalie Salas, Secretary, FCC (Nov. 3, 2000) (stating that “[a]s you declared, television should provide essential information and entertainment to blind and visually impaired citizens. . . . Their needs are no less important than those of deaf and hard of hearing citizens who already receive closed captioning”). Sharon Bryant, who is an occupational therapist for “older adults” struggling with macular degeneration has “listened to many older Americans describe their frustration in not being able to view their televisions.” Letter from Sharon Bryant MS, CTRS, OTR at the Low Vision Rehabilitation Clinic to Magalie Salas, Secretary, FCC (Nov. 8, 2000). Urging the Commission to “go forward with the ruling and the eventual implementation of this very important service,” Ms. Bryant reminds us that “[o]ur population is aging and in the near future there will be escalating numbers of Americans who could benefit from video description.” *Id.* Duane H. Davis explains “[e]very day, over and over again, visually impaired people are confronted with the abject realization that they cannot participate in society as others do. . . . It is good for the visually impaired individuals, and good for society, for visually impaired individuals to be motivated and included whenever possible.” Letter from Duane H. Davis, Assistant Professor of Philosophy, The University of North Carolina at Asheville to Magalie Salas, Secretary, FCC (Nov. 6, 2000).

description.⁹ We further explained that implicit in our rules is the decision to hold programming distributors, rather than programming producers, responsible for compliance with our rules.¹⁰

6. DIRECTV, Inc. (DIRECTV) contends that the Commission's rules hold "the wrong party" responsible for providing video described programming. DIRECTV argues that the Commission should hold programmers responsible for compliance with the video description rules because distributors have no ability to do so.¹¹ If a programmer violates the rules, DIRECTV asserts that MVPDs will be subject to costly litigation seeking indemnification for any liability incurred.¹² As we acknowledged and explained in the *Notice*, while we expect that programming networks, and not broadcast stations or MVPDs, will describe the programming, we should hold distributors responsible for compliance for ease of enforcement and monitoring of compliance with our rules.¹³ DIRECTV presents no new arguments or evidence that would lead us to change our conclusion. Consistent with our findings in adopting closed captioning rules, while we are placing the ultimate responsibility on program distributors, we expect that distributors will incorporate video description requirements into their contracts with program producers and owners, and that parties will negotiate for an efficient allocation of video description responsibilities.¹⁴ We therefore deny DIRECTV's request to hold programming producers, rather than programming distributors, responsible for compliance with our rules.

2. DBS Operators

7. The video description rules require MVPDs that serve 50,000 or more subscribers to provide video description during prime time or on children's programming.¹⁵ We recognized in the *Report and Order* that this standard would include within the scope of the rules two DBS systems that together reach 12 million subscribers: DIRECTV and EchoStar Satellite Corporation (EchoStar).¹⁶ We determined that while DIRECTV indicated that modifying its network to support three audio channels would cost "tens of millions of dollars," those costs appeared to be more than offset by revenues. Specifically, we found that DIRECTV had more than 8.5 million customers as of May 2000, and based on the DBS average programming price of \$30 per month, we expect that DIRECTV subscriber revenues would be over \$3 billion per year.¹⁷ Similarly, based on EchoStar's more than 4 million subscribers as of

⁹ *Video Description Report and Order*, 15 FCC Rcd at 15238, ¶ 20, 15241, ¶ 25.

¹⁰ *Video Description Report and Order*, 15 FCC Rcd at 15238, ¶ 20, n.52.

¹¹ DIRECTV Petition at 8.

¹² DIRECTV Petition at 12-13.

¹³ *Notice*, 14 FCC Rcd at 19855, ¶ 25.

¹⁴ See *In the Matter of Closed Captioning and Video Description of Video Programming, Report and Order*, 13 FCC Rcd 3272, 3286, ¶ 28 (1997) (stating the same with respect to closed captioning responsibilities).

¹⁵ *Video Description Report and Order*, 15 FCC Rcd at 15241, ¶ 25, and at App. B (setting forth the rules to be codified at 47 C.F.R. § 79.3(b)).

¹⁶ *Video Description Report and Order*, 15 FCC Rcd at 15242, ¶ 28.

¹⁷ *Video Description Report and Order*, 15 FCC Rcd at 15242, ¶ 28.

May 2000, we expect that EchoStar's subscriber revenues would appear to be nearly \$1.5 billion per year.¹⁸

8. DIRECTV and EchoStar argue in their petitions that the Commission failed to adequately address the costs that the video description rules impose on DBS operators.¹⁹ DIRECTV asserts that the Commission based its decision "on a fictitious revenue figure" and that "gross revenues are an inappropriate measure" of its ability to bear the expenses associated with the new rules.²⁰ Both petitioners claim that neither company is currently profitable.²¹ DIRECTV explains that, in addition to the costs needed to upgrade its system, the rules create staffing costs and missed opportunity costs, and impose costs for video describing programs "estimated at \$4,000 per hour."²² EchoStar asserts that "[a] requirement supporting SAP feeds for all the hundreds of broadcast stations retransmitted by EchoStar would constitute a significant additional expenditure of bandwidth ... approximately 6.25% of a channel of incremental bandwidth ... comparable to, or even greater than, the 4% set-aside for public interest programming."²³ Neither petitioner, however, explains how this information would lead us to change our finding that MVPDs serving 50,000 or more subscribers should provide programming with video description. We recognize that our video description rules impose costs on DIRECTV and EchoStar, as they do on other MVPDs, as well as broadcast stations. DIRECTV and EchoStar have not provided information to convince us, however, that direct broadcast satellite (DBS) providers should be categorically exempt from our rules. Moreover, neither petitioner explains how the rules impose an undue financial burden or an undue burden on available bandwidth sufficient for the Commission to determine that either should be exempt from the video description rules. While we find no reason at this time to change our standard for MVPDs, DIRECTV and EchoStar have the option of seeking individual exemptions by providing sufficiently detailed information under the rules demonstrating that compliance would result in an undue burden.²⁴

3. Premium Networks

9. MVPDs that fall within the scope of our video description rules²⁵ must provide 50 hours

¹⁸ *Video Description Report and Order*, 15 FCC Rcd at 15242, ¶ 28.

¹⁹ DIRECTV Petition at 8-12; EchoStar Petition at 8-11; DIRECTV Reply at 6-7.

²⁰ DIRECTV Petition at 8, 10.

²¹ DIRECTV Petition at 10; EchoStar Petition at 10-11.

²² DIRECTV Petition at 11. DIRECTV specifically argues that beyond the cost of upgrading its system, "the new rules will require DIRECTV to bear additional costs, including: (i) the addition of video description programming to the top five nonbroadcast networks, estimated at \$4,000 per hour, (ii) staff and marketing materials necessary to educate consumers and to field questions and complaints from consumers who utilize the SAP channel for Spanish language programming; (iii) the implementation of internal compliance measures, such as monitoring equipment and additional staff; and (iv) the opportunity costs incurred from reserving the SAP channel for video description rather than to provide new interactive services in high demand." *Id.*

²³ EchoStar Petition at 9.

²⁴ *Video Description Report and Order*, 15 FCC Rcd at 15247-48, ¶ 42.

²⁵ That is, those with 50,000 or more subscribers.

of described programming quarterly on each of any of the top five nonbroadcast networks they carry, as defined by prime time national audience share.²⁶ In the *Notice*, we proposed to require larger MVPDs to provide programming with video description on nonbroadcast networks that reach 50 percent or more of MVPD households.²⁷ Noting, however, that, as the National Cable Television Association (NCTA) pointed out, more than 40 cable networks serve 50 percent or more of MVPD households and that it might be burdensome for cable systems to retransmit video described programming on so many nonbroadcast networks, we decided to limit the number of nonbroadcast networks to the top five.²⁸ In the *Report and Order*, we also stated that we believed our decision to require 50 hours per quarter would avoid any conflicts between competing uses of the SAP channel.²⁹ In particular, we noted that we did not expect certain premium networks, including the Home Box Office (HBO), to be among the top five nonbroadcast networks subject to our rules.³⁰ The rule, as currently written, however, would require HBO to provide video description.

10. HBO asserts that the Commission never intended to include networks like HBO within the scope of our video description rules.³¹ In its petition, HBO contends that by modifying the standard from MVPDs that reach 50 percent of the MVPD households to the top five nonbroadcast networks, the Commission did not intend to expand the scope of the rule to include networks that would not have been subject to the rules originally proposed in the *Notice*.³² HBO suggests several options to remedy this issue: change the definition of nonbroadcast networks covered by the rule to be either the top five national *non-premium* nonbroadcast networks, based on Nielsen Media Research, Inc. (Nielsen) national prime time audience share, or those national nonbroadcast networks that reach 50 percent or more of MVPD households and are ranked in the top five, based on Nielsen national prime time audience share,³³ or exempting from the rules those networks that currently transmit a high percentage (such as 65 percent or more) of their prime time schedules with Spanish language audio using the SAP channel.³⁴

11. All parties that filed pleadings in response to its petition support HBO's request.³⁵ The

²⁶ *Video Description Report and Order*, 15 FCC Rcd at 15241, ¶ 25.

²⁷ *Video Description Report and Order*, 15 FCC Rcd at 15240, ¶ 24 (citing *Notice*, 14 FCC Rcd at 19854-55, ¶ 25).

²⁸ *Video Description Report and Order*, 15 FCC Rcd at 15240-42, ¶¶ 24-26.

²⁹ *Video Description Report and Order*, 15 FCC Rcd at 15245, ¶ 34.

³⁰ *Video Description Report and Order*, 15 FCC Rcd at 15245, ¶ 34, n.103.

³¹ HBO Petition at 2.

³² HBO Petition at 3.

³³ HBO Petition at 6-7.

³⁴ HBO Petition at 7.

³⁵ LULAC Comments at 2-5; NCLR Comments at 1-2; AFB Response at 2-4; NTVAC Opposition at 4; WGBH Opposition at 3-4.

League of United Latin American Citizens (LULAC)³⁶ and the National Council of La Raza (NCLR)³⁷ urge the Commission to adopt one of HBO's options because they believe networks, like HBO, that provide substantial amounts of Spanish language programming should not be forced to eliminate or disrupt that programming.³⁸ The American Foundation for the Blind (AFB), the National Television Video Access Coalition (NTVAC), and the Media Access Group at the WGBH Educational Foundation (WGBH) do not object to a rule modification based on an audience reach criterion, but urge the Commission to reject HBO's argument that the Commission could create an exemption based on use of the SAP channel for Spanish programming. They assert that Spanish language translations and video descriptions can be offered on alternate feeds to provide multiple broadcasts or cablecasts of the same programs.³⁹

12. We did not intend, in adopting our video description rules, to include networks within the scope of those rules that would not have fallen within the scope of our proposal in the *Notice*. Accordingly, we amend Section 79.3(b)(3) to clarify that the 50-hour requirement applies to the top five national nonbroadcast networks, based on Nielsen national prime time audience share, that reach 50 percent or more of MVPD households.⁴⁰ This result is consistent with our goal of enhancing the widespread availability of video description. The programming of each of the several nonbroadcast, non-premium networks with the highest ratings is available to more than 75 million subscribers.⁴¹ By contrast, while HBO is among the nonbroadcast networks with the highest ratings during prime time, only 27 million subscribers subscribe to its service.⁴² We thus believe that limiting the top nonbroadcast networks to those that are ranked in the top five as defined by national audience share and that reach 50 percent or more of MVPD households best fulfills our goal of ensuring the widest availability of video description. We also believe that this result reconciles our proposal in the *Notice* and our intent to limit the number of nonbroadcast networks required to provide video described programming for the reasons set forth in the *Report and Order*.

³⁶ LULAC describes itself as "the largest and oldest Hispanic organization in the United States... and works through community-based programs operating at more than 700 LULAC councils nationwide." LULAC Comments at 1.

³⁷ NCLR describes itself as "the nation's largest Hispanic civil rights organization serv[ing] over three million Hispanics through a formal network of 'affiliates' – 250 Hispanic community-based organizations that together operate in 39 states, Puerto Rico, and the District of Columbia." NCLR Comments at 1.

³⁸ LULAC Comments at 2-3; NCLR Comments at 2. Both LULAC and NCLR state that more than 93% of the HBO prime time program is accessible to Spanish-speaking viewers through the use of the SAP channel. LULAC Comments at 2; NCLR Comments at 2.

³⁹ AFB Response at 2, 4; NTVAC Opposition at 4; WGBH Opposition at 3-4.

⁴⁰ Thus, MVPDs that serve 50,000 or more subscribers must provide 50 hours of video description per quarter on each channel on which they carry one of the top five national nonbroadcast networks, based on Nielsen national prime time audience share, that reach 50 percent or more of MVPD households.

⁴¹ See, e.g., WGBH Comments on the *Notice* at 13.

⁴² See, e.g., WGBH Comments on the *Notice* at 14.

4. “Pass-Through” of Video Description

13. In the *Report and Order*, we adopted pass-through requirements for programming that contains video description. Broadcast stations, including NCE stations, that have the technical capability to do so, must pass through any second audio program containing video description that they receive from their affiliated networks.⁴³ Similarly, MVPDs that have the technical capability to do so must pass through any second audio program containing video description that they receive from a broadcast station or nonbroadcast network.⁴⁴

14. The National Association of Broadcasters (NAB) asks the Commission not to apply the pass-through requirement where a top 25 market broadcast station has already met its 50-hour quarterly requirement, if the station wants to provide Spanish language or any other SAP service for that particular program. Similarly, NAB asks the Commission not to apply the rule to a small market station not subject to any quarterly minimum, if the station wants to provide any other SAP service for that particular program.⁴⁵ NTVAC opposes NAB's request, arguing that there is no reason to deprive the visually impaired community of described programming where the station already has the equipment in place and is receiving the programming in described format.⁴⁶ WGBH agrees with NAB that stations should be able to serve their non-English speaking viewers,⁴⁷ but both NTVAC and WGBH express concern that allowing local stations to use their SAP channel to provide any other services would allow a local broadcaster to use its SAP channel for information or services that are not related to any programming, including radio feeds or farm reports.⁴⁸

15. We agree that we should provide some additional flexibility under the rule. Because the SAP channel cannot be used to provide two services simultaneously, broadcast stations and MVPDs should be able to provide another service on a SAP channel when airing a program that contains video description, as long as that service is related to the program. Accordingly, we amend Sections 79.3(b)(2) and (4) to require broadcast stations and MVPDs that have the technical capability to do so to pass through video description, unless a program-related use of the SAP channel would cause a conflict with the video description.⁴⁹ We believe this approach affords broadcast stations and MVPDs reasonable flexibility to meet the needs of visually impaired viewers and other viewers that might benefit from program-related use of the SAP channel.

⁴³ *Video Description Report and Order*, 15 FCC Rcd at 15243, ¶ 30, and at App. B (setting forth “pass-through” rules for broadcast stations to be codified at 47 C.F.R. §§ 79.3(b)(2)).

⁴⁴ *Video Description Report and Order*, 15 FCC Rcd at 15243, ¶ 30, and at App. B (setting forth “pass-through” rules for MVPDs to be codified at 47 C.F.R. §§ 79.3(b)(4)).

⁴⁵ NAB Petition at 3.

⁴⁶ NTVAC Opposition at 11.

⁴⁷ WGBH Opposition at 8.

⁴⁸ NTVAC Opposition at 11; WGBH Opposition at 8.

⁴⁹ This holds true even if an entity subject to our video description rules has met the 50-hour requirement.

5. Analog and Digital Television

16. In the *Report and Order*, we stated that the newly adopted video description rules do not apply to digital broadcasts, but that we expect ultimately to require digital television broadcasts to contain video description.⁵⁰ NAB argues that the Commission should not mandate video description in an analog environment because the costs for providing video description represent “orphan” investments in analog systems that are scheduled to be abandoned.⁵¹ NTVAC and WGBH, on the other hand, argue that video description rules should apply to both analog and digital broadcasts.⁵² We reject NAB’s argument that because we did not “impose expenditures” on the cable industry for new analog equipment in the navigation devices proceeding, the Commission should similarly not require broadcasters to provide video description with analog broadcasts.⁵³ The purpose of the navigation devices proceeding was to make equipment, including cable television set-top boxes or direct broadcast satellite receivers previously available only from MVPDs, available for commercial retail purchase.⁵⁴ The statutory authority underlying the proceeding is premised on the belief that consumers would benefit from competition in the manufacturing and sale of this equipment.⁵⁵ The Commission determined, however, that there would not be a market demand for analog-only services, that analog devices would “soon be obsolete,” and that requiring the development of analog equipment would interfere with the development of competition in the digital marketplace.⁵⁶

17. These reasons are inapplicable here. One of the ways in which video description may be transmitted with digital broadcasts is by using an additional audio channel like the SAP channel. NAB simply presents no evidence supporting its contention that technical upgrades made to analog systems cannot be used after the transition to digital television (DTV). We thus have no reason to believe that requiring video description with analog broadcasts will result in significant orphaned investments.⁵⁷ Moreover, as we have previously stated and as AFB, NTVAC, and WGBH argue, the need for video description exists now and given that broadcasters will likely continue transmitting in analog format until at least December 2006, we do not wish to wait for the transition to be complete before adopting video

⁵⁰ *Video Description Report and Order*, 15 FCC Rcd at 15234, ¶ 7.

⁵¹ NAB Petition at 6-8.

⁵² NTVAC Opposition at 7; WGBH Opposition at 8-9.

⁵³ NAB Petition at 7-8.

⁵⁴ In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, CS Docket No. 97-80, *Order on Reconsideration*, 14 FCC Rcd 7596, 7597, ¶ 1 (1999) (*Navigation Devices Reconsideration Order*).

⁵⁵ *Navigation Devices Reconsideration Order*, 14 FCC Rcd at 7600, ¶ 13 (referencing Section 629 of the Communications Act, as amended, 47 U.S.C. § 549).

⁵⁶ *Navigation Devices Reconsideration Order*, 14 FCC Rcd at 7600, ¶ 13.

⁵⁷ NAB Petition at 7.

description requirements.⁵⁸

18. Finally, NTVAC and WGBH argue that “the Commission should make clear now that its mandate will extend to transmission and reception of video description in digital television.”⁵⁹ Both parties argue the Commission should implement rules that require manufacturers of digital consumer reception equipment to support the ancillary audio channel that video description can use in DTV, and provide a schedule for implementing video description on digital programming.⁶⁰ WGBH warns that “unless the Commission signals now that description will need to be supported in DTV, expensive retrofitting or substantial delays will occur down the road.”⁶¹ As we have stated throughout this proceeding, we expect ultimately to require DTV broadcasts to contain video description, but we believe that the decision on how and when to develop those requirements should come after there has been further experience with both digital broadcasting and video description. We fully intend to address the issues raised by NTVAC and WGBH in a future periodic DTV review proceeding. Given our intent to require video description of digital programming at a later time, however, we urge equipment manufacturers to design their products with video description in mind.

B. Programming to Contain Video Description

1. Amount of Programming

a. Counting Repeats of Video Described Programming

19. In the *Report and Order*, we clarified that, once the rules go into effect, broadcast stations and MVPDs may not count toward their 50-hour quarterly requirement programming that they have previously aired with video description.⁶² We further explained in the *Report and Order* that broadcast stations and MVPDs may, however, count any programming they air in excess of their quarterly requirements, if and when they repeat the programming later.⁶³ In addition, a broadcast station or MVPD may count any video described programming that they air before the effective date of the rule, if they repeat it after the effective date of the rule.⁶⁴

20. All parties that filed petitions or responses to petitions on this issue support flexibility in counting programming previously aired with video description toward the 50-hour quarterly requirement. NAB, NCTA, and Turner Broadcasting Systems, Inc. (TBS) argue that broadcast stations and MVPDs do not have enough programming each quarter to meet the 50-hour requirement and not counting repeats of

⁵⁸ *Notice*, 14 FCC Rcd at 19853, ¶ 22; AFB Petition at 3; NTVAC Petition at 7; WGBH Petition at 8.

⁵⁹ NTVAC Petition at 7; WGBH Petition at 9.

⁶⁰ NTVAC Petition at 7; WGBH Petition at 9.

⁶¹ WGBH Petition at 9.

⁶² *Video Description Report and Order*, 15 FCC Rcd at 15244, ¶ 33, and at App. B (setting forth rules on repeats of programs containing video description to be codified at 47 C.F.R. §§ 79.3(c)(2)).

⁶³ *Video Description Report and Order*, 15 FCC Rcd at 15244, ¶ 33.

⁶⁴ *Video Description Report and Order*, 15 FCC Rcd at 15244, ¶ 33.

video described programming will force broadcast stations and MVPDs to change regularly scheduled programming or describe programming, such as sports programming, to meet the requirement.⁶⁵ NCTA and TBS also contend that the restriction will force cable program networks to pay to video describe licensed programming, programming that they do not own.⁶⁶ Finally, NAB and NCTA argue that there is no reason for counting repeat showings of captioned programming toward quarterly closed captioning requirements, but not repeats of video described programming toward video description requirements.⁶⁷

21. WGBH agrees with the petitioners that broadcast stations and MVPDs should be allowed to count previously described programming toward their quarterly requirement, whether the programming is distributed on the same channel for which it was originally described or on another channel.⁶⁸ WGBH states that the blind and visually impaired audience is not interested in the description of programming such as sports.⁶⁹ Similarly, AFB and NTVAC believe some flexibility is warranted.⁷⁰ NTVAC suggests that a maximum number of repeats in any one quarter could be established or broadcasters and MVPDs could be credited with the first repeat of a described program.⁷¹ Both AFB and NTVAC, however, disagree with NAB and NCTA that repeats for closed captioning can be compared with video description because the majority of television programs are now captioned, but our rules only require a few hours of video described programming per quarter.⁷² Finally, AFB, NTVAC, and WGBH believe that program distributors and producers can provide for description as part of licensing arrangements and, therefore, oppose any recommendation to exempt programming that is licensed, but not owned, from our rules.⁷³

22. We agree that some flexibility is warranted and will allow broadcast stations and MVPDs to count a repeat of a described program once toward their 50-hour requirement.⁷⁴ Based on the information provided in the petitions, we recognize that some entities may not have enough new programming each quarter that is appropriate for video description. For example, NAB explains that the four major networks do not produce new prime time programming during the summer rerun season⁷⁵ and NCTA asserts that program networks already have little flexibility because the rules are limited to

⁶⁵ NAB Petition at 2-3; NCTA Petition at 9-10; TBS Petition at 3-4.

⁶⁶ NCTA Petition at 11; TBS Petition at 2.

⁶⁷ NAB Petition at 3; NCTA Petition at 12.

⁶⁸ WGBH Opposition at 4.

⁶⁹ WGBH Opposition at 5.

⁷⁰ AFB Opposition at 4-5; NTVAC Opposition at 9-10.

⁷¹ NTVAC Opposition at 9.

⁷² AFB Opposition at 4-5; NTVAC Opposition at 9.

⁷³ AFB Opposition at 4; NTVAC Opposition at 12; WGBH Opposition at 5.

⁷⁴ Broadcast stations and MVPDs can count a repeat of a previously aired program in the same quarter or in a later quarter, but only once altogether.

⁷⁵ NAB Petition at 2-3.

children's and prime time programming.⁷⁶ While we are unwilling to allow broadcast stations and MVPDs to count all previously aired programming that contains video description toward quarterly requirements, we believe that allowing a limited number of repeats will provide broadcast stations and MVPDs reasonable flexibility to make programming more accessible to the blind or visually impaired without intruding unnecessarily into program production and distribution.

23. Finally, we reject NCTA's and TBS's implicit argument that cable program networks should not have to pay to video describe licensed programming. We agree with AFB, NTVAC, and WGBH that programming distributors and producers can provide for video description as part of a licensing agreement. Moreover, MVPDs may file waiver requests if the cost of providing video description for licensed programming creates an undue burden.⁷⁷

b. Subsequent Airings

24. In addition to outlining rules on how to count repeats of video described programming, we adopted rules in the *Report and Order* pertaining to when a station must provide the video description contained in a previously aired program. Specifically, we stated that "once a broadcast station or MVPD has aired a particular program with video description, all of that broadcast station's or MVPD's subsequent airings of that program should contain video description, unless another use is being made of the SAP channel."⁷⁸ We further explained that this requirement should not impose any burden because the cost of both describing programming and upgrading equipment and infrastructure to distribute it should be a one-time fixed cost.⁷⁹

25. NCTA, with the support of WGBH, asks the Commission to modify this "subsequent airing" requirement as it applies to MVPDs. According to NCTA, the assumption that the cost of both describing programming, and upgrading equipment and infrastructure should be a one-time fixed cost "does not hold true if this obligation applies to cable operators."⁸⁰ NCTA argues that if, for example, "a broadcast station carried by a cable operator airs a video-described program, and a cable program network

⁷⁶ NCTA Petition at 9.

⁷⁷ As noted above, some parties argue that they do not have enough programming each quarter to enable them to meet the 50-hour requirement without counting repeats, unless they change their regularly scheduled programming to describe programming, such as sports programming, to meet the requirement. See *supra* text accompanying note 65. In the *Report and Order*, we declined to exempt categories of programming, including sports programming, from our video description requirement. We believed it was unnecessary to create these types of exemptions because of the limited nature of our initial requirement. *Video Description Report and Order*, 15 FCC Rcd at 15248, ¶ 43 and n.123. That is, we believed that the top networks subject to our rules would be able to select 50 hours per quarter without having to describe programming such as sports programming. If any entities subject to our rules find that they do not have enough prime time or children's programming to enable them to meet their requirement without describing sports programming or repeats, they may seek an undue burden exemption on that basis.

⁷⁸ *Video Description Report and Order*, 15 FCC Rcd at 15244, ¶ 33, and at App. B (setting forth rules on the subsequent airing of programs containing video description to be codified at 47 C.F.R. §§ 79.3(c)(3)).

⁷⁹ *Video Description Report and Order*, 15 FCC Rcd at 15244, ¶ 33.

⁸⁰ NCTA Petition at 15.

later airs that same program, that cable network would have to create the entire infrastructure necessary to provide that one program with video description – even if that network would not be otherwise subject to the video description rules.”⁸¹ WGBH agrees that the rule should be clarified and asserts that the Commission’s rule on subsequent airing of video described programming refers to the particular programming network, not the MVPD.⁸²

26. We clarify that once an MVPD that must provide video description under our rules has aired a particular program with video description on a particular network, every subsequent time that MVPD transmits that program *on the same network*, it must include the video description, unless another program-related use is being made of the SAP channel. Applying this requirement only to the network that initially aired the video-described program is consistent with our finding in the *Report and Order* that the cost of describing programming and upgrading facilities should be a one-time cost. In addition, consistent with our earlier decision regarding the obligation to pass through video described programming, we amend Section 79.3(c)(3) to clarify that a broadcast station or MVPD may elect not to provide video description in subsequent airings of a program if the network is using the SAP channel to provide another program-related service.

27. We do not agree with WGBH, however, that this “subsequent airing” rule should apply to networks that are not subject to our quarterly requirement, but have the technical capability to provide video description.⁸³ We believe that imposing a “subsequent airing” requirement on networks not otherwise required to provide any video description might discourage those networks from voluntarily providing video description in the first place.

2. Clarification of the Definition of “Prime-Time” Programming

28. Broadcast stations and MVPDs must provide described programming either during prime time or in children’s programming.⁸⁴ We explained in the *Report and Order* that prime time programming is the most watched programming, and so programming provided during this time will reach more people than programming provided at any other time.⁸⁵

29. While none of the petitioners challenged the requirement that video programming be described during prime time, TBS asked that we clarify the definition of prime time.⁸⁶ TBS notes that “the predominant definition of ‘prime time’ in the industry is 8:00-11:00 p.m. local time in the Eastern and Pacific time zones Monday-Saturday, and 7:00-11:00 p.m. on Sunday. Under this definition, prime

⁸¹ NCTA Petition at 15.

⁸² WGBH Opposition at 7.

⁸³ See WGBH Opposition at 7 (contending that the rule should be clarified so that stations that are not required to provide video description under our rules should not be required to include video description in subsequently aired programming, unless they have the technical capability necessary to do so).

⁸⁴ *Video Description Report and Order*, 15 FCC Rcd at 15246, ¶ 36, and at App. B (setting forth rules on providing video described programming to be codified at 47 C.F.R. §§ 79.3(b)(1) and (3)).

⁸⁵ *Video Description Report and Order*, 15 FCC Rcd at 15246, ¶ 36.

⁸⁶ TBS Petition at 5-7.

time in the Central time zone coincides with the Eastern time zone (an hour earlier local time) and prime time in the Mountain zone is divided between prime time in the Pacific time zone and prime time in the Central time zone.”⁸⁷ NTVAC and WGBH agree that clarification is needed and support the definition that TBS provides.⁸⁸ TBS also asks the Commission to clarify that for TBS Superstation, a single-transponder nonbroadcast network, “prime time” nationwide will be considered prime time in the Eastern time zone.⁸⁹ Both NTVAC and WGBH stated that they had no objection to this request.

30. We adopt the industry definition of “prime time” for purposes of video description. Accordingly, we amend Section 79.3(a)(6) to define “prime time” as the period from 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday local time, except that in the central time zone the relevant period shall be between the hours of 7 and 10:00 p.m. Monday through Saturday, and 6 and 10:00 p.m. on Sunday, and in the mountain time zone each station shall elect whether the period shall be 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday, or 7 to 10:00 p.m. Monday through Saturday, and 6 to 10:00 p.m. on Sunday. While Part 76 of our rules provides a five-hour time period to define prime time,⁹⁰ we note that our repealed prime-time access rules limited presentations of programs from national networks to a three-hour period during prime time.⁹¹ We also note that Nielsen uses a three-hour time period from Monday through Saturday, and the four-hour time period on Sunday to collect audience prime time viewing data.⁹² We find that using Nielsen’s time periods is consistent with our decision to define the top five nonbroadcast networks based on the audience share during prime time as determined by Nielsen. Moreover, we note that the parties are in agreement on this definition. We also agree that prime time for TBS Superstation, a single-transponder system, should be defined as prime time in the Eastern time zone. Again, as TBS points out, this definition coincides with Nielsen’s standard practice⁹³ and none of the parties object to this definition.

3. Text Information

31. In the *Report and Order*, we recognized that making text information accessible to the

⁸⁷ TBS Petition at 6.

⁸⁸ NTVAC Opposition at 12; WGBH Opposition at 5.

⁸⁹ TBS Petition at 7.

⁹⁰ 47 C.F.R. § 76.5(n). Section 76.5 defines prime time, for purposes of cable systems, as “[t]he 5-hour period from 6 to 11 p.m., local time, except that in the central time zone the relevant period shall be between the hours of 5 and 10 p.m., and in the mountain time zone each station shall elect whether the period shall be 6 to 11 p.m. or 5 to 10:00 p.m.” *Id.*

⁹¹ The repealed rule required commercial television stations owned by or affiliated with a national television network “to devote, during the four hours of prime time (7-11 p.m. e.t. and p.t., 6-10 p.m. c.t. and m.t.), no more than three hours to the presentation of programs from a national network, programs formerly on a national network (off-network programs) other than feature films, or, on Saturdays, feature films.” 47 C.F.R. § 73.658 (1994) (repealed).

⁹² See Nielsen Media Research, *2000 Report on Television, The First Fifty Years* at 14 (2000) (defining prime time as 8 to 11:00 p.m., Monday through Saturday, and 7 to 11:00 p.m. Sunday).

⁹³ TBS Petition at 7.

blind and visually impaired is important, but that we believed a secondary audio program may not be the appropriate vehicle to provide text-based information.⁹⁴ We therefore encouraged programming producers with text information to provide that information aurally, by announcing, for example, the names of speakers.⁹⁵ We also adopted rules for providing emergency information to visually impaired viewers. All broadcast stations and MVPDs that provide emergency information intended to further life, health, safety, and property through regularly scheduled newscasts and newscasts that are sufficiently urgent to interrupt regular programming, must make the critical details of that information accessible to persons with visual disabilities through aural presentation.⁹⁶ A broadcast station or MVPD that provides emergency information using a “crawl” or “scroll” must accompany the message with an aural tone to alert persons with visual disabilities to turn on a radio, the SAP channel, or a designated digital channel.⁹⁷

32. The National Federation of the Blind (NFB) contends that the Commission’s final video description rules are fundamentally flawed because they give priority to describing programming over making printed information on the screen accessible.⁹⁸ NFB argues that the Commission should rescind the final rules and begin an entirely new proceeding because “[b]y the time anyone gets around to thinking about accessible information . . . the available resources will already be committed elsewhere.”⁹⁹ The American Council of the Blind (ACB), AFB, NTVAC, and WGBH support NFB’s concerns about providing described text information, but oppose its request, in effect, to “start all over again.”¹⁰⁰ Instead, AFB, NTVAC, and WGBH encourage the Commission to initiate a separate proceeding to address the issue of video descriptions for text information.¹⁰¹ ACB and NTVAC also explain that while the technology and production outlets for delivering video description for television programs has been in place for years, the technology for described information is still being developed.¹⁰² NCTA likewise encourages programming producers with text information to provide that information aurally, but argues that NFB does not explain “how any broader requirement to verbalize textual information could be accomplished without unduly disrupting the viewing experiences of many customers.”¹⁰³

⁹⁴ *Video Description Report and Order*, 15 FCC Rcd at 15246, ¶ 38.

⁹⁵ *Video Description Report and Order*, 15 FCC Rcd at 15246, ¶ 38.

⁹⁶ *Video Description Report and Order*, 15 FCC Rcd at 15250-51, ¶¶ 49-50, and at App. B (setting forth rules on providing video described programming to be codified at 47 C.F.R. §§ 79.2(b)(1)).

⁹⁷ *Video Description Report and Order*, 15 FCC Rcd at 15250-51, ¶¶ 49-50, and at App. B (setting forth rules on providing video described programming to be codified at 47 C.F.R. §§ 79.2(b)(1)).

⁹⁸ NFB Petition at 2.

⁹⁹ NFB Petition at 9-10.

¹⁰⁰ ACB Opposition at 1-2; AFB Response at 5; NTVAC Opposition at 6; WGBH Opposition at 9.

¹⁰¹ AFB Response at 5; NTVAC Opposition at 6; WGBH Opposition at 9.

¹⁰² ACB Opposition at 2; NTVAC Opposition at 6.

¹⁰³ NCTA Comments at 1-2.

33. We emphasize that we fully recognize the importance of described text information. As ACB and NTVAC explain, the industry has begun to examine the use of “synthetic voice”¹⁰⁴ and we encourage further development of this or any other technology that would address the issue of described information. We agree with NTVAC, however, that video description of programming should not be delayed until the issues of describing text information are addressed.¹⁰⁵ NFB has not presented any new arguments that would lead us to change our finding that video described programming and video described text information are not mutually exclusive services. We therefore deny NFB’s request to rescind the video description rules while recognizing the importance of addressing the issue of described information in a separate proceeding.

C. Use of SAP Channels

34. In the *Report and Order*, we stated that we believed our decision to require 50 hours per quarter, or roughly 4 hours per week, of programming with video description would avoid any conflicts between competing uses of the SAP channel.¹⁰⁶ DIRECTV argues that mandatory requirements to use the SAP channel for video description will confuse customers and that consumer education will not alleviate the problem.¹⁰⁷ DIRECTV contends that it will be required to dedicate staff and resources to address these consumer issues on a permanent basis because “one-time consumer education measures will not alleviate the problem.”¹⁰⁸ In response, NTVAC states that “both Spanish speaking and blind people can figure out program schedules and learn to adjust their viewing habits accordingly.”¹⁰⁹

35. We recognized in the *Report and Order* that no technical solution to allow two uses of the SAP channel simultaneously is currently available, but that most networks that use the SAP channel to provide Spanish language audio do so on a limited basis. We concluded that in the majority of cases our rules would not create conflicts between Spanish language audio and video description for use of the SAP channel and that any confusion could be corrected through viewer education.¹¹⁰ DIRECTV presents no new arguments or evidence in its petition for reconsideration that would lead us to change that conclusion. Any change in programming, whether voluntary or mandatory, requires some measure of consumer education and associated costs to provide that education. DIRECTV fails to present any information that the cost of providing that education would outweigh the benefits of the rules. We also believe that the minimal amount of programming required under our rules does not overly burden use of the SAP channel. Rather, the roughly 4-hour per week requirement reasonably accommodates competing

¹⁰⁴ See ACB Opposition at 2 (stating that Time Warner provides a tone for emergency information, a synthetic voice saying go to a particular channel for information, and finally a synthetic voice on that channel describing the emergency information); NTVAC Opposition at 6 (stating that synthetic voice holds considerable promise for the video industry and consumers alike).

¹⁰⁵ NTVAC Opposition at 6.

¹⁰⁶ *Video Description Report and Order*, 15 FCC Rcd at 15245, ¶ 34.

¹⁰⁷ DIRECTV Petition at 8-9; DIRECTV Reply at 7.

¹⁰⁸ DIRECTV Petition at 9.

¹⁰⁹ NTVAC Opposition at 11.

¹¹⁰ *Video Description Rules Report and Order*, 15 FCC Rcd at 15245, ¶ 34.

uses of the SAP channel, such as providing programming that is accessible to Spanish-speaking viewers.

D. Waivers and Exemptions

36. In the *Report and Order*, we adopted the “undue burden” exemption procedures and standards that we use in the closed captioning context.¹¹¹ We will exempt any affected broadcast station or MVPD that can demonstrate through sufficient evidence that compliance would result in an “undue burden,” which means significant difficulty or expense.¹¹² We declined, however, to exempt any particular category of programming or class of programming providers, given the limited nature of the initial video description rules. We stated that we would consider these issues when we consider expanding the scope of entities that must provide video described programming, and the amount of video description those entities must provide.¹¹³

37. Several parties urge the Commission to amend the video description rules to permit program networks and producers, in addition to distributors, to file requests for waivers for undue burden as they are permitted to do under the closed captioning rules.¹¹⁴ Noting that cable program networks and program owners are not included within the definition of “video programming distributor” under Part 79 of our rules,¹¹⁵ NCTA asserts that these entities, rather than the cable operator, would be the appropriate entities to file for undue burden waivers in most cases.¹¹⁶ TBS argues that while the rules place substantial burdens on networks, those networks have no opportunity to petition for an exemption from the requirements of the rules, leaving them no recourse.¹¹⁷ WGBH agrees with NCTA, noting that program networks and producers must be involved and supportive partners with MVPDs to achieve successful provision of described programming. WGBH asserts that both networks and producers should

¹¹¹ *Video Description Report and Order*, 15 FCC Rcd at 15247-48, ¶ 42, and at App. B (setting forth the procedures and standards for assessing “undue burden” exemptions to be codified at 47 C.F.R. § 79.3(d)). The procedures and standards used to assess undue burden exemptions in the closed captioning context are set forth at 47 C.F.R. § 79.1(f).

¹¹² *Video Description Report and Order*, 15 FCC Rcd at 15247-48, ¶ 42. In the *Report and Order*, we stated that we would consider the following factors: the nature and cost of providing video description of the programming; the impact on the operation of the broadcast station or MVPD; the financial resources of the broadcast station or MVPD; the type of operations of the broadcast station or MVPD; any other factors the petitioner deems relevant; and any available alternatives to video description. *Id.*

¹¹³ *Video Description Report and Order*, 15 FCC Rcd at 15248, ¶ 43.

¹¹⁴ NCTA Petition at 16-17; TBS Petition at 7; WGBH Opposition at 6.

¹¹⁵ NCTA Petition at 17. For purposes of our closed captioning rules, Section 79.1(a)(3) defines “video programming provider” as “[a]ny video programming distributor and any other entity that provides video programming that is intended for distribution to residential households including, but not limited to broadcast or nonbroadcast television network and the owners of such programming.” 47 C.F.R. Part 79.1(a)(3).

¹¹⁶ NCTA Petition at 17.

¹¹⁷ TBS Petition at 7.

have rights similar to distributors to request undue burden exemptions.¹¹⁸

38. We agree that video programming providers should be allowed to file waivers for exemptions under the undue burden standard, as they are allowed under our closed captioning rules. Accordingly, we amend Section 79.3(d) to permit video programming providers, as defined under Part 79 of our rules, to petition the Commission for a full or partial exemption from our video description requirements. As we similarly stated in the closed captioning proceeding, the undue burden exemption is intended to be “sufficiently flexible to accommodate a wide variety of circumstances” for which compliance with our video description requirements would pose a significant financial or technical burden.¹¹⁹ As we have previously recognized, video description is most likely to be added to programming at the production stage prior to distribution, where it is most economically and technically efficient.¹²⁰ Moreover, to the extent a broadcast station’s or MVPD’s inability to comply with our rules stems from problems at, for example, the programming producer end, we believe we should allow the programming producer to plead its hardship directly to the Commission. Otherwise, the programming producer would have to submit information to its local distribution outlets around the country, which would then file numerous separate waiver requests with the Commission. To avoid this inefficiency, therefore, we will allow programming providers to seek exemptions under the undue burden standard. We emphasize, however, that while we will allow other programming providers to seek exemptions from our rules, we hold programming distributors responsible for compliance.

E. Enforcement

1. Initial Complaints

39. In the *Report and Order*, we adopted procedures to enforce our initial video description rules.¹²¹ Under these procedures, complaints are not required to be submitted to a programming distributor before being filed with the Commission. A complainant may allege a violation of the video description rules by sending a complaint to the Consumer Information Bureau (CIB) at the Commission by any reasonable means, such as a letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, audio-cassette, Braille, or some other method that would best accommodate a complainant’s disability.¹²² CIB will forward formal complaints to the Commission’s Enforcement Bureau.¹²³

40. NAB and NTCA note that we have established enforcement procedures for our video

¹¹⁸ WGBH Opposition at 6.

¹¹⁹ See In the Matter of Closed Captioning and Video Description of Video Programming, *Report and Order*, 13 FCC Rcd 3272, 3363, ¶ 198 (1997) (providing the same rationale under our closed captioning rules).

¹²⁰ See *supra* at ¶ 6 (stating that we expect that programming networks, and not broadcast stations or MVPDs, will describe the programming) (citing *Notice*, 14 FCC Rcd at 19855, ¶ 25).

¹²¹ *Video Description Report and Order*, 15 FCC Rcd at 15248-49, ¶¶ 45-47.

¹²² *Video Description Report and Order*, 15 FCC Rcd at 15248-49, ¶ 45.

¹²³ *Video Description Report and Order*, 15 FCC Rcd at 15248-49, ¶ 45. In the *Report and Order*, the Commission delegated authority to act on and resolve any complaints in a manner consistent with the *Report and Order*. *Id.*

description rules that differ from the enforcement procedures for our closed captioning rules.¹²⁴ They contend that complaints should be submitted to a programming distributor before being filed with the Commission.¹²⁵ According to NCTA, “requiring the complainant to go to the video programming distributor first will allow the parties to more quickly and satisfactorily resolve the dispute.”¹²⁶ NAB argues that there is no basis on which to adopt a different complaint procedure for the enforcement of video description rules than for closed captioning because “the record does not indicate that the existing closed captioning rules have been ineffective or inadequate.”¹²⁷ AFB and NTVAC oppose the petitioners’ request, arguing that obtaining information to contact programming distributors is too difficult for blind and visually impaired viewers.¹²⁸ NTVAC contends that “[i]t would be simpler and far more efficient for visually impaired viewers to have a single point of contact.”¹²⁹

41. We believe that viewers should try to resolve disputes with video programming distributors prior to filing a formal complaint with the Commission, as suggested by NAB and NCTA. We therefore amend our rules to require complainants to certify in formal complaints to the Commission, and distributors to certify in their answers, that they have attempted in good faith to settle disputes prior to filing formal complaints and answers with the Commission. We note that this result is consistent with our recently revised rules for filing formal complaints against common carriers.¹³⁰ Prior to or instead of filing a formal complaint, however, viewers may contact CIB either to attempt to resolve disputes by filing an informal complaint, or to obtain information about how to contact the programming distributor. We believe that these procedures will provide parties the opportunity to resolve disputes quickly and efficiently.

2. Clarification of “Technical Errors”

42. Our video description rules provide that, in evaluating whether a video programming distributor has complied with the requirement to provide video programming with video description, we will consider a showing that any lack of video description was *de minimis* and reasonable under the

¹²⁴ NAB Petition at 4-5; NCTA Petition at 12-14.

¹²⁵ NAB Petition at 5; NCTA Petition at 12-13.

¹²⁶ NCTA Petition at 13-14.

¹²⁷ NAB Petition at 5.

¹²⁸ AFB Response at 3; NTVAC Opposition at 9.

¹²⁹ NTVAC Opposition at 9.

¹³⁰ Amendment of Rules to be Followed When Formal Complaints are Filed Against Common Carriers, CC Docket No. 96-238, *First Report and Order*, 12 FCC Rcd 22497 (1997). We also followed these rules when we adopted rules to implement section 255 of the Act, which requires manufacturers of telecommunications equipment, and providers of telecommunications services, to make such equipment and provide such services in a manner that is accessible to persons with disabilities. See Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, WT Docket No. 96-198, *Report and Order and Further Notice of Inquiry*, FCC 99-181 (rel. Sept. 29, 1999).

circumstances.¹³¹ NAB asks the Commission to clarify that technical errors beyond an individual station's control will fall under the "reasonable circumstances" provision.¹³² NAB explains, for example, that "if a station is ready and able to pass through to viewers described programming received from its network, but, due to technical difficulties beyond the station's control, the described programming is not properly received, then that 'lack of video description' should be deemed 'reasonable under the circumstances.'"¹³³ Stating that the Commission rarely faults a broadcaster or cablecaster for a temporary rule violation, NTVAC argues that a technical error should not be construed to include the lack of equipment to provide video descriptions, but that a technical error is "a temporary difficulty" that is "a short-term failure of equipment."¹³⁴

43. We clarify that to be classified as a technical error, the problem must be beyond a station's control. In addition, the problem must be *de minimis* and reasonable under the circumstances. We will examine carefully, however, any showings ascribed to technical error to ensure that those instances are only a temporary difficulty, such as that caused by short-term failure of equipment, and not by a station unreasonably failing to pass-through the described programming supplied by its network.

F. Jurisdiction

44. In the *Report and Order*, we held that the Commission has the authority to adopt video description rules. We explained that sections 1, 2(a), 4(i), and 303(r) of the Act,¹³⁵ taken together, direct and empower the Commission to make available to all Americans a radio and wire communication service, and to make regulations to carry out this mandate, that are consistent with the public interest and not inconsistent with other provisions of the Act or other law.¹³⁶ In reaching this decision, we considered but rejected the arguments of commenters that video description rules would be inconsistent with other law, namely sections 624(f) and 713(f) of the Act,¹³⁷ as well as the First Amendment, and might also interfere with the rights of copyright holders.¹³⁸

45. Petitioners raise the same arguments raised before in this proceeding. For example, petitioners suggest that analysis of the issue of our authority to adopt video description rules begins and ends with section 713(f) of the Act,¹³⁹ which instructed the Commission to "commence an inquiry . . . and

¹³¹ *Video Description Report and Order*, 15 FCC Rcd at 15244, ¶ 33, and at App. B (setting forth the standards for assessing compliance with the video description rules to be codified at 47 C.F.R. § 79.3(c)(4)).

¹³² NAB Petition at 5-6.

¹³³ NAB Petition at 5-6.

¹³⁴ NTVAC Opposition at 5.

¹³⁵ These sections are codified at, respectively, 47 U.S.C. §§ 151, 152(a), 154(i), 303(r).

¹³⁶ *Video Description Report and Order*, 15 FCC Rcd at 15251-52, ¶¶ 54-55.

¹³⁷ These sections are codified at, respectively, 47 U.S.C. §§ 544(f), 613(f).

¹³⁸ *Video Description Report and Order*, 15 FCC Rcd at 15252-56, ¶¶ 56-66.

¹³⁹ DIRECTV Petition at 4-5; EchoStar Petition at 2-3; NAB Petition at 8-9; NCTA Petition at 2-3; *see also* A&E Comments at 4-6.

report to Congress” on video description, but not to make rules. Against the backdrop of section 713, petitioners contend that the Commission cannot rely on other provisions of the Act to make rules.¹⁴⁰ Petitioners also suggest that our rules are content-based, violating the First Amendment¹⁴¹ and, as applied to cable operators, section 624(f) of the Act,¹⁴² which does not permit the government to “impose requirements regarding the provision or content of cable services, except as expressly provided in [Title VI of the Act.]” Petitioners further suggest that our rules interfere with the rights of copyright holders.¹⁴³

46. We addressed most of the statutory arguments petitioners raised at the *Report and Order* stage, and they have offered no reason for us to reconsider our conclusion. As discussed in detail in the *Report and Order*, sections 1, 2(a), 4(i), and 303(r) make clear that the Commission’s fundamental purpose is to make available so far as possible to all Americans a radio and wire communication service, and it has the power to make rules to carry out this mandate that are consistent with the public interest, and not inconsistent with other law. Our video description rules further the public interest because they are designed to enhance the accessibility of video programming to persons with visual disabilities, but at the same time not impose an undue burden on the video programming production and distribution industries. Our video description rules are not inconsistent with sections 624(f) and 713(f) of the Act, the First Amendment, or copyright law. Our rules are not inconsistent with section 713(f), because that section neither authorizes nor prohibits a rulemaking on video description. Our rules are not inconsistent with section 624(f), because they do not require cable operators to carry any particular programming. Our rules are not inconsistent with the First Amendment, because they are content-neutral regulations, and satisfy the applicable test of serving an important government interest without burdening substantially more speech than necessary. Our rules are not inconsistent with copyright law because they do not violate any copyright holder’s rights.¹⁴⁴ In sum, as we explained in greater detail in the *Report and Order*, we believe that our video description rules further the very purpose for which the Commission was created – “to make available, so far as possible, to all the people of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service”¹⁴⁵ – and are within our power to

¹⁴⁰ DIRECTV Petition at 5; DIRECTV Reply at 7; EchoStar Petition at 7; MPAA Petition at 5-6; NAB Petition at 9-10; *see also* A&E Comments at 6-7.

¹⁴¹ DIRECTV Petition at 7; DIRECTV Reply at 8; MPAA Petition at 7-8; *see also* A&E Comments at 8-12.

¹⁴² NCTA Petition at 4-6.

¹⁴³ MPAA Reply at 2.

¹⁴⁴ We also reject EchoStar’s new argument that our rules are inconsistent with section 255 of the Act. EchoStar Petition at 7-8; EchoStar Reply at 1-2. Section 255 requires manufacturers of telecommunications equipment, and providers of telecommunications services, to make such equipment and services accessible to persons with disabilities, but only “if readily achievable.” 47 U.S.C. § 255. EchoStar suggests that our video description rules do not have a similar contingency. EchoStar Petition at 7-8; EchoStar Reply at 1-2. EchoStar also argues that the discrepancy between the “readily achievable” standard and our video description rules further suggests that we do not have authority to adopt such rules – Congress did not qualify the provision of video description because there was no access obligation to qualify in the first place. EchoStar overlooks, however, the fact that our video description rules contain procedures for waiver if compliance would create an undue burden. *See* 47 C.F.R. § 79.3(d).

¹⁴⁵ 47 U.S.C. § 151.

adopt because they are “not inconsistent with [the] Act”¹⁴⁶ and serve the “public convenience, interest, and necessity” and are “not inconsistent with law.”¹⁴⁷

III. CONCLUSION

47. In this *Order on Reconsideration*, we reaffirm and modify rules to more precisely balance the interests between providing a benefit to a great number of visually impaired Americans without imposing an undue burden on the programming production and distribution industries. As we stated in the *Report and Order*, however, as industry and the public gain greater experience with video description, we hope that an increasing number of broadcast stations and MVPDs will provide video description, and those that do so will provide an increasing number of hours of video described programming.

IV. PROCEDURAL MATTERS

48. Authority for issuance of this *Memorandum Opinion and Order on Reconsideration* is contained in Sections 4(i), 303(r), 403, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 403, and 405.

49. *Supplemental Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act (RFA),¹⁴⁸ the Commission has prepared a Supplemental Final Certification of the possible impact on small entities of the rules adopted in this *Memorandum Opinion and Order on Reconsideration*.¹⁴⁹ The Supplemental Final Certification is set forth in Appendix C.

V. ORDERING CLAUSES

50. Accordingly, IT IS ORDERED that the petitions for reconsideration or clarification ARE GRANTED to the extent provided herein and otherwise ARE DENIED pursuant to Sections 1, 2(a), 4(i), 303(r), 307, 309, 310, 403, 405, and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303(r), 307, 309, 310, 403, 405, 613, and Section 1.429(i) of the Commission’s rules, 47 C.F.R. § 1.429(i).

51. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) & (j), 303(r), 307, 308 and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) & (j), 303(r), 307, 308, 309, Part 79 of the Commission’s rules, 47 C.F.R. Part 79, IS AMENDED as set forth in Appendix B.

52. IT IS FURTHER ORDERED that the rule amendments set forth in Appendix B that revise section 79.3 of the Commission’s rules, 47 C.F.R. § 79.3, SHALL BECOME EFFECTIVE on April 1, 2002.

53. IT IS FURTHER ORDERED that the Commission’s Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Memorandum Opinion and Order on*

¹⁴⁶ 47 U.S.C. § 154(i).

¹⁴⁷ 47 U.S.C. § 303(r).

¹⁴⁸ 5 U.S.C. § 601 *et seq.*

¹⁴⁹ 5 U.S.C. § 605(b).

Federal Communications Commission

FCC 01-7

Reconsideration in MM Docket No. 99-339, including the Supplemental Final Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

54. IT IS FURTHER ORDERED that this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A**PETITIONS FOR RECONSIDERATION**

1. DIRECTV, Inc. (DIRECTV)
2. EchoStar Satellite Corporation (EchoStar)
3. Home Box Office (HBO)
4. Motion Picture Association of America, Inc. (MPAA)
5. National Association of Broadcasters (NAB)
6. National Cable Television Association (NCTA)
7. National Federation of the Blind (NFB)
8. Turner Broadcasting System, Inc. (TBS)

COMMENTS IN SUPPORT OF THE PETITIONS

1. A&E Television Networks (A&E)
2. League of United Latin American Citizens (LULAC)
3. National Council of La Raza (NCLR)

OPPOSITIONS, PARTIAL OPPOSITIONS AND PARTIAL SUPPORT OF THE PETITIONS

1. American Council of the Blind (ACB)
2. American Foundation for the Blind (AFB)
3. NCTA
4. National Television Video Access Coalition (NTVAC)
5. Media Access Group at the WGBH Educational Foundation (WGBH)

REPLIES

1. DIRECTV
2. EchoStar
3. HBO
4. MPAA

APPENDIX B
Rule Changes

Part 79 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 79-CLOSED CAPTIONING AND VIDEO DESCRIPTION OF VIDEO PROGRAMMING

1. The authority citation for Part 79 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 613

2. Section 79.3 is amended by
- (a) adding paragraph (a)(6);
 - (b) revising paragraphs (b)(2), (b)(3), (b)(4)(i), (b)(4)(ii);
 - (c) revising paragraphs (c)(2) and (c)(3);
 - (d) redesignating paragraph (c)(4) as paragraph (c)(5);
 - (e) adding new paragraph (c)(4);
 - (f) revising paragraph (d)(1);
 - (g) revising paragraphs (e)(1)(iv) and (e)(1)(v);
 - (h) adding paragraph (e)(1)(vi); and
 - (i) revising paragraph (e)(2).

The revisions read as follows:

§ 79.3 Video description of video programming.

* * * * *

(a) * * *

(6) Prime Time. The period from 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday local time, except that in the central time zone the relevant period shall be between the hours of 7 and 10:00 p.m. Monday through Saturday, and 6 and 10:00 p.m. on Sunday, and in the mountain time zone each station shall elect whether the period shall be 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday, or 7 to 10:00 p.m. Monday through Saturday, and 6 to 10:00 p.m. on Sunday.

(b) * * *

(2) 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 using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description.

(3) Multichannel video programming distributors (MVPDs) that serve 50,000 or more subscribers, as of September 30, 2000, must provide 50 hours of video description per calendar quarter during prime time or on children's programming, 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, as determined by Nielsen Media Research, Inc., for the time period

October 1999-September 2000, that reach 50 percent or more of MVPD households; and

(4) * * *

(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 using the technology for providing video description in connection with the program for another purpose that is related to the programming 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 using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description.

(c) * * *

(2) Programming with video description that has been previously counted by a broadcaster or MVPD toward its minimum requirement for any quarter may be counted one additional time toward that broadcaster's or MVPD's minimum requirement for the same or any one subsequent quarter.

(3) Once a commercial television broadcast station as defined under paragraph (b)(1) of this section has aired a particular program with video description, it is required to include video description with all subsequent airings of that program on that same broadcast station, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description.

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

(i) has aired a particular program with video description on a broadcast station they carry, it is required to include video description with all subsequent airings of that program on that same broadcast station, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description; or

(ii) has aired a particular program with video description on a nonbroadcast station they carry, it is required to include video description with all subsequent airings of that program on that same nonbroadcast station, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description.

* * * * *

(d) * * *

(1) A video programming provider may petition the Commission for a full or partial exemption from the video description requirements of this section, which the Commission may grant upon a finding that the requirements will result in an undue burden.

* * * * *

(e) * * *

(1) * * *

(iv) the specific relief or satisfaction sought by the complainant;

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

(vi) a certification that the complainant attempted in good faith to resolve the dispute with the broadcast station or MVPD against whom the complaint is alleged.

(2) The Commission will promptly forward complaints satisfying the above requirements to the video programming distributor involved. The video programming distributor must respond to the complaint within a specified time, generally within 30 days. The Commission may authorize Commission staff either to shorten or lengthen the time required for responding to complaints in particular cases. The answer to a complaint must include a certification that the video programming distributor attempted in good faith to resolve the dispute with the complainant.

APPENDIX C

Supplemental Final Regulatory Flexibility Analysis Certification
Memorandum Opinion and Order on Reconsideration

The Regulatory Flexibility Act (RFA)¹⁵⁰ requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemaking proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”¹⁵¹ The *Notice of Proposed Rulemaking (Notice)* in this proceeding proposed rules to provide video description on video programming to ensure the accessibility of video programming to persons with visual impairments.¹⁵² The *Report and Order* adopted rules requiring broadcasters and other video programming distributors to provide video description and to make emergency information more accessible to visually impaired viewers.¹⁵³

In an abundance of caution, the Commission published an Initial Regulatory Flexibility Analysis (IRFA) in the *Notice*,¹⁵⁴ even though the Commission was reasonably confident that the proposed rules would not have the requisite “significant economic impact” on a “substantial number of small entities.” The IRFA sought written public comment on the proposed rules. No written comments were received on the IRFA, nor were any general comments received that raised concerns about the impact of the proposed rules on small entities. Because the Commission believed the rules adopted in the *Report and Order* would have a negligible effect on small businesses, the Commission published a Final Certification that the rules adopted in that order would not have a significant economic impact on a substantial number of small entities.¹⁵⁵

The *Memorandum Opinion and Order on Reconsideration* amends certain rules adopted in the *Report and Order*. The Commission amends its rules to define the top five nonbroadcast networks as those that are ranked in the top five as defined by national audience share and that also reach 50 percent or more of MVPD households. The amended rules allow broadcast stations and MVPDs to count previously aired programming one time toward quarterly requirements. Once a broadcast station or MVPD subject to the video description rules has aired a particular program with video description, only subsequent airings of that program by that broadcast station or MVPD on the *same* network or channel must contain the video description. Under both this “subsequent airing” rule and the “pass-through” rule,

¹⁵⁰ The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 11- Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

¹⁵¹ *See* 5 U.S.C. § 605(b).

¹⁵² In the Matter of Video Description of Video Programming, *Report and Order*, MM Docket No. 99-339, *Notice of Proposed Rulemaking*, 14 FCC Rcd 19845 (1999) (*Notice*).

¹⁵³ In the Matter of Video Description of Video Programming, *Report and Order*, MM Docket No. 99-339, 15 FCC Rcd 15230 (2000) (*Report and Order*).

¹⁵⁴ *Notice*, 14 FCC Rcd at 19862-69.

¹⁵⁵ *Report and Order*, 15 FCC Rcd at 15265.

broadcast stations and MVPDs may now use the SAP channel to provide services other than video description, as long as those services, such as foreign language translations, are program-related. The rule amendments allow programming providers, in addition to programming distributors, to file waivers for exemptions. The rule amendments adopt a definition of “prime time” and clarify the definition of “technical error” for purposes of determining compliance with the rules. These amendments only affect large entities as discussed in the Final Certification included in the *Report and Order*.¹⁵⁶ No small entities will experience an economic impact as a result of these amendments.

Finally, under the rule amendments, consumers may bring informal complaints to the Commission at any time, but must include in a formal complaint to the Commission a certification that they have tried to resolve a dispute with the distributor prior to filing the complaint. In addition, distributors are required to make similar certifications in their answers. These amendments to the rules are created to attempt to resolve issues prior to filing a formal complaint. The Commission believes that requiring these certifications is necessary to assure a smooth process to address outstanding issues in a timely and efficient manner. The burden imposed by the inclusion of these certifications is nominal for both consumers and distributors because it will require no more than a single statement to be added to the initial formal complaint and its answer. These amendments will not have a significant economic impact on a substantial number of small entities.

The Commission therefore certifies, pursuant to the RFA, that the rule amendments adopted in the present *Memorandum Opinion and Order on Reconsideration* will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Memorandum Opinion and Order on Reconsideration*, including a copy of this Supplemental Final Certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act.¹⁵⁷ In addition, the Commission will send a copy of the *Memorandum Opinion and Order on Reconsideration*, including a copy of this Supplemental Final Certification, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, a copy of the *Memorandum Opinion and Order on Reconsideration* and this Supplemental Final Certification will be published in the Federal Register.¹⁵⁸

¹⁵⁶ *Report and Order*, 15 FCC Rcd at 15265.

¹⁵⁷ See 5 U.S.C. § 801(a)(1)(A).

¹⁵⁸ See 5 U.S.C. § 605(b).

DISSENTING STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH

**In the Matter of Implementation of Video Description of Video Programming,
MM Docket No. 99-339, Memorandum Opinion and Order on Reconsideration**

I dissented from the original Report and Order's adoption of video description rules because I was unable to read the Communications Act as authorizing such regulations. *See* Statement of Commissioner Harold W. Furchtgott-Roth, Concurring in Part and Dissenting in Part, *In the Matter of Implementation of Video Description of Video Programming*, MM Docket No. 99-339, *Report and Order*, 15 FCC Rcd 15230 (2000). Accordingly, I agree with those commenters who seek reversal of that Order on grounds of lack of jurisdiction, *see supra* at ¶ 45, and I dissent from today's action to the contrary.

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Federal Communications Commission

FCC 01-7

DISSENTING STATEMENT OF COMMISSIONER MICHAEL K. POWELL

In The Matter of Implementation of Video Description of Video Programming, MM Docket No. 99-339,
Memorandum Opinion and Order on Reconsideration

Inasmuch as I share my colleagues' desire to improve access to communications services for the disability community, I cannot support the above-captioned *Order* concerning video description of video programming.

As I noted in my separate statement to the original *Order*, I thoroughly wish that I could support the expansive implementation of video description rules that the Majority is pursuing.¹ However, I continue to believe that Congress spoke to the video description issue in Section 713(f) of the Communications Act of 1934, and purposely limited our authority to studying the issue and reporting to Congress. Since Section F of this *Order* re-affirms the Majority's view that it can promulgate video description rules under its various ancillary jurisdiction provided, in large measure, by Sections 4(i) and 303(r) of the Communications Act, I dissent to this *Order*.

I personally cannot read the law conveniently, even for so worthy a constituency.

¹ To be clear, while I disagree with the Majority about its use of ancillary jurisdiction as a basis for this rulemaking generally, I continue to support that portion of the original *Order* that provides for emergency text information in audio form because I believe that the promotion of safety of life and property is within the scope of the specific authority provided by the Communications Act and the Commission's various rules. See *In The Matter of Implementation of Video Description of Video Programming*, MM Docket No. 99-339, FCC 00-259, *Report and Order* (July 21, 2000) (Separate Statement of Michael K. Powell, Commissioner, Federal Communications Commission) [available on the World Wide Web at <<http://www.fcc.gov/commissioners/powell>>].

Federal Communications Commission

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

In the Matter of)
)
Implementation of Video Description of) MM Docket No. 99-339
Video Programming)

ERRATUM**Adopted:** February 21, 2001**Released:** February 21, 2001

By the Chief, Mass Media Bureau:

This *Erratum* revises the amended rules set forth in Appendix B of the *Memorandum Opinion and Order on Reconsideration* in MM Docket No. 99-339, FCC 01-7 to clarify how parties may count reruns to satisfy their fifty-hour quarterly compliance requirements. Specifically, section 79.3 of the Commission's rules is revised as set forth in the appendix to this *Erratum*.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Federal Communications Commission

APPENDIX

Part 79 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 79-CLOSED CAPTIONING AND VIDEO DESCRIPTION OF VIDEO PROGRAMMING

1. The authority of Part 79 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 613

2. Section 79.3 is amended by revising paragraph (c)(2) to read as follows:

§ 79.3 Video description of video programming.

* * * * *

(c) * * *

(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.

