

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

In the Matter of
Closed Captioning of Internet Protocol-Delivered
Video Programming: Implementation of the
Twenty-First Century Communications and Video
Accessibility Act of 2010
MB Docket No. 11-154

ORDER ON RECONSIDERATION AND
FURTHER NOTICE OF PROPOSED RULEMAKING

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By the Commission: Commissioner Pai approving in part, concurring in part and issuing a statement.

TABLE OF CONTENTS

Heading Paragraph #
I. INTRODUCTION..... 2
II. BACKGROUND..... 3
III. ORDER ON RECONSIDERATION 5
A. Petition for Reconsideration of the Consumer Electronics Association 5
1. Scope of the Apparatus Closed Captioning Rules..... 5
2. Application of the Apparatus Rules to Removable Media Players 16
3. Application of the January 1, 2014 Deadline Only to the Date of Manufacture 23
B. Petition for Reconsideration of TVGuardian, LLC 26
C. Petition for Reconsideration of Consumer Groups 30
1. Application of the IP Closed Captioning Rules to Video Clips 30
2. Propriety of Synchronization Requirements for Apparatus 31
IV. FURTHER NOTICE OF PROPOSED RULEMAKING 32
V. PROCEDURAL MATTERS..... 38
A. Regulatory Flexibility Act 38
B. Paperwork Reduction Act 43
C. Ex Parte Rules..... 45
D. Filing Requirements..... 46
E. Additional Information 49
VI. ORDERING CLAUSES..... 50
APPENDIX A – List of Commenters
APPENDIX B – Final Rules
APPENDIX C – Potential Rule Amendments based on the FNPRM
APPENDIX D – Initial Regulatory Flexibility Act Analysis for the FNPRM

I. INTRODUCTION

1. In this Order on Reconsideration and Further Notice of Proposed Rulemaking (“*Order on Reconsideration and FNPRM*”), we affirm, modify, and clarify certain decisions adopted in the *Report and Order* in MB Docket No. 11-154 regarding closed captioning requirements for video programming delivered using Internet protocol (“IP”) and apparatus used by consumers to view video programming.¹ The actions we take will provide the industry and consumers with certainty about the scope of the captioning obligations before the January 1, 2014 compliance deadline for apparatus. We also seek further comment on the potential imposition of closed captioning synchronization requirements for covered apparatus, and on how DVD and Blu-ray players can fulfill the closed captioning requirements of the statute.

2. Specifically, we address three petitions for reconsideration of the *Report and Order*, which adopted rules governing the closed captioning requirements for the owners, providers, and distributors of IP-delivered video programming and rules governing the closed captioning capabilities of certain apparatus on which consumers view video programming. First, we address the Petition for Reconsideration of the Consumer Electronics Association (“CEA”)² by: (1) granting narrow class waivers for certain apparatus that are primarily designed for activities other than receiving or playing back video programming, while denying CEA’s broader request that the Commission narrow the scope of Section 79.103 of its rules;³ (2) denying CEA’s request that removable media players are not subject to the closed captioning requirements but, at the same time, temporarily extending the compliance deadlines for Blu-ray players as well as for those DVD players that do not currently render or pass through captions, pending resolution of the *FNPRM*;⁴ and (3) granting CEA’s request to modify the January 1, 2014 deadline applicable to apparatus to refer only to the date of manufacture, and not to the date of importation, shipment, or sale.⁵ Second, we deny the Petition for Reconsideration of TVGuardian, LLC (“TVGuardian”),⁶ which requests that the Commission reconsider its decision to allow video programming providers and distributors to enable the rendering *or* pass through of captions to end users and instead to require video programming providers and distributors, and digital source devices, to pass through closed captioning data to consumer equipment.⁷ Third, we address the Petition for Reconsideration of Consumer Groups⁸ by: (1) deferring resolution of whether to reconsider the Commission’s decision to exclude video clips from the scope of the IP closed captioning rules, and directing the Media Bureau to issue a Public Notice to seek updated information on this topic within six

¹ See *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787 (2012) (“*Report and Order*”).

² Petition for Reconsideration of the Consumer Electronics Association (filed Apr. 30, 2012) (“CEA Petition”).

³ *Infra* Section III.A.1.

⁴ *Infra* Section III.A.2.

⁵ *Infra* Section III.A.3.

⁶ TVGuardian, LLC, Petition for Reconsideration (filed Apr. 16, 2012) (“TVGuardian Petition”).

⁷ *Infra* Section III.B.

⁸ Consumer Groups, Petition for Reconsideration of the Commission’s Report and Order (filed Apr. 27, 2012) (“Consumer Groups Petition”). In this *Order on Reconsideration and FNPRM*, we use the term “Consumer Groups” to reference Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), National Association of the Deaf (“NAD”), Deaf and Hard of Hearing Consumer Advocacy Network (“DHHCAN”), Association of Late-Deafened Adults (“ALDA”), Hearing Loss Association of America (“HLAA”), Cerebral Palsy and Deaf Organization (“CPADO”), and Technology Access Program at Gallaudet University (“TAP”).

months;⁹ and (2) issuing an *FNPRM* to obtain further information necessary to determine whether the Commission should impose synchronization requirements on device manufacturers.¹⁰ Our goal in this proceeding remains to implement Congress's intent to better enable individuals who are deaf or hard of hearing to view video programming. In considering the requests made in the petitions for reconsideration, we have evaluated the effect on consumers who are deaf or hard of hearing as well as the cost of compliance to affected entities.

II. BACKGROUND

3. On October 8, 2010, President Obama signed into law the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA").¹¹ The CVAA required the Commission, by January 12, 2012, to establish closed captioning rules for the owners, providers, and distributors of IP-delivered video programming, and for certain apparatus on which consumers view video programming.¹² The CVAA also required the Commission to establish an advisory committee known as the Video Programming Accessibility Advisory Committee ("VPAAC"),¹³ which submitted its statutorily mandated report on closed captioning of IP-delivered video programming to the Commission on July 12, 2011.¹⁴ The Commission initiated this proceeding in September 2011,¹⁵ and it adopted the *Report and Order* on January 12, 2012. In the *NPRM* and the *Report and Order*, the Commission provided extensive background information regarding the history of closed captioning, IP-delivered closed captioning, applicable provisions of the CVAA, the VPAAC First Report, and the evolution of video programming distribution, which we need not repeat here.¹⁶

4. The *Report and Order* was published in the *Federal Register* on March 30, 2012.¹⁷ CEA, TVGuardian, and Consumer Groups each filed a timely petition for reconsideration within 30 days of the *Federal Register* publication date.¹⁸ Each of the petitions for reconsideration is discussed in turn below.

⁹ *Infra* Section III.C.1.

¹⁰ *Infra* Sections III.C.2, IV.

¹¹ Pub. L. No. 111-260, 124 Stat. 2751 (2010). *See also* Amendment of the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA).

¹² Pub. L. No. 111-260, §§ 202(b), 203.

¹³ *Id.* § 201(a). Although the CVAA refers to this advisory committee as the "Video Programming and Emergency Access Advisory Committee," the Commission changed its working name to the "Video Programming Accessibility Advisory Committee" to avoid confusion with the "Emergency Access Advisory Committee" referenced in Section 106 of the CVAA.

¹⁴ *See* First Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010: Closed Captioning of Video Programming Delivered Using Internet Protocol, July 12, 2011, *available at* http://transition.fcc.gov/cgb/dro/VPAAC/First_VPAAC_Report_to_the_FCC_7-11-11_FINAL.pdf ("VPAAC First Report").

¹⁵ *See Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Notice of Proposed Rulemaking, 26 FCC Rcd 13734 (2011) ("*NPRM*").

¹⁶ *See id.* at 13737-42, ¶¶ 5-14; *Report and Order*, 27 FCC Rcd at 790-92, ¶¶ 4-5.

¹⁷ *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, 77 FR 19480 (Mar. 30, 2012).

¹⁸ 47 C.F.R. § 1.429(d).

III. ORDER ON RECONSIDERATION

A. Petition for Reconsideration of the Consumer Electronics Association

1. Scope of the Apparatus Closed Captioning Rules

5. As explained below, we address CEA's claims regarding the scope of the Commission's apparatus closed captioning rules,¹⁹ adopted pursuant to Section 203 of the CVAA, by: (1) affirming the Commission's decision that, to determine what an apparatus was "designed to" accomplish, we should consider the capabilities of the apparatus and not the manufacturer's subjective intent; (2) revising the note to paragraph (a) of Section 79.103 of our rules to be more consistent with the statute; and (3) exempting through waiver certain narrow classes of apparatus that are primarily designed for activities unrelated to receiving or playing back video programming²⁰ transmitted simultaneously with sound.

6. *Meaning of "designed to."* We affirm the Commission's decision in the *Report and Order* that the determination of whether an apparatus was "designed to receive or play back video programming transmitted simultaneously with sound" and therefore covered by Section 203 of the CVAA,²¹ should turn on the capabilities of the apparatus, not the manufacturer's intent.²² CEA argues that the statutory phrase "designed to" suggests that the closed captioning apparatus rules may only reach apparatus that the manufacturer intends to receive, play back, or record video programming.²³ We disagree. Nowhere does the statute reference the "intent" underlying the design and manufacture of an apparatus.²⁴

7. We disagree with CEA that Congress meant its use of the word "designed" to impose a consideration of the manufacturer's intent.²⁵ Instead, we reiterate our finding in the *Report and Order* that we should look to the device's functionality, *i.e.*, whether it is capable of receiving or playing back video programming, to determine what the device was designed to accomplish.²⁶ CEA's proposed

¹⁹ See *id.* § 79.103.

²⁰ Herein we use the phrase "video programming" as the CVAA defines the term, which is "programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media . . ." 47 U.S.C. § 613(h)(2).

²¹ See *id.* § 303(u)(1); see also 47 C.F.R. §§ 79.103(a), 79.104(a).

²² *Report and Order*, 27 FCC Rcd at 842, ¶ 95.

²³ CEA Petition at 3-5; Letter from Julie M. Kearney, Vice President, Regulatory Affairs, CEA, to Marlene H. Dortch, Secretary, FCC, at 1 (May 21, 2012) ("CEA May 21 *Ex Parte* Letter"); Letter from Julie M. Kearney, Vice President, Regulatory Affairs, CEA, to Marlene H. Dortch, Secretary, FCC, at 2 (Sept. 21, 2012) ("CEA Sept. 21 *Ex Parte* Letter"); Letter from Julie M. Kearney, Vice President, Regulatory Affairs, CEA, to Marlene H. Dortch, Secretary, FCC, at 2 (Sept. 26, 2012) ("CEA Sept. 26 *Ex Parte* Letter"). Consumer Groups point out that CEA fails to add any substance to its argument on this issue from what it argued during the rulemaking proceeding, and argue that the Commission should reject the argument again. Consumer Groups, Opposition to the Petition for Reconsideration of the Consumer Electronics Association, at iii, 3-5 (filed June 7, 2012) ("Consumer Groups Opposition"). CEA disagrees, citing to specific new facts and arguments that it presented in its petition, and arguing that reconsideration is warranted to serve the public interest. Reply of the Consumer Electronics Association to Opposition to Petition for Reconsideration at 2 (filed June 18, 2012) ("CEA Reply").

²⁴ See 47 U.S.C. § 303(u).

²⁵ See CEA Petition at 5-8.

²⁶ *Report and Order*, 27 FCC Rcd at 842, ¶ 95. Consumer Groups agree that, if an apparatus is capable of playing back video programming, then it was designed to do so. Consumer Groups Opposition at 7. Consumer Groups state further that, if a manufacturer designs an apparatus with a capability, then it must have intended the apparatus to be used for that purpose. *Id.* at iii, 5.

approach of considering the manufacturer's intent would allow the manufacturer unilaterally to dictate whether an apparatus falls within the scope of the rules, which could harm consumers by making compliance with the apparatus closed captioning requirements effectively voluntary.²⁷ Such an approach would not be consistent with Congress's intent to "ensure[] that devices consumers use to view video programming are able to display closed captions,"²⁸ because devices that consumers actually use to view video programming might not have closed captioning capability if manufacturers could evade our requirements by claiming that they did not intend such use. CEA has not raised any new arguments that persuade us that the Commission's reasoning in the *Report and Order* was incorrect. Accordingly, we affirm our findings in the *Report and Order* and deny CEA's petition for reconsideration on this issue.

8. *Definition of video player.* We revise our definition of "apparatus" to make clear that the "video players" it includes are those capable of displaying video programming transmitted simultaneously with sound. The note to paragraph (a) of Section 79.103 of our rules currently reads: "Apparatus includes the physical device and the *video players* that manufacturers install into the devices they manufacture before sale, whether in the form of hardware, software, or a combination of both, as well as any *video players* that manufacturers direct consumers to install after sale."²⁹ CEA argues that the Commission should revise the note to Section 79.103(a) of our rules to replace the term "video player" with "video programming player," and that we should define a "video programming player" as "a component, application, or system that is specifically intended by the manufacturer to enable access to video programming, not video in general."³⁰ CEA claims that its approach would be consistent with Congress's intent to limit the application of the apparatus closed captioning rules to apparatus containing a subset of video players, not all video players, and that the Commission's approach in the *Report and Order* exceeded its statutory authority by going beyond this intent.³¹ Consumer Groups indicate their broad opposition to CEA's arguments, but they do not make more specific assertions regarding the definition of "video players" subject to our rules.³²

9. To address CEA's argument that our rules should only reach a subset of video players, and to make the language in our rule more consistent with the statute, we revise the note to Section 79.103(a) of our rules to replace references to "video players" with "video player(s) capable of displaying video programming transmitted simultaneously with sound."³³ Here, as elsewhere in the rules adopted in the *Report and Order*, we intend the term "video programming" to have the same meaning it was given in the CVAA.³⁴ Accordingly, a video player that is not capable of displaying programming provided by, or

²⁷ See *Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, 28 FCC Rcd 4871, 4916, ¶ 64 (2013) ("*Emergency Information/Video Description Order*").

²⁸ See S. Rep. No. 111-386, 111th Cong., 2d Sess. at 14 (2010) ("Senate Committee Report"); H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 30 (2010) ("House Committee Report").

²⁹ Note to 47 C.F.R. § 79.103(a) (emphasis added).

³⁰ CEA Petition at 8. See also *id.* at 2; CEA Reply at 3.

³¹ CEA Petition at 3-4; CEA Sept. 26 *Ex Parte* Letter at 2.

³² See Letter from Blake E. Reid, Counsel to TDI, to Marlene H. Dortch, Secretary, FCC, at 3 (June 4, 2012) ("Consumer Groups June 4 *Ex Parte* Letter"); Letter from Andrew S. Phillips, Policy Attorney, NAD, to Marlene H. Dortch, Secretary, FCC, at 2 (June 14, 2012) ("Consumer Groups June 14 *Ex Parte* Letter"); Letter from Andrew S. Phillips, Policy Attorney, NAD, to Marlene H. Dortch, Secretary, FCC, at 2 (June 22, 2012) ("Consumer Groups June 22 *Ex Parte* Letter").

³³ See *Emergency Information/Video Description Order*, 28 FCC Rcd at 4915-16, ¶ 62.

³⁴ "Video programming" is defined as "programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media . . ." 47 U.S.C. § 613(h)(2).

generally considered comparable to programming provided by, a television broadcast station, excluding consumer-generated media, is not subject to the rules. For example, a video player that is only capable of displaying home videos that a consumer recorded on the device is not “capable of displaying *video programming* transmitted simultaneously with sound.” We believe that by clarifying the language of our rules to specify video players that are capable of displaying “video programming transmitted simultaneously with sound,” we will address CEA’s fundamental concern that our definition of “apparatus” should be consistent with the CVAA.

10. We decline to replace the term “video player” with “video programming player” in the note to Section 79.103(a). CEA’s proposed definition of “video programming player” relies upon a consideration of the manufacturer’s intent, by defining a “video programming player” as “a component, application, or system *that is specifically intended by the manufacturer* to enable access to video programming.”³⁵ As discussed above, we disagree with CEA that we should look to manufacturer intent. In any event, such a change is unnecessary because the revised definition we adopt in this *Order on Reconsideration* accomplishes CEA’s goal of making the definition no broader than Congress intended.

11. *Narrow class waivers for certain apparatus.* Even with the clarification above that our closed captioning apparatus rules cover video players capable of displaying video programming transmitted simultaneously with sound, we find a waiver to be appropriate for certain narrow classes of apparatus. For example, digital still cameras may be covered by our apparatus rules because they may enable consumers to use a memory card to view video programming via the apparatus’s video player. Accordingly, in response to CEA’s petition for reconsideration, we now exempt through waiver certain narrow classes of apparatus that are “primarily designed” for activities unrelated to receiving or playing back video programming transmitted simultaneously with sound. The CVAA provides the Commission with authority, on its own motion or in response to a petition, to waive the apparatus closed captioning requirements for any apparatus or class of apparatus “primarily designed for activities other than receiving or playing back video programming transmitted simultaneously with sound.”³⁶ The *Report and Order* stated that such waivers will be addressed on a case-by-case basis and rejected overly broad waiver requests made by several commenters.³⁷ CEA argues that certain apparatus, such as digital still cameras and consumer video cameras, should not be subject to our rules because their manufacturers did not intend these apparatus to be used for receiving or playing back video programming.³⁸ Although, for the reasons stated above, we do not agree that our analysis turns on the manufacturer’s intent, we agree with CEA that these types of devices should not be subject to our rules and, as described below, we grant waivers to those devices that meet the statutory criteria for waiver as described below.

12. We grant a waiver pursuant to Section 303(u)(2)(C)(i) for two classes of apparatus that we find, based on the standard described below, are “primarily designed for activities other than receiving or playing back video programming transmitted simultaneously with sound.”³⁹ Upon consideration of that standard, we conclude that the following two classes of apparatus qualify for waiver: (i) devices that are primarily designed to capture and display still and/or moving images consisting of consumer-

³⁵ CEA Petition at 8 (emphasis added).

³⁶ 47 U.S.C. § 303(u)(2)(C)(i).

³⁷ *Report and Order*, 27 FCC Rcd at 849-50, ¶¶ 106-107.

³⁸ CEA Petition at 4-5.

³⁹ See 47 U.S.C. § 303(u)(2)(C)(i) (authorizing the Commission to waive the closed captioning requirements for any apparatus or class of apparatus “primarily designed for activities other than receiving or playing back video programming transmitted simultaneously with sound”). As stated above, we note that CEA provides examples of apparatus that are capable of video playback but that are primarily designed for other activities. See Letter from Julie M. Kearney, Vice President, Regulatory Affairs, CEA, to Marlene H. Dortch, Secretary, FCC, at 2-3 (Nov. 26, 2012) (“CEA Nov. 26 *Ex Parte* Letter”).

generated media, or of other images that are not video programming as defined under the CVAA and our rules, and that have limited capability to display video programming transmitted simultaneously with sound;⁴⁰ and (ii) devices that are primarily designed to display still images and that have limited capability to display video programming transmitted simultaneously with sound.⁴¹ In determining whether an apparatus or class of apparatus falls within the scope of the “primarily designed” waiver, we look at the various functions and capabilities of the apparatus or class of apparatus. Where the apparatus’s ability to display video programming, as that term is defined in the CVAA and our rules, is only incidental, then we will determine that such apparatus is “primarily designed for activities other than receiving or playing back video programming transmitted simultaneously with sound.”⁴² In determining whether an apparatus’s ability to display video programming is incidental, we objectively look at the activities for which consumers use the apparatus, based on the apparatus’s functions and capabilities and the ease with which consumers can use the apparatus to receive or play back video programming.⁴³ Again, the manufacturer’s subjective intent is not considered in this analysis.

13. For example, applying this analysis to digital cameras, we find that it would be difficult for consumers to view video programming on digital cameras with no ability to receive content from the Internet because doing so would require transferring video programming to a memory card on another device, and then inserting the memory card into the camera. The inconvenience of taking these steps in order to view video programming on the camera screen, including the fact that a camera lacks the full panoply of playback controls typically used to view video programming, leads us to conclude that the device’s ability to display video programming is incidental. Accordingly, digital cameras are an example of a device that is subject to the waiver as part of the first class of apparatus described above: devices that are primarily designed to capture and display still and/or moving images consisting of consumer-generated media, or of other images that are not video programming as defined under the CVAA and our rules, and that have limited capability to display video programming transmitted simultaneously with

⁴⁰ This category includes, for example, digital still cameras, digital video cameras, baby monitors, security cameras, digital video camera microscopes, digital playback binoculars (which act as a combination of a binocular and a digital camera), and digital probes for viewing and playing video of enclosed spaces (which capture still and/or moving images of spaces that are difficult to reach). One factor critical to our waiver analysis is that for the listed devices, consumers use the video playback feature or function to play back the consumer-generated images (still or moving) taken by the device; but it would take additional effort by the consumer to adapt the device to access video programming. By contrast, this category does not include devices such as cell phones that capture images but that consumers use for other purposes, including receiving or playing back video programming transmitted simultaneously with sound, as evidenced, for example, by the inclusion of Internet capability on such devices. Finally, we emphasize that the list of devices identified above is intended to be merely illustrative, and not exhaustive, of the types of devices that qualify under this waiver class.

⁴¹ This category includes, for example, digital picture frames. It does not include digital picture frames that are primarily designed to display still photographs *and* video, because consumers could use such frames to display video programming, and thus the frames could operate much like a television screen.

⁴² See Senate Committee Report at 14 (providing that the Commission may waive the requirements in its discretion “where, for instance, a consumer typically purchases a product for a primary purpose other than viewing video programming, and access to such programming is provided on an incidental basis”); House Committee Report at 30 (same).

⁴³ We find that in general, the devices about which CEA expressed specific concerns (digital still cameras, digital video cameras, baby monitors, security cameras, digital video camera microscopes, digital playback binoculars, digital picture frames that display photos, and digital probes for viewing and playing video of enclosed spaces) have only an incidental ability to view video programming, if there is any such capability, because consumers purchase the devices for activities unrelated to receiving or playing back video programming (for example, in the case of digital still cameras, for taking photographs), and consumers cannot easily use the devices to receive or play back video programming.

sound.⁴⁴ In contrast, if a digital camera includes a general purpose operating system such as Android,⁴⁵ and it can receive content from the Internet and easily display video programming transmitted simultaneously with sound in that manner, then its ability to display video programming will be considered to be more than incidental because it includes more video playback controls (via its Internet connectivity) and the ability to receive content from the Internet suggests that consumers use the apparatus to view video programming available online.

14. As stated above, under the test described herein, we find the following two classes of devices will qualify for waiver: (i) devices that are primarily designed to capture and display still and/or moving images consisting of consumer-generated media, or of other images that are not video programming as defined under the CVAA and our rules, and that have limited capability to display video programming transmitted simultaneously with sound; and (ii) devices that are primarily designed to display still images and that have limited capability to display video programming transmitted simultaneously with sound. We find that identifying the classes of apparatus that qualify for waiver rather than identifying a finite set of specific devices will provide industry with adequate certainty and will alleviate the need for manufacturers to seek individual waivers for each and every device that meets the specified criteria for the waiver class.⁴⁶ If it is unclear whether a particular apparatus qualifies for the waiver described herein, or if the manufacturer seeks a waiver pursuant to a separate provision of the CVAA that authorizes waivers for multi-purpose devices,⁴⁷ then the device manufacturer may file a waiver request, which we will consider on a case-by-case basis.

15. Although CEA would have preferred that the Commission amend its rules so that they do not encompass certain devices,⁴⁸ we find that our approach of defining narrow class waivers serves the objectives of, and is most consistent with, the CVAA, which specifically grants us authority to waive the closed captioning requirements for specific classes of apparatus.⁴⁹ As explained above, we thus exercise

⁴⁴ See, e.g., CEA Petition at 4 (explaining that approximately 92 percent of digital still cameras consumers purchase today can capture video and therefore include a video player for review of that user-captured content, but consumers do not expect such cameras to include closed captioning capability for the display of television programming).

⁴⁵ By “general purpose operating system,” we mean an operating system that permits the user to install new programs onto the device. Android is an example of a mobile general purpose operating system, developed by Google, and used in several brands of mobile telephones and tablets.

⁴⁶ We find that there is good cause to grant the waivers. Specifically, the waivers would serve the public interest by avoiding imposing captioning compliance costs on apparatus where there is no evidence that consumers purchase such apparatus to receive or play back video programming transmitted simultaneously with sound. Additionally, the waivers are narrow and consistent with the CVAA: they apply only to apparatus primarily designed for activities other than receiving or playing back video programming transmitted simultaneously with sound, where any ability to display video programming is only incidental. See 47 C.F.R. § 1.3 (“Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”); *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008); *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁴⁷ See 47 U.S.C. § 303(u)(2)(C)(ii) (authorizing the Commission to waive the closed captioning requirements “for equipment designed for multiple purposes, capable of receiving or playing video programming transmitted simultaneously with sound but whose essential utility is derived from other purposes”).

⁴⁸ See CEA Nov. 26 *Ex Parte* Letter at 4 (arguing that any attempt to create a comprehensive list of exempted apparatus would negatively affect manufacturers’ incentives to develop innovative consumer products, which would not be on the list). CEA also argues that the presence of a waiver mechanism cannot save or justify an irrational rule. CEA Petition at 7; CEA Reply at 4; Letter from Julie M. Kearney, Vice President, Regulatory Affairs, CEA, to Marlene H. Dortch, Secretary, FCC, at 3 (Oct. 26, 2012) (“CEA Oct. 26 *Ex Parte* Letter”).

⁴⁹ Manufacturers are free to file additional requests for waiver with respect to other apparatus or classes of apparatus and we will rule on those requests based upon the facts presented. The CVAA provides the Commission with the (continued....)

our discretion to proceed by waiver consistent with the statute. We expect that the class waivers granted herein will provide manufacturers with certainty as to the status of the devices subject to the waivers, and thus, will not stifle innovation.

2. Application of the Apparatus Rules to Removable Media Players

16. CEA requests that the Commission reconsider its legal analysis that concludes that removable media players are apparatus covered by Section 79.103 of the Commission's rules, and thus must be equipped with capability to display closed-captioned programming.⁵⁰ Although we deny CEA's petition for reconsideration on this issue,⁵¹ we find that some DVD players currently satisfy the closed captioning requirements of the CVAA. With regard to other DVD players as well as Blu-ray players, we temporarily extend the deadline for compliance with our apparatus closed captioning rules pending resolution of the *FNPRM* on this issue.⁵²

17. As an initial matter, we reject two statutory arguments CEA makes in support of its request to exempt removable media players from the scope of the apparatus closed captioning rules. First, we reject CEA's argument that the phrase "transmitted simultaneously with sound" appearing in Section 203⁵³ requires transmission by wire or radio, and not merely the act of a user playing back video programming.⁵⁴ CEA has reiterated its previous arguments regarding this issue,⁵⁵ arguing again that

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authority to waive the apparatus closed captioning requirements based on the apparatus's primary purpose either in response to a petition by a manufacturer *or on its own motion*. 47 U.S.C. § 303(u)(2)(C). Thus, we reject Consumer Groups' claims that we should decline to act on CEA's request in this *Order on Reconsideration* and instead should require manufacturers to file individual requests for waiver. *See* Consumer Groups Opposition at iii, 10-11; Letter from Andrew S. Phillips, Policy Counsel, NAD, to Marlene H. Dortch, Secretary, FCC, at 4 (Oct. 9, 2012) ("Consumer Groups Oct. 9 *Ex Parte* Letter"). We find that addressing the waivers herein is the most administratively efficient approach, and we note that Consumer Groups have not objected on the merits to the grant of the waivers for these narrow classes of apparatus.

⁵⁰ *See* CEA Petition at 8-18; CEA May 21 *Ex Parte* Letter at 1; CEA Sept. 21 *Ex Parte* Letter at 2; Letter from Julie M. Kearney, Vice President, Regulatory Affairs, CEA, to Marlene H. Dortch, Secretary, FCC, at 2-3 (Feb. 26, 2013) ("CEA Feb. 26 *Ex Parte* Letter"). *See also* Letter from Jim Morgan, Director and Counsel, Sony Electronics, Inc., Seth Greenstein, Outside Counsel, Hitachi Consumer Electronics Co., Ltd., Tony Jasionowski, Accessibility Program Manager, Panasonic Corporation of North America, and Paul Schomburg, Senior Manager, Government & Public Affairs, Panasonic Corporation of North America, to Marlene H. Dortch, Secretary, FCC, at 1 (Jan. 25, 2013) ("CE Manufacturers Jan. 25 *Ex Parte* Letter"). "Removable" media describes a form of media storage, such as DVDs and flash drives, which can be removed from a computer or other equipment while the system is running. In the *Report and Order*, the Commission decided not to exclude removable media play back apparatus, such as DVD and Blu-ray players, from the scope of the apparatus closed captioning rules, relying on the fact that Section 203 of the CVAA explicitly applies to "apparatus designed to receive or play back video programming transmitted simultaneously with sound." *See* 47 U.S.C. § 303(u)(1); *Report and Order*, 27 FCC Rcd at 845, ¶ 99. Removable media players are designed to play back video programming transmitted simultaneously with sound.

⁵¹ *See Emergency Information/Video Description Order*, 28 FCC Rcd at 4920-21, ¶ 71.

⁵² Although DVD players generally are single-purpose devices, manufacturers often include Blu-ray players in multi-purpose devices. The extension granted herein applies only to the removable media playback function of a DVD or Blu-ray player, and it does not apply to any other function of a device that contains a DVD or Blu-ray player. For example, if a Blu-ray player also records video programming or receives or plays back IP-delivered video programming, then the extension does not apply with respect to the non-removable media playback function.

⁵³ Section 203 of the CVAA imposes requirements on "apparatus designed to receive or play back video programming transmitted simultaneously with sound." *See* 47 U.S.C. § 303(u)(1).

⁵⁴ CEA Petition at 11-14. *See also* CEA Feb. 26 *Ex Parte* Letter at 2-3.

⁵⁵ *See* Consumer Groups Opposition at 2. *But see* CEA Reply at 5.

“transmitted” means sent across a distance by wire or radio.⁵⁶ The Commission has already considered, addressed, and rejected these arguments in the *Report and Order*.⁵⁷ We reaffirm the Commission’s prior analysis that the phrase “transmitted simultaneously with sound” describes how video programming is conveyed from the device to the end user, and not how the video programming arrives at the device.⁵⁸

18. Second, we reject CEA’s claim that Congress did not intend to reach removable media players within the scope of the closed captioning requirements, and that their inclusion thus exceeds Commission authority.⁵⁹ CEA has reiterated its previous arguments regarding this issue,⁶⁰ arguing that “Congress meant to extend coverage to devices that play back content that was sent to the device by means (e.g., via IP) other than traditional broadcasting or cable service,” and not to “extend[] captioning requirements to removable media players.”⁶¹ The Commission has already considered, addressed, and rejected these arguments in the *Report and Order*.⁶² We reaffirm the Commission’s prior analysis in this proceeding, finding that Congress indicated that Section 203 of the CVAA applies to “apparatus designed to receive *or* play back video programming,”⁶³ and it did not limit the scope of covered apparatus from

⁵⁶ See CEA Petition at 14 (“Here again, and unlike the *IP Captioning Order*, the term ‘transmitted’ means what Congress has consistently intended: sent at a distance by wire or radio, not as part of consumer’s playback of a disc or other fixed media. The Commission should alter its contrary interpretation of this term with respect to removable media devices.”).

⁵⁷ *Report and Order*, 27 FCC Rcd at 845, ¶ 99 (“Some commenters argue that the word ‘transmitted’ indicates content that is streamed, downloaded, or broadcast via ‘wire or radio,’ thus excluding such removable media devices. We are not persuaded by this argument. The reading these commenters advocate ignores Congress’s use of the word ‘or,’ and instead would require devices to both ‘receive *and* play back’ video programming in order to be covered under the statute. We think the better interpretation of the word ‘transmitted’ in context is that Congress’s substitution of the words ‘television pictures broadcast...’ with the corresponding words ‘video programming transmitted...’ while retaining the phrase ‘simultaneously with sound,’ was intended to expand the scope of the statute beyond devices that receive broadcast television without narrowing the statute’s prior coverage. For these reasons, we believe the better reading of the phrase ‘transmitted simultaneously with sound’ in this context is to describe how the video programming is conveyed from the device (e.g., DVD player) to the end user (simultaneously with sound), rather than describe how the video programming arrived at the device (e.g., DVD player.”) (footnote omitted, emphasis in original). See also Consumer Groups Opposition at 13-14.

⁵⁸ Section 203 of the CVAA expressly applies to “apparatus designed to receive *or play back* video programming transmitted simultaneously with sound.” 47 U.S.C. § 303(u)(1) (emphasis added). Accordingly, we reject CEA’s claim that the Commission’s interpretation of “transmitted simultaneously with sound” as describing how the video programming is conveyed from the device to the end user is inconsistent with Section 2(a) of the Communications Act of 1934, as amended (the “Act”), which generally limits the Commission’s jurisdiction to “interstate and foreign communication by wire or radio” and “does not extend to the playback function of a consumer electronics device designed to play back content that is outside the scope of the Commission’s authority.” CEA Petition at 18; 47 U.S.C. § 152(a). Rather, the plain language of the CVAA states that the Commission’s apparatus closed captioning rules apply to apparatus that play back video programming transmitted simultaneously with sound, and this specific grant of jurisdiction is not limited by the authority granted in Section 2(a) of the Act. See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992) (“it is a commonplace of statutory construction that the specific governs the general”). Nonetheless, industry members have provided new factual evidence regarding DVD and Blu-ray players, which persuades us to grant the extension discussed below.

⁵⁹ CEA Petition at 9, 14-18.

⁶⁰ See Consumer Groups Opposition at 2. *But see* CEA Reply at 5. Because we address this issue on the merits by reaffirming the Commission’s prior analysis, we need not consider these procedural issues here.

⁶¹ CEA Petition at 14.

⁶² See *Report and Order*, 27 FCC Rcd at 845, ¶ 99 (“The phrase ‘or play back’ in Section 203 makes clear that Congress no longer intended to only cover devices that receive programming.”).

⁶³ 47 U.S.C. § 303(u)(1) (emphasis added).

reaching apparatus that only play back video programming as CEA claims.⁶⁴

19. *DVD players.* Having rejected CEA's statutory arguments, we find that some DVD players currently satisfy the closed captioning requirements of the CVAA. For other DVD players we temporarily extend the deadline for compliance with our apparatus closed captioning rules pending resolution of the *FNPRM* on this issue. The apparatus closed captioning rules and the CVAA itself require apparatus to "be equipped with built-in closed caption decoder circuitry or capability designed to display closed-captioned video programming."⁶⁵ To the extent that any DVD players render closed captions,⁶⁶ they are not subject to the extension granted herein because they comply with the CVAA and our implementing rules since they are "equipped with built-in closed caption decoder circuitry . . . designed to display closed-captioned video programming" on a television. Other DVD players use their analog output to pass through closed captions to the television, which then renders the captions.⁶⁷ We find that DVD players with pass through capability also comply with the CVAA because a DVD player that passes through closed captions to the television is "equipped with built-in . . . capability designed to display closed-captioned video programming." In this scenario, because a DVD player does not itself contain a screen, the closed captions contained in the video programming that is being accessed through the DVD player are rendered by the television and displayed on the television screen, just as the video programming itself is being displayed. Thus, DVD players equipped with an analog output that passes through closed captioning satisfy the closed captioning requirement set forth in Section 303(u)(1)(A) of the Act and our rules because they are equipped with a capability designed to display closed-captioned video programming, *i.e.*, they enable closed captions to be viewed by consumers on their television sets.⁶⁸ At the same time, we recognize that DVD players that have multiple outputs, only one of which is an analog output that passes through closed captions to the television, may not comply with the Commission's interconnection mechanism rule, which requires that "[a]ll video outputs of covered apparatus shall be capable of conveying from the source device to the consumer equipment the information necessary to permit or render the display of closed captions."⁶⁹ We find good cause,

⁶⁴ See CEA Petition at 14-15.

⁶⁵ 47 U.S.C. § 303(u)(1)(A); 47 C.F.R. § 79.103(a).

⁶⁶ In the *Report and Order*, the Commission explained what it means to render or to pass through closed captions as follows: "HDMI is the preeminent audio-video interconnection standard used by manufacturers to enable uncompressed video signals to be carried from a source device (such as [a multichannel video programming distributor ("MVPD")] set-top box) to consumer equipment (such as a television). Industry commenters explain that with respect to the HDMI connector, 'the captions and video are decoded in the source device and carried as *opened* captions to the display, which acts only as a monitor.' When captions are transmitted in an 'open' manner, such as is the case with HDMI, they are 'rendered' by the source device, embedded (decoded and mixed) into the video stream, then carried by the HDMI connector to the receiving device in a manner that does not allow the consumer to access or utilize the captioning decoding and rendering functionality of the receiving device. When captions are 'closed,' they are transmitted as data alongside the video stream, and permit consumers to access and utilize the captioning functionality of the receiving device." 27 FCC Rcd at 855, ¶ 116 (footnotes omitted). HDMI stands for "High Definition Multimedia Interface."

⁶⁷ See CEA Oct. 26 *Ex Parte* Letter at 3-4 ("there are HDMI-compatible DVD players available (in the marketplace that can render or pass through the closed captioning)").

⁶⁸ To the extent that video technologies evolve resulting in consumers viewing video programming from DVD players on apparatus that are not capable of rendering and displaying closed captions, we will revisit this issue to ensure that consumers are not deprived of access to closed captioning of video programming. See, e.g., 47 C.F.R. § 79.103(b)(1) (display-only monitors with no playback capability are exempt from our apparatus closed caption requirements).

⁶⁹ 47 C.F.R. § 79.103(d). See also 47 U.S.C. § 303(z)(2) (requiring that "interconnection mechanisms and standards for digital video source devices are available to carry from the source device to the consumer equipment the information necessary to permit or render the display of closed captions"). DVD players are not able to pass (continued....)

however, to waive this requirement because requiring compliance with this rule would impose increased costs on otherwise low-cost devices that have been in the marketplace for a long time and for which the market is declining, as discussed below, and because there is already some capability for consumers to view closed captions through the compliant analog output. Accordingly, in the instant case, the public interest benefits of requiring complete compliance with the Commission's interconnection mechanism rule are outweighed by the additional costs on manufacturers.⁷⁰

20. Regarding DVD players that do not either render or pass through closed captions, policy considerations justify an extension of the compliance deadline⁷¹ pending resolution of the *FNPRM* on this issue. Manufacturers have expressed concerns about the costs of modifying DVD players to render the closed captioning themselves. Specifically, the record shows that DVD players generally have been in the marketplace for a long time and tend to be low-cost,⁷² and that adding captioning functionality may have a significant impact on manufacturing costs that would not be supported by consumers in the general public, potentially curtailing the continued availability of such devices in the U.S. market.⁷³ Because the record demonstrates that this is a declining market,⁷⁴ we are sensitive to imposing additional costs at this time without an adequate record. However, the current record does not identify the specific costs to manufacturers of including in DVD players an analog output that passes through closed captions to the television. Nor does it address the benefits to consumers who are deaf or hard of hearing were we to require this pass through obligation, or conversely, the harm to such consumers were we to eliminate all closed captioning obligations for DVD players. Given the above concerns, we temporarily extend the deadline for compliance with the apparatus closed captioning requirements for DVD players that do not either render or pass through closed captions, pending resolution of the *FNPRM* on this issue. We find that any hardship on consumers resulting from a temporary extension of the compliance deadline will be minimized because there are certain models of DVD players currently available that pass through closed captions to the television, which will provide a means for some individuals who are deaf or hard of hearing to view closed captions contained on DVDs.

21. *Blu-ray players.* For Blu-ray players, we temporarily extend the deadline⁷⁵ for compliance with our apparatus closed captioning rules pending resolution of the *FNPRM* on this issue. There is no evidence in the record to suggest that any Blu-ray players today either render closed captioning themselves or pass through closed captions via the type of analog output used by DVD players. And, we have little information on the record as to what the costs would be for Blu-ray players

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through closed captions on digital outputs or on a high-definition analog output unless the DVD player itself renders the captions.

⁷⁰ See 47 C.F.R. § 1.3 (“Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”); *NetworkIP, LLC v. FCC*, 548 F.3d at 127; *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d at 1166.

⁷¹ The compliance deadline for apparatus closed captioning otherwise is January 1, 2014. See 47 C.F.R. § 79.103(a).

⁷² See CE Manufacturers Jan. 25 *Ex Parte* Letter at 2.

⁷³ Regarding the cost of adding closed captioning functionality, a group of consumer electronics manufacturers explains, “[t]he capability to decode and render closed captions would require significant hardware changes to provide additional processing capability which lower-cost, stand-alone removable media players currently do not have As a result, manufacturers may not be able to provide simple removable media players at the low price points consumers expect.” *Id.*

⁷⁴ See Letter from Paul Schomburg, Senior Manager, Government & Public Affairs, Panasonic Corporation of North America, to Marlene H. Dortch, Secretary, FCC, at 1 (Feb. 15, 2013).

⁷⁵ The compliance deadline for apparatus closed captioning otherwise is January 1, 2014. See 47 C.F.R. § 79.103(a).

to render or pass through captions.⁷⁶ Moreover, we note that many, if not all, Blu-ray players are capable of playing DVDs (in addition to Blu-ray discs) but the record currently contains insufficient information regarding the technical changes required for manufacturers to ensure that these players can render or pass through captions from DVDs. These issues are further complicated by the fact that Blu-ray discs today do not contain closed captions,⁷⁷ and no industry-wide standard currently exists for closed captioning on Blu-ray discs. Given that there is no closed captioning standard for Blu-ray discs, Blu-ray players could not, as a technical matter, render⁷⁸ closed captions on Blu-ray discs in the short term because manufacturers of the players would not know what standards to comply with. Moreover, as the Commission has previously recognized, manufacturers require some period of time to design, develop, test, manufacture, and make available for sale new products,⁷⁹ which likely could extend beyond the compliance deadline. Thus, requiring Blu-ray players to comply with the apparatus closed captioning requirements by the January 1, 2014 compliance deadline would raise special difficulties for manufacturers. Accordingly we temporarily extend the compliance deadline with respect to Blu-ray players, pending resolution of the *FNPRM* where we seek more information on these issues. We find that any hardship on consumers resulting from a temporary extension of the compliance deadline will be minimized because Blu-ray discs currently include subtitles,⁸⁰ which will provide a means for some individuals who are deaf or hard of hearing to access dialogue.⁸¹ A temporary extension will provide the Commission with an opportunity to develop a complete record with respect to Blu-ray players so that we can develop a long-term policy with respect to such devices.

22. *Other removable media players.* The temporary extensions granted herein do not apply to all “removable media players”; rather they are expressly limited to DVD players that do not render or pass through closed captions and Blu-ray players. We decline to apply this extension more broadly because, although DVD and Blu-ray players are the current types of removable media players in the marketplace, if new types of “removable media players” are developed in the future, we would expect

⁷⁶ See CE Manufacturers Jan. 25 *Ex Parte* Letter at 2.

⁷⁷ See CEA Reply at 7, n. 32 (“Blu-ray Discs™ primarily use subtitles, including SDH, which, as stated in the CEA Petition, has been identified by an authoritative source as a form of ‘captioning’ for video content Thus, as a general matter, Blu-ray Disc™ players support SDH, rather than closed captioning as contemplated in the *Order*.”). Subtitles for the deaf and hard of hearing (“SDH”) make some video programming accessible to consumers who are deaf or hard of hearing via existing Blu-ray and DVD players. CEA Petition at 10, 17. The Commission explained in the *Report and Order* that SDH does not provide all of the features available with closed captions. *Report and Order*, 27 FCC Rcd at 846, ¶ 100; Consumer Groups Opposition at 19-20; Consumer Groups Oct. 9 *Ex Parte* Letter at 4-5; Letter from Blake E. Reid, Counsel to TDI, to Marlene H. Dortch, Secretary, FCC, at 2 (Feb. 15, 2013) (“Consumer Groups Feb. 15 *Ex Parte* Letter”); Letter from Blake E. Reid, Counsel to TDI, to Marlene H. Dortch, Secretary, FCC, at 3 (Feb. 27, 2013) (“Consumer Groups Feb. 27 *Ex Parte* Letter”); Letter from Blake E. Reid, Counsel to TDI, to Marlene H. Dortch, Secretary, FCC, at 3 (Mar. 4, 2013) (“Consumer Groups Mar. 4 *Ex Parte* Letter”); Letter from Blake E. Reid, Counsel to TDI, to Marlene H. Dortch, Secretary, FCC, at 3 (Mar. 7, 2013) (“Consumer Groups Mar. 7 *Ex Parte* Letter”); Letter from Blake E. Reid, Counsel to TDI, to Marlene H. Dortch, Secretary, FCC, at 3 (Mar. 11, 2013) (“Consumer Groups Mar. 11 *Ex Parte* Letter”); Letter from Blake E. Reid, Counsel to TDI, to Marlene H. Dortch, Secretary, FCC, at 5-6 (Mar. 14, 2013) (“Consumer Groups Mar. 14 *Ex Parte* Letter”).

⁷⁸ The meaning of “render” is discussed in footnote 66, *supra*.

⁷⁹ See *Report and Order*, 27 FCC Rcd at 859, ¶ 122.

⁸⁰ See *supra* note 77.

⁸¹ We note, however, that SDH does not provide all of the features available with closed captions. See *Report and Order*, 27 FCC Rcd at 846, ¶ 100; Consumer Groups Opposition at 19-20; Consumer Groups Oct. 9 *Ex Parte* Letter at 4-5; Consumer Groups Feb. 15 *Ex Parte* Letter at 2; Consumer Groups Feb. 27 *Ex Parte* Letter at 3; Consumer Groups Mar. 4 *Ex Parte* Letter at 3; Consumer Groups Mar. 7 *Ex Parte* Letter at 3; Consumer Groups Mar. 11 *Ex Parte* Letter at 3; Consumer Groups Mar. 14 *Ex Parte* Letter at 5-6.

those devices to be designed with closed captioning capability in mind, as required under the CVAA.

3. Application of the January 1, 2014 Deadline Only to the Date of Manufacture

23. We grant CEA's request that we specify that the January 1, 2014 apparatus compliance deadline refers only to the date of manufacture, and not to the date of importation, shipment, or sale of apparatus manufactured before that date.⁸² In the *Report and Order*, the Commission adopted a compliance deadline of January 1, 2014 for the apparatus covered by our rules.⁸³ The rules that the Commission adopted to implement this deadline arguably create some ambiguity as to whether it applies to the date of importation, manufacture, or shipment of apparatus.⁸⁴ CEA explains that, while the phrase "manufactured in the United States or imported for use in the United States" mirrors provisions of Section 203 of the CVAA,⁸⁵ the Commission should clarify that the rules apply only to devices manufactured on or after the deadline, as it has done in other equipment compliance rules by including explanatory notes.⁸⁶ We agree with CEA that this clarification would serve the public interest because manufacturers can identify and control the date of manufacture, but the date of importation is affected by variables outside of the manufacturer's control, and thus a deadline triggered by the date of importation may be unworkable in many situations for manufacturers.⁸⁷ CEA also explains that its proposal will have little effect on the availability of new compliant products because of the normally brief interval between a product's manufacture and its importation.⁸⁸ Accordingly, we add explanatory notes to Sections 79.101(a)(2), 79.102(a)(3), 79.103(a), and 79.104(a) of our rules, to clarify that the new obligations in the rules apply only to apparatus *manufactured* on or after January 1, 2014. We note that this approach is consistent with the Commission's past practices regarding similar equipment deadlines.⁸⁹

⁸² CEA Petition at 19-21; CEA Reply at 7-10; CEA May 21 *Ex Parte* Letter at 1-2; CEA Sept. 21 *Ex Parte* Letter at 2; CEA Feb. 26 *Ex Parte* Letter at 4. *See also Emergency Information/Video Description Order*, 28 FCC Rcd at 4924-25, ¶ 77.

⁸³ *Report and Order*, 27 FCC Rcd at 859, ¶ 122.

⁸⁴ 47 C.F.R. §§ 79.101(a)(2) ("Effective January 1, 2014, all television broadcast receivers shipped in interstate commerce, manufactured, assembled, or imported from any foreign country into the United States shall comply . . ."); 79.102(a)(3) ("Effective January 1, 2014, all digital television receivers and all separately sold DTV tuners shipped in interstate commerce or manufactured in the United States shall comply . . ."); 79.103(a) ("Effective January 1, 2014, all digital apparatus designed to receive or play back video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States and uses a picture screen of any size must . . ."); 79.104(a) ("Effective January 1, 2014, all apparatus designed to record video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States, must . . .").

⁸⁵ 47 U.S.C. § 303(u)(1) ("apparatus designed to receive or play back video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States"), (z)(1) ("apparatus designed to record video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States"). The CVAA does not, however, impose the January 1, 2014 deadline that the Commission adopted in the *Report and Order*, nor does it specify whether the deadline must apply to the date of manufacture, the date of importation, or both.

⁸⁶ CEA Petition at 19-20; CEA Reply at 9.

⁸⁷ CEA Petition at 20; CEA Reply at 9.

⁸⁸ CEA Reply at 9-10; CEA May 21 *Ex Parte* Letter at 2.

⁸⁹ *See, e.g.*, Notes to 47 C.F.R. §§ 15.120(a), 79.101(a)(1), 79.102(a)(1), (2). We clarify that our application of the apparatus compliance deadline only to the date of manufacture applies only to the rules and requirements at issue in this proceeding and not to any other compliance rules, which may have deadlines that are not based solely on the date of manufacture.

24. Consumer Groups claim that consumer confusion may result from CEA's proposal because consumers expect that any apparatus for sale after the January 1, 2014 deadline will be compliant.⁹⁰ Consumer Groups overlook the fact that nothing in the current apparatus rules expressly ties the compliance deadline to the date of sale. Instead, while the current rules are ambiguous with respect to the triggering event for the January 1, 2014 compliance deadline, nothing in the rules references the date of sale. Additionally, as CEA explains, while manufacturers can identify and control the date of manufacture, the date of sale is affected by variables outside of the manufacturer's control.⁹¹ Further, we expect that a compliance deadline based on the date of sale would create complications for retail vendors with noncompliant apparatus in their inventory after the deadline. For all of these reasons, we conclude that tying the compliance deadline to date of manufacture would best serve the public interest.

25. Further, we agree with CEA that Consumer Groups' proposal that we require manufacturers to label products to indicate which devices are compliant or noncompliant after January 1, 2014⁹² should be dismissed as a late-filed petition for reconsideration of the *Report and Order*.⁹³ Consumer Groups raised this issue in an opposition but not in a petition for reconsideration.⁹⁴ Similarly, we also agree with CEA that Consumer Groups' proposed compliance deadline based on the date of a product's sale⁹⁵ should be dismissed as a late-filed petition for reconsideration of the *Report and Order*.⁹⁶ Again, Consumer Groups raised this issue in an opposition but not in a petition for reconsideration.⁹⁷

B. Petition for Reconsideration of TVGuardian, LLC

26. We deny TVGuardian's petition requesting that the Commission reconsider its decision to allow video programming providers and distributors to enable the rendering *or* pass through of captions⁹⁸ to end users and instead require video programming providers and distributors, and digital

⁹⁰ Consumer Groups Opposition at 20-21; Consumer Groups June 4 *Ex Parte* Letter at 3; Consumer Groups June 14 *Ex Parte* Letter at 2; Consumer Groups June 22 *Ex Parte* Letter at 2.

⁹¹ CEA Reply at 9.

⁹² Consumer Groups Opposition at 22-23; Consumer Groups June 4 *Ex Parte* Letter at 3; Consumer Groups June 14 *Ex Parte* Letter at 2; Consumer Groups June 22 *Ex Parte* Letter at 2.

⁹³ CEA Reply at 10; CEA Feb. 26 *Ex Parte* Letter at 4.

⁹⁴ Additionally, from a practical standpoint, we note that a labeling requirement would impose additional compliance costs on manufacturers with little practical benefit to consumers. *See* CEA Reply at 10. Specifically, labels could provide confusing and misleading information about the capabilities of apparatus. Apparatus manufactured prior to January 1, 2014 would not bear the label, even if such apparatus supported closed captions. Further, a labeling requirement would extend indefinitely, imposing costs and burdens on manufacturers despite our expectation that few, if any, noncompliant apparatus will be on store shelves within a few months of the compliance deadline.

⁹⁵ Consumer Groups Opposition at 21.

⁹⁶ CEA Reply at 8; CEA Feb. 26 *Ex Parte* Letter at 4.

⁹⁷ Additionally, we note that Consumer Groups misconstrue a reference in the *Report and Order* to "mak[ing] available for sale new products" as applying the compliance deadline based upon the date of sale. Consumer Groups Opposition at 21. This reference was part of a sentence explaining that it generally takes two years to bring a new product to market, and it did not apply the compliance deadline to a product's date of sale. *See Report and Order*, 27 FCC Rcd at 859, ¶ 122 ("As the Commission has repeatedly determined, manufacturers generally require approximately two years to design, develop, test, manufacture, and make available for sale new products.") (footnote omitted); CEA Reply at 8-9.

⁹⁸ *See supra* note 66.

source devices, to pass through closed caption data to consumer equipment.⁹⁹ In the *Report and Order*, the Commission required video programming providers and distributors to convey all required captions to the end user, but it allowed the provider or distributor to select whether to render the captions or pass them through.¹⁰⁰ Pursuant to this requirement, the Commission stated that “[w]hen a [video programming provider or distributor] initially receives a program with required captions for IP delivery, we will require the [video programming provider or distributor] to include those captions at the time it makes the program file available to end users.”¹⁰¹ The Commission also implemented the interconnection mechanism provision of the CVAA, which directs the Commission to require that “interconnection mechanisms and standards for digital video source devices are available to carry from the source device to the consumer equipment the information necessary to permit or render the display of closed captions.”¹⁰² Consistent with that provision, the Commission required all video outputs of covered apparatus to be capable of conveying from the source device (such as an MVPD set-top box) to the consumer equipment (such as a television) the information necessary to permit or render the display of closed captions.¹⁰³ As a result, a digital source device (such as a set-top box) is permitted to use a video output such as HDMI, which does not pass through captions in a closed manner (*i.e.*, HDMI does not transmit the closed captions to the receiving device as data alongside the video stream), provided the source device renders the closed captioning (*i.e.*, decodes and mixes the closed captions into the video stream).

27. TVGuardian asks the Commission to reconsider its finding that video programming providers and distributors may enable the rendering (instead of the pass through) of all required captions to the end user, and that video outputs of covered apparatus may convey from the source device to the consumer equipment the information necessary to render the display of closed captions (instead of passing through the closed caption data).¹⁰⁴ TVGuardian claims that Congress intended to permit the rendering of captions only if passing them through would be technically infeasible.¹⁰⁵ We reject TVGuardian’s proposed interpretation because such an approach would effectively read the term “or” out of the statutory language, which permits the rendering *or* the pass through of closed captions by video programming providers, distributors, and interconnection mechanisms,¹⁰⁶ thus indicating an intent by

⁹⁹ TVGuardian Petition at 1, 4. Because we reject TVGuardian’s argument on substantive grounds, we find it unnecessary to address the procedural arguments raised in various oppositions filed in this proceeding. Opposition of the Consumer Electronics Association to Petitions for Reconsideration filed by TVGuardian and the Consumer Groups at 2, 4-5 (filed June 7, 2012) (“CEA Opposition”); Opposition of HDMI Licensing, LLC to TVGuardian, LLC Petition for Reconsideration at 2-4 (filed June 7, 2012) (“HDMI Licensing Opposition”); National Cable & Telecommunications Association, Opposition to Petitions for Reconsideration at 1, n. 4 (filed June 7, 2012) (“NCTA Opposition”); Reply to Comments and Oppositions of Google Inc. at 5 (filed June 18, 2012) (“Google Reply”).

¹⁰⁰ *Report and Order*, 27 FCC Rcd at 804, ¶ 26.

¹⁰¹ *Id.* at 804-05, ¶ 26 (footnote omitted).

¹⁰² 44 U.S.C. § 303(z)(2). As the Commission stated in the *Report and Order*, “[a]s the statute states, ‘interconnection mechanisms’ carry information from source devices to consumer equipment. Interconnection mechanisms consist of an output, a transmission path, and an input.” *Report and Order*, 27 FCC Rcd at 855, ¶ 116.

¹⁰³ *Id.* at 855, ¶ 115.

¹⁰⁴ *See* TVGuardian Petition at 1.

¹⁰⁵ *See id.* at 3-4 (“The Commenter contends that Congress neither intended for the pass-through of closed captions to be omitted from IP video (or else the term ‘pass-through’ would have been eliminated from the CVAA), nor did Congress intend for the pass-through requirement to only apply to Recording Devices. By including the words ‘render or,’ Congress only wanted to give the FCC flexibility to grant exceptions to the pass-through rule for connections in which the FCC determines that enforcement would actually be *technically infeasible*.”) (emphasis in original).

¹⁰⁶ *See* 47 U.S.C. § 613(c)(2)(D)(vi) (“the video programming provider or distributor shall be deemed in compliance if such entity enables the rendering or pass through of closed captions”); *id.* § 303(z)(2) (“interconnection (continued....)”).

Congress to permit alternative means by which a video programming provider or distributor and an interconnection device may satisfy the statute.¹⁰⁷ Not only is TVGuardian's proposed interpretation inconsistent with the statute, but also nothing in the legislative history supports TVGuardian's claim that Congress only intended to permit the rendering of closed captions if passing them through would be technically infeasible.¹⁰⁸ Had Congress intended to permit rendering only if pass through is technically infeasible, it would have included language to this effect. Instead, the statute contains no such limitation.

28. The consumer electronics industry has coalesced around the use of HDMI,¹⁰⁹ which permits the use of rendered captions but does not pass through closed captions, meaning that it only conveys captions when they have been decoded and mixed into the video stream. The Commission found in the *Report and Order* that HDMI complies with the interconnection mechanism requirements,¹¹⁰ and TVGuardian has not presented any arguments that persuade us that the Commission should modify this determination. Rather, TVGuardian has reiterated its prior arguments that the Commission should require HDMI to pass through closed caption data.¹¹¹ The Commission considered and rejected such arguments in the *Report and Order* when it concluded in implementing the interconnection mechanism provision of the CVAA "that it is sufficient, for purposes of this provision, if the video output of a digital source device renders the closed captioning in the source device. Accordingly, we find that the manner in which the HDMI connection carries captions satisfies the statutory requirement for interconnection mechanisms."¹¹² We also find persuasive commenters' rebuttal¹¹³ to TVGuardian's claim that it would

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mechanisms and standards for digital source devices are available to carry from the source device to the consumer equipment the information necessary to permit or render the display of closed captions").

¹⁰⁷ See *Report and Order*, 27 FCC Rcd at 804, 856, ¶¶ 26, 117.

¹⁰⁸ See CEA Opposition at i, 3, 9, 11-14; HDMI Licensing Opposition at 6; NCTA Opposition at 7-8; DIRECTV, LLC's Reply at 3-4 (filed June 18, 2012) ("DIRECTV Reply"). See also *Report and Order*, 27 FCC Rcd at 804, ¶ 26 (requiring video programming providers and distributors "to enable 'the rendering or pass through' of all required captions to the end user"), 856, ¶ 117 ("The use of the phrase 'or permit' indicates an alternative means by which an interconnection device may satisfy the statute. Read in context, we believe Congress intended to give the term 'permit' a different meaning than the term 'render.' We thus interpret the alternative requirement to 'permit' the display of closed captions to mean that the interconnection mechanism may carry the information necessary for the rendered captions to be displayed on the receiving device, without regard to the receiving device's caption functionality. We believe that our interpretation is reasonable because we give effect to Congress's use of the disjunctive 'or,' and because our interpretation achieves the statutory purpose of ensuring consumer access to closed captions.").

¹⁰⁹ TVGuardian asserts that HDMI violates the existing television closed captioning rules, seemingly based on the erroneous assumption that those rules include an interconnection obligation between the set-top box and the consumer display device. TVGuardian Petition at 7. See also 47 C.F.R. § 79.1. The television closed captioning rules are unrelated to the Commission's implementation of the CVAA in the *Report and Order*. In any event, we agree with commenters that HDMI in fact complies with the television closed captioning rules, and that TVGuardian has improperly raised the issue of HDMI's compliance with the television closed captioning rules through a petition for reconsideration of the *Report and Order*, which did not revise or address the television closed captioning rules. See CEA Opposition at i, 3, 14-15; HDMI Licensing Opposition at 9-10. But see CM Boryslawskyj, MBA, Reply Comments at 2 (filed June 15, 2010) ("Boryslawskyj Reply") (agreeing with TVGuardian that HDMI violates the closed caption data pass through rule).

¹¹⁰ *Report and Order*, 27 FCC Rcd at 855, ¶ 115. See also CEA Opposition at 2, 14; HDMI Licensing Opposition at 7; Comments of Mitsubishi Electric Visual Solutions America, at 4 (filed June 7, 2012) ("MEVSA Opposition"); NCTA Opposition at 7-8.

¹¹¹ See TVGuardian Petition at 7-8.

¹¹² *Report and Order*, 27 FCC Rcd at 855, ¶ 115.

¹¹³ CEA Opposition at i, 3, 15-16 ("... TVGuardian's assessment of the burdens of modifying the HDMI interface to pass through closed captions ignores the ample record evidence that implementing closed captioning in HDMI (continued....)").

not be costly to modify HDMI to pass through closed captions and that no additional hardware would be needed.¹¹⁴ We agree with commenters that the costs of any required compliance with a pass through requirement, including both hardware changes and standard revisions, would outweigh the benefits, as we find that any particular benefit to consumers who are deaf or hard of hearing is unclear. We note that TVGuardian's petition fails to identify any resulting benefits to individuals who are deaf or hard of hearing arising from its proposed interpretation. Rather, TVGuardian's request appears to be focused solely on enabling the use of its foul language filter, which operates through the pass through of closed caption data.¹¹⁵ TVGuardian's foul language filter will not operate with rendered closed captions in the video stream because the foul language filter can only read data passed through as closed captions.¹¹⁶ Significantly, Consumer Groups did not file any comments in support of TVGuardian's petition for reconsideration.

29. We also reject TVGuardian's claims that the provisions of the CVAA on recording devices¹¹⁷ and interconnection mechanisms¹¹⁸ must be read together, which TVGuardian argues would require the pass through of closed caption data to consumer equipment.¹¹⁹ TVGuardian claims that its proposed approach is necessary to ensure that recording devices enable viewers to activate and deactivate closed captions, as required by the CVAA.¹²⁰ We instead agree with HDMI Licensing that nothing about the Commission's interpretation of these two provisions is incompatible, because a pass through mandate on HDMI is not needed to enable recording devices to activate and deactivate closed captions on recorded programming,¹²¹ as explained below. Commenters persuasively express several problems with

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would be a lengthy and expensive task with little real benefit [T]he record demonstrates that carriage of closed captioning data over an HDMI connection would require substantial revisions to the standard, which could take years and would also require substantial redesign of the chipsets and associated end-user products." (footnote omitted); HDMI Licensing Opposition at 7-9 ("In contrast with TVGuardian's baseless claim, the record shows that mandating a change to the HDMI interconnection mechanism would be a lengthy process that would take years to fully implement in the marketplace, would impose a significant cost burden on HDTV manufacturers and ultimately on consumers, and would not be backwards compatible with existing HDTVs.") (footnote omitted).

¹¹⁴ TVGuardian Petition at 8.

¹¹⁵ CEA Opposition at 5-6; HDMI Licensing Opposition at 2, 4; Google Reply at 4. *But see* Boryslawskyj Reply at 6 (applauding TVGuardian for understanding consumers' frustration with captioning problems). We note that nothing in our IP closed captioning rules prevents TVGuardian from negotiating with video programming distributors or equipment manufacturers to obtain access to closed caption data. *See* CEA Opposition at 6.

¹¹⁶ *See* CEA Opposition at 5.

¹¹⁷ *See* 47 U.S.C. § 303(z)(1) ("if achievable . . . , apparatus designed to record video programming transmitted simultaneously with sound . . . enable the rendering or the pass through of closed captions . . . such that viewers are able to activate and de-activate the closed captions . . . as the video programming is played back on a picture screen of any size").

¹¹⁸ *See id.* § 303(z)(2) ("interconnection mechanisms and standards for digital video source devices are available to carry from the source device to the consumer equipment the information necessary to permit or render the display of closed captions").

¹¹⁹ TVGuardian Petition at 2-3 ("The Commenter maintains that these two paragraphs are intended to be interpreted together, and the term 'Recording Devices' . . . does not just include [video programming distributor or provider] provided Recording Devices; the term actually includes all Recording Devices capable of being connected to digital video source devices in any wired or wireless manner. Similarly, [the statutory provision addressing interconnection mechanisms] cannot be interpreted without including the Recording Devices mandate [of the prior statutory provision]; therefore, Congress intended for video source devices to pass-through closed captions [sic] data to other consumer equipment besides just Recording Devices using some undefined method.").

¹²⁰ *Id.* at 1-3.

¹²¹ HDMI Licensing Opposition at 5. *See also* DIRECTV Reply at 2-3.

TVGuardian's claims that the Commission's interpretation of the recording device provision and the interconnection mechanism provision are inconsistent. Specifically, commenters explain that the Commission does not need to change its interpretation of these provisions because most recording devices already comply with the requirement that they enable viewers to activate and deactivate closed captions, and they explain that most consumer recording devices such as DVRs do not use interconnection mechanisms to receive content in any event so revisions to the implementation of the interconnection mechanism provision would have no effect on those recording devices.¹²² In other words, few, if any, recording devices acquire video programming via an HDMI connection. Rather, the overwhelming majority of DVRs acquire programming via a built-in cable or over-the-air tuner or via a built-in IP connection. Thus, recording devices are merely required to record the closed captioning stream in addition to the video stream for consumers to be able to turn captioning on and off during playback. Even if a recording device utilizes HDMI to connect to additional consumer electronics devices, it may render closed captions instead of passing them through, and the consumer viewing programming on a recording device may activate and deactivate the closed captions.

C. Petition for Reconsideration of Consumer Groups

1. Application of the IP Closed Captioning Rules to Video Clips

30. At this time, we defer a final decision on whether to reconsider the issue of whether "video clips"¹²³ should be covered by the IP closed captioning rules,¹²⁴ and we will keep the record open pending the development of additional information regarding the availability of captioned video clips.¹²⁵

¹²² CEA Opposition at i, 2-3, 6-9; HDMI Licensing Opposition at 5-6; NCTA Opposition at 7. We also reject TVGuardian's assertion that the word "permit" in the interconnection mechanism provision ("interconnection mechanisms and standards for digital video source devices are available to carry from the source device to the consumer equipment the information necessary to permit or render the display of closed captions") is meant to require recording devices and other consumer equipment to enable the viewer to activate and deactivate the closed captions, which it claims requires the pass through of closed caption data. TVGuardian Petition at 3. Rather, as explained above, the CVAA permits either the rendering or the pass through of closed captions. The rendering of closed captions prior to transmission of video over HDMI does not preclude the viewer from activating and deactivating the captions, when that function is present in the source device. *See also* HDMI Licensing Opposition at 4-5. In other words, even when HDMI renders closed captions instead of passing them through, the viewer may activate and deactivate the captions. Separately, because as explained above we are not persuaded by TVGuardian's central argument that we should require video programming providers and distributors and digital video source devices to pass through closed caption data to consumer equipment, we need not consider its claims that we should make other related rule revisions that would be necessitated by the grant of its petition. *See* TVGuardian Petition at 6-7. We note that apparatus synchronization requirements, which TVGuardian references, are discussed further in Sections III.C.2 and IV below. *See id.* at 7 ("[D]evice manufacturers should be required to render *and* pass-through the closed captions data in some manner, together with the audio and video, with the same accuracy of timing received from the [video programming distributors and providers].") (emphasis in original).

¹²³ The Commission has defined "video clips" as "[e]xcerpts of full-length video programming." 47 C.F.R. § 79.4(a)(12). It has defined "full-length video programming" as "[v]ideo programming that appears on television and is distributed to end users, substantially in its entirety, via Internet protocol, excluding video clips or outtakes." *Id.* § 79.4(a)(2).

¹²⁴ *See Report and Order*, 27 FCC Rcd at 816-18, ¶¶ 44-48 (concluding that the IP closed captioning requirements apply to full length programming and not to video clips or outtakes).

¹²⁵ Consumer Groups recently submitted a report on the state of closed captioning of IP-delivered video programming in which they address the current lack of captioning of video clips, among other topics. *See, e.g.*, Consumer Groups and California Coalition of Agencies Serving the Deaf and Hard of Hearing ("CCASDHH"), Report on the State of Closed Captioning of Internet Protocol-Delivered Video Programming, MB Docket No. 11-154, at ii-iii, 5-13, 18-20 (May 16, 2013) ("Consumer Groups May 2013 Report"); Consumer Groups, Motion for Leave to Supplement Petition for Reconsideration (May 16, 2013). We note that the Consumer Groups May 2013 Report also urges the Commission to impose quality standards on television closed captioning. Consumer Groups (continued....)

To ensure that the Commission obtains updated information on this issue, we direct the Media Bureau to issue a Public Notice within six months of the date of release of this *Order on Reconsideration*, seeking information on the industry's progress in captioning IP-delivered video clips. Consumer Groups argue that the Commission should undertake a reconsideration of this issue at this time and should find that IP-delivered "video clips" must be captioned.¹²⁶ Consumers have expressed particular concern about availability of captioned news clips, which tend to be live or near-live.¹²⁷ We note that live or near-live programming only recently became subject to the IP closed captioning requirements on March 30, 2013.¹²⁸ Now that this implementation deadline has passed, we expect that entities subject to the IP closed captioning rules will have developed more efficient processes to handle captioning of live and near-live programming, including news clips that are posted on websites.¹²⁹ Thus we expect that these entities voluntarily will caption an increased volume of video clips, particularly news clips, even though the Commission's IP closed captioning requirements apply to full-length programming and not video clips.¹³⁰ In the *Report and Order*, the Commission "encourage[d] the industry to make captions available on all TV news programming that is made available online, even if it is made available through the use of video clips."¹³¹ Accordingly, we will monitor industry actions with respect to captioning of video clips, and within six months we direct the Media Bureau to issue a Public Notice to seek updated information on this topic. If the record developed in response to that Public Notice demonstrates that consumers are denied access to critical areas of video programming due to lack of captioning of IP-delivered video clips, we may reconsider our decision on this issue.

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May 2013 Report at iii, 14-17, 20-22. This issue is properly addressed in the pending proceeding on the quality of closed captioning on television. See *Closed Captioning of Video Programming*, Notice of Proposed Rulemaking, 20 FCC Rcd 13211 (2005); Public Notice, *Consumer & Governmental Affairs Bureau Seeks to Refresh the Record on Notices of Proposed Rulemaking Regarding Closed Captioning Rules*, 25 FCC Rcd 15056 (2010).

¹²⁶ Consumer Groups Petition at iii, 1-17; Consumer Groups June 4 *Ex Parte* Letter at 2; Consumer Groups June 14 *Ex Parte* Letter at 1; Consumer Groups June 22 *Ex Parte* Letter at 1; Consumer Groups May 2013 Report at iii, 18-20. Google agrees with Consumer Groups that video clips should be captioned, which would increase accessibility. Google Reply at 2-3. Some commenters argue that Consumer Groups failed to meet the procedural requirements for petitions for reconsideration. See Association of Public Television Stations and Public Broadcasting Service, Opposition to the Petition for Reconsideration filed by Telecommunications for the Deaf and Hard of Hearing, Inc. *et al.*, at 2-6 (filed June 7, 2012) (arguing that Consumer Groups relied on statutory arguments that the Commission already considered and rejected); The National Association of Broadcasters Opposition to Petition for Reconsideration of Telecommunications for the Deaf and Hard of Hearing, Inc., *et al.*, at ii, 4-5 (filed June 7, 2012) (arguing that Consumer Groups could have made their statutory arguments earlier and failed to explain why they did not); NCTA Opposition at 1, n. 4 (arguing that the Consumer Groups Petition repackages arguments that the Commission already considered and rejected). Consumer Groups respond that there is no procedural impropriety because reconsideration would serve the public interest, and in such cases petitions for reconsideration are always appropriate. Consumer Groups, Reply Comments to the Oppositions of the Association of Public Television Stations and Public Broadcasting Service, the National Association of Broadcasters, and the National Cable & Telecommunications Association to the Petition for Reconsideration Regarding "Video Clips," at 7-9 (filed June 18, 2012) ("Consumer Groups Video Clips Reply"). Because we decline, at this time, to resolve Consumer Groups' request regarding video clips, we need not consider these procedural issues here.

¹²⁷ See Consumer Groups Petition at 14-15. See also Consumer Groups May 2013 Report at iii, 9, 12 (finding that 77 percent of observed news clips were not captioned).

¹²⁸ See News Release, *Internet Closed Captioning Rules Go Into Effect March 30, 2013 for Live and Near-Live Programming* (rel. Mar. 27, 2013).

¹²⁹ We note that news is only one type of programming that may be made available online through video clips.

¹³⁰ 47 C.F.R. § 79.4(b) (imposing closed captioning requirements on "[a]ll nonexempt full-length video programming delivered using Internet protocol").

¹³¹ *Report and Order*, 27 FCC Rcd at 818, ¶ 48.

2. Propriety of Synchronization Requirements for Apparatus

31. Consumer Groups argue that the Commission should reconsider its decision not to impose any timing obligations on device manufacturers pursuant to Section 203, and that this decision contravened Congress's intent and the VPAAC's consensus.¹³² In the *Report and Order*, the Commission considered the timing of the presentation of caption text with respect to the video in the context of apparatus requirements, and it concluded that "it is inappropriate to . . . address[] the timing of captions with video, here," concluding instead that "ensuring that timing data is properly encoded and maintained through the captioning interchange and delivery system is an obligation of Section 202 [video programming distributors and providers] and not of device manufacturers."¹³³ Consumer Groups argue that the Commission should reconsider this conclusion and instead should impose on manufacturers obligations related to the synchronization of caption text and the corresponding video.¹³⁴ We find that we need more information before we resolve this issue, because commenters disagree as to whether apparatus may cause captions to appear out of synch with the video, whether existing standards would enable manufacturers to address the timing of captions, and whether video programming owners, providers, and distributors are better suited than manufacturers to ensure proper captioning synchronization.¹³⁵ Accordingly, in the *FNPRM* we consider whether we should impose closed captioning synchronization requirements on apparatus, and if so, what those requirements should entail.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

32. *Apparatus synchronization requirements.* We invite comment on whether the Commission should require apparatus manufacturers to ensure that their apparatus synchronize the appearance of closed captions with the display of the corresponding video. In the *Report and Order*, the Commission concluded that it would be inappropriate to impose synchronization requirements on apparatus.¹³⁶ Rather, the Commission stated "that ensuring that timing data is properly encoded and maintained through the captioning interchange and delivery system is an obligation of Section 202 [video programming distributors and providers], and not of device manufacturers."¹³⁷ Consumer Groups argue that the Commission should impose timing obligations on device manufacturers pursuant to Section 203 of the CVAA because apparatus may cause captions to become out of synch with the corresponding video.¹³⁸ We need more information in the record to address this issue because commenters disagree as to whether synchronization problems can be caused by apparatus.¹³⁹ Commenters also disagree as to

¹³² See Consumer Groups Petition at iv, 18-21; Consumer Groups June 4 *Ex Parte* Letter at 2. See also Boryslawskyj Reply at 3. But see CEA Opposition at 17 (stating that the VPAAC First Report did not impose any responsibility on device manufacturers to ensure that the timing of closed captions is properly encoded and maintained from the video programming distributor or provider to the device and from the device to the consumer).

¹³³ *Report and Order*, 27 FCC Rcd at 853, ¶ 112.

¹³⁴ See Consumer Groups Petition at iv, 18-21

¹³⁵ See *infra* Section IV. The Commission's rules define the terms video programming distributor, video programming provider, and video programming owner. See 47 C.F.R. § 79.4(a)(3)-(4).

¹³⁶ *Report and Order*, 27 FCC Rcd at 853, ¶ 112.

¹³⁷ *Id.*

¹³⁸ See Consumer Groups Petition at iv, 18-21.

¹³⁹ Consumer Groups argue that synchronization problems can be caused by apparatus, and thus failure to place synchronization obligations on apparatus may make timing requirements on video programming distributors ineffective. See Consumer Groups Petition at iv, 18-19; Consumer Groups, Reply Comments to the Oppositions of the Mitsubishi Electric Visual Solutions America and the Consumer Electronics Association to the Petition for Reconsideration Regarding Apparatus Synchronization at 2-5 (June 18, 2012) ("Consumer Groups Synchronization Reply"); Letter from Andrew S. Phillips, Policy Counsel, NAD, to Marlene H. Dortch, Secretary, FCC, at 1-4 (July (continued....))

whether existing standards would enable manufacturers to address caption synchronization.¹⁴⁰ Another issue is whether video programming owners, providers, and distributors are better suited than manufacturers to ensure captioning quality, including captioning synchronization.¹⁴¹ Based on the record information on synchronization in response to the Consumer Groups Petition, it now appears that apparatus may play a role in synchronization problems. We do not, however, currently possess sufficient information to determine the nature or extent to which apparatus are the cause of these problems, or whether there is a workable manner in which to impose synchronization requirements on apparatus. Accordingly, we invite comment on this issue.

33. Specifically, we seek information on whether apparatus may cause closed captioning synchronization problems, and if so, how. We encourage commenters to provide specific evidence on this issue, including for example a discussion of situations in which the same video programming is displayed in the same manner (*i.e.*, on the same website or via the same application) on different apparatus, where one apparatus displays the closed captioning with better synchronization than the other. Are video programming owners, providers, and distributors better suited than manufacturers to ensure caption quality, including synchronization? If so, why? What are the costs and benefits of imposing caption synchronization requirements on video programming owners, providers, and distributors in lieu of imposing such requirements on apparatus manufacturers?

34. To the extent that apparatus cause closed captioning synchronization problems, we seek comment on what requirements we should impose on apparatus to address this problem. Are there existing standards that would enable manufacturers to address closed caption synchronization, or is it possible for manufacturers to develop and implement such standards? If not, by what means could apparatus comply with a synchronization requirement? Do closed captioning standards provide the necessary timing data for compliance with and enforcement of a synchronization standard?¹⁴² If we impose a synchronization requirement on apparatus, should we require apparatus to render closed captions consistent with the data dictating the timing of captions that is included with the video programming the apparatus receives?¹⁴³ What are the costs and benefits of imposing caption synchronization requirements on apparatus manufacturers? What compliance deadline should we impose on any apparatus synchronization requirements that we adopt? In an enforcement proceeding, how could the Commission determine whether synchronization problems are caused by the apparatus or by the video programming owner, provider, or distributor?

35. *Closed captioning requirements on DVD and Blu-ray players.* As explained above, we provide manufacturers of DVD players that do not render or pass through closed captions, and manufacturers of Blu-ray players, with a temporary extension of the compliance deadline, pending resolution of this *FNPRM*.¹⁴⁴ The CVAA and our rules require that apparatus “be equipped with built-in

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20, 2012). To the contrary, Mitsubishi Electric Visual Solutions America, Inc. (“MEVSA”) argues that it is unaware of any caption display synchronization problems caused by receivers, and CEA argues that decoders do not cause synchronization problems. See CEA Opposition at 16-19; MEVSA Opposition at 2-3. See also CEA Feb. 26 *Ex Parte* Letter at 4.

¹⁴⁰ CEA and MEVSA argue that existing standards would not enable manufacturers to comply with a synchronization requirement. See CEA Opposition at 16-17, 19-20; MEVSA Opposition at 3-4. Consumer Groups disagree, arguing that mainstream captioning standards such as CEA-608, CEA-708, and the Society of Motion Picture and Television Engineers (“SMPTE”) Timed Text Format (“SMPTE-TT”) support synchronization. See Consumer Groups Synchronization Reply at 5-9.

¹⁴¹ See CEA Opposition at 17.

¹⁴² See Consumer Groups Synchronization Reply at 5-9.

¹⁴³ See CEA Opposition at 21.

¹⁴⁴ See *supra* Section III.A.2.

closed caption decoder circuitry or capability designed to display closed-captioned video programming.”¹⁴⁵ Thus, we invite comment on the closed captioning requirements that we should impose on DVD players that do not render or pass through closed captions, and on Blu-ray players with regard to Blu-ray discs and DVDs.¹⁴⁶ Commenters should provide information on the costs and benefits of imposing such requirements, including the technical aspects of what would be required to make closed captioning accessible on such devices.

36. We seek comment on whether we should permit DVD players that do not currently render or pass through closed captions to include an analog output to pass through closed captions. As explained above, the record demonstrates that the DVD player market is declining.¹⁴⁷ Accordingly, how would such a regulation on DVD players impact the market? In the context of low-cost DVD players, would there be sufficient consumer demand for manufacturers to continue manufacturing such players if faced with the costs of rendering or adding an analog output? Given that Blu-ray players are able to play both Blu-ray discs and DVDs, should we consider Blu-ray players that do not render closed captions but include an analog output to pass through closed captions on DVDs to comply with the closed captioning requirements of the CVAA? Is there a consumer expectation that captioned DVDs should be viewable on a backward compatible Blu-ray player? Should Blu-ray players that include an analog output that pass through captions be granted a waiver of the Commission’s interconnection mechanism rule (as we have granted in the DVD context)?¹⁴⁸ Alternatively, should we require Blu-ray players to render captions from DVDs? We seek specific comment on the costs and benefits of the approaches considered herein as well as on the technical aspects of what would be required to effectuate these requirements. For example, would manufacturers be required to implement a software or hardware upgrade? Similarly, what are the costs and benefits of requiring all DVD and Blu-ray players to include an analog output, and what technical steps are necessary to achieve this? In addition, what would be an appropriate deadline for compliance with the closed captioning requirements for DVD players that do not render or pass through captions and for Blu-ray players?

37. With regard to Blu-ray players playing Blu-ray discs, as we noted above, there is not currently an industry-wide standard for closed captioning on Blu-ray discs. Thus, Blu-ray discs do not currently contain captions. Does this fact make it more important that Blu-ray player manufacturers take steps to ensure that captions from DVDs can be rendered or passed through? Should we require Blu-ray players to render or pass through captions from Blu-ray discs within a certain period of time with the expectation that doing so would spur the industry to prioritize developing a standard for discs and include captions on Blu-ray discs? Alternatively, given that Blu-ray discs as well as DVDs currently include subtitles,¹⁴⁹ we seek comment on whether, as a legal matter, rendering or passing through subtitles could

¹⁴⁵ 47 U.S.C. § 303(u)(1)(A); 47 C.F.R. § 79.103(a).

¹⁴⁶ We understand that many, if not all, Blu-ray players are “backward compatible” with DVDs, that is, they are able to play both Blu-ray discs *and* DVDs. We seek comment on this understanding.

¹⁴⁷ *See supra* Section III.A.2.

¹⁴⁸ *See* 47 C.F.R. § 79.103(d). *See also supra* Section III.A.2. Closed captions contained on DVDs are output on the line 21 vertical blanking interval when delivered on standard definition analog outputs, such as composite video or a coaxial output. Televisions then make these captions viewable. *See* 47 C.F.R. § 79.101.

¹⁴⁹ *See* CEA Petition at 10 (“[T]he majority of removable media includes subtitles, and an increasing percentage specifically includes subtitles for the deaf and hard of hearing (‘SDH’), rather than the new rules’ closed captions.”); CEA Reply at 7, n.32 (“Blu-ray Discs™ primarily use subtitles, including SDH, which, as stated in the CEA Petition, has been identified by an authoritative source as a form of ‘captioning’ for video content Thus, as a general matter, Blu-ray Disc™ players support SDH, rather than closed captioning as contemplated in the *Order*.”). SDH does not provide all of the features available with closed captions. *See Report and Order*, 27 FCC Rcd at 846, ¶ 100; Consumer Groups Opposition at 19-20; Consumer Groups Oct. 9 *Ex Parte* Letter at 4-5; Consumer Groups Feb. 15 *Ex Parte* Letter at 2; Consumer Groups Feb. 27 *Ex Parte* Letter at 3; Consumer Groups Mar. 4 *Ex Parte* (continued....)

satisfy Section 303(u)'s requirement that the Blu-ray players and DVD players "be equipped with built-in closed caption decoder circuitry or capability designed to display closed-captioned video programming."¹⁵⁰ Could the rendering or passing through subtitles be considered an "alternate means" of compliance with our rules?¹⁵¹ Or, should subtitles or SDH only be considered an alternative means of compliance to the extent that they can be made compatible with the technical capabilities set forth in our apparatus closed captioning rules (for example, the ability to change text font and size)?¹⁵² We seek specific comment on what steps the industry, including content providers, must take to provide this type of "enhanced" subtitles or SDH. For example, what technical steps can manufacturers take in this regard?

V. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

38. The Regulatory Flexibility Act of 1980, as amended ("RFA")¹⁵³ requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that "the rule will not have a significant economic impact on a substantial number of small entities."¹⁵⁴ The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹⁵⁵ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹⁵⁶ 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).¹⁵⁷

39. *Final Regulatory Flexibility Certification.* As required by the RFA, as amended, the Commission has prepared this Final Regulatory Flexibility Certification of the possible impact on small entities of the *Order on Reconsideration*. In this proceeding, the Commission's goal remains to implement Congress's intent to better enable individuals who are deaf or hard of hearing to view video programming. The Commission addresses three petitions for reconsideration of the *IP Closed Captioning Order*, which created rules for the owners, providers, and distributors of IP-delivered video programming and for the apparatus on which consumers view video programming.

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Letter at 3; Consumer Groups Mar. 7 *Ex Parte* Letter at 3; Consumer Groups Mar. 11 *Ex Parte* Letter at 3; Consumer Groups Mar. 14 *Ex Parte* Letter at 5-6.

¹⁵⁰ 47 U.S.C. § 303(u)(1)(A).

¹⁵¹ See Pub. L. No. 111-260, § 203(e) ("An entity may meet the requirements of sections 303(u), 303(z), and 330(b) of the Communications Act of 1934 through alternate means than those prescribed by regulations pursuant to subsection (d) if the requirements of those sections are met, as determined by the Commission."). See also *supra* notes 77, 81. In the *Report and Order*, the Commission recognized that SDH does not offer the same user control features as closed captioning. See *Report and Order*, 27 FCC Rcd at 846, ¶ 100.

¹⁵² See 47 C.F.R. § 79.103(c).

¹⁵³ 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").

¹⁵⁴ 5 U.S.C. § 605(b).

¹⁵⁵ *Id.* § 601(6).

¹⁵⁶ *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in 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."

¹⁵⁷ Small Business Act, § 15 U.S.C. § 632.

40. Pursuant to the RFA, a Final Regulatory Flexibility Analysis (“FRFA”) was incorporated into the *IP Closed Captioning Order*.¹⁵⁸ The instant *Order on Reconsideration* grants certain narrow class waivers of the apparatus requirements, and grants temporary extensions of the compliance deadline to some DVD players and to Blu-ray players, which will have, if anything, a positive impact on small entities subject to the requirements, thereby reducing any potential economic impact. The *Order on Reconsideration* also changes the Commission’s rules by: (1) revising references to “video programming players” in a note to Section 79.103 of our rules to better conform to the statutory text of the CVAA; and (2) clarifying that the January 1, 2014 deadline refers only to the date of manufacture, and not to the date of importation, shipment, or sale. These rule changes merely serve to better conform the rule language to the language codified by Congress, and to clarify the deadline applicable to apparatus. Therefore, we certify that the requirements of this *Order on Reconsideration* will not have a significant economic impact on a substantial number of small entities.

41. The Commission will send a copy of the *Order on Reconsideration*, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the *Order on Reconsideration* and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the *Federal Register*. *See* 5 U.S.C. § 605(b).

42. *Initial Regulatory Flexibility Act Analysis*. As required by the RFA, the Commission has prepared an Initial Regulatory Flexibility Analysis (“IRFA”) relating to this *FNPRM*. The IRFA is attached to this *Order on Reconsideration and FNPRM* as Appendix D.

B. Paperwork Reduction Act

43. The *Order on Reconsideration* does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (“PRA”), Public Law 104-13. 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, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

44. The *FNPRM* does not contain proposed information collection(s) subject to the PRA, Public Law 104-13. 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, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

C. Ex Parte Rules

45. Permit-But-Disclose. This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.¹⁵⁹ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed

¹⁵⁸ *See IP Closed Captioning Order*, 27 FCC Rcd at 877-91.

¹⁵⁹ 47 C.F.R. §§ 1.1200 *et seq.*

consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

D. Filing Requirements

46. Comments and Replies. 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 the Commission's Electronic Comment Filing System ("ECFS"). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- 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.
- 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.

47. 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.

48. 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 FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

E. Additional Information

49. For additional information on this proceeding, contact Diana Sokolow, Diana.Sokolow@fcc.gov, or Maria Mullarkey, Maria.Mullarkey@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

VI. ORDERING CLAUSES

50. Accordingly, **IT IS ORDERED** that pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751, and the authority found in Sections 4(i), 4(j), 303, 330(b), 713, and 716 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303, 330(b), 613, and 617, this *Order on Reconsideration and Further Notice of Proposed Rulemaking* **IS ADOPTED**, effective thirty (30) days after the date of publication in the *Federal Register*.

51. **IT IS ORDERED** that, pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751, and the authority found in Sections 4(i), 4(j), 303, 330(b), 713, and 716 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303, 330(b), 613, and 617, the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix B.

52. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Order on Reconsideration and Further Notice of Proposed Rulemaking* in MB Docket No. 11-154, including the Final Regulatory Flexibility Certification and the Initial Regulatory Flexibility Act Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

53. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of the *Order on Reconsideration* in MB Docket No. 11-154 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

54. **IT IS FURTHER ORDERED** that CEA's Petition for Reconsideration, filed April 30, 2012, is **GRANTED IN PART** and **DENIED IN PART**, to the extent provided herein.

55. **IT IS FURTHER ORDERED** that TVGuardian's Petition for Reconsideration, filed April 16, 2012, is **DENIED**.

56. **IT IS FURTHER ORDERED** that, pursuant to the authority found in Section 303(u)(2)(C)(i) of the Communications Act of 1934, as amended, and Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, a waiver of the closed captioning requirements for two narrow classes of apparatus **IS GRANTED** to the extent provided herein.

57. **IT IS FURTHER ORDERED** that a temporary extension of the closed captioning compliance deadline for DVD players that do not render or pass through closed captions, and for Blu-ray players, **IS GRANTED** to the extent provided herein.

58. **IT IS FURTHER ORDERED** that, pursuant to the authority found in Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, a waiver of the Commission's interconnection mechanism requirement for DVD players that use their analog output to pass through closed captions to the television **IS GRANTED** to the extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A**List of Commenters****Oppositions filed in MB Docket No. 11-154**

Association of Public Television Stations and Public Broadcasting Service (APTS/PBS)
Consumer Electronics Association (CEA)
Consumer Groups¹
HDMI Licensing, LLC
Mitsubishi Electric Visual Solutions America, Inc. (MEVSA)
National Association of Broadcasters (NAB)
National Cable & Telecommunications Association (NCTA)

Reply Comments filed in MB Docket No. 11-154

CM Boryslawskyj, MBA
Consumer Electronics Association (CEA)
Consumer Groups²
DIRECTV, LLC
Google Inc.

¹ This opposition was filed by: Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI); National Association of the Deaf (NAD); Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN); Association of Late-Deafened Adults (ALDA); Hearing Loss Association of America (HLAA); Cerebral Palsy and Deaf Organization (CPADO); and Technology Access Program at Gallaudet University (TAP).

² Consumer Groups filed two separate replies, one to address video clips and the other to address apparatus synchronization. Each reply was filed by: Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI); National Association of the Deaf (NAD); Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN); Association of Late-Deafened Adults (ALDA); Hearing Loss Association of America (HLAA); Cerebral Palsy and Deaf Organization (CPADO); and Technology Access Program at Gallaudet University (TAP).

APPENDIX B**Final Rules**

For the reasons discussed above, the Federal Communications Commission amends Title 47 of the Code of Federal Regulations, Part 79, 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, 330, 544a, 613, 617.

2. Amend Section 79.101 by adding a note to paragraph (a)(2) to read as follows:

§ 79.101 Closed caption decoder requirements for analog television receivers.

(a) * * *

(2) * * *

Note to paragraph (a)(2): This paragraph places no restrictions on the importing, shipping, or sale of television receivers that were manufactured before January 1, 2014.

* * * * *

3. Amend Section 79.102 by adding a note to paragraph (a)(3) to read as follows:

§ 79.102 Closed caption decoder requirements for digital television receivers and converter boxes.

(a) * * *

(3) * * *

Note to paragraph (a)(3): This paragraph places no restrictions on the importing, shipping, or sale of digital television receivers and separately sold DTV tuners that were manufactured before January 1, 2014.

* * * * *

4. Amend Section 79.103 by revising the note to paragraph (a) to read as follows:

§ 79.103 Closed caption decoder requirements for all apparatus.

(a) * * *

Note 1 to paragraph (a): Apparatus includes the physical device and the video player(s) capable of displaying video programming transmitted simultaneously with sound that manufacturers install into the devices they manufacture before sale, whether in the form of hardware, software, or a combination of both, as well as any video players capable of displaying video programming transmitted simultaneously with sound that manufacturers direct consumers to install after sale.

Note 2 to paragraph (a): This paragraph places no restrictions on the importing, shipping, or sale of apparatus that were manufactured before January 1, 2014.

* * * * *

5. Amend Section 79.104 by adding a note to paragraph (a) to read as follows:

§ 79.104 Closed caption decoder requirements for recording devices.

(a) * * *

Note to paragraph (a): This paragraph places no restrictions on the importing, shipping, or sale of apparatus that were manufactured before January 1, 2014.

* * * * *

APPENDIX C

Potential Rule Amendments Based on the *FNPRM*

For the reasons discussed above, the Federal Communications Commission proposes to amend Title 47 of the Code of Federal Regulations, Part 79, 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, 330, 544a, 613, 617.

2. Amend Section 79.103 to add paragraph (c)(12) to read as follows:

§ 79.103 Closed caption decoder requirements for all apparatus.

* * * * *

(c) * * *

(12) *Synchronization.* All apparatus that render closed captions must do so consistent with the timing data included with the video programming the apparatus receives.

* * * * *

APPENDIX D

Initial Regulatory Flexibility Act Analysis for the *FNPRM*

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),¹ the Commission has prepared this present Initial Regulatory Flexibility Analysis (“IRFA”) concerning the possible significant economic impact on small entities by the policies and rules proposed in the Further Notice of Proposed Rulemaking (“*FNPRM*”). 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 provided on the first page of the item. The Commission will send a copy of the *FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).² In addition, the *FNPRM* and IRFA (or summaries thereof) will be published in the Federal Register.³

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

2. In the *FNPRM*, we seek further comment on the potential imposition of closed captioning synchronization requirements for covered apparatus, and on how DVD and Blu-ray players can fulfill the closed captioning requirements of the statute. These issues were raised by petitions for reconsideration of the *Report and Order*, which implemented portions of Sections 202 and 203 of the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”)⁴ by adopting rules governing the closed captioning requirements for the owners, providers, and distributors of video programming delivered via Internet protocol (“IP”) and rules governing the closed captioning capabilities of certain apparatus on which consumers view video programming.⁵ Specifically, in response to the Petition for Reconsideration of Consumer Groups,⁶ we issue an *FNPRM* to obtain further information necessary to determine whether the Commission should impose synchronization requirements on device manufacturers.⁷ Such synchronization requirements could provide that all apparatus that render closed captions must do so consistent with the timing data included with the video programming the apparatus receives. Separately, in response to issues raised by the Petition for Reconsideration of the Consumer Electronics Association,⁸ the *FNPRM* seeks comment on how DVD and Blu-ray players can fulfill the closed captioning requirements of the statute.

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 Pub. L. No. 111-260, 124 Stat. 2751 (2010). See also Amendment of the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA).

⁵ See *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787 (2012) (“*Report and Order*”).

⁶ Consumer Groups, Petition for Reconsideration of the Commission’s Report and Order (filed Apr. 27, 2012) (“Consumer Groups Petition”). In the *Order on Reconsideration and FNPRM*, we use the term “Consumer Groups” to reference Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), National Association of the Deaf (“NAD”), Deaf and Hard of Hearing Consumer Advocacy Network (“DHHCAN”), Association of Late-Deafened Adults (“ALDA”), Hearing Loss Association of America (“HLAA”), Cerebral Palsy and Deaf Organization (“CPADO”), and Technology Access Program at Gallaudet University (“TAP”).

⁷ *Order on Reconsideration and FNPRM* Sections III.C.2, IV.

⁸ Petition for Reconsideration of the Consumer Electronics Association (filed Apr. 30, 2012) (“CEA Petition”).

3. Our goal in this proceeding remains to implement Congress's intent to better enable individuals who are deaf or hard of hearing to view video programming. In considering the requests made in the three petitions for reconsideration received, we have evaluated the effect on consumers who are deaf or hard of hearing as well as the cost of compliance to affected entities.

B. Legal Basis

4. The proposed action is authorized pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751, and the authority found in Sections 4(i), 4(j), 303, 330(b), 713, and 716 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303, 330(b), 613, and 617.

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

5. 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 Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

6. *Small Businesses, Small Organizations, and Small Governmental Jurisdictions.* Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards.¹³ First, nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA.¹⁴ In addition, a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."¹⁵ Nationwide, as of 2007, there were approximately 1,621,315 small organizations.¹⁶ Finally, the term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a

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 See 5 U.S.C. §§ 601(3)–(6).

¹⁴ See SBA, Office of Advocacy, "Frequently Asked Questions," <http://web.sba.gov/faqs> (last visited May 6, 2011; figures are from 2009).

¹⁵ 5 U.S.C. § 601(4).

¹⁶ INDEPENDENT SECTOR, THE NEW NONPROFIT ALMANAC & DESK REFERENCE (2010).

population of less than fifty thousand.”¹⁷ Census Bureau data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States.¹⁸ We estimate that, of this total, as many as 88,506 entities may qualify as “small governmental jurisdictions.”¹⁹ Thus, we estimate that most governmental jurisdictions are small.

7. *Cable Television Distribution Services.* 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.”²⁰ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 1,906 firms that operated that year. Of those 1,906, 1,880 had fewer than 1000 employees, and 26 firms had more than 1000 employees.²¹ Thus under this category and the associated small business size standard, the majority of such firms can be considered small.²²

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 indicate that all but ten cable operators nationwide are small under this size standard.²⁴ In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.²⁵ Industry data indicate that, of 6,101 systems nationwide, 4,410 systems have under 10,000 subscribers, and an

¹⁷ 5 U.S.C. § 601(5).

¹⁸ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, Table 427 (2007).

¹⁹ The 2007 U.S Census data for small governmental organizations are not presented based on the size of the population in each such organization. There were 89,476 small governmental organizations in 2007. If we assume that county, municipal, township and school district organizations are more likely than larger governmental organizations to have populations of 50,000 or less, the total of these organizations is 52,125. If we make the same assumption about special districts, and also assume that special districts are different from county, municipal, township, and school districts, in 2007 there were 37,381 special districts. Therefore, of the 89,476 small governmental organizations documented in 2007, as many as 89,506 may be considered small under the applicable standard. This data may overestimate the number of such organizations that has a population of 50,000 or less. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2011, Tables 427, 426 (Data cited therein are from 2007).

²⁰ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

²¹

http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

²²

http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

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 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

²⁴ See BROADCASTING & CABLE YEARBOOK 2010 at C-2 (2009) (data current as of Dec. 2008).

²⁵ 47 C.F.R. § 76.901(c).

additional 258 systems have 10,000-19,999 subscribers.²⁶ Thus, under this standard, most cable systems are small.

9. *Cable System Operators.* 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.”²⁷ 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.²⁸ Industry data indicate that all but nine cable operators nationwide are small under this subscriber size standard.²⁹ 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,³⁰ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

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,”³¹ which was 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.³² Census data for 2007 shows that there were 31,996 establishments that operated that year.³³ Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees.³⁴ Thus, under this category and the associated small business size standard, the majority of such firms can be considered small. 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).³⁵ Each currently offers subscription services.

²⁶ See TELEVISION & CABLE FACTBOOK 2009 at F-2 (2009) (data current as of Oct. 2008). The data do not include 957 systems for which classifying data were not available.

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

²⁸ 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).

²⁹ See BROADCASTING & CABLE YEARBOOK 2010 at C-2 (2009) (data current as of Dec. 2008).

³⁰ 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).

³¹ See 13 C.F.R. § 121.201; 2007 NAICS code 517110. The 2007 NAICS definition of the category of “Wired Telecommunications Carriers” is in paragraph 7, above.

³² 13 C.F.R. § 121.201; 2007 NAICS code 517110.

³³ http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ2&prodType=table.

³⁴ See *id.*

³⁵ 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).

DIRECTV³⁶ and EchoStar³⁷ 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 Telecommunications Providers.* Two economic census categories address the satellite industry. The first category has a small business size standard of \$15 million or less in average annual receipts, under SBA rules.³⁸ The second has a size standard of \$25 million or less in annual receipts.³⁹

12. The category of “Satellite Telecommunications” “comprises establishments primarily engaged in providing 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.”⁴⁰ Census Bureau data for 2007 show that 607 Satellite Telecommunications establishments operated for that entire year.⁴¹ Of this total, 533 establishments had annual receipts of under \$10 million or less, and 74 establishments had receipts of \$10 million or more.⁴² Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

13. The second category, *i.e.*, “All Other Telecommunications,” comprises “establishments 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.”⁴³ For this category, Census Bureau data for 2007 shows that there were a total of 2,623 establishments that operated for the entire year.⁴⁴ Of this total, 2,478 establishments had annual receipts of under \$10 million and 145 establishments had annual receipts of \$10 million or more.⁴⁵ Consequently,

³⁶ 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.

³⁷ 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. *See 13th Annual Report*, 24 FCC Rcd at 687, Table B-3. 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.

³⁸ 13 C.F.R. § 121.201; NAICS code 517410.

³⁹ 13 C.F.R. § 121.201; NAICS code 517919.

⁴⁰ U.S. Census Bureau, 2007 NAICS Definitions, “517410 Satellite Telecommunications,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517410&search=2007>.

⁴¹ http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ1&prodType=table.

⁴² *See id.*

⁴³ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2007%20NAICS%20Search>.

⁴⁴ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=900&-ds_name=EC0751SSSZ4&-lang=en.

⁴⁵

http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ1&prodType=table.

the Commission estimates that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

14. *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.”⁴⁶ The SBA has created the following small business size standard for Television Broadcasting firms: those having \$14 million or less in annual receipts.⁴⁷ The Commission has estimated the number of licensed commercial television stations to be 1,387.⁴⁸ In addition, according to Commission staff review of the BIA Advisory Services, LLC’s *Media Access Pro Television Database* on March 28, 2012, about 950 of an estimated 1,300 commercial television stations (or approximately 73 percent) had revenues of \$14 million or less.⁴⁹ We therefore estimate that the majority of commercial television broadcasters are small entities.

15. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations⁵⁰ 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 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.

16. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 396.⁵¹ These stations are non-profit, and therefore considered to be small entities.⁵²

17. *Open Video Systems.* 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.⁵³ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,⁵⁴ OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”⁵⁵ The SBA has developed a small business size standard for this

⁴⁶ U.S. Census Bureau, 2007 NAICS Definitions, “515120 Television Broadcasting,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515120&search=2007>.

⁴⁷ 13 C.F.R. § 121.201; NAICS code 515120.

⁴⁸ See *FCC News Release*, “Broadcast Station Totals as of December 31, 2011,” dated January 6, 2012, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-311837A1.pdf.

⁴⁹ We recognize that BIA’s estimate differs slightly from the FCC total given *supra*.

⁵⁰ “[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).

⁵¹ See *FCC News Release*, “Broadcast Station Totals as of December 31, 2011,” dated January 6, 2012, http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC-311837A1.pdf.

⁵² See generally 5 U.S.C. §§ 601(4), (6).

⁵³ 47 U.S.C. § 571(a)(3)-(4). See *13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

⁵⁴ See 47 U.S.C. § 573.

⁵⁵ U.S. Census Bureau, 2007 NAICS Definitions, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

category, which is: all such firms having 1,500 or fewer employees.⁵⁶ Census data for 2007 shows that there were 31,996 establishments that operated that year.⁵⁷ Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees.⁵⁸ Thus, under this category and the associated small business size standard, the majority of such firms can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service.⁵⁹ Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.⁶⁰ 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, at least some of the OVS operators may qualify as small entities.

18. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.”⁶¹ The SBA has developed a small business size standard for this category, which is: all such firms having \$15 million dollars or less in annual revenues.⁶² To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007 show that there were 659 establishments in this category that operated for the entire year.⁶³ Of that number, 462 operated with annual revenues of \$9,999,999 million dollars or less,⁶⁴ and 197 operated with annual revenues of 10 million or more.⁶⁵ Thus, under this category and associated small business size standard, the majority of firms can be considered small.

19. *Motion Picture and Video Production.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials.”⁶⁶ We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for

⁵⁶ 13 C.F.R. § 121.201; 2007 NAICS code 517110.

⁵⁷ http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ2&prodType=table.

⁵⁸ *See id.*

⁵⁹ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsr.html>.

⁶⁰ *See 13th Annual Report*, 24 FCC Rcd at 606-07, ¶ 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.

⁶¹ U.S. Census Bureau, 2007 NAICS Definitions, “515210 Cable and Other Subscription Programming,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁶² 13 C.F.R. § 121.201; 2007 NAICS code 515210.

⁶³ *See*

http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ1&prodType=table.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ U.S. Census Bureau, 2007 NAICS Definitions, “512110 Motion Picture and Video Production,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=512110&search=2007>.

cable television. The SBA has developed a small business size standard for this category, which is: all such firms having \$29.5 million dollars or less in annual revenues.⁶⁷ To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 9,095 firms in this category that operated for the entire year.⁶⁸ Of these, 8,995 had annual receipts of \$24,999,999 or less, and 100 had annual receipts ranging from not less than \$25,000,000 to \$100,000,000 or more.⁶⁹ Thus, under this category and associated small business size standard, the majority of firms can be considered small.

20. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors.”⁷⁰ We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having \$29.5 million dollars or less in annual revenues.⁷¹ To gauge small business prevalence in the Motion Picture and Video Distribution industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 450 firms in this category that operated for the entire year.⁷² Of these, 434 had annual receipts of \$24,999,999 or less, and 16 had annual receipts ranging from not less than \$25,000,000 to \$100,000,000 or more.⁷³ Thus, under this category and associated small business size standard, the majority of firms can be considered small.

21. *Small Incumbent Local Exchange Carriers.* We have included small incumbent local exchange carriers in this present RFA analysis. A “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”⁷⁴ The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not “national” in scope.⁷⁵ We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

⁶⁷ 13 C.F.R. § 121.201; 2007 NAICS code 512110.

⁶⁸ See <http://www.census.gov/econ/industry/ec07/a51211.htm> (Subject Series: Establishment and Firm Size (national) – Table 4: Revenue Size of Firms for the U.S).

⁶⁹ See *id.*

⁷⁰ See U.S. Census Bureau, 2007 NAICS Definitions, “512120 Motion Picture and Video Distribution,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=512120&search=2007>.

⁷¹ 13 C.F.R. § 121.201; 2007 NAICS code 512120.

⁷² See <http://www.census.gov/econ/industry/ec07/a51212.htm> (Subject Series: Establishment and Firm Size (national) – Table 4: Revenue Size of Firms for the U.S).

⁷³ See *id.*

⁷⁴ 15 U.S.C. § 632.

⁷⁵ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

22. *Incumbent Local Exchange Carriers (“LECs”)*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category “Wired Telecommunications Carriers.” Under that size standard, such a business is small if it has 1,500 or fewer employees.⁷⁶ Census data for 2007 shows that there were 31,996 establishments that operated that year.⁷⁷ Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees.⁷⁸ Thus, under this category and the associated small business size standard, the majority of such firms can be considered small.

23. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), “Shared-Tenant Service Providers,” and “Other Local Service Providers.”* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category “Wired Telecommunications Carriers.” Under that size standard, such a business is small if it has 1,500 or fewer employees.⁷⁹ Census data for 2007 shows that there were 31,996 establishments that operated that year.⁸⁰ Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees.⁸¹ Thus, under this category and the associated small business size standard, the majority of such firms can be considered small. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, “Shared-Tenant Service Providers,” and “Other Local Service Providers” are small entities.

24. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.”⁸² The SBA has developed a small business size standard for “Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing,” which is: all such firms having 750 or fewer employees. According to Census Bureau data for 2007, there were 919 establishments that operated for part or all of the entire year.⁸³ Of those 919 establishments, 771 operated with 99 or fewer employees, and 148 operated with 100 or more employees.⁸⁴ Thus, under that size standard, the majority of establishments can be considered small.

⁷⁶ 13 C.F.R. § 121.201; 2007 NAICS code 517110.

⁷⁷ http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ2&prodType=table.

⁷⁸ *See id.*

⁷⁹ 13 C.F.R. § 121.201; 2007 NAICS code 517110.

⁸⁰ http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ2&prodType=table.

⁸¹ *See id.*

⁸² *See* 13 C.F.R. § 121.201; U.S. Census Bureau, 2007 NAICS Definitions, “334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=334220&search=2007>.

⁸³ http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_3111&prodType=table.

⁸⁴ *See id.*

25. *Audio and Video Equipment Manufacturing.* The SBA has classified the manufacturing of audio and video equipment under in NAICS Codes classification scheme as an industry in which a manufacturer is small if it has less than 750 employees.⁸⁵ Data contained in the 2007 Economic Census indicate that 491 establishments in this category operated for part or all of the entire year.⁸⁶ Of those 491 establishments, 456 operated with 99 or fewer employees, and 35 operated with 100 or more employees.⁸⁷ Thus, under the applicable size standard, a majority of manufacturers of audio and video equipment may be considered small.

26. *Internet Publishing and Broadcasting and Web Search Portals.* The Census Bureau defines this category to include “. . . establishments primarily engaged in 1) publishing and/or broadcasting content on the Internet exclusively or 2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals). The publishing and broadcasting establishments in this industry do not provide traditional (non-Internet) versions of the content that they publish or broadcast. They provide textual, audio, and/or video content of general or specific interest on the Internet exclusively. Establishments known as Web search portals often provide additional Internet services, such as e-mail, connections to other web sites, auctions, news, and other limited content, and serve as a home base for Internet users.”

27. In this category, the SBA has deemed an Internet publisher or Internet broadcaster or the provider of a web search portal on the Internet to be small if it has fewer than 500 employees.⁸⁸ For this category of manufacturers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 2,705 such firms that operated that year.⁸⁹ Of those 2,705 firms, 2,682 (approximately 99%) had fewer than 500 employees and, thus, would be deemed small under the applicable SBA size standard.⁹⁰ Accordingly, the majority of establishments in this category can be considered small under that standard.

28. *Closed Captioning Services.* These entities would be indirectly affected by our proposed action. The SBA has developed two small business size standards that may be used for closed captioning services. The two size standards track the economic census categories, “Teleproduction and Other Postproduction Services” and “Court Reporting and Stenotype Services.”

29. The first category of *Teleproduction and Other Postproduction Services* “comprises establishments primarily engaged in providing specialized motion picture or video postproduction services, such as editing, film/tape transfers, subtitling, credits, closed captioning, and animation and special effects.” The relevant size standard for small businesses in these services is an annual revenue of less than \$29.5 million.⁹¹ For this category, Census Bureau Data for 2007 indicate that there were 1,605 firms that operated in this category for the entire year. Of that number, 1,597 had receipts totaling less

⁸⁵ See 13 C.F.R. § 121.201; U.S. Census Bureau, 2007 NAICS Definitions, “334310 Audio and Video Equipment Manufacturing,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=334310&search=2007>.

⁸⁶ http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_3111&prodType=table.

⁸⁷ See *id.*

⁸⁸ 13 C.F.R. § 121.201, NAICS Code 519130.

⁸⁹ U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 519130 (rel. Nov. 19, 2010); <http://factfinder.census.gov>.

⁹⁰ *Id.*

⁹¹ U.S. Census Bureau, 2002 NAICS Definitions, “512191 Teleproduction and Other Postproduction Services”; <http://www.census.gov/epcd/naics02/def/NDEF512.HTM>. The size standard is \$29.5 million.

than \$29,500,000.⁹² Consequently we estimate that the majority of Teleproduction and Other Postproduction Services firms are small entities that might be affected by our proposed actions.

30. The second category of *Court Reporting and Stenotype Services* “comprises establishments primarily engaged in providing verbatim reporting and stenotype recording of live legal proceedings and transcribing subsequent recorded materials.” The size standard for small businesses in these services is an annual revenue of less than \$7 million.⁹³ For this category, Census Bureau data for 2007 show that there were 2,706 firms that operated for the entire year. Of this total, 2,590 had annual receipts of under \$5 million, and 19 firms had receipts of \$5 million to \$9,999,999.⁹⁴ Consequently, we estimate that the majority of Court Reporting and Stenotype Services firms are small entities that might be affected by our proposed action.

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

31. The *FNPRM* invites comment on whether the Commission should impose closed captioning synchronization requirements on apparatus. Such synchronization requirements could provide that all apparatus that render closed captions must do so consistent with the timing data included with the video programming the apparatus receives. The *FNPRM* invites comment on the extent to which apparatus are the cause of synchronization problems, and on the means by which manufacturers could address closed caption synchronization. The *FNPRM* also asks whether video programming owners, providers, and distributors are better suited than manufacturers to ensure caption quality, including synchronization, and it asks about the costs and benefits of imposing caption synchronization requirements on apparatus manufacturers. Separately, the *FNPRM* seeks comment on what closed captioning requirements we should impose on manufacturers of DVD players that do not render or pass through closed captions, and on manufacturers of Blu-ray players with regard to Blu-ray players playing Blu-ray discs and playing DVDs, including specific questions about the rendering or pass through of closed captions. The *FNPRM* also seeks comment on the costs and benefits of imposing such requirements. Information received in response to the *FNPRM* will enable the Commission to consider the costs that would be incurred by affected entities, including smaller entities.

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

32. 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.⁹⁵

33. We note that, pursuant to rules and policies previously adopted in the *Report and Order* in this proceeding, the Commission may grant exemptions to the IP closed captioning rules adopted

⁹² http://factfinder.census.gov/servlet/IBOTable?_bm=y&-geo_id=&-skip=300&-ds_name=EC0751SSSZ5&-lang=en.

⁹³ U.S. Census Bureau, 2002 NAICS Definitions, “561492 Court Reporting and Stenotype Services”; <http://www.census.gov/epcd/naics02/def/NDEF561.HTM>. The size standard is \$7 million.

⁹⁴ http://factfinder.census.gov/servlet/IBOTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=400&-ds_name=EC0756SSSZ4&-lang=en.

⁹⁵ 5 U.S.C. § 603(c)(1)-(c)(4).

pursuant to Section 202 of the CVAA where a petitioner has shown that compliance would present an economic burden (*i.e.*, a significant difficulty or expense),⁹⁶ and may grant exemptions to the apparatus rules adopted pursuant to Section 203 of the CVAA where a petitioner has shown that compliance is not achievable (*i.e.*, cannot be accomplished with reasonable effort or expense)⁹⁷ or is not technically feasible.⁹⁸ This exemption process enables the Commission to address the impact of the rules on individual entities, including smaller entities, and to modify the application of the rules to accommodate individual circumstances. Further, a video programming provider's or owner's *de minimis* failure to comply with the IP closed captioning rules shall not be treated as a violation,⁹⁹ and parties may use alternate means of compliance to the rules adopted pursuant to either Section 202 or Section 203 of the CVAA.¹⁰⁰ Individual entities, including smaller entities, may benefit from these provisions.

34. Regarding the specific issue of synchronization requirements as discussed in the *FNPRM*, the Commission seeks comment on whether video programming owners, providers, and distributors are better suited than manufacturers to ensure caption quality, including synchronization. The Commission also seeks comment on what requirements it should impose on apparatus, to the extent that apparatus cause closed captioning synchronization problems. Accordingly, the Commission seeks to allocate responsibilities appropriately.

35. Regarding the specific issue of DVD players that do not render or pass through closed captions and Blu-ray players as discussed in the *FNPRM*, the Commission seeks comment on the costs and benefits of imposing closed captioning requirements, including the technical aspects of what would be required to make closed captioning accessible on such devices. Accordingly, the Commission seeks to balance the costs and benefits appropriately in crafting a final rule.

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

36. None.

⁹⁶ 47 C.F.R. § 79.4(d).

⁹⁷ *Id.* §§ 79.103(b)(3), 79.104.

⁹⁸ *Id.* § 79.103(a).

⁹⁹ *Id.* § 79.4(c)(3).

¹⁰⁰ *Report and Order*, 27 FCC Rcd at 831, 858-59, ¶¶ 74, 121.

**STATEMENT OF
COMMISSIONER PAI
APPROVING IN PART AND CONCURRING IN PART**

Re: *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154.

Voltaire's *La Béguéle* opens with an observation invaluable for Commission officials involved in the collaborative arts: “[L]e mieux est l'ennemi du bien,” or “The best [or perfect] is the enemy of the good.” It's in this spirit that I am voting to approve in part and concur in part in this Order on Reconsideration and Further Notice of Proposed Rulemaking. Although not “the best,” today's item improves upon the earlier *IP Closed Captioning Order*.¹

Let's start with the many areas where I agree with my colleagues. To begin with, I support the Commission's decision to deny TVGuardian's petition for reconsideration. I also agree with our decision to leave in place the Commission's determination that video clips shouldn't be covered by our IP closed captioning rules. Furthermore, I too believe we should clarify that the Commission's January 1, 2014 compliance deadline applies to the date of an apparatus's manufacture. Finally, I endorse seeking further comment on whether any synchronization requirements should be placed on apparatus manufacturers.

However, I concur in part because I would interpret the text of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) differently with respect to two issues.

First, I would use a different test to evaluate whether an apparatus is covered by our IP closed captioning rules. The statute only covers devices “*designed to receive or play back video programming*.”² This, in my view, requires more than looking just to an apparatus's capabilities, the standard adopted in the prior order and reaffirmed today.³ The word “designed” indicates manifested intent,⁴ and interpreting the statute as not requiring *any* measure of intent essentially reads the phrase “designed to” out of the statute.⁵

To be sure, today's item claims that the Commission looks to “the device's functionality . . . to determine what the device was designed to accomplish.”⁶ But functionality is not always aligned with intent. Take, for example, the drug commonly known as Propecia. Although it certainly is capable of

¹ *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154, Report and Order, 27 FCC Rcd 787 (2012) (*IP Closed Captioning Order*).

² 47 U.S.C. § 303(u)(1) (emphasis added).

³ *IP Closed Captioning Order*, 27 FCC Rcd at 842, para. 95; Order on Reconsideration and Further Notice of Proposed Rulemaking at para. 5 (*Recon. Order*).

⁴ See Webster's New International Dictionary 707 (2d ed. 1940) (defining “design” as “to conceive or execute a scheme or plan for the making of anything” or “to plan; to intend”).

⁵ Under the Commission's interpretation, the result would be the same whether the statute read “apparatus that receives or plays back video programming” or (as it does) “apparatus designed to receive or play back video programming.” See 47 U.S.C. § 303(u)(1).

⁶ *Recon. Order* at para. 7.

reversing male pattern baldness, Propecia was not designed for this purpose. Rather, it was developed to treat enlarged prostates.⁷ Similarly, while a credit card can sometimes open locked doors,⁸ I don't think anyone would say that it was designed to do so.

I share my colleagues' concern that a subjective intent test would grant manufacturers too much leeway by allowing them to "evade our requirements by claiming that they did not intend such use."⁹ This is one reason why I favor using an objective intent test to determine whether an apparatus is covered by the statute and our IP closed captioning rules. In particular, we should ask whether a reasonable person would conclude that a device was intended to receive or play back video programming.¹⁰ While a device's functionality would certainly be highly probative evidence in such an inquiry, it would not always be outcome determinative. For example, I do not believe that a reasonable person would conclude that the devices that are the subject of the waivers granted in today's item, such as digital still cameras and baby monitors, were intended to receive or play back video programming.

That said, the Commission today reaches a similar result by taking a different path. In particular, the Commission's application of the "primarily designed" test to grant waivers,¹¹ in which it assesses whether an apparatus's video capability is only incidental, will generally arrive at the same outcome as an objective intent test. So while my preferred approach would give meaning to the phrase "designed to" in the statute and lighten the workload of the Commission and stakeholders in addressing future waiver requests, I think the real-world outcome of today's item is generally acceptable in the context of closed captioning (and definitely an improvement over the status quo).

Second, I would not interpret the CVAA to impose a closed-captioning requirement on removable media players. The statute applies such requirements on "apparatus designed to receive or play back video programming transmitted simultaneously with sound."¹² The word "transmitted" is most logically read to refer to the transmission of programming to the device (*e.g.*, from a cable head-end to a set-top box) rather than from the device to the end user (*e.g.*, from a television to a viewer). That's certainly the usual meaning of the word "transmit" in communications law.¹³ Moreover, absent a clear indication to the contrary, we should hesitate to extend our jurisdiction beyond its traditional bounds. Congress, after all, does not "hide elephants in mouseholes."¹⁴ Several other statutory considerations also counsel a more

⁷ See Susan Scutti, "Schizophrenic Drugs That Can Kill Antibiotic-Resistant Bacteria," *Medical Daily*, May 17, 2013 ("Propecia, for instance, was originally marketed as Proscar and was intended to treat the benign enlargement of the prostate. After five years on the market, it became known that one of the side effects of Proscar was hair growth on bald men; now it is used to treat male-pattern baldness."), available at <http://www.medicaldaily.com/articles/15661/20130517/schizophrenia-drugs-kill-antibiotic-resistant-bacteria.htm>.

⁸ See, *e.g.*, *The French Connection* (20th Century Fox 1971).

⁹ *Id.*

¹⁰ Similar intent tests are used in other contexts. See, *e.g.*, *Sigma-Tau Pharmaceuticals, Inc. v. Schwetz*, 288 F.3d 141, 146 (4th Cir. 2002) (explaining FDA's objective intent test in assessing drugs, which involves examining both direct expressions by manufacturers and "the circumstances surrounding the distribution of the article").

¹¹ See *Recon. Order* at para. 12.

¹² 47 U.S.C. § 303(u)(1) (emphasis added).

¹³ See, *e.g.*, 47 U.S.C. § 152(a); *Am. Library Ass'n v. FCC*, 406 F.3d 689, 705 (D.C. Cir. 2005) (invalidating certain regulations affecting how DTV devices share content with recording devices because such sharing occurs "after a transmission is complete"); see also, *e.g.*, Webster's New International Dictionary 2692-93 (2d ed. 1940) (defining "transmit" as "to send or transfer from one person or place to another; to forward by rail, post, wire, etc.").

¹⁴ *Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001).

restrained approach with respect to removable media players.¹⁵

Looking at the bigger picture, I also believe that the structure of the CVAA (as well as the Communications Act) suggests that Congress did not intend to impose closed-captioning requirements on DVD and Blu-ray players. Given that distributors of DVDs and Blu-ray discs are under no legal obligation to include closed captioning along with their video programming,¹⁶ it doesn't seem to me that Congress meant to require DVD and Blu-ray players to display closed captions. Indeed, Blu-ray discs do not even have a standard format for closed captioning.¹⁷

Nevertheless, I appreciate the Commission's decision today to delay application of the closed-captioning requirements to DVD and Blu-ray players pending resolution of the Further Notice of Proposed Rulemaking on this issue. If we ultimately levy these requirements on removable media players, I hope we do so in a minimally intrusive manner.

Finally, I would like to thank my colleagues for their willingness to incorporate my suggestions and commend Chairwoman Clyburn for her leadership in implementing the CVAA. Less than a month into her tenure as the head of our agency, we have already adopted two items that bring us closer to realizing the statute's promise. This is a significant accomplishment.

¹⁵ For one, the statute uses the past participle "transmitted," which suggests completed action—*i.e.*, video programming that has already been transmitted simultaneously with sound, not video programming that is being or will be transmitted simultaneously with sound.

For another, before the CVAA amended section 303(u), that section discussed "video programming broadcast simultaneously with sound"—a clear reference to how the device received the programming, not how it was displayed. In amending that statutory term, Congress broadened the provision to encompass non-broadcast transmissions; it seems unlikely that Congress meant not to broaden the provision but to change its fundamental scope. This is especially so in light of the fact that Congress adopted the CVAA to adapt the Communications Act to the "fundamental transformation, driven by growth in broadband," of the communications marketplace since 1996, House Report 111-563, at 19 (Committee on Energy and Commerce July 26, 2010); Congress was certainly aware of the development of the Sony Betamax, the VCR, the computer diskette, the DVD player, the Zip drive, the USB card, the Blu-Ray player, and other removable media players, but adapting the law to them was not the purpose of the CVAA.

For yet another, this interpretation of "transmitted" cannot be applied coherently to other statutory provisions that use the same term. Section 203 of the CVAA also includes section 303(z) of the Communications Act, and uses parallel language about recording devices—but if a recording device doesn't play back any video programming (and thus does not itself "transmit" the programming simultaneously with sound to the user), does the question become whether video programming might eventually be transmitted (or is intended to be transmitted) simultaneously with sound? Similarly, section 201(e)(2)(F) of the CVAA requires "a recommendation for the standards, protocols, and procedures used to enable the functions of apparatus designed to receive or display video programming *transmitted* simultaneously with sound (including apparatus designed to receive or display video programming *transmitted* by means of services using Internet protocol) to be accessible to and usable by individuals with disabilities" (emphases added). Under the Commission's interpretation, how could video programming be "transmitted" to the user "by means of services using Internet protocol"?

¹⁶ See *IP Closed Captioning Order*, 27 FCC Rcd at 846, para. 99 & n.398.

¹⁷ See *Recon Order* at para. 21 & n.78; see also Reply Comments of CEA at 7 n.32.