

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

In the Matter of)
)
Implementation of the Commercial Advertisement) MB Docket No. 11-93
Loudness Mitigation (CALM) Act)
)

ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: October 31, 2013

Released: November 1, 2013

Comment Date: (30 days after date of publication in the Federal Register)

Reply Comment Date: (45 days after date of publication in the Federal Register)

By the Commission: Commissioner Rosenworcel issuing a statement.

I. INTRODUCTION

1. In this Further Notice of Proposed Rulemaking (FNPRM), we propose minor rule changes to incorporate into our rules the Advanced Television Systems Committee’s (ATSC)¹ recently published successor document to its July 25, 2011 A/85:2011 Recommended Practice (Current RP).² The Commercial Advertisement Loudness Mitigation (CALM) Act directs the Commission to incorporate such successor documents by reference into the rules and make them mandatory.³ While this proceeding is pending, the Current RP that the Commission incorporated into our rules in 2011 will continue to be mandatory until the proposed rule modifications incorporating the March 12, 2013 A/85:2013 Recommended Practice (Successor RP) take effect, except that we waive this rule as necessary to permit parties the alternative to follow the loudness measurement method contained in the Successor RP, rather than that in the Current RP, prior to the rule modifications taking effect.⁴

¹ According to its website, ATSC is an international, non-profit organization developing voluntary standards for digital television. The ATSC member organizations represent the broadcast, broadcast equipment, motion picture, consumer electronics, computer, cable, satellite, and semiconductor industries. ATSC creates and fosters implementation of voluntary Standards and Recommended Practices to advance digital television broadcasting and to facilitate interoperability with other media. See <http://www.atsc.org/aboutatsc.html>.

² See ATSC A/85:2013 “ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television,” (March 12, 2013) (Successor RP). The Successor RP, which replaces A/85:2011 “ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television,” (July 25, 2011) (Current RP), is available on the ATSC website at: http://www.atsc.org/cms/standards/A_85-2013.pdf.

³ See 47 U.S.C. § 621(a); see also *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17236, ¶ 20 (2011) (*CALM Act Report and Order*).

⁴ See *infra* ¶ 7.

II. BACKGROUND

2. On December 13, 2011, the Commission released a Report and Order adopting rules implementing the CALM Act.⁵ As mandated by the statute,⁶ the Commission incorporated into its rules by reference and made mandatory the 2011 ATSC A/85 RP,⁷ which describes how the television industry can monitor and control the loudness level of digital TV programming. The rules took effect on December 13, 2012 and require digital TV broadcasters, digital cable operators, satellite TV providers, and other digital MVPDs to ensure that the commercials they transmit to viewers comply with the A/85 Recommended Practice (RP).⁸

3. Section 2(a) of the CALM Act mandates that the Commission's rules incorporate by reference and make mandatory "any successor" to the RP, affording the Commission no discretion in this regard.⁹ On March 12, 2013, the ATSC published a successor document to its 2011 A/85 RP.¹⁰ As described by the ATSC, the Successor RP applies an improved loudness measurement algorithm to conform to the International Telecommunication Union's (ITU)¹¹ updated BS.1770 measurement algorithm, "BS.1770-3."¹² BS.1770-3 employs "gating" that will exclude very quiet or silent passages of a commercial when calculating the average loudness of that commercial.¹³ Use of the new algorithm may result in some reduction in commercial loudness in certain circumstances.¹⁴ The successor RP also contains other minor changes that do not affect our rules.¹⁵

⁵ See generally *CALM Act Report and Order*, 26 FCC Rcd 17222.

⁶ 47 U.S.C. § 621(a).

⁷ See Current RP, which was incorporated as it existed on the date of its approval by the Director of the Federal Register (*i.e.*, Dec. 13, 2012). See 47 C.F.R. §§ 73.8000(a), (b)(5) and 76.602(a), (b)(2); 1 C.F.R. § 51.1(f) ("Incorporation by reference of a publication is limited to the edition of the publication that is approved. Future amendments or revisions of the publication are not included."). The Current RP is available at the ATSC website: http://www.atsc.org/cms/standards/a_85-2011a.pdf.

⁸ See 47 C.F.R. §§ 73.682(e) and 76.607.

⁹ 47 U.S.C. § 621(a). See *CALM Act Report and Order*, 26 FCC Rcd at 17236, ¶ 20 (observing that "Section 2(a) mandates that the required regulation incorporate by reference and make mandatory "any successor" to the RP, affording the Commission no discretion in this regard.").

¹⁰ See *supra* note 2.

¹¹ The ITU is a specialized agency of the United Nations whose goal is to promote international cooperation in the efficient use of telecommunications, including the use of the radio frequency spectrum. The ITU publishes technical recommendations concerning various aspects of radio communication technology. These recommendations are subject to an international peer review and approval process in which the Commission participates.

¹² See Letter from Mark S. Richer, ATSC President, to Alison Neplokh, Chief Engineer, Media Bureau, FCC, at 1 (dated April 5, 2013) (*ATSC April 5 Letter*) (stating that "the revised version of A/85 includes an update of the reference to the [ITU] recommendation for 'Algorithms to measure audio programme loudness and true-peak audio level.' The revised A/85 now references ITU-R BS.1770-3."). As explained in the *CALM Act Report and Order*, the ITU-R BS.1770 measurement algorithm provides a numerical value that indicates the perceived loudness of the content (measured in units of LKFS – loudness, K-weighted, relative to full scale) by averaging the loudness of audio signals in all channels over the duration of the content. See *CALM Act Report and Order*, 26 FCC Rcd at 17228, ¶ 5.

¹³ *Id.* ("Version 3 of BS.1770, adds 'gating' (excluding low level passages from the measured value) to the measurement algorithm.").

¹⁴ See *infra* note 22.

¹⁵ See *ATSC April 5 Letter* at 1. ATSC explains that version 3 of BS.1770 also "includes some minor editorial updates to the loudness measurement text and a minor correction to the true-peak measurement algorithm." *Id.* ATSC also explains that "[b]eyond the reference change, A/85 now includes improved guidance for measuring the

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III. DISCUSSION

4. As an initial matter, we address a procedural issue. In the *CALM Act Report and Order*, the Commission concluded that “although the ‘good cause’ exception [to the Administrative Procedure Act] excuses compliance with notice and comment requirements under these circumstances, the public interest [would] be better served by an opportunity for comment in most cases.”¹⁶ The *CALM Act Report and Order* further stated that “if, however, a successor is not sufficiently substantive to require interpretation or public comment, [the Commission would] simply adopt the successor by Public Notice.”¹⁷ Although we find that the “good cause” exception arguably would allow us to forgo notice and comment requirements in the instant circumstances because the successor RP’s changes do not require substantive interpretation on our part, we conclude that it is appropriate for us to seek comment on an appropriate timeline for implementation, as described below.

5. We tentatively conclude that the only substantive change raised by the Successor RP as it relates to our rules is the change to the measurement algorithm to conform to BS.1770-3, and seek comment on this tentative conclusion. As a practical matter, this change seems to be designed to prevent advertisers from using silent passages to offset excessively loud passages when calculating the average loudness of program material.¹⁸ Thus, once this Successor RP is implemented, consumers may notice a modest decrease in the perceived loudness of certain commercials. This change is consistent with the type of updates that we believe Congress intended the Commission to incorporate in its rules by specifying in the CALM Act that the Commission shall make mandatory successor versions of the RP. Accordingly, we propose to adopt the Successor RP and incorporate it by reference into our rules.¹⁹

6. We recognize that, as a result of the proposed changes, parties²⁰ may need a software or device upgrade for their equipment. Accordingly, we believe that it is appropriate to afford a reasonable amount of time for affected parties to implement the Successor RP. We are mindful of the fact that many such parties have recently purchased new equipment to comply with the Commission’s rules implementing the statute, which took effect on December 13, 2012. Therefore, we seek comment about the costs and timing associated with upgrading existing equipment to comply with the Successor RP. Based on the limited scope of the rule changes raised by the Successor RP, we believe an effective date of one year from the release date of the Report and Order in the instant proceeding would provide enough time to implement any necessary equipment upgrades. We seek comment on this proposal, including the costs and benefits of this proposed implementation deadline. In particular, we seek specific comment from affected parties who have already purchased equipment that is not easily upgradable or for which implementation of the Successor RP would be significantly burdensome for some other reason. We also seek comment on whether small TV stations and MVPDs, as a class, may need more time to implement the Successor RP.²¹ In setting an effective date, we seek to ensure that consumers can benefit in a timely

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loudness of surround programming in both its multichannel format and in its 2-channel downmix.... In addition, A/85 is now specific about the differences between loudness and dynamic range.” *Id.*

¹⁶ *Id.* (citing 5 U.S.C. § 553(b)(B) (providing that Administrative Procedure Act’s notice and comment requirements do not apply “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest”).

¹⁷ *Id.*

¹⁸ *See supra* note 13.

¹⁹ *See* Appendix A – Proposed Rules.

²⁰ In addition to broadcasters and MVPDs, parties affected by these rules may include programmers and other third parties that may be performing the loudness measurements on which stations and MVPDs rely.

²¹ The *CALM Act Report and Order* defines a “small broadcast station” and a “small MVPD system” for purposes of a streamlined financial hardship waiver to obtain a one-year waiver of the effective date of the rules. *See CALM Act* (continued....)

fashion from the improved method of controlling loudness,²² while avoiding imposing unreasonable burdens on affected parties. If a commenter suggests that any party should have more time to implement the Successor RP, then we ask that commenter to explain in detail the reasons for needing the additional time and why that need outweighs the effect that the longer implementation timeline would have on consumers.

7. Although stations and MVPDs must continue to comply with the 2011 A/85 RP that is currently incorporated by reference in the rules,²³ we waive our rules to permit stations and MVPDs to implement the Successor RP early. We expect that some stations and MVPDs may be able and willing to implement the Successor RP in less than the year we propose to allow for compliance with the new standard. Therefore, to the extent it may be necessary to expressly permit such early adoption of the Successor RP, and in light of the fact that the CALM Act makes mandatory the revision of our rules proposed herein, we hereby waive our rules to allow stations and MVPDs to comply with our existing rules by following either the BS.1770-1 measurement method in the Current RP or the BS.1770-3 updated measurement method in the Successor RP. Although the change in the measurement method is minor, we believe that consumers may benefit from early implementation of the improved loudness measurement technique incorporated into the Successor RP, and allowing stations and MVPDs to demonstrate compliance at this time based on the new standard is accordingly in the public interest. Finally, we invite comment on whether the Successor RP raises any other issues that should be addressed in this proceeding.²⁴

IV. PROCEDURAL MATTERS

8. Initial Regulatory Flexibility Act Analysis. As required by the Regulatory Flexibility Act of 1980 (RFA),²⁵ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA). The IRFA is attached as Appendix B. Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the first page of this document. The Commission will send a copy of this document, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).

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Report and Order, 26 FCC Rcd at 17253-54, ¶ 53-54. A “small broadcast station” is defined as a TV station with \$14.0 million or less in annual receipts or that is located in television markets 150 to 210. A “small MVPD system” is defined as an MVPD with fewer than 15,000 subscribers (as of December 31, 2011) and that is not affiliated with a larger operator serving more than 10 percent of all MVPD subscribers. *Id.* We note that some small stations and MVPDs have obtained financial hardship waivers for a one-year waiver of the effective date of the rules (until December 13, 2013) and are eligible for a second one-year waiver (until December 13, 2014).

²² We note that the potential benefit that may occur for consumers is limited to situations where a commercial has a significant amount of silent or very quiet passages. The new algorithm’s use of “gating” is intended to more accurately reflect consumer perceptions in situations in which the commercial contains both very loud and very quiet passages. In this circumstance, the new algorithm would result in a greater perceived loudness measurement than the old algorithm, therefore requiring the commercial to be adjusted using one of the methods in the RP. Thus, the new algorithm may result in somewhat reduced loudness problems perceived by consumers in this circumstance, but is otherwise substantially the same as the existing algorithm.

²³ See *supra* note 7.

²⁴ We note, however, that the scope of this proceeding is limited to the incorporation into our rules of the Successor RP and we will not revisit issues already decided by the Commission. Any comments or reply comments that raise such issues will not be substantively considered.

²⁵ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601, *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

9. Initial Paperwork Reduction Act of 1995 Analysis. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA).²⁶ In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002.²⁷

10. Ex Parte Rules. This matter will be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.²⁸ *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.²⁹ More than a one- or two-sentence description of the views and arguments presented is generally required.³⁰ Additional rules pertaining to oral and written presentations in “permit-but-disclose” proceedings are set forth in section 1.1206(b) of the rules.³¹

11. Filing Requirements. Pursuant to Sections 1.415 and 1.419 of the Commission’s rules,³² interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. All comments are to reference **MB Docket No. 11-93** and may be filed using: (1) the Commission’s Electronic Comment Filing System (ECFS) or (2) by filing paper copies.³³

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy 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.

- 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. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

²⁶ 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.).

²⁷ The Small Business Paperwork Relief Act of 2002 (SBPRA), Pub. L. No. 107-198, 116 Stat 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); *see* 44 U.S.C. 3506(c)(4).

²⁸ *See* 47 C.F.R. § 1.1206 (“Permit-but-disclose” proceedings); *see also id.* §§ 1.1200-1.1216.

²⁹ *See id.* § 1.1206(b)(2).

³⁰ *See id.*

³¹ *See id.* § 1.1206(b). *See also Commission Emphasizes the Public’s Responsibilities in Permit-But-Disclose Proceedings*, Public Notice, 15 FCC Rcd 19945 (2000). We note that the Commission has amended the rules governing the content of *ex parte* notices. *See Amendment of the Commission’s Ex Parte Rules and Other Procedural Rules*, Report and Order and Further Notice of Proposed Rulemaking, GC Docket No. 10-43, FCC 11-11, ¶¶ 35-36 (rel. Feb. 2, 2011).

³² *See* 47 C.F.R. §§ 1.415, 1419.

³³ *See Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

- 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.

12. 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).

13. Availability of Documents. Comments and reply comments will be publically available online via ECFS.³⁴ These documents will also be available for public inspection during regular business hours in the FCC Reference Information Center, which is located in Room CY-A257 at FCC Headquarters, 445 12th Street, SW, Washington, DC 20554. The Reference Information Center is open to the public Monday through Thursday from 8:00 a.m. to 4:30 p.m. and Friday from 8:00 a.m. to 11:30 a.m.

14. For additional information, contact Evan Baranoff, Evan.Baranoff@fcc.gov, of the Media Bureau, Policy Division, (202) 418-7142 or Shabnam Javid, Shabnam.Javid@fcc.gov, of the Engineering Division, Media Bureau at (202) 418-2672. Direct press inquiries to Janice Wise at (202) 418-8165.

V. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that pursuant to the Commercial Advertisement Loudness Mitigation Act of 2010, Pub. L. No. 111-311, 124 Stat. 3294, and Sections 1, 2(a), 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), and 303(r), and 621, this Order and Further Notice of Proposed Rulemaking IS ADOPTED and NOTICE IS HEREBY GIVEN of the proposals and tentative conclusions described in this Further Notice of Proposed Rulemaking.

16. IT IS FURTHER ORDERED that, pursuant to the Commercial Advertisement Loudness Mitigation Act of 2010, Pub. L. No. 111-311, 124 Stat. 3294, and section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 621, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, that sections 73.682(e) and 76.607 of the rules, 47 C.F.R. §§ 73.682(e) and 76.607, are waived to the extent described in paragraph 7 herein.

17. IT IS FURTHER ORDERED that the Reference Information Center, Consumer and Governmental Affairs Bureau, shall send a copy of this Further 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

³⁴ Documents will generally be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

APPENDIX A**Proposed Rules**

The Federal Communications Commission proposes to amend Parts 73 and 76 of Title 47 of the Code of Federal Regulations (CFR) as set forth below:

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 73.8000 is amended in paragraph (b)(5) by removing “ATSC A/85:2011” and adding in its place “ATSC A/85:2013”, and removing the date “July 25, 2011” and adding in its place “March 12, 2013”.

PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE.

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.602 is amended in paragraph (b)(2) by removing “ATSC A/85:2011” and adding in its place “ATSC A/85: 2013”, and removing the date “July 25, 2011” and adding in its place “March 12, 2013”.

APPENDIX B

Initial Regulatory Flexibility Act 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) concerning the possible significant economic impact on small entities of the rule changes proposed in this *Order and Further Notice of Proposed Rulemaking (FNPRM)*. Written public comments are requested on this IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *FNPRM*² and they must have a separate and distinct heading designating them as responses to the IRFA. The Commission will send a copy of the *FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).³ In addition, the *FNPRM* and IRFA (or summaries thereof) will be published in the Federal Register.⁴

A. Need for, and Objectives of, the Proposed Rule Changes

2. This FNPRM proposes minor rule changes to incorporate by reference into the Commission's rules and make mandatory the Advanced Television Systems Committee's (ATSC) March 12, 2013 A/85:2013 Recommended Practice (RP) (Successor RP).⁵ The Commercial Advertisement Loudness Mitigation (CALM) Act directs the Commission to incorporate by reference and make mandatory "any successor" to the ATSC's A/85 Recommended Practice (RP), affording the Commission no discretion in this regard.⁶ Accordingly, this FNPRM proposes to replace the July 25, 2011 A/85:2011 RP (Current RP), incorporated into our rules in 2011, with the Successor RP published in 2013.⁷ This FNPRM also seeks comment on the appropriate timing for the 2013 Successor RP to replace the 2011 Current RP. As mandated by the statute, the proposed rule changes will apply to television station broadcasters and multichannel video programming distributors (MVPDs).⁸

B. Legal Basis

3. The proposed action is authorized pursuant to the Commercial Advertisement Loudness Mitigation Act of 2010, Pub. L. No. 111-311, 124 Stat. 3294, and Sections 1, 2(a), 4(i) and (j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), and 303 and 621.

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 paragraph 11 of the *FNPRM*.

³ See 5 U.S.C. § 603(a).

⁴ See *id.*

⁵ ATSC A/85:2013 "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," (March 12, 2013) (Successor RP).

⁶ See 47 U.S.C. § 621(a); see also *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17236, ¶ 20 (2011) (*CALM Act Report and Order*).

⁷ The Successor RP, which replaces A/85:2011 "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," (July 25, 2011) (Current RP), is available on the ATSC website at: http://www.atsc.org/cms/standards/A_85-2013.pdf.

⁸ We refer herein to covered entities collectively as "stations/MVPDs" or "regulated parties."

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

4. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may 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 SBA.¹² The rule changes proposed herein will directly affect small television broadcast stations and small MVPD systems, which include cable operators and satellite video providers. Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

5. **Television Broadcasting.** This economic census category “comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.”¹³ The SBA has created the following small business size standard for Television Broadcasting businesses: those having \$35.5 million or less in annual receipts.¹⁴ The Commission has estimated the number of licensed commercial television stations to be 1,386.¹⁵ In addition, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on June 10, 2013, about 1,245 (or about 90 percent) the estimated 1,386 commercial television stations had revenues of \$35.5 million or less. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 396.¹⁶ NCE stations are non-profit, and therefore considered to be small entities.¹⁷ Therefore, we estimate that the majority of television broadcast stations are small entities.

6. 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. In addition, an

⁹ 5 U.S.C. § 603(b)(3).

¹⁰ 5 U.S.C. § 601(6).

¹¹ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

¹² 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission’s statistical account of television stations may be over-inclusive.

¹³ U.S. Census Bureau, 2012 NAICS Definitions, “515120 Television Broadcasting,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

¹⁴ 13 C.F.R. § 121.201; 2012 NAICS code 515120.

¹⁵ See *Broadcast Station Totals as of June 30, 2013*, Press Release (MB rel. July 10, 2013) (*Broadcast Station Totals Press Release*) at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-322079A1.pdf.

¹⁶ See *Broadcast Station Totals*, *supra*, note 11.

¹⁷ See generally 5 U.S.C. §§ 601(4), (6).

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. § 21.103(a)(1).

element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

7. Cable Television Distribution Services. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which was developed for small wireline businesses. This 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. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services.”¹⁹ The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.²⁰ Census data for 2007 shows that there were 31,996 establishments that operated that year.²¹ Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.²² Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

8. Cable Companies and Systems. The Commission has also 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.²³ Industry data shows that there were 1,141 cable companies at the end of June 2012.²⁴ Of this total, all but 10 incumbent cable companies are small under this size standard.²⁵ In addition, under the Commission’s rate regulation rules,

¹⁹ U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition) at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. Examples of this category are: broadband Internet service providers (e.g., cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television (CCTV) services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (DTH) services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (MMDS).

²⁰ 13 C.F.R. § 121.201; 2012 NAICS code 517110.

²¹ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

²² *Id.*

²³ 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. *Implementation of Sections of the Cable Television Consumer Protection And Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, MM Docket No. 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

²⁴ NCTA, Industry Data, Number of Cable Operating Companies (June 2012), <http://www.ncta.com/Statistics.aspx> (visited Sept. 28, 2012). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, FCC 13-99 at ¶ 24 (rel. July 22, 2013) (*15th Annual Competition Report*).

²⁵ See SNL Kagan, “Top Cable MSOs – 12/12 Q”; available at <http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2012Q4&sortcol=subscribersbasic&sortorder=desc>. We note that, when applied to an MVPD operator, under this size standard (i.e., 400,000 or fewer subscribers) all but 14 MVPD operators would be considered small. See NCTA, Industry Data, Top 25 Multichannel Video Service

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a “small system” is a cable system serving 15,000 or fewer subscribers.²⁶ Current Commission records show 4,945 cable systems nationwide.²⁷ Of this total, 4,380 cable systems have less than 20,000 subscribers, and 565 systems have 20,000 subscribers or more, based on the same records. Thus, under this standard, we estimate that most cable systems are small.

9. Cable System Operators (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”²⁸ There are approximately 56.4 million incumbent cable video subscribers in the United States today.²⁹ Accordingly, an operator serving fewer than 564,000 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.³⁰ Based on available data, we find that all but 10 incumbent cable operators are small under this size standard.³¹ 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.³² Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

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,³³ which was developed for small wireline

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Customers (2012), <http://www.ncta.com/industry-data> (visited Aug. 30, 2013). The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. *See Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17245-46, ¶ 37 (2011) (*CALM Act Report and Order*) (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

²⁶ 47 C.F.R. § 76.901(c).

²⁷ The number of active, registered cable systems comes from the Commission’s Cable Operations and Licensing System (COALS) database on Aug. 28, 2013. A cable system is a physical system integrated to a principal headend.

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

²⁹ *See* NCTA, Industry Data, Cable Video Customers (2012), <http://www.ncta.com/industry-data> (visited Aug. 30, 2013).

³⁰ 47 C.F.R. § 76.901(f); *see* Public Notice, FCC Announces New Subscriber Count for the Definition of Small Cable Operator, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

³¹ *See* NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), <http://www.ncta.com/industry-data> (visited Aug. 30, 2013).

³² The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. *See* 47 C.F.R. § 76.901(f).

³³ *See* 13 C.F.R. § 121.201, 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that

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businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.³⁴ Census data for 2007 shows that there were 31,996 establishments that operated that year.³⁵ Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.³⁶ Therefore, under this size standard, the majority of such businesses can be considered small. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled “Cable and Other Program Distribution.” The definition of Cable and Other Program Distribution provided that a small entity is one with \$12.5 million or less in annual receipts.³⁷ Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.³⁸ Each currently offer subscription services. DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

11. Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs). SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA’s broad economic census category, Wired Telecommunications Carriers,³⁹ which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.⁴⁰ Census data for 2007 shows that there were

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they operate are included in this industry.” (*Emphasis added to text relevant to satellite services.*) U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

³⁴ 13 C.F.R. § 121.201; 2012 NAICS code 517110.

³⁵ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

³⁶ *Id.*

³⁷ 13 C.F.R. § 121.201, NAICS code 517510 (2002).

³⁸ See *15th Annual Competition Report*, at ¶ 27. As of June 2012, DIRECTV is the largest DBS operator and the second largest MVPD in the United States, serving approximately 19.9 million subscribers. DISH Network is the second largest DBS operator and the third largest MVPD, serving approximately 14.1 million subscribers. *Id.* at ¶¶ 27, 110-11.

³⁹ See 13 C.F.R. § 121.201, 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. *By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.*” (*Emphasis added to text relevant to satellite services.*) U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁴⁰ 13 C.F.R. § 121.201; 2012 NAICS code 517110.

31,996 establishments that operated that year.⁴¹ Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.⁴² Therefore, under this size standard, the majority of such businesses can be considered small.

12. 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.⁴³ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,⁴⁴ OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”⁴⁵ The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.⁴⁶ Census data for 2007 shows that there were 31,996 establishments that operated that year.⁴⁷ Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.⁴⁸ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities. In addition, we note that the Commission has certified some OVS operators, with some now providing service.⁴⁹ Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises.⁵⁰ 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.

⁴¹ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁴² *Id.*

⁴³ 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, ¶ 135 (2009) (*Thirteenth Annual Cable Competition Report*).

⁴⁴ See 47 U.S.C. § 573.

⁴⁵ See 13 C.F.R. § 121.201, 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined in part as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services.” U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁴⁶ 13 C.F.R. § 121.201; 2012 NAICS code 517110.

⁴⁷ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁴⁸ *Id.*

⁴⁹ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovscer.html>.

⁵⁰ See *Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer businesses that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

13. As stated above, the *FNPRM* proposes to incorporate by reference into our rules and make mandatory the Successor RP published in 2013, thereby replacing the Current RP incorporated into our rules in 2011. As discussed in the *FNPRM*, the only substantive change raised by the Successor RP appears to be the change in the measurement algorithm to be used when calculating the average loudness of a commercial.⁵¹ Under the Current RP, television stations and MVPDs use the BS.1770-1 measurement method, whereas, under the Successor RP, stations and MVPDs will use the BS.1770-3 method. The primary difference is that BS.1770-3 employs “gating” that will exclude very quiet or silent passages of a commercial when calculating the average loudness of that commercial. As a result, stations and MVPDs may need a software or device upgrade for their equipment in order to perform the new loudness measurement technique. The *FNPRM* seeks comment about the costs and timing associated with upgrading existing equipment to comply with the Successor RP. The *FNPRM* does not otherwise propose any new reporting, recordkeeping or other compliance requirements.⁵²

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

14. 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.⁵³

15. The CALM Act requires that the new technical loudness standard (*i.e.*, the 2011 ATSC A/85 RP) be made mandatory for all stations and MVPDs, regardless of size.⁵⁴ The statute also requires that the Commission make mandatory “any successor” to the ATSC A/85 RP, affording the Commission no discretion in this regard.⁵⁵ However, in this *FNPRM*, the Commission finds that it has some discretion to afford a reasonable amount of time for regulated parties to implement the Successor RP, and proposes to afford regulated parties with one year from the release date of the Report and Order in the instant proceeding to implement any necessary equipment upgrades. The *FNPRM* specifically considers (and seeks comment on) whether small TV stations and MVPDs, as a class, may need more time to implement the Successor RP.⁵⁶

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

16. None.

⁵¹ See *FNPRM* ¶¶ 4-5.

⁵² For an overview of the existing compliance requirements pursuant to our implementation of the CALM Act, see Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act, MB Docket No. 11-93, Small Entity Compliance Guide, DA 13-1002 (MB rel. May 7, 2013); available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-13-1002A1.docx.

⁵³ 5 U.S.C. § 603(c)(1)-(c)(4)

⁵⁴ See 47 U.S.C. § 621(a).

⁵⁵ *Id.*

⁵⁶ See *FNPRM* ¶¶ 6-7 (also seeking “specific comment from affected parties who have already purchased equipment that is not easily upgradable or for which implementation of the Successor RP would be significantly burdensome for some other reason”).

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Implementation of the Commercial Advertisement Loudness Mitigation Act*,
MB Docket No. 11-93

Consumers have long complained about excessively-loud commercials on television. This is especially true when advertisements are dramatically louder than the programming they accompany. It's a small thing. But for many viewers, it's irritating in a big way.

So Congress decided to do something about it. In the Commercial Loudness Mitigation (CALM) Act, Congress directed the Commission to incorporate by reference industry technical standards designed to control the volume of digital programming offered on broadcast television and through multichannel video programming distributors. The Commission implemented this law in 2011. Our rules became effective in 2012. Today, we build on what has come before by adopting a rulemaking designed to make sure that as technology evolves, our policies remain up-to-date.

So far, so good. But to ensure that the CALM Act really has a meaningful effect will require more than just rulemakings. Since our rules became effective, the Commission has received nearly 20,000 complaints involving excessively-loud commercials. By any measure, that is a lot. Viewers are—quite literally—reaching out to us and asking us to take action. That is why I support the request made by Representative Anna Eshoo and Senator Sheldon Whitehouse to issue quarterly reports that identify patterns of CALM Act noncompliance. I believe this will not only facilitate enforcement of our rules—it could help us put this irritating, persistent problem to rest.