

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

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	)	
In the Matter of	)	
	)	
Closed Captioning of Video Programming	)	CG Docket No. 05-231
	)	
Telecommunications for the Deaf and Hard of	)	PRM11CG
Hearing, Inc.	)	
Petition for Rulemaking	)	

**REPORT AND ORDER, DECLARATORY RULING, AND FURTHER NOTICE OF PROPOSED RULEMAKING**

**Adopted: February 20, 2014**

**Released: February 24, 2014**

**Comment Date for Section VI.A: (30 days after publication in the Federal Register)**

**Reply Comment Date for Section VI.A: (60 days after publication in the Federal Register)**

**Comment Date on the Remaining Sections: (90 days after publication in the Federal Register)**

**Reply Comment Date on the Remaining Sections: (120 days after publication in the Federal Register)**

By the Commission: Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai and O’Rielly  
 issuing separate statements.

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## I. INTRODUCTION

1. Over sixteen years ago, the Commission adopted its first set of rules governing the provision of closed captioning on television—a service that makes television programming accessible to people who are deaf and hard of hearing.<sup>1</sup> Viewers' captioning experience during the intervening years confirms the need for the Commission to update its captioning rules to ensure that they achieve Congress's goal that "all Americans ultimately have access to video services and programs, particularly as video programming becomes an increasingly important part of the home, school, and workplace."<sup>2</sup> In keeping with Congress's clear direction, our actions today advance the accessibility of video programming, while being mindful of potential burdens on industry. To this end, we amend our rules and take other actions in a manner that provides flexibility on ways to achieve compliance, and effectively balances the impact that our actions will have on industry with the benefits that fully accessible programming can achieve for people who are deaf and hard of hearing.

2. With this Order, the Commission adopts captioning quality standards and technical compliance rules to ensure that video programming is fully accessible to individuals who are deaf and hard of hearing through the provision of closed captioning.<sup>3</sup> In the Declaratory Ruling, the Commission clarifies certain closed captioning requirements for "on demand" programming, bilingual and non-English/non-Spanish language programming, the closed captioning obligations of low power television stations, and requirements concerning video programming distributor (VPD) contact information. In the Further Notice of Proposed Rulemaking (FNPRM), the Commission seeks comment on additional measures to ensure the accessibility of television programming for individuals who are deaf and hard of hearing and improve the Commission's procedural rules governing closed captioning.

## II. EXECUTIVE SUMMARY

3. In the Report and Order, we take the following actions to improve the accessibility of television programming for people who are deaf and hard of hearing:

- We define four non-technical quality standards as the components necessary to ensure that closed captions provided by VPDs<sup>4</sup> fully and effectively convey the content of television programming

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<sup>1</sup> See *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, Report and Order, 13 FCC Rcd 3272 (1997) (*1997 Closed Captioning Report and Order*), recon. granted in part, Order on Reconsideration, 13 FCC Rcd 19973 (1998) (*Closed Captioning Reconsideration Order*); 47 C.F.R. § 79.1.

<sup>2</sup> House Conference Report No. 104-458, 104<sup>th</sup> Cong., 2d Sess. at 183-184 (Jan. 31, 1996) (H.R. Conf. Rep. 104-458).

<sup>3</sup> This Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking (FNPRM) is adopted pursuant to section 713(b) of the Communications Act of 1934, as amended (Act). 47 U.S.C. § 613(b).

<sup>4</sup> In the *1997 Closed Captioning Report and Order*, the Commission decided to place the responsibility for compliance with the television closed captioning rules on VPDs, "defined as all entities who provide video programming directly to customers' homes, regardless of distribution technology used (*i.e.*, broadcasters and MVPDs)." *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3280, ¶ 18. See also 47 C.F.R. § 79.1(a)(2) (defining a VPD as (1) any television broadcast station licensed by the Commission; (2) any multichannel video programming distributor (MVPD) as defined in Section 76.1000(e); and (3) any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission). The Commission explained that placing compliance obligations on VPDs would "allow [it] to monitor and enforce these rules more efficiently." *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286, ¶ 27. In this order, we intend the term "VPD" to have the same meaning as that term is defined in Section 79.1(a)(2) of the Commission's rules. 47 C.F.R. § 79.1(a)(2). We note that the television closed captioning statute references video programming providers (VPPs) and owners (VPOs). See, *e.g.*, 47 U.S.C. § 613(b)(2) (directing the Commission to prescribe regulations that "shall ensure" that "video programming providers or owners maximize the accessibility of video programming first published or exhibited prior to the effective date of such

to people who cannot hear to the same extent that the audio track conveys this content to people who are able to hear:

- Accuracy: To be accurate, captions must reflect the dialogue and other sounds and music in the audio track to the fullest extent possible based on the type of the programming, and must identify the speakers.
- Synchronicity: In order to be synchronous, captions must coincide with their corresponding dialogue and other sounds to the fullest extent possible based on the type of the programming, and must appear at a speed that can be read by viewers.
- Program Completeness: For a program's captions to be complete, they must run from the beginning to the end of the program, to the fullest extent possible, based on the type of the programming.

(Continued from previous page) \_\_\_\_\_  
regulations through the provision of closed captions"); 47 U.S.C. § 613(d) (authorizing the Commission to issue exemptions where "the provision of closed captioning would be economically burdensome to the provider or owner of such programming" and authorizing the "provider of video programming or program owner" to petition the Commission for an exemption from the television closed captioning requirements). The Telecommunications Act of 1996 does not define VPP or VPO. The legislative history, however, explains that the term "provider" "refers to the specific television station, cable operator, cable network or other service that provides programming to the public." See H.R. Rep. 104-204, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1995, at 114, *reprinted in* 1996 U.S.C.C.A.N. 10, 82. The term "provider" is thus more encompassing than "VPD" because, in addition to including television stations and MVPDs, "providers" include nonbroadcast networks (which provide programming to MVPDs, which in turn, provide programming to the public) and "other service that provides programming to the public." *Id.* The Commission has used the term "distributor" to mean "all entities who provide video programming directly to a customer's home" for the purpose of defining who is "responsible for compliance with our closed captioning rules." *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286, ¶ 27 (explaining that responsibility for compliance with the captioning rules will be placed on video programming distributors, such as broadcasters, cable operators, wireless cable operators, ITFS or LMDS, SMATV operators, DBS providers, DTH providers, HSD providers and OVS operators). The legislative history does not define the term "video programming owner." See H.R. Rep. 104-204, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1995, at 114, *republished in* 1996 U.S.C.C.A.N. 10, 82. We reiterate the Commission's previously stated expectation that VPDs will privately negotiate with program owners and producers regarding "an efficient allocation of captioning responsibilities" and "that program owners and producers will cooperate with distributors to ensure that nonexempt programming is closed captioned in accordance with our rules." *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286-87, ¶ 28.

We also note that a different definition of VPD is used for purposes of programming distributed on the Internet. Section 79.4 of the rules defines "video programming distributor or video programming provider" to mean: "Any person or entity that makes available directly to the end user video programming through a distribution method that uses Internet protocol." 47 C.F.R. § 79.4(a)(3). See *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, 793-797 at ¶¶ 8-13 (2012) (*IP Captioning Report and Order*), *recon. granted in part*, Order on Reconsideration and Further Notice of Proposed Rulemaking, 28 FCC Rcd 8785 (2012) (*IP Captioning Reconsideration Order*). A section 79.1 VPD may also be subject to the requirements of section 79.4 to the extent it distributes programming using Internet protocol. For the purposes of this Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, all references to VPDs are to section 79.1 VPDs unless otherwise noted. To avoid possible ambiguity, we are changing the heading for section 79.1 of our rules to now read "Closed captioning of televised programming." See Appendix B, § 79.1. Nevertheless, as discussed in section IV.A.1, *infra*, video programming distributed on the Internet that is required to include closed captions must have captions with at least the same quality as the television captions provided for the same programming. See 47 C.F.R. §§ 79.4(c)(1)(i) and (c)(2)(i); *IP Captioning Report and Order*, 27 FCC Rcd at 811-14, ¶¶ 36-39.

- Placement: For proper placement, captions may not cover up other important on-screen information, such as character faces, featured text, graphics, or other information essential to the understanding or accessing of a program's content.
- Pre-recorded Programming: Captions for pre-recorded programming must be accurate, synchronous, complete and appropriately placed.
- Live Programming: In evaluating a VPD's compliance with the captioning quality standards, the Commission will consider the challenges in captioning live programming, such as the lack of an opportunity to review and edit captions before the programming is aired on television. Notwithstanding these challenges, however, measures can be taken to ensure that captioning of live programming is sufficiently accurate, synchronous, complete, and appropriately placed to allow a viewer who depends on captioning to understand the program and have a viewing experience that is comparable to someone listening to the sound track.
- Near-Live Programming: Near-live programming, which is programming that is performed and recorded within 24 hours prior to when it is first aired on television, will be evaluated under the same standards we apply to live programming, although we encourage measures that can be taken prior to the program's airing to improve its captioning quality.
- We require VPDs to make best efforts to obtain a certification from video programmers either that their programming (i) complies with the captioning quality standards; (ii) adheres to the Best Practices for video programmers set out in this Report and Order; or (iii) is exempt from the closed captioning rules under one or more properly attained and specified exemptions.
- We adopt additional requirements for broadcasters who utilize Electronic Newsroom Technique (ENT) to ensure that most news programming, including sports, weather, and most late-breaking news is scripted for the teleprompter and therefore captioned. In addition, we require that crawls and other visual information be utilized to provide visual access to those segments where ENT is not used. If there is a Commission investigation into non-compliance with the new procedures, broadcasters adhering to these procedures will be able to fall under a "compliance ladder" that provides them with opportunities to take corrective action prior to enforcement action by the Commission.
- We codify the requirement that VPDs monitor and maintain their equipment and take any corrective measures necessary to ensure that such equipment is in proper working order, as part of their obligation to ensure that the captioning included with video programming reaches consumers. We also adopt a new rule requiring VPDs to perform technical equipment checks in a manner that is sufficient to ensure that captions are passed through to viewers intact. Additionally, we require VPDs to keep records of their activities related to the maintenance, monitoring and technical checks of their captioning equipment.
- We specify that, for the purpose of the captioning exemption for channels producing revenues of less than \$3 million, the revenue of each multicast program stream of a digital television station is considered separately for purposes of the \$3 million limit.
- We decline to adopt a base forfeiture amount for violations of the closed captioning rules.
- We require that petitions for exemptions from the captioning requirements, together with comments on or objections to such petitions, be filed electronically.

4. In the Declaratory Ruling, we take the following actions to clarify and reconfirm certain of the Commission's closed captioning requirements:

- We clarify that all new bilingual English and Spanish language programming and 75% of pre-rule bilingual English and Spanish language programming not subject to an exemption must be closed captioned.

- We clarify that small, discrete portions of English or Spanish segments that account for only a small percentage of an otherwise non-English or non-Spanish program, respectively, need not be captioned.
- We clarify that all VPDs are required to make contact information available to consumers and the Commission.
- We clarify that “on demand” programming not subject to an exemption must comply with the requirements to caption 100 percent of all new English, Spanish and bilingual English and Spanish language programming and 75 percent of pre-rule English, Spanish and bilingual English and Spanish language programming.
- We reconfirm that low power television (LPTV) stations must comply with the Commission’s closed captioning rules.

5. In the FNPRM, we seek comment on the following issues for the purpose of further enhancing accessibility to television programming and improving the Commission’s procedural rules:

- Whether the Commission should impose some responsibilities for compliance with the Commission’s closed captioning quality rules on video programmers and other programming entities.
- Whether the Commission should require specific measures to ensure program completeness and synchronicity for live and near-live programming and how the Commission should define near-live programming.
- Whether the Commission should require the use of offline captioning or other measures to achieve improved accuracy, synchronicity, placement and program completeness of the captions prior to the re-airing of live and near-live programming first shown after the effective date of any such rule.
- Whether the Commission should apply the ENT requirements adopted for broadcasters to non-broadcast networks to ensure greater accessibility to news programming.
- Whether the Commission should establish specific intervals by which monitoring, maintenance, and technical checks of captioning equipment must take place and whether methods other than regular equipment checks can be used to ensure that captions are passed through to consumers.
- How VPDs should improve their consumer complaint handling.
- Whether the Commission should provide a public “dashboard” containing information about captioning complaints.
- Whether to require that captioning outages be communicated to viewers in real-time and be reported to the Commission, consistent with reporting requirements for other types of outages.
- Whether the Commission should require that VPD contact information provided to the Commission be provided by webform only.
- How the Commission should handle the forwarding of complaints when the VPD receiving the complaint is not the responsible party.
- The extent to which the Commission should retain or modify the exemption for new networks.
- The extent to which the Commission should take action on January 2011 proposals from a coalition of consumer groups to eliminate the exclusion from captioning requirements of advertisements of five minutes duration or less and to eliminate the following self-implementing exemptions from the closed captioning requirements: late night programming, locally produced and distributed non-news programming with no repeat value, interstitials, promotional announcements, and public service announcements that are 10 minutes or less in duration, and

channels producing revenues under \$3 million.

- The extent to which technical standards adopted by the Commission for the display of closed captions, which allow control over caption features such as size, font, background and foreground colors, are being met and effectively improving the captioning experience for viewers.
- The extent to which on-screen visual changes or textual depictions have caused a problem for caption viewers and, to the extent that these problems exist, their causes and possible solutions.
- The current practices and capabilities for closed captioning 3D television programming and ultra high definition television programming and the need for Commission action to ensure the accessibility of such programming.

### III. BACKGROUND

#### A. Section 713 and the Closed Captioning Regulations

6. Closed captioning is a technology that provides visual access to the audio content of video programs by displaying this content as printed words on the television screen. In addition to displaying text of verbal dialogue, captions generally identify speakers, sound effects, music, and audience reaction. Because closed captioning is hidden as encoded data transmitted within the television signal, consumers can turn the captions on or off.<sup>5</sup>

7. Captioning technology was introduced more than forty years ago when the Public Broadcasting System initiated captions in an “open captioning format” by transmitting text with the video on the television screen in a manner visible to all viewers.<sup>6</sup> In 1976, the Commission adopted rules providing that line 21 of the vertical blanking interval (VBI) be used for the transmission of closed captioning in analog receivers.<sup>7</sup> In 1990, Congress passed the Television Decoder Circuitry Act of 1990 (TDCA), requiring closed captioning capability in all television receivers with screen sizes of 13 inches or larger that are manufactured or sold in the United States.<sup>8</sup> In July 2000, the Commission adopted technical standards for the decoding and display of closed captions by digital television (DTV) tuners and receivers.<sup>9</sup>

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<sup>5</sup> See *Amendment of Part 15 of the Commission's rules to Implement the Provisions of the Television Decoder Circuitry Act of 1990*, GEN Docket No. 91-1, Report and Order, 6 FCC Rcd 2419, 2420 at ¶ 2 (1991) (*TDCA Order*), recon. granted in part, Memorandum Opinion and Order, 7 FCC Rcd 2279 (1992).

<sup>6</sup> See generally *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, Notice of Proposed Rulemaking, 12 FCC Rcd 1044 (1997) (*1997 Closed Captioning NPRM*). See also *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, Report, 11 FCC Rcd 19214, 19223, at ¶ 25 (1996) (*1996 Closed Captioning Report to Congress*).

<sup>7</sup> For analog television, closed captioning is hidden as encoded data transmitted within the VBI of the television signal which, “when decoded, provides a visual depiction of information simultaneously being presented on the aural channel. . . .” 47 C.F.R. § 73.682(a)(22)(i). See also 47 C.F.R. § 79.101.

<sup>8</sup> Pub. L. No. 101-431, 104 Stat. 960 (1990) (codified at 47 U.S.C. §§ 303(u), 330(b)). See generally *TDCA Order*.

<sup>9</sup> *Closed Caption Decoder Requirements for Digital Television Receivers and Converter Boxes, Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, Report and Order, 15 FCC Rcd 16788 (2000) (*DTV Closed Captioning Order*). See 47 C.F.R. § 79.102. Section 79.102(a)(3), which was amended in 2012 to also include digital television receivers that use picture screens less than 13 inches in size, applies the section 79.102 requirements to all digital television receivers and separately sold DTV tuners, effective January 1, 2014, except that digital television receivers that use picture screens less than 13 inches in size must comply with the provisions of the rule only if technically feasible and if doing so is achievable. 47 C.F.R. § 79.102(a)(3). See also 47 U.S.C. § 303(u); *IP Captioning Report and Order*, 27 FCC Rcd at 842-843, 848, ¶¶ 96, 104.

8. Up until and after the passage of the TDCA, the video programming industry provided closed captioning of video programming selectively and on a voluntary basis.<sup>10</sup> In 1996, Congress determined that additional measures were required to ensure access to television programming for people who are deaf and hard of hearing,<sup>11</sup> and added section 713 to the Act, directing the Commission to prescribe rules for the closed captioning of televised video programming.<sup>12</sup> In particular, section 713(b) directs the Commission to prescribe regulations to ensure that “video programming first published or exhibited after the effective date of such regulations is fully accessible through the provision of closed captions,”<sup>13</sup> and that “video programming providers or owners maximize the accessibility of video programming first published or exhibited prior to the effective date of such regulations through the provision of closed captions. . . .”<sup>14</sup> In 1997, pursuant to section 713, the Commission adopted rules that established various captioning benchmarks (*i.e.*, implementation schedules), which differed based on whether the programming was analog or digital, Spanish or English, and new or “pre-rule.”<sup>15</sup> At the present time, all *new* English and Spanish language programming, both analog and digital, that is not specifically exempt from the Commission’s rules must be closed captioned.<sup>16</sup> In addition, 75% of all nonexempt *pre-rule* English and Spanish language programming must be closed captioned.<sup>17</sup>

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<sup>10</sup> During the 1980s, closed captioning was largely supported by grants from the U.S. Department of Education. *See* Robert Davila, Office of Special Education and Rehabilitative Services, letter to Sy DuBow, NCLD, March 23, 1990 (by 1988, the Department of Education had invested more than \$45 million into its captioning project and was spending over \$6 million a year – or approximately 40 percent of all captioning costs – to support television captioning).

<sup>11</sup> H.R. Report 104-204, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 113-14 (1995).

<sup>12</sup> Section 713 was added to the Act by section 305 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996 Act), codified at 47 U.S.C. § 613.

<sup>13</sup> 47 U.S.C. § 613(b)(1).

<sup>14</sup> 47 U.S.C. § 613(b)(2). As noted above, *see* n.4, *supra*, although the Act uses the terms VPP and VPO, the Commission’s rules impose television closed captioning obligations directly on VPDs. The rules define a VPP to include “[a]ny video programming distributor and any other entity that provides video programming and that is intended for distribution to residential households including, but not limited to broadcast or nonbroadcast television network and the owners of such programming.” 47 C.F.R. § 79.1(a)(3).

<sup>15</sup> *See 1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3292-95, ¶¶ 41-47; 47 C.F.R. § 79.1(b). Analog programming that first aired on or after January 1, 1998, and digital programming that first aired on or after July 1, 2002 is called *new* programming. 47 C.F.R. § 79.1(a)(5). Analog programming that first aired prior to January 1, 1998, and digital programming that first aired *prior to* July 1, 2002, is called *pre-rule* programming. 47 C.F.R. § 79.1(a)(6). Because final standards for DTV receivers did not exist when the Commission adopted its closed captioning rules in 1997, the Commission temporarily defined all programming prepared for digital transmission as pre-rule, until the DTV decoder standard rules became effective in 2002. *See 1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3300-01, ¶ 60.

<sup>16</sup> The effective date for all nonexempt, new programming to be captioned was January 1, 2006 for English language programming, 47 C.F.R. § 79.1(b)(1)(iv), and January 1, 2010 for Spanish language programming. 47 C.F.R. § 79.1(b)(3)(iv). Section 713(d) of the Act allows the Commission to grant two types of exemptions from its captioning mandates. 47 U.S.C. § 613(d). First, the Commission’s rules list thirteen categorical exemptions that are self-implementing. *See* 47 C.F.R. § 79.1(d). In addition, a video programming provider, producer, or owner may petition the Commission for an individual exemption from the closed captioning obligations if it can show that providing captions would be economically burdensome. *See* 47 C.F.R. § 79.1(f). *See* section IV.B.2 for a more detailed description of the economically burdensome standard. *See also 1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3363-64, ¶ 199.

<sup>17</sup> The effective date for 75% of nonexempt, pre-rule programming to be captioned was January 1, 2008 for English language programming, 47 C.F.R. § 79.1(b)(2)(ii), and January 1, 2012 for Spanish language programming. 47 C.F.R. § 79.1(b)(4)(ii). *See also 1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3301-02, ¶¶ 61-63.

## B. The 2004 Petition and Notice of Proposed Rulemaking

9. On July 23, 2004, several advocacy groups representing individuals who are deaf and hard of hearing (Petitioners or Consumer Groups) filed a joint petition for rulemaking (2004 Petition) seeking amendments to the Commission's captioning rules pertaining to matters of captioning quality, scope, and enforcement.<sup>18</sup> Specifically, Petitioners asked the Commission to adopt non-technical captioning quality standards (*e.g.*, requirements regarding accuracy, timing, completeness, and placement of captions) to ensure that video programming is "fully accessible," along with effective mechanisms to ensure that VPDs pass through captions intact to viewers.<sup>19</sup> In addition, Petitioners asked the Commission to extend the prohibition on using ENT<sup>20</sup> to all television markets, revise the process for submitting closed captioning complaints, create a database with updated contact information for VPDs, establish monitoring and reporting requirements, undertake compliance audits, and establish base fines or penalties for non-compliance.<sup>21</sup> On September 2, 2004, the Commission placed the 2004 Petition on public notice.<sup>22</sup>

10. On July 21, 2005, the Commission released a Notice of Proposed Rulemaking granting the 2004 Petition and initiating a proceeding to examine the Commission's closed captioning rules.<sup>23</sup> The *2005 Closed Captioning NPRM* sought comment on a broad range of issues concerning closed captioning, including whether to adopt non-technical quality standards for closed captioning<sup>24</sup> and whether additional mechanisms and procedures are necessary to prevent or promptly correct technical problems that impede the intact delivery of captions from their origination source to end users.<sup>25</sup> In addition, the Commission sought comment on whether to revise the procedures for submitting closed captioning complaints<sup>26</sup> and whether to require VPDs to file compliance reports detailing the amount of closed captioning they

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<sup>18</sup> Telecommunications for the Deaf Inc. *et al.* Petition for Rulemaking, RM-11065 at 35-40 (July 23, 2004) (2004 Petition). Petitioners included Telecommunications for the Deaf, Inc. (TDI), the National Association of the Deaf (NAD), Self Help for Hard of Hearing People, Inc. (SHHH), the Association for Late Deafened Adults (ALDA), and the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), (collectively Petitioners or Consumer Groups). TDI has since changed its name to Telecommunications for the Deaf and Hard of Hearing, Inc., but still uses the acronym TDI, and SHHH has since changed its name to Hearing Loss Association of America (HLAA).

<sup>19</sup> 2004 Petition at 24-27, 30-34, 35-39.

<sup>20</sup> See section IV.B, *infra*.

<sup>21</sup> 2004 Petition at 12-24, 27-30, 34-35.

<sup>22</sup> *Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemaking Filed*, Public Notice, Report No. 2670, Sept. 2, 2004.

<sup>23</sup> See *Closed Captioning of Video Programming, Telecommunications for the Deaf, Inc., Petition for Rulemaking*, Notice of Proposed Rulemaking, 20 FCC Rcd 13211 (2005) ("2005 Closed Captioning NPRM").

<sup>24</sup> Specifically, the Commission asked about the need for standards on the accuracy of transcriptions, spelling, grammar, punctuation, placement, identification of nonverbal sounds, the style of captions, the extent to which captions are verbatim or edited for reading speed, type fonts, and the appropriateness of certain proposed quantitative error rates. *2005 Closed Captioning NPRM*, 20 FCC Rcd at 13216-17, ¶¶ 10-16. In addition, the Commission sought comment on whether quality standards should differ for programming that is "pre-produced" versus live. *Id.* at 13217, ¶ 15. Although the *NPRM* used the term "pre-produced" programming for non-live television shows, commenters addressing this issue generally referred to this programming as "pre-recorded." See, *e.g.*, AG Bell Comments at 4; NCI Comments at 4; CBS Reply Comments at 2. For consistency, this Report and Order uses the term "pre-recorded" to describe such programming. The Commission also sought comment on Petitioners' suggestion to deem a program not captioned when it contains excessive captioning errors. *2005 Closed Captioning NPRM*, 20 FCC Rcd at 13217, ¶ 15.

<sup>25</sup> *2005 Closed Captioning NPRM*, 20 FCC Rcd at 13217-18, ¶ 17.

<sup>26</sup> *Id.* at 13220-22, ¶¶ 26-35.

provide.<sup>27</sup> Finally, the Commission sought comment on whether to further limit the circumstances under which ENT is allowed to count as captioning for live programming.<sup>28</sup>

### C. The 2007 Consumer Advisory Committee Report

11. In 2007, the Commission's Consumer Advisory Committee (CAC), an advisory committee tasked with providing recommendations to the Commission on consumer and disability affairs,<sup>29</sup> submitted a Report to the Commission in response to its Digital Television (DTV) Consumer Education Initiative.<sup>30</sup> The Report informed the Commission that the transition from analog to digital television transmissions had exacerbated captioning problems, causing frequent occurrences of "overlapping captions (two lines of captions displayed over each other), captions appearing in the middle of the television screen (blocking faces and other important information on the screen), garbled captions, captions running off the edge of the picture, captions exceedingly small, and captions that inadvertently switch to text mode which causes 95% of the screen image to be obscured."<sup>31</sup> The 2007 CAC Report further explained that these failures stemmed from a host of technical and non-technical problems, including "problems with local broadcast station signals, local cable provider transmissions, broadcast and cable network transmissions, maladjustment of consumer equipment that is purchased or leased from cable or satellite companies, satellite transmission signals, and/or improper encoding and transmission by caption providers."<sup>32</sup>

### D. The 2008 Closed Captioning Declaratory Ruling, Order, and Notice of Proposed Rulemaking

12. On November 7, 2008, the Commission released a Declaratory Ruling, Order and Notice of Proposed Rulemaking ("*2008 Closed Captioning Decision*") that responded in part to the 2004 Petition by amending the captioning complaint process to allow consumers to file complaints directly with the Commission, rather than filing first with the VPD, and by specifying new timelines by which such complaints must be addressed.<sup>33</sup> The Commission also adopted rules requiring VPDs to make available

<sup>27</sup> *Id.* at 13224-25, ¶¶ 40-43.

<sup>28</sup> *Id.* at 13225, ¶ 44.

<sup>29</sup> See *Consumer Advisory Committee: Announcement of Rechartering, Appointment of Members, and First Meeting*, Public Notice, DA 07-2426, June 8, 2007 (*CAC Rechartering Public Notice*).

<sup>30</sup> FCC Consumer Advisory Committee Report, MB Docket No. 07-148, October 1, 2007 (errata received October 25, 2007) (2007 CAC Report). The DTV Consumer Education Initiative was established to "further the Commission's goal of ensuring that all consumers, especially the elderly, low-income, non-English speaking consumers and people with disabilities, are aware of the transition and understand what specific steps, if any, they must take to continue watching television after the transition was completed on February 17, 2009." *CAC Rechartering Public Notice* at 1.

<sup>31</sup> 2007 CAC Report § II.B at 11.

<sup>32</sup> *Id.*

<sup>33</sup> *Closed Captioning and Video Programming, Closed Captioning Requirements for Digital Television Receivers*, Declaratory Ruling, Order and Notice of Proposed Rulemaking, 23 FCC Rcd 16674 (2008) ("*2008 Closed Captioning Decision*"). Prior to this time, a consumer was required to first file a complaint with the VPD, and if not satisfied with the VPD's response, the consumer could then file the complaint with the Commission. *Id.* at 16680-81, ¶ 17. Under the new rules, written closed captioning complaints may be filed with either the VPD or the Commission within sixty (60) days of the captioning problem, and the complaints must be addressed within specified timelines. *Id.* at 16681-84, ¶¶ 20-25. See also 47 C.F.R. § 79.1(g). Citing a possible conflict with another statutory provision of the Act, on December 11, 2009, the Commission released an Order temporarily suspending a requirement that had been adopted in the 2008 Closed Captioning Decision, that VPDs forward closed captioning complaints to third parties. See *Closed Captioning of Video Programming, Order Suspending Effective Date*, 24 FCC Rcd 14777 (2009) ("*2009 Suspension Order*"). We seek to address this conflict in the FNPRM accompanying this Report and Order.

two different kinds of contact information – contact information for the receipt and handling of immediate closed captioning concerns by consumers, and contact information for written closed captioning complaints.<sup>34</sup> The Commission has since developed a database to collect VPD contact information,<sup>35</sup> and issued public notices to inform VPDs of their obligation to file such contact information.<sup>36</sup> The Commission took such measures in response to the difficulties that consumers had been experiencing when trying to file complaints or contact their VPDs about captioning problems.

13. In the *2008 Closed Captioning Decision*, the Commission also clarified that all nonexempt digital programming must be captioned pursuant to the applicable benchmark for that type of programming, and specified that there would be no “digital exemption” to the obligation to caption such programming.<sup>37</sup> Finally, in the *2008 Closed Captioning Decision*, the Commission sought comment on the extent to which the self-implementing exemption in section 79.1(d)(12) for video programming channels that produce annual gross revenues of less than \$3 million during the previous calendar year should apply to digital broadcasters that multicast.<sup>38</sup>

**E. Public Notice Seeking Comments to Refresh the Record**

14. On October 25, 2010, the Consumer and Governmental Affairs Bureau (CGB) issued a

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<sup>34</sup> *2008 Closed Captioning Decision*, 23 FCC Rcd at 16685-86, ¶¶ 30-32. See also *Closed Captioning and Video Programming, Closed Captioning Requirements for Digital Television Receivers*, Erratum, 24 FCC Rcd 8262 (CGB 2009) (amending the language in the new rule section 79.1(i)(1)). On February 16, 2010, the Bureau waived section 79.1(i) to the extent that it requires VPDs to place such contact information in local telephone directories in which the VPD does not itself directly advertise or otherwise place commercial listings, so long as the VPD makes the contact information available on its website or on billing statements. *Closed Captioning of Video Programming*, Order, 25 FCC Rcd 1370, 1372 at ¶ 6 (CGB 2010).

<sup>35</sup> See *Closed Captioning of Video Programming*, Order, 24 FCC Rcd 14837 (2009) (*Captioning Contact Webform Order*).

<sup>36</sup> These notices also informed the viewing public as to how they can use this database to search for their VPDs. *Information for Contacting Video Programming Distributors About Closed Captioning Problems Now Available on FCC Website, and Information on New Complaint Procedures for Closed Captioning and Revised Form 2000C*, Public Notice, 25 FCC Rcd 4903 (CGB 2010); *Reminder to All Video Distributors Closed Captioning Contact Information is Overdue*, Public Notice, 25 FCC Rcd 4548 (CGB 2010); *Closed Captioning of Video Programming; Closed Captioning Requirements for Digital Television Receivers*, Small Entity Compliance Guide Report and Order, 24 FCC Rcd 7046 (OCBO 2009).

<sup>37</sup> *2008 Closed Captioning Decision*, 23 FCC Rcd at 16679, ¶ 11. The Commission further clarified that, even where a digital channel is exempt from the closed captioning rules because it is subject to a self-implementing categorical exemption under 47 C.F.R. §79.1(d), or an individual exemption under 47 C.F.R. §79.1(f), the VPD must still pass through any captioning it receives, even on rebroadcasts of programs, and that this requirement applies “regardless of whether the distributor has already met the relevant captioning benchmark.” *2008 Closed Captioning Decision*, 23 FCC Rcd at 16679, ¶ 11. The Commission stated that, in such a case (*i.e.*, where the VPD is exempt), the VPD is not obligated to create new digital captions if only analog captions are provided on the programming it receives. *Id.* The *2008 Closed Captioning Decision* was adopted seven months prior to the June 12, 2009 transition to digital television for full power broadcast stations.

<sup>38</sup> *2008 Closed Captioning Decision*, 23 FCC Rcd. at 16687-89, ¶¶ 35-40. With analog broadcasting, broadcasters use their spectrum allocation to provide programming on a single channel. With digital broadcasting, broadcasters may use their digital allotment to simultaneously telecast several streams of programming. This is known as “multicasting.” *Id.* at 16687, ¶ 35. The Commission sought comment on whether, for purposes of receiving a captioning exemption under section 79.1(d)(12), each programming stream on a multicast signal constitutes a separate channel, or whether the broadcaster’s entire operations attributable to its digital allotment should be considered one channel. *Id.*

Public Notice seeking to refresh the record in this proceeding.<sup>39</sup> Specifically, CGB asked interested parties to provide updated information on: (1) whether there should be quality standards for non-technical aspects of closed captioning; (2) the need for mechanisms and procedures, over and above the “pass through” rule,<sup>40</sup> to prevent technical captioning problems and to remedy technical problems that do arise; (3) whether to establish specific per violation forfeiture amounts for non-compliance; (4) whether VPDs should be required to file compliance reports; (5) whether the rules should be revised to disallow the use of ENT for DMAs beyond the top 25 DMAs;<sup>41</sup> (6) whether petitions for captioning exemptions should be filed electronically; and (7) whether the captioning exemption for channels producing under \$3,000,000 annually should apply to individual programming streams of a multicast channel.<sup>42</sup>

#### IV. REPORT AND ORDER

##### A. Captioning Quality

##### 1. The Need for Captioning Quality Standards

15. *Background.* The Consumer Groups report “widespread problems” with the quality of closed captions, and claim that the inaccuracies that occur are often severe enough to “affect the comprehensibility of a program.”<sup>43</sup> To correct this, the Consumer Groups request non-technical quality standards that will ensure that captions transmit information about the audio portion of the program that is “functionally equivalent to the information available through the program’s soundtrack.”<sup>44</sup> These standards, the Consumer Groups state, are necessary in order to ensure that closed captioning is fully accessible to people who are deaf and hard of hearing, in accordance with the mandates of Section 713 of the Communications Act.<sup>45</sup>

16. In response to the Commission’s 2005 *Closed Captioning NPRM* and 2010 *Refresh Public Notice* on the merits of Consumer Groups’ request for closed captioning quality standards, the

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<sup>39</sup> *Consumer & Governmental Affairs Bureau Seeks to Refresh the Record on Notices of Proposed Rulemaking Regarding Closed Captioning Rules*, Public Notice, 25 FCC Rcd 15056 (CGB 2010) (“2010 Refresh Public Notice”).

<sup>40</sup> See 47 C.F.R. § 79.1(c).

<sup>41</sup> See 47 C.F.R. § 79.1(e)(3).

<sup>42</sup> See 47 C.F.R. § 79.1(d)(12).

<sup>43</sup> 2004 Petition at 37. To demonstrate their point, Petitioners offer an extensive list of captioning mistakes that occurred during pre-recorded programs on major cable networks and changed the meaning of the program’s content. For example, the following captions appeared in place of the words that were actually spoken: “offence” instead of “fence,” “kept tracks” instead of “skeptics,” “repaired” instead of “prepared,” and “sack ri lj” instead of “sacrilege.” *Id.*

<sup>44</sup> *Id.* at 38.

<sup>45</sup> *Id.* at 1, 37, 40, 41. The Consumer Groups state that the following provisions are necessary:

- Captions must include all elements of the soundtrack necessary for accessibility, including verbal information, identification of the speaker (if not apparent), sound effects, and audience reaction;
- There should be standards for proper spelling, grammar, timing, accuracy, and placement;
- Captions should be provided in the style that is appropriate for the particular type of programming that is being captioned;
- The placement of captions must reflect the source of audio information contained in the soundtrack;
- Captions must be synchronized with the audio content of the program, with some allowance made for programming that is live or recorded shortly before air time; and
- Captions should not interfere with other visually displayed information.

*Id.* at 38-39.

Commission received more than 1600 comments and *ex parte* letters. Closed captioning users uniformly echo the Consumer Groups' concerns about the lack of consistent captioning quality and urge the Commission to adopt quality standards.<sup>46</sup> Some commenters specifically highlight the dangers that can result when captions are erroneous – for example, when misinformation is provided about weather disasters and safety threats.<sup>47</sup> Others report the detrimental impact that faulty captions can have on the ability of children who are deaf and hard of hearing to understand television content.<sup>48</sup> The Commission's experience with informal consumer complaints is consistent with the concerns raised by these various individuals and organizations. Captioning complaints over the past five years have averaged 465 per year, making them the most frequent type of informal complaint received by the Commission's Disability Rights Office during this period.<sup>49</sup>

17. Many captioning agencies also support captioning quality standards. The WGBH National Center for Accessible Media (WGBH/NCAM), for example, reports that competition in the marketplace has caused captioning prices to drop precipitously, causing insufficient attention to captioning quality and captioning problems that have become “pervasive.”<sup>50</sup> Similarly, Caption Colorado

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<sup>46</sup> See, e.g., American Society of Deaf Children (ASDC) Comments at 1; National Disability Rights Network, Inc. (NDRN) Comments at 2; Northern Virginia Resource Center for Deaf and Hard of Hearing Persons (NVRC) Reply Comments at 1; Sheila Mentkowski Comments; Janice Schacter Comments; Hearing Access Program Late-filed Refresh Reply Comments (Feb. 9, 2011); Joan Rittgers, RN Comments; Margaret Rakow Comments; Rosemarie Kasper Comments; James Johnson Comments; Katie Gott Comments; Terrie LaBarbera Refresh Comments. Inclusive Technologies, a firm that focuses on access to information and communication technologies, insists that captioning quality standards are essential to improve the user experience. It recommends separate standards for live and pre-recorded programming that focus on the need for accuracy, timing and synchronization. Inclusive Technologies Refresh Comments at 1-2.

<sup>47</sup> See, e.g., DC Association of the Deaf Reply Comments at 1 (such substandard captioning quality can “lead to misunderstandings or to a life-threatening situation”). The DC Association of the Deaf was one of 14 state organizations for the deaf that filed comments supporting non-technical quality standards in this docket. See also William Vance Comments (garbled captions on a local news show prevented him from ascertaining the location of a crime scene in which a shooting was taking place); NDRN Comments at 2 (“The current state of closed captioning of news programming is far from perfect and inaccurate transcriptions could put people who are deaf or hard of hearing in danger.”); NVRC Reply Comments at 1-4 (captioning on a local news program covering Lyme disease contained so many errors about the symptoms of the disease and its possible remedies that it provided “dangerous misinformation”); Consumer Groups *Ex Parte* Letter, April 25, 2011, at 1 (Consumer Groups April 25, 2011 *Ex Parte*) (poor captioning creates a “serious safety hazard . . . by denying the deaf and hard of hearing access to emergency weather information). Some of these errors may also constitute violations of 47 C.F.R. § 79.2, which requires visual access to televised emergency information.

<sup>48</sup> For example, the American Society for Deaf Children (ASDC) explains that children who watch captions with many mistakes may not be able to fill in the gaps to figure out what was actually said. ASDC Comments at 1. Similarly, the Alexander Graham Bell Association for the Deaf and Hard of Hearing (AG Bell) emphasizes that “a complete rendering of the audio soundtrack . . . is of particular importance to children who are reading captions and enhancing and developing literacy skills as they view video programming.” AG Bell Comments at 2-3. See also Marty Fahncke Comments (what appears to be a “60 percent accuracy rate” for captions has impeded his child's ability to learn to read); Theresa Morello Comments (mother of two deaf children found captioning on Nickelodeon to be “of very poor quality”); Farley Warshaw Comments (parent of a fifteen year old dislikes having to “explain to her daughter ridiculous, erroneous captioning that is often garbled or completely wrong”); Meryl Troop Comments (a sign language interpreter urging the importance of making accurate and timely information available through captions for deaf professionals who are responsible for educating deaf children).

<sup>49</sup> Specifically, the Commission received a total of 2323 general captioning complaints from 2009 through 2013, with an average of 465 per year. We believe that even this number underestimates the problem because until now, the Commission has not had rules on captioning quality, eliminating the incentive to file complaints on this issue.

<sup>50</sup> WGBH National Center for Accessible Media (WGBH/NCAM) Comments at 2.; see also WGBH/NCAM *Ex Parte* Letter, July 15, 2011, Attachment, Caption Accuracy Metrics: Solutions for Automatically Measuring

asks the Commission to establish a set of specific, clear and objective criteria for measuring the quality of captioning of pre-recorded programming.<sup>51</sup> The National Court Reporters Association (NCRA), which represents individuals working in the captioning field, likewise claims that many VPDs seem to be “obtaining the lowest cost services possible, without respect for the quality of those services,”<sup>52</sup> and urges the adoption of a “fair, objective standard for quality captioning.”<sup>53</sup>

18. Many program providers and VPDs, on the other hand, argue that industry has already taken sufficient steps to ensure the captioning quality of its programming.<sup>54</sup> For example, the National Association of Broadcasters (NAB) and Time Warner Inc. (Time Warner) take issue with consumer claims that widespread captioning problems exist, and claim that the number of captioning complaints is small considering the amount of captioned televised programming.<sup>55</sup> NAB adds that because the causes of captioning problems are varied and there are no obvious patterns, it would be difficult to identify and solve such problems by “inflexible regulation.”<sup>56</sup> They and other commenters further claim that the

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Caption Quality, at 6 (WGBH/NCAM July 15, 2011 *Ex Parte*); Consumer Groups *Ex Parte* Letter, July 26, 2013, at 2 (Consumer Groups July 26, 2013 *Ex Parte*) (stating that video programmers “seek out the cheapest possible captioning services without regard to quality”).

<sup>51</sup> Caption Colorado Comments at 6-7. Caption Colorado suggests that quality standards cover “quality” issues of “accuracy of transcription, spelling, grammar, punctuation, placement, identification of nonverbal sounds, verbatim and edited for reading speed.” Caption Colorado Refresh Comments at 5. *See also* Caption Colorado *Ex Parte* Letter, January 10, 2011 (suggesting that the three primary factors of readability, completeness and latency be used for evaluation of non-technical quality standards, but urging that the Commission adopt standards without imposing penalties for non-compliance); Caption Perfect Comments at 1 (generally supporting “editorial quality standards”). *See also* Media Captioning Services (MCS) Refresh Comments at 9-12 (insisting that a high quality standard is necessary for captioning to be functionally equivalent to the audio portion of the program and recommending a 99% accuracy rate for post-production captioning along with a 98.5% accuracy rate for real-time captioning); National Court Reporters Association (NCRA) Comments at 4, 11 (asking for a “fair, objective standard for quality captioning”); Accessible Media Industry Coalition (AMIC) Comments at 14 (noting that the absence of objective, quantifiable captioning standards “has sown confusion and inconsistency in the marketplace”).

<sup>52</sup> NCRA Comments at 10; *see also* Consumer Groups July 26, 2013 *Ex Parte* at 2.

<sup>53</sup> NCRA Comments at 4, 11; *see also* NCRA *Ex Parte* Letter, March 28, 2011, at 2 (NCRA March 28, 2011 *Ex Parte*) (advocating for “the consistent application of reasonable standards on captioning quality”).

<sup>54</sup> *See, e.g.*, AZN Comments at 12 (a group of twelve non-broadcast networks including AZN Television, stating that its members have implemented a number of quality control standards and processes to ensure accuracy and quality); National Cable and Telecommunications Association (NCTA) Comments at 3 (insisting that “the industry has taken steps on its own to ensure that captions achieve a high degree of accuracy,” that their contracts with captioning agencies include quality and accuracy provisions, and that cable programmers continually review the performance of captioning services that they use); NCTA *Ex Parte* Letter, June 27, 2013, at 1 (arguing that additional regulations are not “necessary or justified” and that cable customers “can readily provide feedback to cable operators and programmers about caption quality problems, if any”); NCTA *Ex Parte* Letter, July 26, 2013, at 1 (NCTA July 26, 2013 *Ex Parte*) (stating that NCTA’s members receive “relatively few complaints from consumers about caption quality” and “were unaware of any systemic problems in this area”); Motion Picture Association of America (MPAA) Comments at 3 (reporting that service agreements with captioning vendors typically specify that captions for pre-recorded programs are expected to be completely accurate); Home Box Office, Inc. (HBO) Comments at 7-8 (current closed captioning rules already are “achieving high quantitative and qualitative results”); NCTA Refresh Comments at 3.

<sup>55</sup> NAB Refresh Comments at 6; Time Warner Refresh Reply Comments at 2, 5. *See also* Walt Disney Company Comments at 5.

<sup>56</sup> NAB Refresh Comments at 8, *citing* Office of Engineering and Technology and Consumer and Governmental Affairs Bureau, *Report on Digital Captioning Informal Complaints: Review and Analysis May 2009 – May 2010*, presented to Digital Closed Captioning and Video Description Technical Working Group, October 27, 2010 (OET,

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revised captioning complaint process and contact information requirements adopted by the Commission in 2008 have helped ensure that occasional and unavoidable captioning errors are addressed quickly.<sup>57</sup>

19. *Discussion.* When the Commission adopted the closed captioning obligations in 1997, it noted its expectation that video programming providers would establish captioning quality controls through their arrangements, contracts, and licensing agreements with captioning companies.<sup>58</sup> The Commission predicted that this approach would “result in high quality captions comparable to the level of quality of other aspects of programming, such as audio and video,”<sup>59</sup> and that mandated captioning quality standards were not likely to be necessary because providers would have their own strong incentives to maintain the overall quality of captions as an integral part of programming, commensurate with the quality of other video and audio components of their programming.<sup>60</sup> The Commission added that consumers would be able to demonstrate their satisfaction or disapproval of a program’s captions through their purchase of advertised products, subscriptions to programming services, or contacts with the video programming providers or programmers.<sup>61</sup> Finally, the Commission raised concerns about the administrative burden that would be associated with having to monitor hours of television programming “to make sure that no more than a specified percentage of the words are wrong, misspelled or missing at the same time that mandatory captioning is being implemented.”<sup>62</sup> The Commission cautioned, however, that it would revisit the need to adopt quality standards if it became apparent that its assumptions regarding the marketplace incentives for quality captioning were incorrect, and problems relating to the non-technical aspects of closed captioning surfaced.<sup>63</sup>

20. The record in this proceeding is mixed on the extent to which providers have engaged in voluntary efforts to provide high quality captions. Industry groups point to various examples where they have instituted quality controls.<sup>64</sup> For example, CBS notes that, for off-line captions,<sup>65</sup> the CBS and UPN Networks require “multiple reviews of the finished product, by the captioning agency prior to delivery and again by CBS personnel after delivery.”<sup>66</sup> NCTA points out that programmers typically enter into

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CGB October 27, 2010) (“2010 Closed Captioning Complaint Report”). See also Verizon Refresh Comments at 1-2, citing 2010 Closed Captioning Complaint Report.

<sup>57</sup> NAB Refresh Comments at 8, 9; NCTA Refresh Comments at 7; Verizon Refresh Comments at 1; Time Warner Refresh Reply Comments at 5.

<sup>58</sup> 1997 Closed Captioning NPRM, 12 FCC Rcd at 1092-93, ¶ 118, noting the Commission’s belief that rules requiring “closed captioning as an integral part of video programming will provide a marketplace incentive for program providers and producers to distribute the best quality captioning possible,” and that “as the demand for captioning increases, we expect competition among caption suppliers . . . will serve to set an industry standard for acceptable levels of quality and accuracy.”

<sup>59</sup> *Id.* at 3374, ¶ 222.

<sup>60</sup> *Id.* at 3374, ¶ 223.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 3374-75, ¶ 224. The Commission also noted that decision to not adopt standards was based in part on the failure of commenters to provide the level of details it had requested to devise such standards. *Id.*

<sup>63</sup> *Id.* at 3374, ¶¶ 222, 225. See also 1997 Closed Captioning NPRM, 12 FCC Rcd at 1093 ¶ 118 (“While not proposing specific standards now, we propose to monitor the closed captioning that results from the implementation of our rules and to revisit this issue in the future if we believe that standards for quality and accuracy may be warranted.”)

<sup>64</sup> See, e.g., AZN Comments at Summary page 1; NCTA Reply Comments at 3; HBO Comments at 5; MPAA Comments at 3.

<sup>65</sup> Captioning done in advance of airing a pre-recorded programming is often referred to as “off-line captioning.”

<sup>66</sup> CBS Reply Comments at 2.

captioning contracts that include quality and accuracy provisions, and “continually review the performance of captioning services that they use.”<sup>67</sup> HBO also reports having an extensive quality control program that it claims has resulted in a lower number of errors in closed captioning than “the miniscule amount of audio discrepancies.”<sup>68</sup>

21. However, comments submitted by consumer organizations, captioning agencies, and individual caption viewers reveal inconsistencies in the quality of closed captioning and support the Consumer Groups’ contention that the marketplace alone has not provided effective incentives for all providers to maintain good quality captioning.<sup>69</sup> For example, urging the adoption of quality caption standards, a substantial number of consumer commenters describe various problems with caption quality that they claim impair the accessibility of television programming by viewers who are deaf and hard of hearing, including captions that are inaccurate,<sup>70</sup> gibberish,<sup>71</sup> garbled,<sup>72</sup> butchered,<sup>73</sup> incomplete,<sup>74</sup> misspelled and/or misunderstood,<sup>75</sup> incomprehensible,<sup>76</sup> obscuring the speaker,<sup>77</sup> or significantly lag

<sup>67</sup> NCTA Comments at 3; NCTA Refresh Comments at 3.

<sup>68</sup> HBO Comments at 5. *But see* United States Telecom Association (USTelecom) Reply Comments at 5 (VPDs generally do not receive programming in advance of their transmissions to subscribers and, therefore, have no opportunity to address quality issues); DIRECTV, Inc. (DIRECTV) Refresh Comments at 4-5 (MVPDs receive captioned programming as a package and may not edit or alter the programming, making it impossible for them to correct non-technical errors).

<sup>69</sup> *See* Consumer Groups Reply Comments at 3, noting that “the market has failed to bring ubiquitous high-quality captioning,” and that, “[f]rom the perspective of the deaf and hard of hearing communities, the status quo is unacceptable.” For example, NVRC reports a long list of captioning problems that include captions appearing out of sync or with poor or “incoherent” quality, as well as programs where captions disappeared, failed to appear, or ended before the program ended. It provides the following examples of complaints from consumers: “captions totally out of sync at the beginning of *CSI*, most of a season of *Survivor* that had terrible quality, captions that did not reappear on PBS programs after pledge breaks, the first episode of [a] CNN series on the Cold War with incoherent captions, an Antique Road Show that inexplicably had no captions, an episode of *Friends* with captions that ended just a few minutes into the program, [the] complete absence of captioning from Hallmark Channel for weeks, and an episode of *Six Feet Under* that lost captions after 20 minutes.” NVRC Reply Comments at 1. *See also* Larry Sivertson Comments (captions that “bear no discernable relationship to the spoken words”); Gary Bootay Comments; Michael Buerger Comments (captions that drop off in the middle of TV shows); Lawrence Brick Comments, Joan Haber Comments and Robert Roth Comments (captions that drop off when commercials start); Jennifer Oleson Comments, Sharaine J. Rawlinson Roberts Comments, and Dana Mulvany Comments (garbled captions); Theresa Morello Comments, Jackie Williams Comments, and Carrie Morgan Comments (frequent misspellings or mangled dialogue); David Myers Comments, Libby Marks Comments, and Wayne Scott Comments (captions that block critical information on the screen); Deafness Research Foundation (DRF) Comments at 1 (faulty placement of closed captions often result in the concealment of characters’ faces or action occurring on screen).

<sup>70</sup> Joe Clark Refresh Comments.

<sup>71</sup> Lauren Wismer Refresh Comments; Terry Golson Refresh Comments (describing captioning of live shows); Nancy McClellan-Hickey Refresh Comments.

<sup>72</sup> Stephen Gensmer Refresh Comments; Bobbie Williams-Boyce Refresh Comments; Barry Siebert Refresh Comments; Cathy Muehl Refresh Comments; Consumer Groups April 25, 2011 *Ex Parte* at 1.

<sup>73</sup> Mark M. Motyka Refresh Comments.

<sup>74</sup> Joe Clark Refresh Comments; Valerie C. Coffey Refresh Comments; Consumer Groups April 25, 2011 *Ex Parte* at 1.

<sup>75</sup> Valerie C. Coffey Refresh Comments; Steven Johnson Refresh Comments; Bobbie Williams-Boyce Refresh Comments; Stephen Gensmer Refresh Comments; Oregon Communications Access Project, Hearing Loss Association of Oregon and LNS Captioning (Oregon Group) Late-filed Refresh Comments at 1 (Feb. 10, 2011); Hearing Access Program Late-filed Refresh Reply Comments at 2; Consumer Groups *Ex Parte* Letter, June 1, 2011, at 1 (Consumer Groups June 1, 2011 *Ex Parte*); *see also* WGBH/NCAM July 15, 2011 *Ex Parte*, Attachment,

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behind the spoken words they are intended to convey.<sup>78</sup> Moreover, the refreshed record demonstrates that the consumer experience has not improved during the intervening years.<sup>79</sup> Consumers maintain that the quality captioning controls put into place by some covered entities are the “rare exception,”<sup>80</sup> and suggest that, “if these controls were enacted by each and every cable program provider and national and local broadcaster, then the instant proceeding would not be necessary.”<sup>81</sup>

22. Although the record shows that some effective quality control mechanisms have been put into place during this period, the continued dissatisfaction reported in hundreds of individual accounts submitted to the Commission in this proceeding confirms that this practice does not appear to be consistent throughout the industry.<sup>82</sup> The lack of regularity in the quality of closed captioning

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Caption Accuracy Metrics: Solutions for Automatically Measuring Caption Quality, at 9-12 (citing examples of misspellings or inaccuracies in closed captions, such as “disznltz” instead of “dissidents,” “might yes” instead of “mighty,” “sun certainties” instead of “some uncertainties,” “climb togglit” instead of “climatologist,” “proswilling” instead of “process will,” “gagne” instead of “gain new,” “resident” instead of “resume,” and “photostat us quo” instead of “for the status quo”).

<sup>76</sup> Hearing Access Program Late-filed Refresh Reply Comments at 2.

<sup>77</sup> Valerie C. Coffey Refresh Comments; Hearing Access Program Late-filed Refresh Reply Comments at 2; Consumer Groups June 1, 2011 *Ex Parte* at 1 (noting “poor placement” of closed captions).

<sup>78</sup> Brandy Lee Liguori Tomlinson Refresh Comments at 1; Valerie C. Coffey Refresh Comments; Patricia Bitner Refresh Comments; Nancy McClellan-Hickey Refresh Comments; Pat Volz Refresh Comments at 1; Terry LaBarbera Refresh Comments; Barry Siebert Refresh Comments; Cathy Muehl Refresh Comments; Oregon Group Late-filed Refresh Comments at 1; Consumer Groups June 1, 2011 *Ex Parte* at 1.

<sup>79</sup> *See, e.g.*, Consumer Groups Refresh Comments at 3 (for the refresh comments, the Consumer Groups expanded to now include TDI, NAD, HLAA, ALDA, DHHCAN, the American Association of the Deaf-Blind (AADB), and the California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH)); Michael J. Boucher Refresh Comments; Don Lee Hanaumi Refresh Comments; Bob Hawbaker Refresh Comments; Guy A. L’Heureux Refresh Comments; Hugh Lafler Refresh Comments; Kim Mihan Refresh Comments; Brian Morace Refresh Comments; Daniel M. O’Toole Refresh Comments; Brian Sturgis Refresh Comments; Nicolas Tegni Refresh Comments; Kirwan Rockefeller, PhD Refresh Comments; Jennifer L. Thomas Refresh Comments; Stephen Gensmer Refresh Comments; Valerie C. Coffey Refresh Comments; Patricia Bitner Refresh Comments; Carol Ann Nemecek Refresh Comments; Catherine Berger Refresh Comments; Elizabeth Botts Refresh Comments; Kelly A. Scherf Refresh Comments; Rachel Mazique Refresh Comments; Daniel Geiger Refresh Comments; Lauren E. Storck, Ph.D. Refresh Comments; Joe Clark Refresh Comments; Hearing Access Program Late-filed Refresh Reply Comments at 4-5; Oregon Group Late-filed Refresh Comments at 2. Accordingly, consumers continue to urge the Commission to adopt captioning quality standards. *See also* Consumer Groups *Ex Parte* Letter, June 7, 2013, at 2 (Consumer Groups June 7, 2013 *Ex Parte*) (noting that “the quality of captions has become untenably poor on both television and IP-delivered programming in the absence of specific quality standards for television” and again urging the Commission to adopt such standards).

<sup>80</sup> Consumer Groups Reply Comments at 4 (suggesting that the quality captioning controls put into place by Home Box Office (HBO) is the “rare exception”).

<sup>81</sup> WGBH/NCAM Reply Comments at 2 (referring to HBO’s quality control program).

<sup>82</sup> For example, the Hearing Access Program reports extensive mistakes on three television programs. Hearing Access Program Comments at 1, 2-5 (reporting captioning errors in Martha Stewart, The Happy Elf, and the Apprentice to show that extensive spelling errors can affect the comprehensibility of a program). *See also* Hearing Access Program, *Ex Parte* Letter, November 9, 2009 (asserting that without FCC-mandated quality standards, consumers are powerless to have their complaints about poor quality addressed by the Commission); Hearing Access Program Late-filed Refresh Reply Comments at 1 (same). *See also, e.g.*, NVRC Reply Comments at 1 (reporting that it frequently receives complaints from consumers about the poor quality of captioning); DC Association of the Deaf Reply Comments at 1; American Society for Deaf Children at 1; Deafness Research Foundation Comments; Larry Sivertson Comments, Gary Bootay Comments; Michael Buerger Comments; Lawrence Brick Comments; Joan Haber Comments; Robert Roth Comments; Jennifer Oleson Comments; Sharaine

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demonstrates that the Commission's original assumptions regarding the marketplace incentives for quality captioning have not been borne out.<sup>83</sup> Contrary to the assertions of some VPDs who suggest that the number of captioning complaints is small considering the amount of captioned televised programming,<sup>84</sup> the comments filed in this proceeding, as well as the hundreds of captioning complaints received annually by the Commission, reveal widespread frustration among the viewing public with the inconsistencies in captioning quality.<sup>85</sup> Accordingly, based on the instant record, we conclude that quality standards are necessary to achieve section 713(b)'s requirement for new video programming to be "fully accessible through the provision of closed captions,"<sup>86</sup> and for "video programming providers or owners [to] maximize the accessibility of video programming first published or exhibited prior to the effective date of such regulations through the provision of closed captions. . . ."<sup>87</sup>

23. In this Report and Order, we identify captioning quality standards that are necessary to achieve compliance with the Act's accessibility requirements. We emphasize that our intent for captions to fully meet the accessibility needs of people who are deaf and hard of hearing, as directed by Congress, is no different now than it was at the time that the Commission adopted the initial closed captioning rules in 1997. Specifically, during the 1997 proceeding, the Commission, acknowledging the importance of captioning quality for viewers who rely on captions to understand a program's content, stated that "[w]e recognize that captions must provide information substantially equivalent to that of the audio portion of a video program in order to be useful and ensure accessibility to individuals with hearing disabilities. Captions also should not interfere with the viewability of the video portion of the program."<sup>88</sup> Then, as now, the Commission intended for companies to take the measures necessary to ensure that the captions would be produced as an integral part of their video production process,<sup>89</sup> and would render the captioned programming fully accessible, as required by section 713(b) of the Act. Without full access to the audio track through captions, people who are deaf and hard of hearing can only get limited amounts of information on the programs they watch. Most importantly, the absence of quality captioning can

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J. Rawlinson Roberts Comments; Dana Mulvany Comments; Theresa Morello Comments; Jackie Williams Comments; Carrie Morgan Comments; David Myers Comments; Libby Marks Comments; Wayne Scott Comments; Consumer Groups April 15, 2011 *Ex Parte* Letter, Attachment, Petition to FCC on Captioning Quality Issues, at 7 (Consumer Groups April 15, 2011 *Ex Parte*) (reporting examples of captioning mistakes for one episode of "Living with Tigers," a one-hour, pre-produced program on the Discovery Channel).

<sup>83</sup> See Consumer Groups Reply Comments at 3.

<sup>84</sup> See, e.g., NAB Refresh Comments at 6; Time Warner Refresh Reply Comments at 2, 5.

<sup>85</sup> Further, it is telling that captioning agencies also request the adoption of caption quality standards for pre-recorded programming. For example, according to Caption Perfect, although "the captioning industry, by and large, represents the opinions of those who pay them – namely the video program producers and distributors," this industry urges the FCC to "represent those who depend on captioning and not those who profit from it." Caption Perfect Comments at 3.

<sup>86</sup> 47 U.S.C. § 613(b)(1). See also *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3273, 3276, 3278, ¶¶ 1, 7, 11.

<sup>87</sup> 47 U.S.C. § 613(b)(2). See also H.R. Conf. Rep. 104-458 at 183-184 ("It is the goal of the House to ensure that all Americans ultimately have access to video services and programs, particularly as video programming becomes an increasingly important part of the home, school and workplace."). See also WGBH/NCAM Comments at 7-8 (Without caption quality guidelines, consumers will be forced to "accept the least-common denominator, lowest-level of service, determined only by how little a program provider is willing to pay."); Consumer Groups Reply Comments at 3-4; AG Bell Comments at 2; ASDC Comments at 1; DHHCAN Reply Comments at 1.

<sup>88</sup> *1997 Closed Captioning NPRM*, 12 FCC Rcd at 1091, ¶1111.

<sup>89</sup> *Id.* at 1092, ¶ 118 ("We further believe that the adoption of rules that require closed captioning as an integral part of video programming will provide a marketplace incentive for program providers and producers to distribute the best quality captioning possible.").

significantly impact the ability of people who are deaf and hard of hearing to understand news, public affairs, entertainment, weather and sports programming to the same extent as the rest of the public. The approach we now adopt will help ensure the uniform provision of good quality captions as intended by Congress, pursuant to section 713(b).<sup>90</sup>

24. The Commission applauds entities that have taken the initiative to establish closed captioning quality control systems that provide high quality captioning for viewers who depend on this technology for their program viewing. We expect that the quality standards we now adopt will have little impact on the operations of such entities; rather these standards are intended to ensure that covered entities that are *not* currently taking quality standards into consideration will do so, in order for their video programming to be fully accessible to all viewers as required by section 713(b) of the Act. To the extent that caption quality problems persist, these standards will also provide the Commission with a mechanism for addressing consumer complaints about such problems.

25. The need for captioning quality standards takes on an added dimension in light of passage of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA).<sup>91</sup> Section 202 of this legislation requires the Commission to mandate closed captioning on video programming delivered using Internet protocol (“IP”) when such programming is shown on television with captions after the effective date of the Commission rules.<sup>92</sup> In fulfillment of this directive, in January 2012, the Commission adopted rules requiring that captioning of IP-delivered programs be of at least the same quality as when such programs are shown on television.<sup>93</sup> IP-delivered programming that is captioned

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<sup>90</sup> We are not persuaded by some commenters’ suggestion that quality standards will impede the development of new methods of captioning, including speech recognition software. *See e.g.*, MPAA Comments at 3 (a government imposed standard may encourage the video programming industry to prematurely abandon this emerging technology and rely wholly on existing closed captioning vendors for the foreseeable future); NBC Telemundo Comments at 16 (technological solutions have made significant advancement over the past few years; however, progress in technology can be delayed or stopped by regulation that poses significant and unexpected challenges to implementation of that technology); NAB Comments at 17 (cost-efficient technologies, such as voice-recognition software, still need the opportunity to develop; establishing specific accuracy benchmarks and onerous monitoring requirements will frustrate the development of such new technologies). Rather, we expect that the quality standards we now adopt will continue to spur innovation to improve the effectiveness and accuracy of captioning technologies. *See e.g.*, AMIC Reply Comments at 1-2 (such requirements will raise the bar for new technology, thus compelling development and innovation); WGBH/NCAM Reply Comments at 3. As we have previously noted, rather than discourage innovation, in many instances, accessibility challenges spur innovative solutions. *See Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010; Consumer Electronics Associations; National Cable & Telecommunications Association; Entertainment Software Association; Petitions for Class Waivers of Sections 716 and 717 of the Communications Act and Part 14 of the Commission’s Rules Requiring Access to Advanced Communications Services and Equipment by People with Disabilities*, CG Docket No. 10-213, Order, 27 FCC Rcd 12970, 12992, n.184 (CGB 2012) (noting as an example, talking caller ID systems, which enable people who are blind to ascertain the identities of incoming callers).

<sup>91</sup> Pub. L. No. 111-260, 124 Stat. 2751 (Oct. 8, 2010), *technical amendments*, Pub. L. No. 111-265, 124 Stat. 2795 (Oct. 8, 2010).

<sup>92</sup> *Id.* § 202.

<sup>93</sup> *See IP Captioning Report and Order*, 27 FCC Rcd at 812, ¶ 37; 47 C.F.R. § 79.4(c)(1)(i) (placing the obligation on video programming owners to send program files to IP-based video programming providers or VPDs with captions of at least the same quality as the television captions) and 47 C.F.R. § 79.4(c)(2)(i) (placing the obligation on IP-based VPDs to enable the rendering or pass through of captions to the end user while maintaining the quality of the captions provided by the video programming owner). *See also* First Report of the Video Programming Accessibility Advisory Committee (VPAAC) on the Twenty-First Century Communications and Video Accessibility Act of 2010—Closed Captioning of Video Programming Delivered Using Internet Protocol, [http://transition.fcc.gov/cgb/dro/VPAAC/First\\_VPAAC\\_Report\\_to\\_the\\_FCC\\_7-11-11\\_FINAL.pdf](http://transition.fcc.gov/cgb/dro/VPAAC/First_VPAAC_Report_to_the_FCC_7-11-11_FINAL.pdf), at 13-14 (last viewed, June 18, 2013) (VPAAC Report) (recommending a consumer experience for IP-delivered programming that

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pursuant to these rules often is widely distributed on Internet web sites, which make the programming available to any viewer, at any time. This means that to the extent that the televised version of this programming contains captioning errors, such errors will be carried forward online and shown time and again to the viewing public.<sup>94</sup> The expanded availability of such programming makes ensuring the quality of captioning on shows aired on television in the first instance all the more important.<sup>95</sup>

## 2. Accuracy, Synchronicity, Completeness and Placement

26. We agree with the Consumer Groups that the primary objective of our closed captioning quality standards should be to ensure that video programming is as “understandable to the non-hearing person as it is to the person who is able to hear the audio that accompanies it.”<sup>96</sup> Because, as noted by AG Bell, captioning is intended to “replicate the hearing listener’s aural experience,”<sup>97</sup> our overarching goal is to ensure that the captioning required by our rules fully and effectively conveys the content of such programming for people who are deaf and hard of hearing to the same extent that the audio track conveys this content to people who are able to hear. To achieve this goal, we amend our rules, as described below, to require that captions (1) accurately reflect what is in the program’s audio track by matching the dialogue, music, and sounds, and identify the speakers; (2) are delivered synchronously with the corresponding dialogue and other sounds at a speed that can be read by viewers; (3) are complete for the entire program; and (4) do not obscure important on-screen information and are not obscured by other information on the screen.

27. We believe that each of these four components is essential to ensure that video programming is fully accessible to people who are deaf and hard of hearing through the provision of closed captions, and that these standards will ensure that the visual information received through captions is consistent with the information provided through the audio track of the programming.<sup>98</sup> As discussed

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is “equal to, if not better than, the experience provided as the content was originally aired on television” and specifying completeness, placement, accuracy and timing as part of the consumer experience).

<sup>94</sup> See Consumer Groups, Report on the State of Captioning of Internet Protocol-Delivered Video Programming, MB Docket No. 11-154, CG Docket No. 05-231, at 14-15 (May 16, 2013) (Consumer Groups May 16, 2013 Report) (reporting “numerous instances of entirely uncaptioned speech, misspelled or incorrect words, captions displayed out of sync with corresponding visual events, captions displayed in illegibly small font, and captions that displayed only a single word or letter at a time”); Consumer Groups, Report on Initial Compliance with the Commission’s IP Closed Captioning Rules, MB Docket No. 11-154, at 12-13 (December 20, 2012) (“Many programs distributed with captions contained serious quality issues that rendered them partially or wholly inaccessible to viewers who are deaf or hard of hearing.”); Consumer Groups Comments in response to Notice of Proposed Rulemaking, MB Docket No. 11-154, at 9-10 (October 18, 2011) (stating that “[c]aptions on television are often incomplete and inaccurate; if VPDs/VPPs are permitted to distribute videos on the Internet with further degraded captions, consumers who are deaf or hard of hearing will be unfairly deprived of essential information and cultural participation afforded their hearing peers.”); Consumer Groups April 25, 2011 *Ex Parte* at 2 (emphasizing that “bad caption quality would simply be transferred to the Internet without improvement” under the CVAA).

<sup>95</sup> See Consumer Groups June 7, 2013 *Ex Parte* at 2, n.7 (noting that “the implementation of television caption quality standards would permit the Commission to address issues with the quality of captions on IP-delivered programming”); Consumer Groups May 16, 2013 Report at 20-22 (urging the Commission to act in this proceeding and arguing that “[o]nce television quality standards are in place, the IP captioning rules will accordingly require equally high-quality IP captions . . . and ensure that deaf and hard of hearing consumers are afforded equal access to IP-delivered video programming”).

<sup>96</sup> Consumer Groups Reply Comments at 6, quoting AMIC Comments at 5, 3-4; Consumer Groups Reply Comments at 3-4 (rather than look at the volume of errors, our focus should be on the understandability of a program).

<sup>97</sup> AG Bell Comments at 2.

<sup>98</sup> See e.g., ASDC Comments at 1 (captioning quality should be consistent with the audio quality that hearing viewers expect).

earlier, the 2004 Consumer Groups Petition proposed non-technical quality standards for accuracy, synchronicity, completeness and placement.<sup>99</sup> Additionally the Captioning Key,<sup>100</sup> the Captioning Vendors,<sup>101</sup> and other countries<sup>102</sup> all have captioning standards generally based on the components contained in these four standards. Our focus on these components of captioning quality also is consistent with the *IP Captioning Report and Order*, wherein the Commission determined that in evaluating whether captioning of programming shown on the Internet is of at least the same quality as the television captions provided for that programming, it will consider such factors as completeness, placement accuracy and timing.<sup>103</sup> As explained below, for purposes of assessing compliance with respect to each of these components, we will consider the type of programming at issue, *i.e.*, pre-recorded, live, or near live programming, and thereby take into account, among other things, the time available to review and edit captions on the particular type of programming prior to its distribution and display to viewers.

**a. Accuracy**

28. In order to be accurate, captions must match the spoken words in the dialogue, in their original language (English or Spanish), to the fullest extent possible<sup>104</sup> and include full lyrics when provided on the audio track.<sup>105</sup> Specifically, to accurately convey the dialogue in a program, closed

<sup>99</sup> See 2004 Petition at 33-34, 35-39. See also ASDC Comments at 1 (urging the Commission to adopt non-technical quality standards for closed captioning, including standards for completeness, accuracy, readability, and synchronicity); James Johnson Comments (same); NDRN Comments at 2 (urging the Commission to adopt quality standards that require closed captions to be accurate); Sheila Conlon Mentkowski Comments (urging the Commission to adopt non-technical quality standards for closed captioning, including standards for completeness, accuracy, readability, and synchronicity); Hearing Access Program Late-filed Refresh Reply Comments (urging the Commission to adopt closed caption quality standards, including standards for accuracy, synchronization, and placement); Inclusive Technologies Refresh Comments at 1 (urging the Commission to adopt nontechnical quality standards for closed captioning, including standards for accuracy and timeliness).

<sup>100</sup> The Captioning Key, a set of caption guidelines developed by the U.S. Department of Education's Described and Captioned Media Program (DCMP), are based on the general principles of accuracy, synchronicity, completeness, and placement. Captioning agencies wishing to become a DCMP vendor have their work evaluated according to the Key's guidelines. See DCMP, *2011 Captioning Key, Guidelines and Preferred Techniques* ("2011 Captioning Key") at 1, 3, <http://www.dcmp.org/captioningkey/captioning-key.pdf>. (last visited January 29, 2014); update at DCMP, Captioning Key, [www.captioningkey.org](http://www.captioningkey.org) (follow "Caption Quality" hyperlink) (last visited February 3, 2014) (maintaining general principles but recategorizing them).

<sup>101</sup> The Captioning Vendors are an ad-hoc industry group that includes CaptionMax, National Captioning Institute (NCI), VITAC and WGBH/NCAM. See NCI January 1, 2014 Comments, Attachment, Captioning Vendor Suggested Best Practices at 4 (Captioning Vendors Best Practices).

<sup>102</sup> The Australian Communications and Media Authority (ACMA) sets standards for closed captioning based on readability, including placement; accuracy; and comprehensibility, including synchronicity. ACMA Broadcasting Services Television Captioning Standard 2013 (May 24, 2013) at §§ 7-9; see also Broadcasting Regulatory Policy 2012-362 (Can) (setting forth the Canadian Radio-television and Telecommunication Commission regulations for quality standards for English language closed captioning); Broadcasting Regulatory Policy CRTC 2011-741, as amended by Broadcasting Regulatory Policy 2011-741-1 (Can) (setting forth the Canadian Radio-television and Telecommunication Commission regulations for quality standards for French language closed captioning).

<sup>103</sup> *IP Captioning Report and Order*, 27 FCC Rcd at 812, ¶ 37. We now use the term "synchronicity" rather than "timing" as was used in the *IP Captioning Report and Order*. See also VPAAC Report, [http://transition.fcc.gov/cgb/dro/VPAAC/First\\_VPAAC\\_Report\\_to\\_the\\_FCC\\_7-11-11\\_FINAL.pdf](http://transition.fcc.gov/cgb/dro/VPAAC/First_VPAAC_Report_to_the_FCC_7-11-11_FINAL.pdf), at 13-14 (recommending to the Commission consideration of such factors as completeness, placement, accuracy and timing to determine captioning quality).

<sup>104</sup> See, e.g., WGBH/NCAM Comments at 8; NCI Comments at 4; Consumer Groups Reply Comments at 7; Consumer Groups Refresh Comments at 5.

<sup>105</sup> Only programming that consists primarily of non-vocal music is exempt from our rules. See 47 C.F.R. § 79.1(d)(10).

captions need to contain all words in the order spoken, without paraphrasing<sup>106</sup> or substituting words for proper names and places,<sup>107</sup> contain proper spelling (including appropriate homophones, such as “their,” not “there”), and provide, as needed to understand the program, appropriate punctuation and capitalization to reflect natural linguistic breaks and the flow of the dialogue,<sup>108</sup> the proper tense, and the accurate representation of numbers (including currency figures with appropriate symbols or words).<sup>109</sup> Accurate captions do not rewrite dialogue, or use synonyms to replace actual dialogue because this fails to capture the program’s content and nuances.<sup>110</sup> To this end, where necessary to understand a program’s content, accurate captions also convey the manner and tone of the speaker’s voice.<sup>111</sup> Similarly, where slang or grammatical errors are intentionally used in a program’s dialogue, accuracy dictates that captions mirror such slang and errors, so that viewers can fully understand the speaker’s intent and message.<sup>112</sup> Although we recognize that utterances (*e.g.*, “um”) and false starts may not be as critical to a program’s content, accuracy also requires that these be captioned if needed for the viewer to understand the program.<sup>113</sup>

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<sup>106</sup> If the captions paraphrase rather than present verbatim the dialogue of a dramatic or comedic performance, the viewer loses much of the impact of that performance. Accordingly, paraphrasing generally should not be used where the entirety of the dialogue can be conveyed through captions. Nevertheless, we understand that in certain circumstances, paraphrasing may be necessary to ensure that the intended audience can capture the content of the program. For example, at times, paraphrasing may be needed if time does not permit providing verbatim captions, such as when the time lag between when the dialogue occurs and the captions appear on live programming would prevent complete captioning of the program’s audio content unless summarization occurs. See ACMA Broadcasting Services Television Captioning Standard 2013 at § 8(b)(iii) (Stating one factor for determining the accuracy of closed captions: “[W]here it is not possible for the captions of spoken content to be verbatim, whether the captions reflect the actual meaning of the spoken content”).

<sup>107</sup> For example, if the speaker said “David Cameron,” the caption should not substitute “the prime minister of the United Kingdom.”

<sup>108</sup> See ACMA Broadcasting Services Television Captioning Standard 2013 at § 7(a) containing a similar requirement. WGBH/NCAM mentions two commonly accepted stylebooks that may be used for this purpose. See WGBH/NCAM Comments at 8 (noting the “Elements of Style” by Strunk and White and the “Chicago Manual of Style”).

<sup>109</sup> See WGBH/NCAM, Caption Accuracy Metric Projects, Caption Viewer Survey: Error Ranking of Real-time Captions in Live Television News Programs, WGBH/NCAM *Ex Parte* Survey, December, 20, 2010, at 7-15; Caption Colorado Comments at 7; Caption Colorado Refresh Comments at 13-23; MCS Refresh Comments at 11.

<sup>110</sup> In this regard, except as prohibited by 47 C.F.R. § 73.3999, which restricts the broadcast of obscene and indecent material pursuant to 18 U.S.C. § 1464, in which case both aural and closed captioned programming must be treated equivalently, aural words and phrases that may appear objectionable to the program owner, provider or VPD or to the captioning agency when put in writing must nevertheless be captioned verbatim if made audible to the general public in a program’s dialogue. A person who relies upon captioning is denied an equivalent viewing experience to a person who can hear the dialogue when the program owner, provider or captioner chooses to make word substitutions. See, *e.g.*, Joe Clark Refresh Comments at 18; Elizabeth Mayton *Ex Parte* Letter, August 1, 2011.

<sup>111</sup> See *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3273, ¶ 2. See also AMIC Comments at 5-6; ACMA Broadcasting Services Television Captioning Standard 2013 at § 8(b); *2011 Captioning Key* at 20 (“If the speaker is not visible onscreen, or visual cues that denote the emotional state are not shown, indicate the speaker’s emotion.”); see also DCMP, Captioning Key, [www.captionkey.org](http://www.captionkey.org) (follow “Special Considerations” hyperlink) (last visited February 3, 2014). Speaker intonation provides information about the attitudes and emotions of the speaker. For example, captions should indicate when a speaker is yelling, whispering, or crying.

<sup>112</sup> See WGBH/NCAM Comments at 8 (“Grammar should mirror audio (if incorrect grammar is spoken, it should be reflected in the text)”; MPAA Comments at 7 (“Dialogue in video programming is comprised of everyday speech, including half-sentences, interjections, and slang.”); Disney Reply Comments at 6 (“most video programming involves dialogue or everyday speech, which includes slang, incomplete sentences and grammatical errors.”).

<sup>113</sup> See Hearing Access Program Late-filed Refresh Reply Comments, Attachment, The Benefits of Closed Captioning Commercials (December 2010) (ANA Recommendations) at 3 (recommending inclusion of “ums”).

29. In order to be accurate, captions must also provide nonverbal information that is not observable, such as who is speaking, the existence of music (even when there are no lyrics to be captioned), sound effects, and audience reaction,<sup>114</sup> to the greatest extent possible, given the nature of the program.<sup>115</sup> If there is more than one speaker, the proper placement of captions dictates that each speaker be identified, through caption identification or caption placement, so that viewers can understand who is speaking at any given time.<sup>116</sup> When a speaker is not on the screen, identification of that individual in the caption text must also be provided if viewers not using captions are able, from the program's audio content, to discern the speaker's identity.<sup>117</sup> Finally, in order to be considered accurate, captions must also be legible, with appropriate spacing between words to allow for readability.

#### b. Synchronicity

30. In order to be synchronous, captions must coincide with their corresponding spoken words and sounds to the greatest extent possible, given the type of the programming.<sup>118</sup> This means that captions should begin to appear at the time that the corresponding speech or sounds begin and end approximately when the speech or sounds end.<sup>119</sup> In addition, synchronicity requires that captions be displayed on the screen at a speed that can be read by viewers.<sup>120</sup> The requirement for synchronous captions is consistent with the Commission's prior statement, in the *1997 Closed Captioning Report and Order*, that "captions not synchronized with the video portion of the program. . . deny accessibility to persons with hearing disabilities. . ."<sup>121</sup> Similarly, in the *Closed Captioning Reconsideration Order*, the Commission directed that whenever rebroadcast programming is edited,<sup>122</sup> captions be reformatted if necessary to ensure that they are properly synchronized with the edited programming.<sup>123</sup> We agree with

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<sup>114</sup> Audience reaction includes, for example, cheers, applause and laughter.

<sup>115</sup> See ANA Recommendations at 3 (recommending the identification of all sound effects); WGBH/NCAM Comments at 10 (recommending identification of non-verbal sounds). In addition, although we continue not to require captioning of words spoken in languages other than English and Spanish, in order to be accurate, captions also must provide some indication that the dialogue contains words in another language, so that viewers who cannot hear dialogue understand why captions are not being provided when they see a person talking during a program.

<sup>116</sup> See WGBH/NCAM Comments at 9-10; Caption Colorado Comments at 10; ANA Recommendations at 4. We understand, however, that providing speaker identification may be difficult at times for live and near-live programming.

<sup>117</sup> See AMIC Comments at 6; WGBH/NCAM Comments at 9-10; Valerie Coffey Refresh Comments; ANA Recommendations at 3.

<sup>118</sup> See *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3368, ¶ 211. Just as the captions may not lag behind the spoken words, the spoken words may not lag behind the captions.

<sup>119</sup> See generally, Ofcom Code on Television Access Services (Ofcom Code), ¶A4.18, <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/tv-access-services/> (last visited February 11, 2014).

<sup>120</sup> While we recognize that everyone reads at a different speed, captions should not blink on and off at a speed that is too quickly to read or otherwise be paced at a speed that is difficult to read.

<sup>121</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3368, ¶ 211.

<sup>122</sup> Rebroadcast programs (*i.e.* reruns) are often edited to allow for additional commercial time.

<sup>123</sup> See *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 20008 and 20009, ¶¶ 80 and 82 (captions on edited programming must be reformatted if such captioning is necessary for a VPD to meet its captioning obligations – *i.e.*, 100 percent of all new, non-exempt English and Spanish language programming and 75 percent of all English and Spanish language pre-rule programming).

commenters that when captions are not synchronized with the program's audio track, it is difficult, and sometimes impossible, to follow the content of the program.<sup>124</sup>

### c. Program Completeness

31. In order for a program's captions to be complete, captions must run from the beginning to the end of the program, to the fullest extent possible. This standard is consistent with the *1997 Closed Captioning Report and Order*, in which the Commission required "all video programming providers, regardless of distribution technology, to ensure that programming with closed captions is delivered to viewers in a complete manner."<sup>125</sup> The Commission explained that when captions end before the end of the programming, this "den[ies] accessibility to persons with hearing disabilities even when captioning seems to be available."<sup>126</sup> To address this problem, the Commission went on to adopt the pass-through rule, requiring VPDs to deliver all programming received from an origination source containing closed captioning to television households with the original closed captioning data intact.<sup>127</sup> Notwithstanding these requirements, Petitioners and several commenters to this proceeding raise concerns about captions that drop off in the middle or just prior to the end of programming.<sup>128</sup> We now affirm that in order for new video programming to be considered "fully accessible" to viewers<sup>129</sup> and for captions on pre-rule programming to maximize accessibility,<sup>130</sup> a program's captions must be complete for the entirety of the program.

### d. Placement

32. Some commenters raise concerns about the placement of captions and more specifically, the tendency of some captions to obscure important textual information, moving action, or characters' faces.<sup>131</sup> Consumers do not have the technical capability to relocate captions on their screens when

<sup>124</sup> See Oregon Group Late-filed Refresh Comments at 1 (lack of synchronous timing is especially difficult for those with residual hearing who rely upon closed captions to fully understand everything that is spoken); Bob Hawbaker Refresh Comments (when roll-up captions result in timing being off, it is difficult to tell who said what). The requirement for captions to appear simultaneously with their corresponding spoken words is also consistent with guidelines set forth in the *2011 Captioning Key*, which states: "Captions should closely match the original audio. Maintaining the textual unity with picture and sound ensures clarity, and can be especially important to hard of hearing viewers." *2011 Captioning Key* at 20; DCMP, Captioning Key, [www.captioningkey.org](http://www.captioningkey.org) (follow "Synchronization" hyperlink) (last visited February 3, 2014).

<sup>125</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3368, ¶ 211.

<sup>126</sup> *Id.* at 3368-69, ¶ 211.

<sup>127</sup> 47 C.F.R. § 79.1(c). See also *Closed Captioning and Video Description of Video Programming; Implementation of Section 305 of the Telecommunications Act of 1996; Accessibility of Emergency Programming*, Second Report and Order, MM Docket No. 95-176, 15 FCC Rcd 6615, 6622 n.48 (2000) (*Second Report & Order*) (noting that any loss of captions prior to the end of a program would be a violation of the pass-through rule).

<sup>128</sup> See 2004 Petition at 26 (captions being turned off ten minutes before the end of national network programming). See also AMIC Comments at 13-18 (reports captions that disappear one hour into a two hour movie); Oregon Group Late-filed Refresh Comments at 1; NVRC Reply Comments at 1; Michael Buerger Comments; Gary Bootay Comments; Lawrence Brick Comments; Joan Haber Comments; Robert Roth Comments; NCI *Ex Parte* Letter, December 12, 2013, Attachment, NCIFYI, at 4 (reporting that "modem drops" are a cause of caption service disruptions, "resulting in loss of captions for minutes at a time" that can occur "once to several times a day").

<sup>129</sup> See 47 U.S.C. § 613(b)(1).

<sup>130</sup> See 47 U.S.C. § 613(b)(2).

<sup>131</sup> See, e.g., Caption Perfect Comments at 2; Consumer Groups Reply Comments at 6; Wayne Scott Comments (closed captions for ads block the TV listings); Valerie C. Coffey Refresh Reply Comments ("captions are often displayed across the center of the screen, obscuring the lips and face of the speaker"); Hearing Access Program Late-filed Refresh Reply Comments at 2, 4; DISH Network and DIRECTV *Ex Parte* Letter, December 9, 2013, at 1

(continued...)

captions cause these obstructions.<sup>132</sup> Consistent with the goal of ensuring that programming is fully accessible to those who rely on captions to the same extent that it is available to other viewers through a program's audio stream, captions should not block other important visual content on the screen including, but not limited to, character faces, featured text (e.g., weather or other news updates, graphics and credits), and other information that is essential to understanding a program's content when the closed captioning feature is activated.<sup>133</sup> Although we understand that it is technically possible for viewers to turn off the closed caption function when it blocks other material, requiring viewers who rely on captions to do this would deny them access to the same information that other viewers receive in the audio track.<sup>134</sup>

33. Appropriate caption placement also dictates that the caption font be sized appropriately for legibility<sup>135</sup> and that captions be adequately positioned so they do not run off the edge of the video screen. Each of these features is basic to providing individuals who are deaf and hard of hearing "with the same opportunity to share in the benefits provided by television programming that is available to others" as required by section 713 of the Act, and as confirmed by the Commission in the *1997 Closed Captioning Report and Order*.<sup>136</sup>

### 3. Application of Standards to Types of Programming

34. We discuss below standards for accuracy, synchronicity, program completeness, and placement as they apply to different types of programming: pre-recorded, live, and near-live, as well as program re-feeds of live and near-live programming. As we explain below, because of the greater opportunity for reviewing and editing captions on pre-recorded programming, we believe pre-recorded programming is capable of achieving full compliance with the above standards, except for *de minimis* errors. For purposes of addressing captioning complaints with respect to live and near-live programming, we will take into consideration the lack of an opportunity to review and edit captions on these types of

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(DISH Network and DIRECTV December 9, 2013 *Ex Parte*) (stating that "placement of captioning on programming can be especially difficult when there is important visual information on most of the screen (e.g., weather bulletins, sports scores, news crawls, etc.)").

<sup>132</sup> This capability was not built into the standards for built-in television decoders. See 47 C.F.R. § 79.102; *DTV Closed Captioning Order*, 15 FCC Rcd at 16798-16799, ¶¶ 26-27.

<sup>133</sup> This is consistent with section 79.2(b)(4) of our rules, which covers emergency broadcasts and states that VPDs must ensure that "[e]mergency information does not block any closed captioning and any closed captioning does not block any emergency information provided by means other than closed captioning." 47 C.F.R. § 79.2(b)(4).

<sup>134</sup> See ANA Recommendations at 4. Similarly, the 2005 Screen Actors Guild Television Agreement (2005 SAG TV Agreement) provides that "credits shall be in a readily readable color, size and speed" and limits over what images credits may be superimposed." 2005 SAG TV Agreement § 54 found at <http://www.sag.org/files/sag/2005TVAgreement.pdf> (last visited January 29, 2014).

<sup>135</sup> In 2000, the Commission adopted EIA-708-B technical standards for the display of closed captioning to allow viewers to choose and alter the color, size and font of their captioning. *DTV Closed Captioning Order*, 15 FCC Rcd at 16795-16798, ¶¶ 20-25. More recently, however, in a proceeding to implement CVAA mandates requiring user interfaces to be accessible on video programming devices, commenters wrote of their concerns about "ongoing problems that consumers have in finding and controlling these display features." The Commission presently is now reviewing these concerns in response to a further notice of proposed rulemaking seeking feedback on the ease of accessing such captioning quality tools by consumers. *Accessibility of User Interfaces, and Video Programming Guides and Menus; 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*, MB Docket No. 12-108, MB Docket No. 12-107, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 17330, 17416, ¶ 142 (2013).

<sup>136</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3276-77, ¶ 7, citing H.R. Report 104-204, 104<sup>th</sup> Congress, 1<sup>st</sup> Sess. at 113-14 (1995) (noting Congress' concern for "video programming through all delivery systems [to] be accessible. . ."). See also, 2007 CAC Report, § II.B at 11, *supra* at section III.C.

programming. With this in mind, our standards are crafted in a manner to ensure that captions make all types of programming understandable to the fullest extent possible, so that viewers who rely on captions have a comparable viewing experience to those who can hear the audio portion of the programming. We believe that the standards we adopt herein appropriately take into consideration the limitations that may be present when captioning certain types of programming, while generally ensuring the accessibility of video programming for people who are deaf and hard of hearing.

**a. Pre-Recorded Programming**

35. Pre-recorded programming is programming that is produced, recorded, and edited in advance of its first airing on television.<sup>137</sup> Generally, captioning done for pre-recorded programming is referred to as offline captioning.<sup>138</sup> Offline captioning is the process of adding captions to a program after it has been produced,<sup>139</sup> and combining these captions with the program before it airs.<sup>140</sup> Several commenters, including several captioning vendors,<sup>141</sup> confirm that when the preparation of captions occurs in advance of a program's airing, as an integral part of the pre-distribution program production process, sufficient time exists to ensure the accuracy, synchronicity, program completeness, and appropriate placement of the captions produced.<sup>142</sup> For example, CBS requires "multiple reviews of the finished product, by the captioning agency prior to delivery and again by CBS personnel after delivery" for offline captioned programs.<sup>143</sup> Similarly WGBH/NCAM proposes 100 percent accuracy for pre-recorded programming,<sup>144</sup> Caption Colorado argues that pre-recorded programming should be nearly flawless,<sup>145</sup> and NCI proposes an error rate that is "virtually nil" for pre-recorded programming.<sup>146</sup> Because the period between the time that a captioning agency receives the program and the airing date is sufficient to allow the careful review and editing of captions, as well as their proper timing and placement, captioning will be considered to comply with our captioning quality standards if it contains no other errors than those we consider *de minimis*, as explained herein.<sup>147</sup> We intend to apply the *de minimis*

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<sup>137</sup> See 47 C.F.R. § 79.4(a)(9) (defining prerecorded programming in the context of video programming delivered using Internet protocol as video programming that is not "live" or "near live").

<sup>138</sup> See NCTA *Ex Parte* Letter, January 27, 2014 (NCTA January 27, 2014 *Ex Parte*), Attachment, NCTA Best Practices, at 2 (NCTA Best Practices); Captioning Vendors Best Practices at 3.

<sup>139</sup> NCI, Prerecorded Captioning, <http://www.ncicap.org/services/prerecorded-captioning/> (last visited January 29, 2014).

<sup>140</sup> See NCTA Best Practices at 1.

<sup>141</sup> We define "captioning vendor" to mean any entity that is responsible for providing captioning services to a video programmer. Sometimes this Report and Order or the Best Practices contained herein also refer to a captioning vendor as a captioning service provider.

<sup>142</sup> See, e.g., NCTA Best Practices at 1 (certain quality control measures may be used with offline captioning that are not available or feasible for real-time captioning); Caption Perfect Comments at 2; NCI Comments at 4; MCS Comments at 10.

<sup>143</sup> CBS Reply Comments at 2.

<sup>144</sup> WGBH/NCAM Comments at 8.

<sup>145</sup> Caption Colorado Comments at 7.

<sup>146</sup> NCI Comments at 4. See also Caption Perfect Comments at 2 (99.9% accuracy for pre-recorded programming); MCS Refresh Comments at 12 (99.9% accuracy for pre-recorded programming).

<sup>147</sup> See A.G. Bell Comments at 4 (proposing 100% perfect for pre-recorded programming); New Jersey Division on Civil Rights Late-filed Comments at 3 (there should be no errors for prerecorded programming); NVRC Reply Comments at 4 (pre-recorded programming should be completely accurate); Dr. P.T. Newton Comments, Jay Wyant Comments and Jack Cassell Comments (99.8% accuracy for pre-recorded programming); Consumer Groups *Ex Parte* Letter, December 24, 2013, at 2.

standard in a flexible manner, consistent with our past approach, rather than specifying particular criteria that we will apply to make a *de minimis* determination.<sup>148</sup> Specifically, in determining whether a failure to comply with the captioning quality standards is *de minimis*, we will consider the particular circumstances presented, including the type of failure, the reason for the failure, whether the failure was one-time or continuing, the degree to which the program was understandable despite the errors, and the time frame within which corrective action was taken to prevent such failures from reoccurring.<sup>149</sup>

36. We believe this approach is consistent with the Commission's approach in the *Closed Captioning Reconsideration Order*, in which the Commission stated its intent to enforce the closed captioning requirements "in a manner that ensures that we do not penalize video programming distributors that are generally in compliance with the rules except for a *de minimis* amount of uncaptioned programming."<sup>150</sup> In considering whether a violation of our caption quality requirements has occurred with respect to pre-recorded programming, the Commission further stated that it would consider any evidence provided by the video programming distributor in response to a complaint that demonstrates that the lack of captioning was *de minimis* and reasonable under the circumstances.<sup>151</sup> The Commission again followed this approach in the *IP Captioning Report and Order*, wherein it adopted a rule providing that a "*de minimis* failure to comply with Section 79.4 of our rules shall not be treated as a violation of the requirements."<sup>152</sup>

37. *Use of real-time captioning techniques for pre-recorded programming.* Although off-line captioning techniques are generally used for pre-recorded programming, at times programming providers use real-time captioning techniques, which generates and adds captions to their pre-recorded programming as it airs to the public. Some commenters suggest that real-time captioning has been used for pre-recorded programs to save costs<sup>153</sup> or to ensure that programming is captioned when it is produced on a tight schedule.<sup>154</sup> NCTA indicates that real-time captioning is also used when there are technical problems with the caption file, changes need to be made to later network feeds, or there are proprietary considerations – presumably with revealing the outcome of a program before it is aired.<sup>155</sup> Generally, commenters acknowledge the shortcomings of using real-time captioning methods for pre-recorded programming.<sup>156</sup> Indeed, the record reflects that real-time captioning methods can result in a greater

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<sup>148</sup> See *IP Captioning Report and Order*, 27 FCC Rcd at 830-831, ¶ 73; *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 19979, ¶ 10.

<sup>149</sup> See *IP Captioning Report and Order*, 27 FCC Rcd at 830, ¶ 72; *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 19979, ¶ 10. For example, with respect to accuracy, a *de minimis* error might be occasionally misspelled words that do not interfere with the ability to understand the program's content.

<sup>150</sup> *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 19979, ¶ 10.

<sup>151</sup> *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 19979, ¶ 10. See also *IP Captioning Report and Order*, 27 FCC Rcd at 831, ¶ 73.

<sup>152</sup> *IP Captioning Report and Order*, 27 FCC Rcd at 830-831, ¶ 73. See also 47 C.F.R. § 79.4(c)(3).

<sup>153</sup> Real-time captioning costs less than off-line captioning due to the time it takes to produce off-line captioning. See AG Bell Comments at 6; Caption Perfect Comments at 2.

<sup>154</sup> See AZN Comments at 20 (the use of real-time captioning is necessary when programmers are faced with a tight production schedule, and barring the use of steno-captioning for pre-recorded programming could have the unintended effect of prohibiting an enormous amount of programming that is produced on a tight production schedule).

<sup>155</sup> NCTA Best Practices at 2-3.

<sup>156</sup> See AG Bell Comments at 6; Caption Perfect Comments at 2; Bob Hawbaker Refresh Comments; NCTA Best Practices (certain quality control measures are not available for real-time captioning).

number of errors (because there is no opportunity to proofread the captions),<sup>157</sup> greater omissions than captions carefully prepared and reviewed in advance,<sup>158</sup> and greater lag time between when the words are spoken and captions appear, making it difficult to follow who is speaking during a program.<sup>159</sup> In addition, AG Bell and Caption Perfect note that, at times, the use of real-time captioning methods can have the unintended consequences of obscuring significant visual elements in a program and eliminating speaker identification.<sup>160</sup>

38. In order to minimize any additional burden on and provide flexibility to the captioning industry and to promote innovation in the use of captioning techniques, the captioning quality standards we adopt herein generally are aimed at functional requirements rather than specifying particular captioning techniques. Nevertheless, based on comments submitted in the record about the limitations of real-time captioning methods that are now available,<sup>161</sup> we believe that, as a practical matter, such methods may not be sufficient to achieve full compliance with the captioning standards that we now adopt for pre-recorded programming. NCTA has proposed Best Practices that state that a programmer will ensure that pre-recorded programs generally are captioned offline before airing except when, “in the exercise of a programmer’s commercially reasonable judgment,” circumstances require real-time or live display techniques for pre-recorded programming.<sup>162</sup> Accordingly, we expect that as a general matter the use of real-time captioning methods for pre-recorded programming will be limited to only those situations when it is necessary to do so. As noted below,<sup>163</sup> NCTA also proposes, and we agree on, the need for a review of the state of captioning quality by interested parties after the captioning quality standards have been in effect for a period of one year. At that time, as part of the overall review of the Best Practices discussed below, we will review the extent to which the circumstances permitting the continued use of real-time captioning techniques for pre-recorded programming have been successful in improving captioning quality on this type of programming. Depending on the outcome of this review, the Commission will consider additional action to further limit the use of real-time techniques on pre-recorded programming, if necessary.

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<sup>157</sup> NCI, Prerecorded Captioning, <http://www.ncicap.org/services/prerecorded-captioning/> (last visited January 29, 2014).

<sup>158</sup> See Caption Colorado Comments at 20-26; MCS Refresh Comments at 9-12; Inclusive Technologies Refresh Comments at 2; Consumer Groups Refresh Comments at 5; Consumer Groups April 25, 2011 *Ex Parte* at 1.

<sup>159</sup> See Bob Hawbaker Refresh Comments; Oregon Group Late-filed Refresh Comments at 1.

<sup>160</sup> See AG Bell Comments at 6; Caption Perfect Comments at 2 (roll-up captioning can be moved to the top of the screen or to other vertical positions, but doing so often obscures a subject’s face; urges Commission to reject use of roll-up captioning for pre-recorded programming).

<sup>161</sup> See, e.g., NCRA Comments at 3-4 (noting the “inherent challenges of providing quality live captioning” and stating that “[p]roviding captions in a live environment is extremely demanding, as there is only one chance for the realtime captioner to get it right before those captions are broadcast to the viewing public”); Caption Colorado Refresh Comments at 6-7, 9 (stating that “a ‘perfect’ verbatim transcription of any live program or event is nearly impossible to create, even using professional transcriptionists with plenty of turnaround time” and that “realtime television captioners are often unable to keep pace with broadcasters when the broadcasters speak faster than even the best and most experienced captioner in the industry are [*sic*] capable of transcribing); NCTA *Ex Parte* Letter, November 7, 2013, at 1 (stating that live captioning will never be free from human error); NAB *Ex Parte* Letter, November 5, 2013 at 1 (NAB November 5, 2013 *Ex Parte*) (stating that inherent in the process of providing live captioning is “an unavoidable truth” that “both human error and transmission delays will preclude perfect captions”); DISH Network and DIRECTV December 9, 2013 *Ex Parte* at 1 (stating that live captioning “will never been free from human error, nor will it be instantaneous”).

<sup>162</sup> NCTA Best Practices at 2.

<sup>163</sup> See ¶ 65 *infra*.

**b. Live Programming**

39. We define live programming as video programming that is shown on television substantially simultaneously with its performance.<sup>164</sup> For example, live programming includes news and sports, some public affairs programming, some awards programs and some late night live comedy and talk shows. Captioning for live programming, referred to as “real-time” captioning, is generated and combined with programming while it is being aired,<sup>165</sup> and there is little or no opportunity to edit the captioning for accuracy, synchronicity, program completeness, and placement prior to airing.<sup>166</sup> Most live programs utilize “roll-up” captions, which roll onto and off the screen in a continuous motion.<sup>167</sup> Usually two to three lines of text appear at one time, and as a new bottom line appears, it pushes up the previously appearing lines until they roll off the screen.<sup>168</sup>

40. *Accuracy.* The Commission recognizes the greater hurdles involved with captioning live programming, given the simultaneous production of captions as the programming is aired, and the lack of time for the review and correction of captions.<sup>169</sup> NCTA and NAB each suggest that quality standards must take into consideration that human errors can occur with real time captioning and that perfection of such captions cannot be guaranteed.<sup>170</sup> In this regard, they and other industry commenters raise concerns with and note the possible consequences of strictly enforcing specific quality standards for the captioning of live programming.<sup>171</sup> For example, NAB asserts that “[f]aced with [the] task of delivering perfect captioning or risk[ing] significant forfeitures, local stations may err on the side of caution and refrain from airing live, local programming, including breaking news and emergency weather information.”<sup>172</sup>

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<sup>164</sup> This definition is the same definition previously adopted in the Commission’s IP captioning rules. *IP Captioning Report and Order*, 27 FCC Rcd at 821-22, ¶ 55.

<sup>165</sup> NCTA Best Practices at 1.

<sup>166</sup> *Id.*; see also DCMP, Real-Time Captioning, <http://www.dcmp.org/caai/nadh28.pdf> (last visited January 29, 2014).

<sup>167</sup> See NCI, Captioning Terms, <http://www.ncicap.org/viewer-resources/about-captioning/captioning-terms/> (last visited January 14, 2014). Roll-up captions are generally authored by a real-time stenographer or by someone who repeats the aural content of the program into a computerized system that is trained to recognize the person’s particular voice patterns. NCI refers to the latter as “voice writing professionals.” <http://www.ncicap.org/services/pre-recorded-captioning/> (last visited January 25, 2014).

<sup>168</sup> See NCI, Captioning Terms, <http://www.ncicap.org/viewer-resources/about-captioning/captioning-terms/> (last visited January 14, 2014).

<sup>169</sup> See e.g., NCTA Refresh Comments at 4 (“Since live captioners operate under extreme pressure, there is little or no time to correct for errors”); AMIC Comments at 2; Caption Colorado Comments at 21; Caption Perfect Comments at 2; MCS Comments at 9-10; NCI Comments at 3; NCRA Comments at 3-4; WGBH Comments at 8; Consumer Groups Reply Comments at 5; Consumer Groups Refresh Comments at 5-6.

<sup>170</sup> NCTA Comments at 3-4; NAB Refresh Reply Comments at 9 (rigid quality would likely frustrate the creativity and judgment of stenocaptioners).

<sup>171</sup> See, e.g., MPAA Comments at 6; Hubbard Broadcasting, Inc. Comments at 2, 11; CBS Comments at 6; NAB Comments at 8; Disney Reply Comments at 9; KVMD, KNLA & Rancho Palos Verdes Broadcasting (collectively referred to as KVMD) Reply Comments at 2-3; NCRA Comments at 5; NCTA Comments at 3-4; NCTA Refresh Comments at 4; MPAA Reply Comments at 6-7; Alamo Public Telecommunications Council (Alamo) Refresh Comments at 1; NAB Refresh Comments at 4, 12; NAB November 5, 2013 *Ex Parte* at 1.

<sup>172</sup> NAB Comments at 12. Both NAB and NCTA also argue that there is no agreed-upon industry method for assessing caption accuracy or counting errors for live programming. NAB Refresh Comments at 13; NAB Refresh Reply Comments at 8; NCTA Refresh Reply Comments at 3. See also California Oregon Broadcasting, Inc. (COBI) Refresh Comments at 4 (questioning whether quality standards for live programming could be crafted and enforced); Hubbard Comments at 10 (suggesting that charitable broadcasts, such as telethons, could be replaced with movies, sitcoms and other syndicated programming in order to alleviate the burden associated with having to caption such

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41. The record reflects numerous ways that captioners, programmers and distributors can work together to produce more accurate captions on live programming. For example, the Captioning Vendors Best Practices suggest a number of measures that VPDs can specify in their contracts with programmers to be taken to reduce errors and to produce more complete and timely captions. Among other things, VPDs can specify in their contracts that programmers are to provide captioners advance notice of vocabulary, such as proper names and places, that the program is likely to use, that captioners are to be equipped with reliable, high speed Internet, multiple telephone lines and backup plans to minimize caption interruption due to malfunctions, that programmers are to provide captioning agencies with high quality audio program signals to improve accuracy, and that programmers are to enter into contracts with captioning agencies that require appropriate captioner training and skills to reduce captioning errors.<sup>173</sup> It is apparent from these and other practices that both the video programming industry and captioning agencies have already developed many practices of their own to achieve good quality captions on live programming for people who are deaf and hard of hearing. We encourage the continued use of these measures and other measures that are technically feasible, to provide live captions that keep errors to a minimum and that provide an accurate presentation of what is being said.

42. Nonetheless, we recognize that it may be impossible, using today's technologies, to always achieve fully accurate captioning on live programming due to the particular constraints involved with captioning such programming.<sup>174</sup> For this reason, in considering complaints concerning our captioning quality standards as they pertain to live programming, we will take into consideration the nature of this programming and the challenges associated with accurately captioning such programming.<sup>175</sup> Our overall objective is to ensure that closed captions convey a program's content so that the program is fully accessible to viewers. To this end, whatever method is used to provide real-time captioning,<sup>176</sup> we will address complaints by considering, on a case-by-case basis, the overall accuracy or understandability of the programming, the ability of the captions to convey the aural content of the program in a manner equivalent to the aural track, the extent to which the captioning errors prevented viewers from having access to the programming, and whether the VPD made best efforts to receive a certification from programmers that the programmer is either in compliance with the Commission's non-technical quality standards or with the Best Practices adopted herein, or is exempt from the captioning obligations. Our ultimate goal is to ensure better captioning quality without unduly burdening VPDs and programming providers. We believe that the approach we adopt strikes this balance.

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live programming in a manner that would be consistent with whatever quality standards are adopted by the Commission); NCRA *Ex Parte* Letter, December 19, 2013, at 1 (NCRA December 19, 2013 *Ex Parte*) (stating that past efforts to establish specific quality standards have been unsuccessful because of the inability to define precisely what constitutes an error); NCRA *Ex Parte* Letter, January 2, 2014 (NCRA January 2, 2014 *Ex Parte*) (noting that many organizations have attempted to develop specific captioning metrics, "but there is currently a lack of universal agreement as to *what* those metrics should be").

<sup>173</sup> See Captioning Vendors Best Practices at 1-2.

<sup>174</sup> See e.g., NCTA Refresh Comments at 4 ("Since live captioners operate under extreme pressure, there is little or no time to correct for errors"); AMIC Comments at 2; Caption Colorado Comments at 21; Caption Perfect Comments at 2; MCS Comments at 9-10; NCI Comments at 3; NCRA Comments at 3-4; WGBH Comments at 8; Consumer Groups Reply Comments at 5; Consumer Groups Refresh Comments at 5-6.

<sup>175</sup> For example, a fast paced sports program or a Sunday morning talk show where panelists are talking on top of each other would be more difficult to caption accurately than a program proceeding at a slower pace. See NCRA December 19, 2013 *Ex Parte*, at 1.

<sup>176</sup> As discussed above, captioning on live programming is provided by a stenographer or by someone who revoices the aural content of the program into a machine that is trained to the revoicer's particular voice patterns. See n. 167, *supra*.

43. *Synchronicity.* Consumers report that even if captions are accurate, a significant delay in the display of captions between the appearance of captions and the time that words are spoken can make the program difficult to understand.<sup>177</sup> For this reason, commenters suggest that the delays that occur between the time when words are spoken in a live program and the time when captions appear on the screen, or their “latency,” be limited to a specified number of seconds.<sup>178</sup> For example, the Oregon Group, while recognizing that some delay is inevitable on live programming, suggests that “...a good [c]aptioner should be able to produce corresponding text that displays in less than 6 seconds of the voicing, preferably 3-4 seconds.”<sup>179</sup> Alternatively, Caption Colorado suggests that an average latency of 5 seconds or less for an entire program with a maximum latency of 7 seconds for any specific word is appropriate for such programming.<sup>180</sup>

44. We agree that a significant delay between the dialogue and captions can make it difficult to follow a program’s content. However, we recognize, based on comments from industry and captioners, that a slight delay in the delivery of live captions is inevitable due to the time it takes for the captioner to hear the program, provide the captions, and have the captions transmitted to the viewer.<sup>181</sup> We will consider such technical limitations when reviewing consumer allegations of non-compliance regarding the lack of synchronicity between a live program’s audio track and its captions. At the same time, in an effort to eliminate delays that prevent caption viewers from understanding a program’s content, there are measures programmers can take to keep the delay in their presentation of live captions to a minimum, consistent with an accurate presentation of what is being said, so that the time between when words are spoken or sounds occur and captions appear does not interfere with the ability of viewers to follow the program. For example, as noted above, VPDs can specify in their contracts with programmers that the programmers will provide captioners with advance materials that help them to generate caption text as they hear a program’s audio, provide high quality audio program signals to reduce caption lag times, and enter into contracts with captioning agencies that require appropriate captioner training and skills to reduce captioning delays while a program is being aired.<sup>182</sup> We believe that this approach effectively balances the competing concerns of viewers and covered entities with respect to ensuring access to programming content while acknowledging the limitations of the real-time captioning process. Our accompanying FNPRM seeks further comment on possible technical solutions for improving synchronicity for captioning on live programming to prevent excessive delays that impede the ability of viewers to understand a program’s content.<sup>183</sup>

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<sup>177</sup> See, e.g., AMIC Comments at 5 (“... presenting every word correctly spelled does not constitute good quality if the viewer is unable to read [the captions] because timing is poor or it is presented in a way (such as against a full screen of graphics) that renders the caption[s] unreadable.”). See also 2004 Petition at 39 (“captions must be synchronized with the audio content of the program, with some allowance made for programming that is live or recorded shortly before air time”); Consumer Groups Refresh Comments at 6 (specify a maximum delay in the delivery and display of real-time captions); Oregon Group Late-filed Refresh Comments at 1 (for individuals with residual hearing, a delay in captioning makes it difficult to fill in from the captioning words that are not heard); Caption Perfect Comments at 1-2.

<sup>178</sup> See, e.g., Oregon Group Late-filed Refresh Comments at 1; Caption Colorado Refresh Comments at 22.

<sup>179</sup> Oregon Group Late-filed Refresh Comments at 1.

<sup>180</sup> Caption Colorado Refresh Comments at 22; Caption Colorado Comments at 15.

<sup>181</sup> See, e.g., See, e.g., Caption Colorado Comments at 15; DISH Network and DIRECTV December 9, 2013 *Ex Parte* at 1; NAB *Ex Parte* Letter, December 24, 2013, at 1.

<sup>182</sup> See Captioning Vendor Best Practices at 2; NCTA Best Practices at 2.

<sup>183</sup> Consumers suggest that for real time captions, “gaps should never exceed the time it takes a skilled captioner to hear and transcribe an audible event, plus the amount of time it reasonably takes to transmit the captions from the captioner back to the station, plus the time taken by equipment to merge the captions with the audio and video streams.” Consumer Groups *Ex Parte* Letter, January 15, 2014, at 4 (Consumer Groups January 15, 2014 *Ex Parte*).

45. *Program Completeness.* As discussed above, in order for a program to be fully accessible to viewers, captions must run from the beginning to the end of the program to the fullest extent possible, given the nature of the program. We recognize, however, that the delays inherent in sending caption transmissions on live programs to viewers pose particular challenges with respect to ensuring that the entire program is captioned up to its very last second. As a consequence, often such captions “cut off” when the program transitions to a commercial or the subsequent program. We have noted in the preceding paragraphs various measures that programmers and captioners can take, working together, to minimize the lag time between the time a program’s audio content is heard and the time that captions appear. Shortening the lag time for real-time captions also will help captioners capture a greater amount of the live program’s aural content for purposes of providing a more complete program to caption viewers. In addition, to the extent technically feasible, we encourage entities that send the audio feed to the live captioner to alert the captioner that a program’s end is imminent, so that the captioner can paraphrase or abbreviate the remaining text before the program cuts off. Finally, to the extent available, we encourage use of the following measures to capture as much of a live program as possible through captions: (1) a fade out after the last scene to add a few seconds for the transition to the next program content, (2) advance delivery of the audio to captioners by a few seconds, and (3) allowing captions remaining at the end of a program’s audio to be placed in a location on the screen during the subsequent advertisement (or program) in a manner that does not overlap with the captions on that advertisement or program.<sup>184</sup> Because we need to gain a greater understanding of the barriers to and solutions for ensuring that caption viewers have full access to video programs from beginning to end, in the FNPRM we seek comments on these and other techniques, and whether and how the rules we adopt today can be modified to better achieve this result.

46. *Placement.* Entities certifying to their compliance with the captioning quality standards will be considered to comply with our placement standards if they ensure the proper placement of captions on the screen to avoid obscuring on-screen information and graphics to the extent possible.<sup>185</sup> However, we recognize there are some types of live programming, such as sports programming, that make extensive use of graphics and crawls, and for which it can be challenging to avoid having captions block graphics and crawls. As a result, we recognize that placement errors may be more frequent with these and certain other types of live programming than with pre-recorded programming. We will take into consideration the type and nature of the programming when considering complaints regarding violations of the placement standard.

### c. Near-Live Programming

47. We define near-live programming as video programming performed and recorded less than 24 hours prior to the time it was first aired on television.<sup>186</sup> Typical near-live programming includes

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The further notice will assist the Commission in determining whether technologies exist to make this approach feasible.

<sup>184</sup> For example, the captions from the prior program could appear at the top of the screen, while the captions from the subsequent program could appear at the bottom of the screen.

<sup>185</sup> See Captioning Vendors Best Practices at 1.

<sup>186</sup> This is same definition as the Commission adopted in the *IP Captioning Report and Order*, 27 FCC Rcd at 823, ¶¶ 57-58, and codified at 47 C.F.R. § 79.4(a)(8). As discussed in the *IP Captioning Report and Order*, some near-live programming, such as a late-night talk show that is performed and recorded earlier the same day, may include some pre-recorded elements, for example, a segment that was performed and recorded more than 24 hours prior to its distribution on television. The presence of such pre-recorded elements does not change the nature of the near-live programming. *Id.* at 823-824 ¶ 58. The *Video Description Order* adopted substantially the same definition. See *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 26 FCC Rcd 11847, 11866-11868, ¶¶ 40-42 (2011) (“*Video Description Order*”). We seek comment in the Further Notice on whether this definition is appropriate for our caption quality rules, and on a

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late-night talk and comedy shows and some public affairs programming. The production schedules for near-live programming often do not afford an opportunity for reviewing and editing captions equivalent to offline captioning processes. Rather, because of the short turnaround time between taping and airing, programmers typically use real time-captioning techniques for this type of programming.

48. For purposes of our caption quality standards discussed above, we will treat near-live programming as if it were live programming. We note that the Consumer Groups generally support excluding near-live programming from the definition of pre-recorded programming and allowing for real-time captioning of such shows as if they were live programs, so long as the Commission requires editing of captions on these programs to the maximum extent possible prior to airing.<sup>187</sup> We agree that editing and synchronization of captions on near-live programming should be performed during the hours between taping and airing to the extent there is sufficient time for such activities. In addition, in response to concerns raised by Consumer Groups that the definition of near-live programming adopted above does not adequately consider whether programming performed and recorded in less than 24 hours could be captioned offline, the FNPRM seeks feedback on whether to revise this definition.

49. We encourage as well the adoption of either of two industry practices to improve the quality of near-live programming. First, in advance of a program's airing, programmers may be able to deliver a complete program script or a near-completed program to a captioning agency, which the agency can then use to create a caption file that is later combined simultaneously with the program when it is aired. The process of synchronizing captions that were originally produced in real-time is known as "live display,"<sup>188</sup> and it can serve to reduce errors and long lag times that can occur with real-time captioning. Alternatively, programmers may be able to provide a captioning agency with access to a live feed of the taping of near-live programming, enabling a captioner to generate captions while the program is being taped. The captioner can then improve the captions for accuracy, synchronicity, program completeness and placement prior to its airing. During these intervening hours, the programming provider also could inform the captioning agency about any edits made to the show prior to airing.<sup>189</sup> The accompanying FNPRM seeks feedback on whether the Commission's rules should require either of these measures or other ways to achieve good captioning quality for near-live programming.

#### 4. Program Re-feeds of Live and Near-Live Programming

50. In the FNPRM, the Commission seeks comment on whether our rules should require any measures to improve the quality of captions on program re-feeds. While the Commission has not addressed ways to improve the quality of captions on live and near-live programs that initially have been captioned using real-time captioning techniques, but that are later re-aired on television captioning, vendors that have submitted best practice proposals to the Commission have suggested encouraging the use of offline captioning for such programming.<sup>190</sup> We believe that such practice, because it affords the opportunity to review and edit captions, and to appropriately time and place captions into the final program, will more effectively match the program's audio content and thereby ensure the full television access through captioning that is required by the Act.<sup>191</sup> While offline captioning may not always be

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Consumer Groups' proposal to define "near-live" programming for purposes of these rules to mean "programming recorded and performed less than double its length prior to air." See section VI.B.2, *infra*.

<sup>187</sup> Consumer Groups Reply Comments at 7, n.19.

<sup>188</sup> See NCI, Captioning Terms, <http://www.ncicap.org/viewer-resources/about-captioning/captioning-terms/> (last visited, January 14, 2014).

<sup>189</sup> This could prevent captions without corresponding audio from appearing during the show's airing when some of the program's content is cut after its taping.

<sup>190</sup> See Captioning Vendor Best Practices at 2.

<sup>191</sup> 47 U.S.C. § 613(b)(1).

possible, we encourage it and other steps to be taken that are necessary to achieve improved accuracy, synchronicity, completeness and placement of captions on such programs prior to their being re-aired. For example, to the extent feasible, we encourage efforts to correct errors inadvertently made and timing lags that occurred when the program first aired with real-time captions.

## 5. Best Practices

### a. VPD Best Efforts Obligations

51. Section 713 of the Act authorizes the Commission to ensure the provision of closed captioning of video programming “by providers and *owners* of video programming.”<sup>192</sup> Nevertheless, in the *Closed Captioning Report and Order*, the Commission chose to place exclusive responsibility for compliance with the closed captioning requirements on VPDs because they are ultimately responsible for ensuring the delivery of programming to consumers.<sup>193</sup> The Commission explained that placing responsibility for compliance solely on VPDs would help expeditiously increase the availability of video programming with closed captioning and focus compliance responsibility on a single entity.<sup>194</sup> Likewise, the record here demonstrates that VPDs have a role to play in improving caption quality.<sup>195</sup> Because VPDs are the entities that provide video programming directly to customers’ homes, keeping them in the chain of responsibility will provide consumers an entity to which they can address their complaints, and which can assist in identifying other entities responsible for the captioning quality errors. Accordingly, we believe that imposing obligations on VPDs to ensure compliance with the captioning quality standards is a critical first step toward achieving Congress’s goal of making television programming fully accessible to people who are deaf or hard of hearing.

52. At the same time, we recognize, and the Commission has previously noted, that “closed captioning is most likely to be done at the production stage or prior to distribution where it is most economically and technically efficient.”<sup>196</sup> Thus, we generally agree with NCTA that “the creation and delivery of good quality captions is not solely within the control of any one entity and often requires coordination and execution among many connected parties in the video delivery chain.”<sup>197</sup> In addition to VPDs, such parties include video programmers, *i.e.*, entities that provide video programming that is intended for distribution to residential households including, but not limited to, broadcast or nonbroadcast television networks and the owners of such programming.<sup>198</sup> For example, it is video programmers who

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<sup>192</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286, ¶ 27 (emphasis added) (citing sections 713(b)(2), (d)(1) and (d)(3) of the Act, 47 U.S.C. § 613(b)(2), (d)(1) and (d)(3)). Section 713(b)(2) directs the Commission to prescribe regulations that “shall ensure” that “video programming providers or *owners* maximize the accessibility of video programming first published or exhibited prior to the effective date of such regulations through the provision of closed captions” (emphasis added); section 713(d)(1) and (3) authorizes the Commission to exempt classes of programs where “the provision of closed captioning would be economically burdensome to the provider or *owner* of such programming” and authorizing the “provider of video programming or *program owner*” to petition the Commission for an exemption from the captioning requirement (emphasis added).

<sup>193</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286, ¶ 27.

<sup>194</sup> *Id.* The Commission reasoned that placing compliance obligations on VPDs would promote more efficient monitoring and enforcement of the closed captioning rules because typically there would “be a single entity to which complaints must be addressed, and there would be no need for tracking the entities responsible for producing programs alleged to violate the rules.” *Id.* at 3286, ¶ 27. *See also IP Captioning Report and Order*, 27 FCC Rcd at 801, ¶ 20.

<sup>195</sup> Comcast/NBCUniversal *Ex Parte* Letter, January 28, 2014, at 1 (Comcast/NBC January 28, 2014 *Ex Parte*).

<sup>196</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3363-64, ¶ 199.

<sup>197</sup> NCTA January 27, 2014 *Ex Parte* at 1.

<sup>198</sup> *See* NCTA Best Practices at 1. The above definition of video programmers is contained within the definition of VPPs in our rules. *See* 47 C.F.R. § 79.1(a)(3).

enter into contracts with captioning vendors, control when programming is delivered to captioning vendors to be captioned, and incorporate captioning with the programming for delivery to VPDs. In this manner, video programmers typically are the entities with the most direct control over the quality of closed captioning of their programming. Given these responsibilities for the production and delivery of captions, in the FNPRM, we explore changes in the way that our captioning rules should apportion responsibilities for meeting the new obligations for ensuring captioning quality between VPDs and video programmers, as well as other entities.

53. However, as noted above, to ensure that video programming includes captions that meet the captioning quality standards set forth in this Report and Order, as an initial step, we place responsibility for compliance on VPDs. In acknowledgment of the critical role that video programmers play in the delivery of captions, we will require VPDs to fulfill this obligation by exercising best efforts to obtain a certification described below from each video programmer.<sup>199</sup> Under the captioning rules adopted in 1997, VPDs have been permitted to rely on certifications from their programming suppliers to demonstrate compliance with the requirement to provide captions on the programming that they distribute.<sup>200</sup> We believe that the rules we now adopt are in keeping with this practice, while continuing to acknowledge that captioning is often done prior to the distribution stage.<sup>201</sup> As noted above, the accompanying FNPRM seeks comment on whether some of these compliance obligations should be placed on entities that are in a better position to ensure compliance with the captioning quality rules.<sup>202</sup>

54. In order to satisfy the requirement to exercise best efforts to obtain a certification from each of its video programmers, a VPD must request, in writing,<sup>203</sup> that each programmer that supplies it with programming provide a certification attesting that the programmer either (1) complies with the captioning quality standards adopted herein; (2) adheres to the Best Practices for video programmers set forth below, or (3) is exempt from the closed captioning rules under one or more properly attained exemptions, in which case such certification must identify the specific exemption claimed.<sup>204</sup> In addition, the VPD must request, in writing, that the programmer make such certification widely available within 30 days after receiving a written request from the VPD. VPDs will further have the obligation to check websites or other widely available locations used for the purpose of posting widely available

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<sup>199</sup> We note, however, that MVPDs will not need to obtain certifications from broadcast television stations that are carried on the MVPDs' systems. Because broadcast television stations are VPDs, and the Commission is exercising direct authority over all VPDs with regard to the captioning quality rules adopted herein, any issues regarding captioning quality can be more effectively dealt with by addressing them directly with broadcast stations. This is particularly important with must-carry broadcast signals, which MVPDs are prohibited from either modifying or dropping. *See Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17247, ¶ 39 (2011) ("*CALM Act Order*"). *CALM Act Order*, 26 FCC Rcd at 17247, ¶ 39. All MVPDs, however, are responsible for passing through captions intact to their viewers. *See* 47 C.F.R. § 79.1(c).

<sup>200</sup> Distributors are not held responsible even when a program source falsely certifies that the programming meets the Commission's captioning requirements, so long as the distributor is unaware that the certification is false. Enforcement actions, however, may be taken with respect to deliberate falsifications. 47 C.F.R. § 79.1(g) (6).

<sup>201</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3363-64, ¶ 199 (expecting "that most captioning [would] be done through arrangements between the video programming distributors responsible for compliance and these other entities").

<sup>202</sup> *See* section VI.A, *infra*. *See, e.g.*, Verizon Comments at 3 (stating that "as a video distributor rather than a broadcaster or other content owner, Verizon is not in a position to ensure the non-technical accuracy of the closed captioning that it transmits to consumers").

<sup>203</sup> Electronic correspondence is acceptable for this purpose.

<sup>204</sup> Such exemptions may either be self-implementing under 47 C.F.R. § 79.1(d) or attained through an individual petition under the economically burdensome standard, pursuant to 47 C.F.R. § 79.1(f).

certifications,<sup>205</sup> to determine which of their programmers have certified their compliance. VPDs that locate a programmer's certification on the programmer's website or other widely available location used for the purpose of posting certifications as of the effective date of these rules will be deemed in compliance with this best efforts obligation even if the VPD did not previously notify such programmer, in writing, of the need for this certification. VPDs that fail to exercise best efforts to obtain the certification noted above may be subject to enforcement action.

55. In each instance in which a video programmer does not provide the certification noted above, if the VPD nevertheless carries the programmer's programming, it will be obligated to report the non-certifying programmer to the Commission.<sup>206</sup> The Commission will compile a list of such programmers that will become available in a public database maintained by the Commission. The data compiled in such database will help inform the Commission (and caption viewers) about potentially non-compliant programmers and assist in the Commission's ongoing evaluation of the effectiveness of its rules. This will provide useful information toward our overall goal of ensuring that video programming is fully accessible by people who are deaf and hard of hearing as required by section 713(b).<sup>207</sup> If a VPD uses its best efforts to obtain one of these certifications from each of its programmers, and it reports to the Commission the identity of any programmer whose programming the VPD carries who has refused to provide the requested certification, no sanctions will be imposed on the VPD as a result of any captioning violations that are outside the control of the VPD.<sup>208</sup>

56. As is the case with the Commission's implementation of the CALM Act,<sup>209</sup> we permit the use of widely available certifications for the above purpose, to obviate the need for individual contractual certifications, thus greatly reducing the burden on both VPDs and programmers.<sup>210</sup> We understand that virtually all VPDs receive the same programming feed of a given network.<sup>211</sup> Consequently, once the programmer provides caption-compliant video programming to one VPD, presumably it will be supplying the same compliant programming to all VPDs. As a practical matter, then, a widely available certification can provide the same assurance as an individual certification, but have the added benefits of being available to all VPDs,<sup>212</sup> without the burdens of requiring VPDs to acquire such certifications on an individual basis.

57. These requirements will become effective upon the latter of a date announced in a public notice published in the Federal Register following approval by the Office of Management and Budget of the modified information collection requirements under the Paperwork Reduction Act of 1995<sup>213</sup> or January 15, 2015.

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<sup>205</sup> See n. 210 *infra* for discussion of the meaning of "widely available."

<sup>206</sup> The Consumer and Governmental Affairs Bureau will issue a Public Notice announcing the proper procedure for submitting such reports to the Commission.

<sup>207</sup> See 47 U.S.C. 613(b).

<sup>208</sup> VPDs will still be responsible for ensuring the monitoring and maintenance of its equipment to pass through captions to consumers, see section IV.C.1, *infra*, and will be expected to respond to consumer complaints about captioning quality. See section IV.A.5.c, *infra*.

<sup>209</sup> Pub. L. No. 111-311, 124 Stat. 3294 (2010) (codified at 47 U.S.C. § 621) (directs the Commission to adopt rules designed to prevent digital television commercial advertisements from being transmitted at louder volumes than the program material they accompany); See *CALM Act Order*, 26 FCC Rcd at 17243-44, ¶ 34.

<sup>210</sup> For example, posting a certification on an affiliate website will make it widely available to VPDs. See *id.*

<sup>211</sup> See *id.*

<sup>212</sup> The Commission reached this same conclusion in its implementation of the CALM Act. See *id.*

<sup>213</sup> 44 U.S.C. §§ 3501-3520.

**b. Application of Best Practices**

58. A number of parties to this proceeding, including VPDs, video programmers, captioning vendors, and consumers, have proposed Best Practices to ensure caption quality and we applaud these parties for their thoughtful submissions. These parties include NCRA,<sup>214</sup> a coalition of captioning vendors, including CaptionMax, NCI, VITAC, and WGBH/NCAM (collectively Captioning Vendors),<sup>215</sup> NCTA,<sup>216</sup> and Consumer Groups.<sup>217</sup> We have considered the various proposals in the record describing the best practices, and as discussed below, have drawn upon many of these suggestions in crafting our Best Practices.

59. Consumer Groups have expressed concern about reliance on these Best Practices to ensure quality captions. Specifically, they state that “the ultimate quality of captions delivered to consumers, and not the process by which they are created, is the only logical and acceptable metric for the Commission to review” and that entities that “follow some particular process to create captions for a program cannot cure the program’s inaccessibility if the process ultimately results in poor-quality captions. . . .”<sup>218</sup> Although we agree on the importance of delivering high quality captions to viewers, we expect that adherence to the Best Practices identified below will advance this objective because this approach is designed to both provide the captioning industry with concrete steps it can take to achieve quality captions and to ensure that caption quality problems that do arise are quickly resolved. One year after implementation of the rules we adopt herein, we will assess the extent to which our prediction about the effectiveness of these Best Practices has been accurate. If we find that this approach is not effective in ensuring the production and distribution of good quality captions, we will revisit these rules to the extent necessary.<sup>219</sup>

60. *Video Programmer Best Practices.* To satisfy its obligation to exercise its best efforts to obtain certification from its programmers regarding closed caption quality, a VPD may seek certification from its video programmers that they will adhere to the following practices.<sup>220</sup>

- *Agreements with captioning services.* Video programmers complying with the Best Practices will take the following actions to promote the provision of high quality television closed captions through new or renewed agreements with captioning vendors.
  - *Performance requirements.* Include performance requirements designed to promote the creation of high quality closed captions for video programming comparable to the

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<sup>214</sup> NCRA December 19, 2013 *Ex Parte* Attachment (NCRA Best Practices).

<sup>215</sup> Coalition of Captioning Vendors *Ex Parte* Letter Attachment, January 10, 2014 (Captioning Vendors Best Practices).

<sup>216</sup> NCTA *Ex Parte* Letter, January 14, 2014; NCTA January 27 *Ex Parte*, at Attachment; NCTA *Ex Parte* Letter, February 7, 2014, at Attachment (NCTA Best Practices).

<sup>217</sup> See Consumer Groups January 15, 2014 *Ex Parte*.

<sup>218</sup> Consumer Groups January 15, 2014 *Ex Parte* at 6.

<sup>219</sup> We decline to adopt best practices for VPDs at this time. See generally NCTA Best Practices at 4-5. VPDs already have an obligation to maintain and monitor their equipment so that it is in good working order. *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3369, ¶ 212. In addition, VPDs will be expected to comply with new technical compliance requirements (set forth below) pertaining to equipment checks and recordkeeping to ensure the technical pass through of captioning to the consumers. See section IV.C, *infra*. In the FNPRM, we seek comment on whether the Commission should adopt Best Practices proposed by NCTA addressing the resolution of consumer complaints filed directly with VPDs. See NCTA Best Practices at 4-5. We further seek comment on whether to expand the entities responsible for the provision of improved captioning quality.

<sup>220</sup> These Best Practices are drawn largely on the Best Practices proposal submitted by NCTA. See, e.g., NCTA Best Practices at 2-4.

- Captioning Vendor Best Practices set forth in paragraphs 62-64 below.<sup>221</sup>
- *Verification.* Include a means of verifying compliance with the above performance requirements such as through periodic spot checks of captioned programming.
  - *Training.* Include provisions designed to ensure that captioning vendors' employees and contractors who provide caption services have received appropriate training and that there is oversight of individual captioners' performance.
- *Operational best practices.* Video programmers complying with the Best Practices will take the following actions to promote delivery of high quality television captions through improved operations:
    - *Preparation materials.* To the extent available, provide captioning vendors with advance access to preparation materials such as show scripts, lists of proper names (people and places), and song lyrics used in the program, as well as to any dress rehearsal or rundown that is available and relevant.
    - *Quality audio.* Make commercially reasonable efforts to provide captioning vendors with access to a high quality program audio signal to promote accurate transcription and minimize latency.
    - *Captioning for pre-recorded programming.*
      - The presumption is that pre-recorded programs, excluding programs that initially aired with real-time captions, will be captioned offline before air except when, in the exercise of a programmer's commercially reasonable judgment, circumstances require real-time or live display captioning. Examples of commercially reasonable exceptions may include instances when (1) a programmer's production is completed too close to initial air time to be captioned offline or may require editorial changes up to air time (*e.g.*, news content, reality shows), (2) a program is delivered late, (3) there are technical problems with the caption file,<sup>222</sup> (4) last minute changes must be made to later network feeds (*e.g.*, when shown in a later time zone) due to unforeseen circumstances, (5) there are proprietary or confidentiality considerations, or video programming networks or channels with a high proportion of live or topical time-sensitive programming, but also some pre-recorded programs, use real-time captioning for all content (including pre-recorded programs) to allow for immediate captioning of events or breaking news stories that interrupt scheduled programming.<sup>223</sup>

<sup>221</sup> We recognize that some programmers may contract with captioning agencies that employ practices that vary somewhat from the Captioning Vendor Best Practices but nonetheless generate high quality closed captions for video programming. Accordingly, to provide the captioning industry with flexibility, we will deem compliance with these Best Practices to include compliance with performance requirements that are comparable to these practices. Such requirements should adhere to the basic tenets of the requirements set forth above, and will qualify only if they are designed to achieve captions that are accurate, synchronous, complete and appropriately placed, as required by our new standards.

<sup>222</sup> For example, technical problems could result in the caption file being unusable, thereby necessitating last minute real-time captioning.

<sup>223</sup> We recognize that there may be some limited circumstances when the late delivery of a program is unavoidable, but expect that this exception to offline captioning will not encourage the practice of late-delivered programming. We also believe that many proprietary concerns generally can be addressed in agreements between programmers and the captioning vendors, and that the same level of confidentiality expected of those associated with other aspects of program production would extend to such captioning vendors and captioners. We will assess the extent to which these various exceptions have an effect on the quality of captions on prerecorded programming one year after the new captioning quality rules have been in effect, in accordance with NCTA's efforts to gather trade associations, VPDs, programmers, captioning vendors, representatives of the deaf and hard of hearing communities, the

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- Make reasonable efforts to employ live display captioning instead of real-time captioning for pre-recorded programs if the complete program can be delivered to the caption service provider in sufficient time prior to airing.
- *Monitoring and remedial best practices.* Video programmers complying with the Best Practices will take the following actions aimed at improving prompt identification and remediation of captioning errors as they occur:
  - *Pre-air monitoring of offline captions.* As part of the overall pre-air quality control process for television programs, conduct periodic checks of offline captions on pre-recorded programs to determine the presence of captions.
  - *Real-time monitoring of captions.* Monitor television program streams at point of origination (e.g., monitors located at the network master control point or electronic monitoring) to determine presence of captions.
  - *Programmer and captioning vendor contacts.* Provide to captioning vendors appropriate staff contacts who can assist in resolving captioning issues. Make captioning vendor contact information readily available in master control or other centralized location, and contact captioning vendor promptly if there is a caption loss or obvious compromise of captions.
  - *Recording of captioning issues.* Maintain a log of reported captioning issues, including date, time of day, program title, and description of the issue. Beginning one year after the effective date of the captioning quality standards, such log shall reflect reported captioning issues from the prior year.
  - *Troubleshooting protocol.* Develop procedures for troubleshooting consumer captioning complaints within the distribution chain, including identifying relevant points of contact, and work to promptly resolve captioning issues, if possible.
  - *Accuracy spot checks.* Within 30 days following notification of a pattern or trend of complaints from the Commission, conduct spot checks of television program captions to assess caption quality and address any ongoing concerns.
- *Certification procedures for video programmers.* Video programmers complying with the Best Practices will certify to video programming distributors that they adhere to Best Practices for video programmers and will make such certifications widely available to VPDs, for example, by posting on affiliate websites.

61. *Captioning Vendor Best Practices.* As noted above, as part of their Best Practices, certifying video programmers must have agreements with captioning vendors that include performance requirements that are comparable to the Captioning Vendor Best Practices set forth below. These practices, based in large part on a proposal by a coalition of four captioning vendors that provide captioning services for a significant percentage of video programming nationwide, are intended to result in high quality captions and ensure that captioners have adequate training and oversight.<sup>224</sup> Consistent with the Captioning Vendors' proposal, we divide these Best Practices into three sets of practices – first, for captioning vendors, second, for individual captioners who generate real-time captions, and third, for the generation of offline captioning.

62. *Best Practices for Real-Time (Live) Captioning Vendors.*<sup>225</sup>

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Commission, and other interested parties together in a national conference to review the state of caption quality on television. See ¶ 65, *infra*

<sup>224</sup> See Captioning Vendors Best Practices at 1-2. The four vendors that proposed these practices are CaptionMax, NCI, VITAC, and WGBH (collectively Captioning Vendors).

<sup>225</sup> See *id.*

- Create and use metrics to assess accuracy, synchronicity,<sup>226</sup> completeness, and placement<sup>227</sup> of real-time captions;<sup>228</sup>
- Establish minimum acceptable standards based upon those metrics while striving to regularly exceed those minimum standards
- Perform frequent and regular evaluations and sample audits to ensure those standards are maintained;
- Consider “accuracy” of captions to be a measurement of the percentage of correct words out of total words in the program, calculated by subtracting number of errors from total number of words in the program, dividing that number by total number of words in the program and converting that number to a percentage. For example, 7,000 total words in the program minus 70 errors equals 6,930 correct words captioned, divided by 7,000 total words in the program equals 0.99 or 99% accuracy;<sup>229</sup>
- Consider at a minimum mistranslated words, incorrect words, misspelled words, missing words, and incorrect punctuation that impedes comprehension, and misinformation as errors;
  - Captions are written in a near-as-verbatim style as possible, minimizing paraphrasing;<sup>230</sup>
  - The intended message of the spoken dialogue is conveyed in the associated captions in a clear and comprehensive manner;<sup>231</sup>
  - Music lyrics should accompany artist performances;<sup>232</sup>
- Consider synchronicity of captions to be a measurement of lag between the spoken word supplied by the program origination point and when captions are received at the same program origination point;<sup>233</sup>
- Ensure placement of captions on screen to avoid obscuring on-screen information and graphics (e.g., sports coverage);<sup>234</sup>
- Ensure proper screening, training, supervision, and evaluation of captioners by

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<sup>226</sup> Although the Captioning Vendors Best Practices uses the term “timeliness,” *see* Captioning Vendor Best Practices at 1, we have substituted the term “synchronicity” to achieve consistency with our captioning standards in section IV.A.2, *supra*.

<sup>227</sup> Although the Captioning Vendors Best Practices include caption placement within the completeness factor, *see* Captioning Vendors Best Practices at 1, we consider placement to be a separate factor. *See* section IV.A.2, *supra*.

<sup>228</sup> *See id.* at 2. Although the Commission is not adopting accuracy metrics as part of its captioning standards, *see* section IV.A.6, *infra*, we understand that captioning vendors often develop their own accuracy metrics as part of their Best Practices, and thus have included this as a best practice.

<sup>229</sup> Although the Captioning Vendors consider missing words under completeness rather than accuracy, *see* Captioning Vendors Best Practices at 1, we consider missing words as part of the accuracy analysis, and therefore include the total of incorrect, missing and added words in the error count. *See* section IV.A.2, *supra*.

<sup>230</sup> Although this proposal was made by the Captioning Vendors under the topic of “completeness,” *see* Captioning Vendors Best Practices at 1, we consider this best practice under the accuracy factor. *See* section IV.A.2, *supra*.

<sup>231</sup> *See id.*

<sup>232</sup> *See id.*

<sup>233</sup> Although the Captioning Vendors use the word “timeliness,” *see* Captioning Vendors Best Practices at 1, we are using the term “synchronicity.” *See* section IV.A.2, *supra*.

<sup>234</sup> Although this proposal was made by the Captioning Vendors under the topic of “completeness,” *see* Captioning Vendors Best Practices at 1, we separately address caption placement as one of the four factors affecting caption quality. *See* section IV.A.2, *supra*.

- experienced and qualified real-time captioning experts;<sup>235</sup>
  - Ensure there is an infrastructure that provides technical and other support to video programmers and captioners at all times;
  - Ensure that captioners are qualified for the type and difficulty level of the programs to which they are assigned;
  - Utilize a system that verifies captioners are prepared and in position prior to a scheduled assignment;
  - Ensure that technical systems are functional and allow for fastest possible delivery of caption data and that failover systems are in place to prevent service interruptions;
  - Regularly review discrepancy reports in order to correct issues and avoid future issues;
  - Respond in a timely manner to concerns raised by video programmers or viewers;
  - Alert video programmers immediately if a technical issue needs to be addressed on their end;
  - Inform video programmers of appropriate use of real-time captioning (*i.e.*, for live and near-live programming, and not for pre-recorded programming) and what is necessary to produce quality captions, including technical requirements and the need for preparatory materials;<sup>236</sup>
  - For better coordination for ensuring high quality captions and for addressing problems as they arise, understand the roles and responsibilities of other stakeholders in the closed-captioning process, including VPDs, video programmers, producers, equipment manufacturers, regulators, and viewers, and keep abreast of issues and developments in those sectors; and
  - Ensure that all contracted captioners adhere to real-time captioner Best Practices.
63. *Best Practices for Real-Time (Live) Captioners.*<sup>237</sup>
- Caption as accurately, synchronously, completely, and appropriately placed as possible;<sup>238</sup>
  - Ensure they are equipped with a failover plan to minimize caption interruption due to captioner or equipment malfunction;
  - Be equipped with reliable, high speed Internet;
  - Be equipped with multiple telephone lines;
  - Prepare as thoroughly as possible for each program;<sup>239</sup>
  - File thorough discrepancy reports<sup>240</sup> with the captioning vendor in a timely manner;

<sup>235</sup> See Captioning Vendors Best Practices at 1. We are not adopting NCRA’s proposal for captioners to obtain and maintain national certification available through NCRA. See NCRA Best Practices at 2. Many captioning vendors establish their own standards for captioners, and so long as the captioning vendors and captioners follow the Best Practices we adopt herein and provide captions that meet our quality standards, at this time we do not see a need to require separate certification of captioners by NCRA.

<sup>236</sup> For example, preparatory materials for a news or public affairs program would include, among other things, the names of individuals, geographic locations and other terminology anticipated to be spoken during the news program. Similarly, preparatory materials for a sports event would include, among other things, the names of the athletes.

<sup>237</sup> See Captioning Vendors Best Practices at 2.

<sup>238</sup> Although the Captioning Vendors Best Practices use terminology somewhat differently than is being used by the Commission when describing captioning standards in section IV.A.2, *supra*, the above requirement is consistent with the proposal by the Captioning Vendors to: “Caption as timely, accurately, factually, and completely as possible.” Captioning Vendor Best Practices at 2.

<sup>239</sup> For example, preparation would include, among other things, adding names of individuals, geographic locations and other terminology to the captioning equipment’s dictionary.

- To the extent possible given the circumstances of the program, ensure that real-time captions are complete when the program ends;<sup>241</sup>
  - Engage the command that allows captions to pass at commercials and conclusion of broadcasts;<sup>242</sup>
  - Monitor captions to allow for immediate correction of errors and prevention of similar errors appearing or repeating in captions;
  - Perform frequent and regular self-evaluations;
  - Perform regular dictionary maintenance;
  - Keep captioning equipment in good working order and update software and equipment as needed;
  - Possess the technical skills to troubleshoot technical issues,<sup>243</sup> and
  - Keep abreast of current events and topics that they caption.
64. *Best Practices for Offline (Pre-recorded) Captioning Vendors and Captioners.*<sup>244</sup>
- Ensure offline captions are verbatim;
  - Ensure offline captions are error-free;
  - Ensure offline captions are punctuated correctly and in a manner that facilitates comprehension;
  - Ensure offline captions are synchronized with the audio of the program;
  - Ensure offline captions are displayed with enough time to be read completely and that they do not obscure the visual content;
  - Ensure offline captioning is a complete textual representation of the audio, including speaker identification and non-speech information;
  - Create or designate a manual of style to be applied in an effort to achieve uniformity in presentation;
  - Employ frequent and regular evaluations to ensure standards are maintained;
  - Inform video programmers of appropriate uses of real-time and offline captioning and strive to provide offline captioning for pre-recorded programming;
    - Encourage use of offline captioning for live and near-live programming that originally aired on television and re-feeds at a later time;
    - Encourage use of offline captioning for all original and library pre-recorded programming completed well in advance of its distribution on television; and
  - For better coordination for ensuring high quality captions and for addressing problems as they arise, understand the roles and responsibilities of other stakeholders in the closed-

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<sup>240</sup> Discrepancy reports address captioning problems encountered by the captioner while captioning.

<sup>241</sup> Although this best practice differs somewhat from the Captioning Vendors proposal, Captioning Vendors Best Practices at 2 (“Make an effort to ensure live captions do not carry over into the following broadcast or commercial, impeding the subsequent captioning”), this best practice takes into account the program completeness requirements we adopt herein for live and near-live programming. See section IV.A.3.b and c, *supra*.

<sup>242</sup> Unless the captioner directs the captions to continue after the cut-over to a commercial or the end of the program, real-time captions will be cut-off. The use of a command on the captioner’s equipment prevents this from happening.

<sup>243</sup> The Captioning Vendors proposed the wording: “Possess good troubleshooting skills.” Captioning Vendors Best Practices at 2. We modified this wording for the purpose of clarity.

<sup>244</sup> See *id.* at 3. Although the Captioning Vendors Best Practices reference only “captioning vendors” for this section on offline captioning, some of these practices also apply to captioners (e.g., ensuring offline captions are punctuated correctly and in a manner that facilitates comprehension and ensuring offline captions are synchronized with the audio of the program). Thus, we have included “captioners” under this section of the Best Practices.

captioning process, including VPDs, video programmers producers, equipment manufacturers, regulators, and viewers, and keep abreast of issues and developments in those sectors.

65. In addition to following the Best Practices listed above, we agree with NCTA that an ongoing dialogue among interested parties can help assess the industry's progress in implementing these practices and their impact on caption quality for television programs, as well as promote a better understanding of issues relevant to caption quality. NCTA proposes that trade associations sponsor an annual conference with VPDs, programmers, captioning vendors, representatives of the deaf and hard of hearing communities, the Commission, and other interested parties to review the state of caption quality on television, and to discuss developments in captioning technology and other issues of concern.<sup>245</sup> We support this proposal. In addition to the annual conference proposed by NCTA, we encourage industry and consumers to engage in frequent discussions so that the myriad of issues associated with captioning can be resolved to the mutual satisfaction of industry and consumers on an ongoing basis.

### c. Consumer Complaints

66. We will rely on consumers to bring any potential noncompliance with our captioning quality standards to our attention. We believe that a consumer-complaint-driven procedure, rather than an audit-driven one, is the most practical means to monitor industry compliance with our rules. We therefore disagree with NCTA's argument that informal complaints regarding caption quality should be treated as informational filings only, with no requirement for the covered entity to investigate or respond to complaints brought to a company's attention.<sup>246</sup> Our experience with closed captioning informal complaints filed pursuant to section 79.1(g) of our rules<sup>247</sup> has been that they have been useful in bringing to our attention and to the attention of programming entities, technical and other problems that these entities generally correct after investigating the problems raised in the informal complaints. We agree with NAB, however, that we should not forward an informal complaint to a covered entity unless the informal complaint contains specific information necessary to work toward its resolution. Accordingly, CGB will forward informal complaints only if they contain the following information: (1) the channel number, channel name, call sign, or network;<sup>248</sup> (2) the name of the MVPD, if applicable; (3) the date and time when the captioning problem occurred; (4) the name of the program with the captioning problem; and (5) a detailed description of the captioning problem, including specifics about the frequency and type of problem (*e.g.*, garbling, captions cut off at certain times or on certain days, and accuracy problems).<sup>249</sup> CGB will undertake efforts to work with consumers to obtain additional information, as needed, to ensure complete information on deficient complaints prior to forwarding these to VPDs to ease the burdens on both consumers and industry. In the past, the informal complaint process has been an effective tool in identifying problems that need to be addressed, and we hope that these measures will improve upon this process for the speedy and effective resolution of captioning problems in the future. Our goal is to ensure accessible television programming for people who are deaf and hard of hearing, and we believe the informal complaint process will help to achieve this goal by enabling VPDs to correct problems early on, before they become a pattern or trend.

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<sup>245</sup> NCTA Best Practices at 5.

<sup>246</sup> See NCTA January 27, 2014 *Ex Parte* at 2.

<sup>247</sup> 47 C.F.R. § 79.1(g).

<sup>248</sup> NAB proposes that the complaint include the channel number, call sign and network. See NAB *Ex Parte* Letter, January 23, 2014, at 2 (NAB January 23, 2014 *Ex Parte*). We find that any one of those items are sufficient to identify the channel the consumer was viewing. We are also adding the alternative of channel name, because many MVPD viewers identify non-broadcast networks by name.

<sup>249</sup> *Id.*, at 2.

## 6. Cost/Benefit Analysis

67. We believe that the rules we adopt today on non-technical quality standards are a first step to achieving compliance with Congress's directive to provide full access to new video programming and to maximize access on pre-rule programming through captions without unduly burdening the industry charged with providing improved captioning.<sup>250</sup> We are sensitive to the concerns raised by VPDs about burdens that could be imposed were they required to monitor every program on every channel at all times, for the purpose of measuring captioning quality on a program by program basis.<sup>251</sup> In this regard, we note that this order rejects the need for the Commission to "identify clear metrics for determining the completeness, accuracy, readability, and synchronicity of programming."<sup>252</sup> Rather, by (1) defining standards that comprise good quality captions, and taking into consideration the extent to which compliance with these standards can be achieved for various types of programming, and (2) requiring VPDs to obtain certification from programmers that they are either complying with the quality standards or with Best Practices, we focus more on the end result – *i.e.*, the provision of captions that effectively convey video programming content for people who are deaf and hard of hearing to the same extent that the audio track conveys this content to people who do not rely on captions – than a strict numeric accuracy standard that may be more burdensome,<sup>253</sup> yet less effective in ensuring that viewers can fully understand the captions.<sup>254</sup>

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<sup>250</sup> See 47 U.S.C. § 613(b)(1) (requiring video programming first published or exhibited after the effective date of the Commission's rules to be "fully accessible through the provision of closed captions," and 47 U.S.C. § 613(b)(2) (requiring video programming providers or owners to "maximize the accessibility" of older video programming).

<sup>251</sup> See NAB Comments at 14; NCTA Comments at 6 ("Operators nationwide would need equipment and personnel to monitor captions on nearly 2 million channels"); NCTA *Ex Parte* Letter, August 8, 2013 (NAB August 8, 2013 *Ex Parte*) (stating that "requiring cable operators to monitor caption quality around-the-clock . . . would be a significant and costly undertaking and should not be required"); DIRECTV *Ex Parte* Letter, July 26, 2013, at 1 (DIRECTV July 26, 2013 *Ex Parte*) (stating that DIRECTV and DISH Network do not have the capability to monitor closed captioning on all channels in real-time, and that "[m]onitoring so many channels on a constant basis would be prohibitively expensive"; NCTA Reply Comments at 8 ("[T]he typical cable system carries hundreds of channels. None of the equipment described by WGBH is capable of simultaneously monitoring all those analog and digital channels"); NCTA Refresh Comments at 4.

<sup>252</sup> Consumer Groups January 15, 2014 *Ex Parte* at 3. The action we take today is consistent with the Commission's decision in 1997 not to require extensive monitoring "to make sure that no more than a specified percentage of the words are wrong, misspelled or missing." *1997 Closed Captioning Report and Order*, 13 FCC Red at 3374-3375, ¶ 224.

<sup>253</sup> See HBO Comments at 11 ("[t]he types of standards being proposed do not lend themselves to easy measurement or compilation"); NAB Reply Comments at 9, *citing* Caption Colorado Comments at 9 ("the reality of strict schedules and other financial considerations do not always allow time for multiple reviews of captions to guarantee that each word and phrase is captioned verbatim"); NAB Refresh Comments at 4, 12; Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) and the Western Telecommunications Alliance (WTA) Refresh Reply Comments at 2 (OPASTCO Refresh Reply Comments); NAB November 5, 2013 *Ex Parte* at 1 (opposing "specific numeric captioning quality standards"); CBS *Ex Parte* Letter, November 25, 2013, at 1 (stating that "new rules that attempt to quantify or define a required level of quality are unworkable").

<sup>254</sup> We agree with Global Translation, Inc. that "[w]hile some errors have a trivial effect on understandability, many others can significantly impair the viewer's ability to understand the programming, which is the purpose of the captions." Global Translation, Inc. Comments at 3 (doing business as Translate TV, Global translates English captions into Spanish captions and subtitles for national and local TV broadcasts); NCRA January 2, 2014 *Ex Parte* at 1 (noting that many organizations have attempted to develop specific captioning metrics, "but there is currently a lack of universal agreement as to *what* those metrics should be"). Should we find, however, after the standards adopted today have been put into practice, that these are ineffective in ensuring good quality captions, we will revisit the need for numeric accuracy closed captioning standards.

68. As noted above, since 1997, Commission rules have required VPDs to utilize captions that provide full access to video programming for people who are deaf and hard of hearing.<sup>255</sup> The record in this proceeding shows that many entities covered by our rules already have undertaken practices to make this happen. For example, according to NCTA, “the industry has taken steps on its own to ensure that captions achieve a high degree of accuracy,” through contracts with captioning agencies that include quality and accuracy provisions, and continual reviews by cable programmers of the captioning services that they use.<sup>256</sup> Similarly, as noted above, CBS reports that its networks require multiple reviews of captions on pre-recorded programs both by the captioning agency prior to delivery and again by CBS personnel after delivery.<sup>257</sup> HBO similarly indicates that its extensive quality control program keeps errors down and even has resulted in a lower number of errors in closed captioning than “the miniscule amount of audio discrepancies.”<sup>258</sup>

69. Although we acknowledge that there may be some costs associated with the caption quality requirements we are adopting today, we believe the certification approach that we are adopting imposes only a minimal burden on VPDs. Under the new requirements, VPDs need to exercise their best efforts to obtain certifications from their video programmers that they are in compliance with the new quality standards or the Best Practices or are exempt from the captioning requirements. We also are permitting the use of widely available certifications for this purpose, which will eliminate the need for VPDs to obtain individual contractual certifications and, thus, will further reduce the burden on VPDs in complying with the certification requirement. We also have minimized the burden on VPDs with respect to video programmers that fail to provide a certification, requiring a VPD that nevertheless carries the non-certifying programmer’s programming to report that programmer to the Commission. We believe these narrowly defined obligations will not impose an undue burden on VPDs, several of whom, in the ordinary course of their businesses, already take measures to ensure compliance with our 1997 closed captioning directives to provide good quality captions.

70. We also recognize that the certification approach that we are implementing imposes some burden on programmers that elect to certify to compliance with either the standards or the Best Practices, *i.e.*, they may be required to implement practices and incur some additional costs to ensure that the captioning that they provide meets the Commission’s caption quality standards or Best Practices we adopt herein. For example, video programmers that use real time captioning methods to routinely caption pre-recorded programming may, depending on the programming, decide to switch to offline captioning techniques as a result of the order we adopt today.<sup>259</sup> The record shows that the cost of real time captioning is approximately \$125 per hour,<sup>260</sup> and costs for offline captioning are three to four times this amount, or approximately \$375 to \$500 per hour. Accordingly, some video programmers may incur incremental expenses beyond what they now pay to improve their captions on pre-recorded programming if they elect to certify that they will comply with the new standards or Best Practices.<sup>261</sup> Nonetheless, we

<sup>255</sup> See *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286-88. ¶¶ 27-30.

<sup>256</sup> NCTA Comments at 3; NCTA Refresh Comments at 3.

<sup>257</sup> CBS Reply Comments at 2.

<sup>258</sup> See HBO Comments at 5. VPDs supplied with HBO programming have been assured, through HBO’s captioning quality controls, that captions on programming received from HBO will effectively convey the program’s aural content. See also MPAA Comments at 3.

<sup>259</sup> As noted above, there are some situations where real-time captioning may still be necessary for pre-recorded programming. See section IV.A.3.a, *supra*.

<sup>260</sup> See NAB *Ex Parte Letter*, December 9, 2013, at 2.

<sup>261</sup> See section IV.A.3.a, *supra*. The record reflects that real-time captioning methods can result in a greater number of errors (because there is no opportunity to proofread the captions), see NCI, *Prerecorded Captioning*, <http://www.ncicap.org/services/prerecorded-captioning/> (last visited January 29, 2014); NCTA *Ex Parte Letter*, November 22, 2013 (noting that real-time captioning “will never be free from human error”), greater omissions than

believe the overall cost burden on programmers choosing to certify will be relatively minimal, as demonstrated by the record, which reflects that caption prices have “fallen dramatically” since the Commission first implemented its 1997 captioning rules.<sup>262</sup> We also note that permitting video programmers to provide widely available certifications, rather than having to provide individual certifications to each requesting VPD, will substantially minimize the burden on programmers choosing to certify. Accordingly, we find that the incremental costs that are incurred by the captioning industry as a result of the adoption of our order today are outweighed by the benefits that will be gained by allowing millions of Americans who are deaf and hard of hearing who rely on captions<sup>263</sup> to have full access to local, national, and worldwide events and entertainment shown on television.<sup>264</sup>

## B. Use of Electronic Newsroom Technique (ENT) for Live Programming

71. *Background.* Electronic Newsroom Technique (ENT) is a technique that can convert the dialogue included on a teleprompter script into captions. In the *1997 Closed Captioning Report and Order*, the Commission allowed the use of ENT for the captioning of newscasts and other live programming – for purposes of meeting the captioning benchmarks – both to permit flexibility in the methods used to create closed captions and to address the record’s conflicting accounts at that time as to the number of available real-time captioners.<sup>265</sup> At the same time, the Commission stated that because

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 captions carefully prepared and reviewed in advance, *see* Caption Colorado Comments at 20-26; MCS Refresh Comments at 9-12; Inclusive Technologies Refresh Comments at 2; Consumer Groups Refresh Comments at 5; Consumer Groups April 25, 2011 *Ex Parte* at 1, and greater lag time between when the words are spoken and captions appear, making it difficult to follow who is speaking during a program. *See* Bob Hawbaker Refresh Comments; Oregon Group Late-filed Refresh Comments at 1. *See also* Consumer Groups Reply Comments at 10-11 (“the only significant change in cost is if a local broadcaster uses an inexperienced [captioner] who does not produce captioning to the standards set by the Commission,” and, as a result of the new standards, switches to using qualified individuals that might be more expensive).

<sup>262</sup> WGBH/NCAM Comments at 8; MCS Refresh Comments at 5 (40% decline in the rates charged); NCI *Ex Parte* Letter, October 6, 2010, at 1 (noting a “[d]ramatic lowering of captioning rates”); Consumer Groups July 26, 2013 *Ex Parte* at 2.

<sup>263</sup> National Institute on Deafness and Other Communication Disorders, *Quick Statistics*, <http://www.nidcd.nih.gov/health/statistics/Pages/quick.aspx> (last visited August 27, 2013).

<sup>264</sup> When Congress first adopted the captioning rules, it stated that its goal was “to ensure that all Americans ultimately have access to video services and programs, particularly as video programming becomes an increasingly important part of the home, school and workplace.” S. Conf. Rep. 104-230, at 183-84 (1996); H.R. Conf. Rep. 104-458, at 183-84 (1996). *See also* Alexandra Cherrie Comments at 2 (captions allow these individuals to “be part of the ‘cultural mainstream of our society’ by providing an essential link to news, entertainment, and other information”); ANA Recommendations at 2-3 (captioning costs are small as compared to the benefits; Charles Benton Comments; Marierlin Jiminez *Ex Parte* Letter, December 19, 2005, at 2. We further note that the incremental cost of using offline captioning, approximately \$250 to \$375 more per hour than real time captioning, is small compared relative to the high production costs that are often associated with putting a television program on the air. *See, e.g.*, Curt Schleier, *Tough economy hits TV production, too*, Today, Apr. 13, 2010, available at <http://www.today.com/id/35884577#.UsrWCPVnW3E> (last visited Jan. 6, 2014) (an hour-long drama can cost as much as \$3 million an episode); Curt Schleier, *Tough economy hits TV production, too*, Today, Apr. 13, 2010, available at <http://www.today.com/id/35884577#.UsrWCPVnW3E> (last visited Jan. 6, 2014) (the Jay Leno Show (NBC) costs approximately \$500,000 per episode); Leslie Gornstein, *Which Costs More, Reality TV or Scripted Series?*, E! Online, Nov. 22, 2008, available at <http://www.eonline.com/news/70141/which-costs-more-reality-tv-or-scripted-series> (last visited Jan. 6, 2014) (“‘Generally, half-hour reality shows on cable are budgeted in the \$100,000 to \$500,000 range, per episode,’ says Hadjii, producer-director of the BET show *Somebodies*. . . . One TV producer [says] that [scripted] dramas ring in at roughly \$1 million per episode . . .”). Finally, we remind any entity for whom it is economically burdensome to meet the expenses associated with providing captions that it is permitted to seek an exemption under our rules. 47 C.F.R. §79.1(f).

<sup>265</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3311-12, ¶ 84.

ENT often leaves portions of live newscasts uncaptioned, this method cannot provide the “functional equivalent” of the audio portion of television programming.<sup>266</sup>

72. On reconsideration, because of the inability of ENT to capture interviews, field reports, and late breaking weather and sports reports, the Commission narrowed the circumstances under which captions created with this technique could be counted toward the Commission’s closed captioning requirements.<sup>267</sup> The ENT rule now prohibits the four major national broadcast networks, their affiliates in the 25 largest DMAs as defined by the Nielsen ratings, and national non-broadcast networks serving at least 50 percent of all homes subscribing to multichannel video programming services from using ENT to caption live programming.<sup>268</sup> Also on reconsideration, the Commission indicated its intent to expand the class of providers that cannot count captions created by ENT toward compliance with the rules, and eventually to phase out the ability to use ENT-created captions entirely,<sup>269</sup> predicting that in the future, ENT would “by far be the exception rather than the general rule, and that only those entities that are so small or who present unusual circumstances will be permitted to continue to use EN[T] because live closed captioning would be an economic burden.”<sup>270</sup>

73. Petitioners have requested the Commission to extend the ENT prohibition to all markets beyond the top 25.<sup>271</sup> In the *2005 Closed Captioning NPRM* and the *Refresh Public Notice*, the Commission sought comment on this proposal, and asked whether the rationale that originally led the Commission to allow the use of this method by some VPDs is still relevant.<sup>272</sup> Commenters are divided on this issue, with consumers uniformly urging the elimination of ENT to achieve greater access through real-time captioning<sup>273</sup> and the video industry united in its opposition to elimination of ENT as a captioning option for live programming.<sup>274</sup>

74. NAB maintains that cost considerations and challenges associated with securing real-time captioners continue to make live captioning of local news difficult for broadcasters in medium and small markets.<sup>275</sup> Specifically, NAB states that extending the requirement for real-time captioning to medium and small markets could result in staff cuts, diminished newsgathering capabilities, fewer local newscasts

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<sup>266</sup> *Id.* at 3311-12, ¶ 84.

<sup>267</sup> *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 19991, ¶¶ 35-36.

<sup>268</sup> 47 C.F.R. § 79.1(e)(3).

<sup>269</sup> *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 19991, ¶ 36.

<sup>270</sup> *Id.* at 19993, ¶ 40.

<sup>271</sup> 2004 Petition at 35.

<sup>272</sup> *2005 Closed Captioning NPRM*, 20 FCC Rcd at 13226-27, ¶ 48; *Refresh Public Notice* at 2-3.

<sup>273</sup> See ASDC Comments at 2; Consumer Groups Reply Comments at 20-22; Consumer Groups Refresh Comments at 8-12; NVRC Reply Comments at 5; Terrie La Barbera Refresh Comments; Brian Sturgis Refresh Comments; Brian Morace Refresh Comments; Guy A. L’Heureux Refresh Comments; Hugh Lafler Refresh Comments; Kim Mihan Refresh Comments; Nicolas Tegni Refresh Comments; Bob Hawbaker Refresh Comments; Don Lee Hanaumi Refresh Comments; Lauren E. Storck Ph.D. (founder of the Collaborative for Communications Access via Captioning) Refresh Comments; Daniel O’Toole Refresh Comments; Jennifer L. Thomas Refresh Comments; Kirwan Rockefeller, Ph.D. Refresh Comments; Michael J. Boucher Refresh Comments; Carol Ann Nemecek Refresh Comments; Catherine Berger Refresh Comments; Elizabeth Botts Refresh Comments; Rachel Mazique Refresh Comments; Kelly A. Scherf Refresh Comments; Daniel Geiger Refresh Comments. See also WGBH/NCAM Comments at 22-24.

<sup>274</sup> See Cosmos Comments at 5-8; Block Comments at 1; Radio-Television News Directors Association (RTNDA) Comments at 5-8; NAB Comments at 6-10; NAB Refresh Comments at 21-25; COBI Refresh Comments at 2-3; RTDNA Refresh Comments at 4-6; NCTA Refresh Comments at 10-11; Entravision Refresh Reply Comments.

<sup>275</sup> See NAB *Ex Parte* Letter, January 17, 2014, at 1 (NAB January 17, 2014 *Ex Parte*).

and the possible cessation of news operations.<sup>276</sup> Moreover, NAB claims that significant attempts over the last decade to find sponsors for real-time captioning of local news have been unsuccessful.<sup>277</sup> NAB adds that because real-time captioning is subject to human error, generally has greater synchronicity problems, and is less accurate and complete than ENT captions derived from scripts, the risk of having newscasts cancelled if required to use such methods would not likely be outweighed by significant benefits to consumers.<sup>278</sup> To remedy the lack of full access to news programming, NAB proposes Electronic Newsroom Technique Best Practices that it claims can improve the amount of programming captured by ENT for broadcast television stations in all markets. Under NAB's proposal, stations using such methods would be deemed in compliance with the Commission's captioning rules and therefore would not be required to use real-time captioning technologies for such programming.<sup>279</sup>

75. Consumers raise concerns with NAB's proposed solution.<sup>280</sup> They allege that viewers will continue to be denied access to breaking news, on-the-scene, and weather reporting in markets outside the top 25 if ENT is permitted to continue, even with enhancements.<sup>281</sup> They further assert that NAB's claims that the costs of live captioning would reduce news programming are speculative,<sup>282</sup> and that the "strong market for skilled captioners would fill any shortage in light of the demand created by the discontinuance of ENT."<sup>283</sup> They insist that all live programming, including news and weather programming should be captioned "completely and ubiquitously."<sup>284</sup> If the Commission moves ahead with NAB's proposal, Consumer Groups urge the Commission to authorize the continued use of ENT "for a period no longer than one year, and to set for the end of that period a proceeding to assess the continuing use of ENT and proceed with a timed phase-out if ENT still does not facilitate the equal access to video programming required by the 1996 Act."<sup>285</sup>

76. *Discussion.* For the reasons discussed below, we amend section 79.1(e)(3) of our rules to describe the manner in which broadcast stations not subject to the prohibition on ENT will be deemed in compliance with our captioning rules if they continue to use ENT to provide captioning on their live programming. We will require broadcasters using ENT to follow such enhanced ENT procedures, and will evaluate the effectiveness of these procedures for caption viewers one year from the effective date of

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<sup>276</sup> See NAB January 17, 2014 *Ex Parte* Attachment at 1 ("In particular, small and medium market stations may not be able to procure real-time captioners or absorb exponentially increased costs . . . resulting in reduction or elimination of local news programming"); COBI Refresh Comments at 2-3 (cuts could include live breaking local news); RTDNA Refresh Comments at 3 (for small and medium markets, real time captioning would cost \$100,000 to \$300,000 annually; the same reasons for permitting ENT in 1997 persist today; because voice activated software does not produce sufficiently accurate results at this time, 55 percent of stations would need to consider cuts in news operations); NAB Refresh Comments at 2-5, 21-24; NCTA Refresh Comments at 6-7, 10-11; Entravision Refresh Reply Comments at 1-6 (economic burden would be greater for Spanish and other foreign language stations).

<sup>277</sup> See NAB January 17, 2014 *Ex Parte* Attachment at 1.

<sup>278</sup> See NAB January 17, 2014 *Ex Parte* at 1.

<sup>279</sup> NAB January 23, 2014 *Ex Parte* Attachment at 1.

<sup>280</sup> Consumer Groups *Ex Parte* Letter, January 28, 2014, at 1-2 (Consumer Groups January 28, 2014 *Ex Parte*).

<sup>281</sup> See Consumer Groups January 15, 2014 *Ex Parte* at 5, listing as examples Albuquerque, New Mexico, Rochester, New York, Austin, Texas, Baton Rouge, Louisiana, Birmingham, Alabama, and Hartford.

<sup>282</sup> *Id.*; See also Consumer Groups January 28, 2014 *Ex Parte* at 2 (insisting that there is no evidence on the record in this proceeding to support the conclusion that the use of real-time captioning instead of ENT would impose an economic burden for all of the entities that would be affected by a phase out of ENT).

<sup>283</sup> Consumer Groups January 15, 2014 *Ex Parte* at 5.

<sup>284</sup> *Id.*

<sup>285</sup> Consumer Groups January 28, 2014 *Ex Parte* at 3.

this proceeding. In the intervening sixteen years since the Commission's closed captioning rules first took effect, captioning has become a routine part of video production. As a consequence, viewers have come to expect that when closed captions are added to a program, they convey the full content of that program. While the top four network-affiliated stations in the top 25 DMAs have successfully implemented live captioning of local news programming without the use of ENT, their programming reaches only approximately half of U.S. households.<sup>286</sup> VPDs operating in mid-size to smaller markets generally have not voluntarily chosen to use real-time captioning for their news programming.<sup>287</sup> As a consequence, roughly half of the 36 million people living in the U.S. who are deaf and hard of hearing still do not have complete access to local news.<sup>288</sup> Section 713 of the Communications Act requires video programming first published or exhibited after the effective date of the Commission's regulations to be "fully accessible through the provision of closed captions."<sup>289</sup> We agree with those commenters who assert that reliance on ENT as it is now being done is preventing these individuals from having full access to news and information that is not pre-scripted, including but not limited to, sports and weather updates, on-the-spot field reporting, interviews and dialogue between anchors.<sup>290</sup>

77. We remain concerned about the inability of ENT, as it is currently used in markets outside of the largest 25 DMAs, to provide full and equal access to news programming for all Americans. We continue to believe that full and equal access to news programming is critical for all Americans, no matter where they live.<sup>291</sup> However, while the costs for real-time captioning have dropped significantly<sup>292</sup>

<sup>286</sup> See Consumer Groups Refresh Comments at 10; Nielson, *Local Television Market Universe Estimates – Comparisons of 2008-09 and 2009-10 Market Ranks*, attached to Consumer Groups Refresh Comments as Exhibit 1 (Nielson DMA Population List).

<sup>287</sup> See Consumer Groups Refresh Comments at 11-12. Many of the markets where ENT still is in use have substantial populations of viewers who are deaf and hard of hearing, including Raleigh-Durham, Baltimore, San Diego, Nashville, Salt Lake City, Kansas City, Cincinnati, Columbus, Milwaukee, San Antonio, Las Vegas, Oklahoma City, Austin, Jacksonville, New Orleans, Providence-New Bedford, Rochester, NY, and Sioux Falls. See Nielson, *Local Television Market Universe Estimates - Estimates as of January 1, 2014*, [http://www.tvb.org/media/file/TVB\\_Market\\_Profiles\\_Nielsen\\_TVHH\\_DMA\\_Ranks\\_2013-2014.pdf](http://www.tvb.org/media/file/TVB_Market_Profiles_Nielsen_TVHH_DMA_Ranks_2013-2014.pdf) (last visited January 29, 2014). See also Rhode Island Commission on the Deaf and Hard of Hearing, *Ex Parte* Letter, December 4, 2013, at 1-2 (a television station in Providence that used to real-time caption its news programs, but switched to ENT in 2011).

<sup>288</sup> See generally Consumer Groups Refresh Comments at 8-12. *Accord*, Terrie La Barbera Refresh Comments; Brian Sturgis Refresh Comments; Brian Morace Refresh Comments; Guy A. L'Heureux Refresh Comments; Hugh Lafler Refresh Comments; Kim Mihan Refresh Comments; Nicolas Tegni Refresh Comments; Bob Hawbaker Refresh Comments; Don Lee Hanaumi Refresh Comments; Lauren E. Storck Ph.D. Refresh Comments; Daniel O'Toole Refresh Comments; Jennifer L. Thomas Refresh Comments; Kirwan Rockefeller, Ph.D. Refresh Comments; Michael J. Boucher Refresh Comments; Carol Ann Nemecek Refresh Comments; Catherine Berger Refresh Comments; Elizabeth Botts Refresh Comments; Rachel Mazique Refresh Comments; Kelly A. Scherf Refresh Comments; Daniel Geiger Refresh Comments.

<sup>289</sup> 47 C.F.R. § 613(b)(1).

<sup>290</sup> See e.g., Consumer Groups Refresh Comments at 8-12. Consumer Groups report that sometimes the information omitted also has safety implications. See Consumer Groups Refresh Comments at 9.

<sup>291</sup> See Waldman, Steve, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, Federal Communications Commission, July 2011, Chapter 24, People with Disabilities, at 258-261; *Closed Captioning Reconsideration Order*, 13 FCC at 19993-19994, ¶42 (discusses issues associated with accessibility of media).

<sup>292</sup> See WGBH/NCAM Comments at 11 (caption prices have fallen dramatically since the Commission first instituted its captioning rules); Caption Colorado Refresh Comments at 13 (the cost of real time captioning has dropped to extremely low levels in the past year or two); Consumer Groups Refresh Comments at 11 (the real time captioning rates, adjusted for inflation, have declined 70 to 85 percent since the mid-1990s). According to the Consumer Groups, the cost of real time captioning in 2010 ranged from \$50 to \$175 per hour, while the cost of real-

(continued...)

and steps, including the allocation of federal appropriations to expand training opportunities,<sup>293</sup> have been taken to increase the number of real-time captioners over the past sixteen years since section 79.1(e)(3) was adopted, we recognize that many stations continue to have significant concerns about their ability to provide local news if they are denied the opportunity to provide captions through ENT. We agree with NAB that the public interest would not be served were television stations required to cut back on local news programming.

78. In addition, the record indicates that the enhanced ENT procedures enumerated in NAB's Electronic Newsroom Technique Best Practices and listed below, offer stations permitted to continue using ENT a means to improve caption quality for consumers, without requiring all stations to assume the cost of real-time captioning of all news programming. Therefore, we will permit the continued use of ENT at this time, provided that these new ENT procedures are followed. Specifically, we expect that the enhanced ENT procedures and the use of visual information, such as crawls on the third lower half of the screen where scripts for ENT are *not* available, will fill many, if not most, of the gaps that current ENT practices often leave.<sup>294</sup> In this manner, we anticipate that these procedures will ensure that most in-studio programming, such as weather, sports, news and entertainment, as well as breaking news and on-the-scene programming will be made more accessible to viewers who are deaf and hard of hearing.

79. According to NAB, improvements in technology and the fuller utilization of pre-scripted text through ENT will allow the "majority of content contained in a local newscast [to] be captioned using existing ENT equipment without significant additional cost, or ramp-up time."<sup>295</sup> NAB further explains that there are three widely-used ENT systems,<sup>296</sup> all of which have a cost-effective means of sending relevant text data to a captioning encoder and the ability to allow stations to fill unscripted portions of program with text.<sup>297</sup> Specifically, according to NAB, these techniques allow scripts to be added, deleted,

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time captioning in the mid-1990s, adjusted for inflation (using the United States Bureau of Labor Statistics Consumer Price Index), ranged from \$172 to \$1717 per hour in 2009 dollars. Consumer Groups Refresh Comments at 11 n.18. The non-adjusted cost of real-time captioning in the mid-1990s used by the Consumer Groups ranged from \$120 to \$1200 per hour. *See* Consumer Groups Refresh Comments at 11 n.18, *citing 1996 Closed Captioning Report to Congress*, 11 FCC Rcd at 1923, ¶ 48. In addition, local stations in smaller markets have fewer hours of local news programming than the stations in larger markets, necessitating fewer hours of real-time captioning. Caption Colorado Refresh Comments at 13; Caption Colorado *Ex Parte* Letter, December 2, 2011 (data for average number of hours of news programming per week for network affiliates drops from 48.72 hours in the top 25 DMAs to 34.57 hours in DMAs 101-125).

<sup>293</sup> *See* "Application for New Awards; Training for Realtime Writers Program," 78 FR 22530, Pages 22530-35, April 16, 2013. (Nearly \$1.1 million dollars in grant money available in 2013 for court reporting schools from the U.S. Department of Education.) *See also* NCRA link, <http://www.ncra.org/News/newsdetail.cfm?ItemNumber=14205> and <http://www.ncra.org/News/content.cfm?ItemNumber=10418> (last visited January 29, 2014) (reporting that court reporting schools nationwide have secured more than \$14 million through 32 Congressional earmarks, and \$20 million total in funding). In the last round in 2012, four court reporting schools received grants from the U.S. Department of Education: the College of Court Reporting (Ind.), San Antonio College (Texas), MacCormac College (Ill.), and Green River Community College (Wash.) that amount to \$1,108,869. The College of Court Reporting received \$300,000; San Antonio received \$214,878; MacCormac College received \$295,850; and Green River Community College received \$298,141. Adam Finkel, *NCRA Legislative Efforts Yield More than \$1.1 million in Grants to Court Reporting Schools*, Aug. 24, 2012, <http://www.ncra.org/News/newsdetail.cfm?ItemNumber=13381> (last visited January 29, 2014).

<sup>294</sup> NAB January 23, 2014 *Ex Parte* Attachment at 1.

<sup>295</sup> NAB January 17, 2014 *Ex Parte* at 2.

<sup>296</sup> Associated Press ENPS, Avid iNEWS, and/or Comprompter. *See* NAB January 17, 2014 *Ex Parte* at 2.

<sup>297</sup> *See id.*

or updated with lead times of less than one minute.<sup>298</sup> NAB adds that even field reporters with access to broadband can provide scripts from the field.<sup>299</sup> As an example, NAB reports that weather scripts, which are commonly prepared for the web and other platforms (e.g., radio) as well as television, can “readily be updated and entered into the ENT system.”<sup>300</sup> While there still may be breaking news or live interview segments that are not scripted, NAB explains that the pertinent information contained in such segments typically can be provided in summary form in crawls or in the lower third of the screen and that follow up reports on those segments can be captioned.<sup>301</sup>

80. *Effective Date.* Allowing the continued use of ENT in compliance with the procedures enumerated below will promote the use of this captioning technique in a manner that achieves our goal of ensuring quality captioning, while still providing for flexibility in complying with our rules.<sup>302</sup> We believe that this approach will serve the public interest, as it will both ensure the continuation of local newscasts while requiring that enhancements be made to ENT that are consistent with Congress’s objective to provide full access to television programming by people who are deaf and hard of hearing. In accordance with NAB’s statements that little ramp-up time is needed to put these conditions into place,<sup>303</sup> we will make these requirements effective 90 days after publication in the Federal Register. To the extent it is not technically feasible for a particular station to comply with our new requirements by this time, the station may request additional time by seeking a limited waiver of the effective date, supported by an appropriate good cause showing.<sup>304</sup> Finally, we remind regulated entities that our current rules prohibiting ENT for certain VPDs remain in effect.<sup>305</sup> Additionally, any station may, in lieu of following the enhanced ENT procedures, provide real-time captioning on their live programming.

81. *ENT Best Practices.* Accordingly, based on the proposals submitted by NAB, we require that in order to be deemed in compliance with our rules requiring captioning of live programming, broadcast stations that are not subject to the current prohibition on ENT must adhere to the following procedures in the ordinary course of business if they continue to use ENT for live programming:

- In-studio produced programming will be scripted. These scripted elements will include in-studio news, sports, weather, and entertainment programming.
- For weather interstitials where there may be multiple segments within a news program, weather information explaining the visual information on the screen and conveying forecast

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<sup>298</sup> *See id.*

<sup>299</sup> *See id.* at 3. Specifically, NAB explains that reporters in the field can script their next segment and send that to the studio so long as an Internet connection is available. NAB acknowledges that the extent to which breaking news, on-the-scene and interviews can be captioned through ENT will depend on the nature of the programming. For example, they acknowledge that a reporter on the scene of a car crash might have to report the events as they are being seen, without the benefit of scripted text. However, they indicate that such information could be provided in crawls or text in the lower third of the screen. *Id.*

<sup>300</sup> *Id.* at 3. Where the meteorologist or anchor person is unable to follow such text verbatim, NAB explains that the pertinent information, such as the forecast, would be scripted (and thus, presumably available for reporting).

<sup>301</sup> NAB January 17, 2014 *Ex Parte* at 2.

<sup>302</sup> In this regard, we note that the incorporation of ENT scripts prepared in accordance with the best practices described herein should also adhere, to the greatest extent possible, to the four standards of captioning quality: accuracy, synchronicity, program completeness and appropriate placement.

<sup>303</sup> NAB January 17, 2014 *Ex Parte* Attachment at 1 (“[B]ecause ENT systems already are deployed at station facilities, there would be no significant ramp-up time in implementing best practices”)

<sup>304</sup> *See* 47 C.F.R. § 1.3; *Wait Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“The agency’s discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.”) (citations omitted).

<sup>305</sup> 47 C.F.R. § 79.1(e)(3).

information will be scripted, although the scripts may not precisely track the words used on air.

- Pre-produced programming will be scripted (to the extent technically feasible).
- If live interviews, live on-the scene and/or breaking news segments are not scripted, stations shall supplement them with crawls, textual information, or other means (to the extent technically feasible).
- These provisions do not relieve stations of their obligations to comply with requirements regarding the accessibility of programming providing emergency information under 47 C.F.R. § 79.2.
- Stations will provide training to all news staff on scripting for improving ENT.<sup>306</sup>
- Stations will appoint an “ENT Coordinator” accountable for compliance.

82. *One-year ENT Report.* Although we now adopt new ENT procedures, we acknowledge Consumer Groups’ concerns about whether these enhancements “will ultimately provide viewers who are deaf and hard of hearing with sufficient access to critical news programming that would otherwise be captioned in real-time.”<sup>307</sup> Because the record is not fully developed on how the new ENT procedures will be applied by news programmers across the country, and the extent to which compliance with these procedures will fulfill the Act’s requirement for full access to news programming,<sup>308</sup> we will reevaluate the effectiveness of these ENT enhancements in providing people who are deaf and hard of hearing with full access to television news programming one year after the effective date of the rules pertaining to ENT. To begin this process, no later than one year after the implementation of these ENT procedures, we require broadcast stations that have relied on these procedures to prepare and submit to the Commission a report on their experiences with following these new measures, and the extent to which they have been successful in providing full and equal access to news programming. Such report shall be prepared in consultation with Consumer Groups and may be prepared by the NAB on behalf of the affected broadcasters.<sup>309</sup> Consumer Groups recommend that such report include data to demonstrate the extent to which ENT captioning meets the principles of accuracy, completeness, synchronicity, and placement, the percentage and quantity of uncaptioned programming by stations using ENT, the impact of ENT usage on the ability of consumers who are deaf and hard of hearing to access programming, complaints filed about ENT, the state of the market for real-time captioners, the economic need for stations to continue using ENT in lieu of real-time captioning, and technological progress toward achieving improvements with ENT.<sup>310</sup> We encourage the inclusion of such information in the one year report, which we believe can assist the Commission in evaluating whether a further proceeding that may include the phase out of ENT for certain DMAs is necessary to ensure full access to televised news programming by people who are deaf and hard of hearing.

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<sup>306</sup> NAB has indicated that it pledges “to support local television stations with training resources and programs targeted to improve ENT,” as well as “to work with all interested stakeholders to collaboratively assess the use of improved ENT on an ongoing basis.” NAB January 23, 2014 *Ex Parte* Attachment at 2.

<sup>307</sup> Consumer Groups January 28, 2014 *Ex Parte* at 1.

<sup>308</sup> *See id.* at 2-3.

<sup>309</sup> In our experience, development of joint reports by consumers and industry have been successful in fostering industry and consumer communication and collaboration in resolving issues related to accessibility of closed captioning. *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, MB Docket No. 11-154, 26 FCC Rcd 13734, 13741-42, ¶ 13-14 (describing meetings of the Video Programming Accessibility Advisory Committee (VPAAC) and its July 12, 2011 report providing suggestions for the Commission’s regulations of IP closed captioning).

<sup>310</sup> Consumer Groups *Ex Parte* Letter, February 6, 2014, at 2.

83. *Complaints.* The Commission will entertain informal complaints of noncompliance with the Commission's closed captioning rules by those stations using the above procedures for ENT, but will forward a complaint to a station only if it contains the following relevant information, which we deem necessary to effectively respond to such complaint: the television channel number, network and/or call sign, the name of the subscription service, if relevant, the date and time of the alleged captioning problems, the name of the program with the alleged captioning problem, a detailed and specific description of the captioning problem, including the frequency and type of problem.<sup>311</sup>

84. *Compliance Ladder.* Based on proposals set forth by NAB,<sup>312</sup> we further adopt the following compliance ladder in the event that complaints gathered by the Commission indicate a pattern or trend of noncompliance with the new ENT rules:

- If the Commission notifies a broadcast station that the Commission has identified a pattern or trend of possible noncompliance by the station, the station shall respond to the Commission within 30 days regarding such possible noncompliance, describing corrective measures<sup>313</sup> taken, including those measures the station may have undertaken in response to informal complaints and inquiries from viewers.
- If, after the date for a broadcast station to respond to the above notification, the Commission subsequently notifies the broadcast station that there is further evidence indicating a pattern or trend of noncompliance, the broadcast station shall submit to the Commission, within 30 days of receiving such subsequent notification, an action plan describing specific measures it will take to bring the station's ENT performance into compliance with the Commission's regulations for ENT. Action plans could include, for example, training of station personnel, more prominent reminders of the need for accessibility, and, if appropriate, the use of improved equipment. In addition, the station shall be required to conduct spot checks of its ENT performance and report to the Commission on the results of such action plan and spot checks 180 days after submission of such action plan.<sup>314</sup>
- If, after the date for submission of such report on the results of an action plan, the Commission finds continued evidence of a pattern or trend of noncompliance, the Commission will then consider, through its Enforcement Bureau, appropriate enforcement action including admonishments, forfeitures, and other corrective actions as necessary that may include a requirement to cease using ENT, and instead use real-time captioning for live programming.

85. We note that under NAB's ENT proposal, the Commission would be permitted to revoke a station's entitlement to use ENT only as a fourth step, *i.e.*, *after* the station has been subject to a prior formal enforcement proceeding that resulted in appropriate action, such as admonishments, forfeitures or other corrective actions, and there is further evidence of a pattern or trend of noncompliance.<sup>315</sup> Consumer Groups, on the other hand, urge the Commission to automatically revoke a station's eligibility to use ENT once an entity is referred to the Enforcement Bureau, rather than require an additional violation after the commencement of that enforcement proceeding.<sup>316</sup> We decline NAB's proposal for a

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<sup>311</sup> See NAB January 23, 2014 *Ex Parte* at 2.

<sup>312</sup> See NAB January 23, 2014 *Ex Parte*.

<sup>313</sup> We expect such measures to be specific, measurable, and time sensitive.

<sup>314</sup> *Id.*

<sup>315</sup> NAB January 23, 2014 *Ex Parte* at 2.

<sup>316</sup> Consumer Groups January 28, 2014 *Ex Parte* at 2-3.

protracted compliance ladder and Consumer Group's request for automatic revocation of a station's eligibility to use ENT and. We believe the compliance ladder adopted above strikes the appropriate balance between these competing interests by giving stations two opportunities to correct a pattern or trend of captioning quality problems before being subject to enforcement action, while at the same time holding stations accountable for caption quality failures. Accordingly, we have included this option in the third prong of this compliance ladder. In determining whether to require a station to implement real-time captioning, the Commission will take into consideration all relevant information regarding the nature of the problem and the station's efforts to correct the problem.

86. We emphasize that our intent in adopting the enhanced ENT procedures proposed by NAB is to ease the regulatory burden on covered entities outside the 25 largest DMAs by permitting the continued use of ENT, and at the same time, promoting improved captioning on news programs. The record reflects that enhanced ENT will not place an undue burden on broadcasters; as NAB explains, offering such "improved captioning ability does not appear to come at an additional cost"<sup>317</sup> and that even for those stations with older equipment, "software upgrades are available for relatively nominal cost."<sup>318</sup> The purpose of the compliance ladder is to ensure that regulated entities have ample opportunities to improve their captioning, especially if their current practices are deficient. As discussed above, if we find that this approach is not effective in ensuring widespread compliance with our goals of ensuring full access to television programming, we will revisit this issue to the extent necessary after one year.

87. Because the *2005 Closed Captioning NPRM* and the *Refresh Public Notice* sought comment on the use of ENT by broadcasters only,<sup>319</sup> we do not apply these requirements to enhance ENT to non-broadcast networks serving less than 50 percent of all homes subscribing to MVPD services at this time, but rather seek comment on this matter in the FNPRM.

## C. Video Programming Distributor Technical Rules

### 1. Equipment Monitoring

88. *Background.* Even when captions delivered to VPDs are complete, accurate, synchronous, and appropriately located on the screen in compliance with our captioning quality standards, there still remains the possibility that technical problems prevent these captions from reaching viewers.<sup>320</sup> In the *1997 Closed Captioning Report and Order*, the Commission identified a series of technical problems with captions that, it said, appeared to be the result of "lax maintenance and monitoring of equipment."<sup>321</sup> These included "captions not being delivered intact, captions not synchronized with the video portion of the program, captions ending before the end of the programming, programming without captions even though the program indicates captioning, or captions transmitted during one offering of the program but not another."<sup>322</sup> The Commission concluded that the reported problems "den[ie]d accessibility to persons with hearing disabilities,"<sup>323</sup> and adopted a "pass-through requirement" for VPDs to "ensure that captioned programming is always delivered to viewers complete

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<sup>317</sup> NAB January 17 *Ex Parte* at 2.

<sup>318</sup> *See id.*

<sup>319</sup> *See 2005 Closed Captioning NPRM*, 20 FCC Rcd at 13226-27, ¶ 48; *2010 Refresh Public Notice* at 2-3.

<sup>320</sup> *See* NCRA Comments at 3 (while quality standards refer to "the skill, knowledge and ability" of a captioner, technical compliance "affect[s] the actual quality of the captions after the captions have been produced by the realtime captioner").

<sup>321</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3367, ¶ 208; *see also Second Report & Order*, 15 FCC Rcd at 6622 n.48.

<sup>322</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3368, ¶ 211.

<sup>323</sup> *Id.*

and intact.”<sup>324</sup> At the time, the Commission noted its reluctance to specifically require video programming distributors to individually monitor hundreds of channels of programming, and concluded that it would not be appropriate to impose such a burden “without knowing whether market forces are sufficient to ensure quality captioning and our assumption regarding marketplace incentives is correct.”<sup>325</sup>

89. To prevent technical problems from occurring in the future, however, the Commission stated that VPDs would “be responsible for any steps needed to monitor and maintain their equipment and signal transmissions to ensure that the captioning included with the video programming reaches consumers,”<sup>326</sup> and cautioned that VPDs were to take “corrective measures necessary to ensure that the captioning is consistently included with the video programming delivered to viewers.”<sup>327</sup> The Commission further clarified that it is the “*video programming distributor’s responsibility . . . to ensure that the equipment used to transmit these channels to viewers is capable of passing the captioning through along with the programming [and] is in proper working order.*”<sup>328</sup>

90. Notwithstanding this pass-through requirement,<sup>329</sup> in the 2004 Petition, the Consumer Groups describe a litany of technical problems that have been associated with captioning, including captions being turned off ten minutes before the end of national network programming; captions disappearing one hour into a two-hour movie; captions missing from an entire program, even when the TV programming schedule identifies the show as captioned; illegible captions, including white boxes and overtypes; captions appearing on a national program in one locality but not another; captions missing from repeats of previously aired captioned programming; and captions that are scrambled and unreadable.<sup>330</sup> They assert that the pass-through requirement alone has failed to prevent or remedy such technical problems, and that “additional mechanisms or procedures are required to prevent the occurrence of such problems.”<sup>331</sup>

91. As noted in the 2007 CAC Report, the nation’s transition to digital television introduced new complexities into the transmission of closed captions, further aggravating the technical problems

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<sup>324</sup> *Id.* See also 47 C.F.R. § 79.1(c) (“*Obligation to pass through captions of already captioned programs.* All VPDs shall deliver all programming received from the video programming owner or other origination source containing closed captioning to receiving television households with the original closed captioning data intact in a format that can be recovered and displayed by decoders meeting the standards of part 15 of this chapter unless such programming is recaptioned or the captions are reformatted by the programming distributor.”).

<sup>325</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3375, ¶ 224.

<sup>326</sup> *Id.* at 3369, ¶ 212.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* (emphasis added). Similarly, in the *1996 Closed Captioning Report to Congress* that preceded these rules, the Commission noted that captioning problems may occur “because of inadvertent errors in the transmission of captions by the broadcaster, distributor, cable network, local station or cable system operator.” *1996 Closed Captioning Report to Congress*, 11 FCC Rcd 19214, 19253 at ¶ 93. The Commission explained that “[t]he critical technical steps of a quality captioning service are accurate encoding, transmission reception and decoding of the signal.” *Id.* The Commission added that such technical errors could be avoided if the captioned signal is “monitored as it is fed, monitored during the duplication process and checked to ensure that the equipment used is not inadvertently stripping the captions, moving them onto the wrong line or placing them in the wrong field.” *Id.* (footnote omitted).

<sup>329</sup> 47 C.F.R. § 79.1(c).

<sup>330</sup> 2004 Petition at 26. See also AMIC Comments at 13-18 (reports the following common problems: captions that disappear one hour into a two hour movie; loss of captions; illegible captions; captions appearing on some programs and not others; and captions missing from repeated programs).

<sup>331</sup> 2004 Petition at 27.

experienced by viewers.<sup>332</sup> In May of 2009, the Commission established the “Digital Television Closed Captioning and Video Description Technical Working Group” (DTV Working Group) to examine and identify solutions for these newer problems.<sup>333</sup> On May 27, 2010, this DTV Working Group received a report from the Commission’s Office of Engineering and Technology and the Commission’s Consumer and Governmental Affairs Bureau on the prior year’s informal captioning complaints submitted to the Commission,<sup>334</sup> evidencing sizeable numbers of complaints about programs where captions were either missing entirely or were garbled or missing information.<sup>335</sup> The report concluded that “[i]n situations where captions were lost for extended periods of time, it would appear that captions received priority far lower than picture or sound, as it is unlikely that loss of picture or sound would go unnoticed for hours.”<sup>336</sup> The significant number of viewer-filed closed captioning complaints received by the Commission since this report was submitted has continued to raise concerns about technical captioning quality.

92. *Discussion.* Generally, the television programming industry has made great strides toward making the transmission of closed captions an integral part of the television programming delivered to viewers.<sup>337</sup> We recognize, however, that there is substantial opportunity for technical problems to occur when various entities are involved in the delivery of captions, from the point of origination to the end user, and we remain concerned about the consequences that mistakes along this data stream are having for caption viewers. The record in this proceeding shows that each time the program stream is transcoded or manipulated – as it travels from the caption company and passes through encoding equipment, is relayed by satellites to local stations and cable companies, and finally passes through their network to the home receiver – the captions can become garbled or disappear, or otherwise have their quality impaired.<sup>338</sup> The long and complicated path through which captions must journey makes the need for technical controls all the more important.<sup>339</sup>

93. The record shows that technical problems have been preventing some viewers from being able to fully access video programming as required by the Act and our captioning rules.<sup>340</sup> Our pass-

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<sup>332</sup> See 2007 CAC Report, § II.B at 11, discussed in section III.C, *supra*.

<sup>333</sup> Public Notice, *FCC Announces Establishment of Technical Working Group to Study Digital Closed Captioning and Video Description Issues, Appointment of Members, Agenda For First Meeting*, DA 09-995 (May 1, 2009) (noting a string of reported digital captioning mishaps, including: lack of or garbled captions on high definition (HD) channels; HD set-top boxes stripping or garbling captions on HD channels; the failure of VPD or station equipment to deliver up-converted (analog to digital) captions; problems with receiving captions through digital-to-analog converter boxes and multi-channel VPD set-top boxes; overlapping captions (two lines of captions displayed over each other); captions flashing on and off; and captions that inadvertently switch to text mode, causing 95% of the screen image to be obscured).

<sup>334</sup> *2010 Closed Captioning Complaint Report*.

<sup>335</sup> *2010 Closed Captioning Complaint Report* at 6 (reporting that 57% of those who complained reported missing captions, and 30% reported garbled captions or missing characters, words, or caption lines).

<sup>336</sup> *2010 Closed Captioning Complaint Report* at 11.

<sup>337</sup> See generally HBO Comments at 3, 7; CBS Comments at 1-2.

<sup>338</sup> See NCRA Comments at 6-7 (citing NCI’s website <http://nccap.org/FAQ1.asp>). See also NCI Comments at 2; WGBH/NCAM Comments at 14-15.

<sup>339</sup> See NCRA Comments at 6-7. See also AMIC Comments at 3 (technical problems with captioning could be introduced at a cable system head-end, occur at a satellite uplink or downlink, or be the result of faulty equipment or reception problems at the consumer’s end).

<sup>340</sup> See 47 U.S.C. § 613(b); 47 C.F.R. § 79.1. See also, e.g., NDRN Comments at 3 (asking for the monitoring of captioning to make sure the equipment is working properly); Consumer Groups Refresh Comments at 6; Brian Morace Refresh Comments; Guy A. L’Heureux Refresh Comments; Hugh Lafler Refresh Comments; Kim Mihan Refresh Comments; Nicolas Tegni Refresh Comments; Bob Hawbaker Refresh Comments; Don Lee Hanaumi

through rule,<sup>341</sup> when followed in conjunction with related rules addressing transmission standards and built-in captioning decoder capabilities, was intended to avoid such mishaps, by imposing a clear responsibility on VPDs to ensure that each step of the distribution chain is capable of delivering captions intact.<sup>342</sup> However, we are concerned that the pass-through rule and the associated requirements and guidelines contained in the *1997 Closed Captioning Report and Order*<sup>343</sup> have not been sufficiently implemented by all VPDs to guarantee that viewers always receive captions intact. We agree with parties who maintain that VPDs could eliminate most technical captioning glitches if they have mechanisms in place to monitor and check their engineering equipment and procedures.<sup>344</sup> In addition, the need for filing complaints would be reduced if these entities actively monitor and maintain their equipment “to eliminate the occurrence of technical problems in the first instance, and to quickly and efficiently repair such problems that do occur.”<sup>345</sup>

94. As noted above, we recognize that many entities covered by our rules have exercised diligence in their efforts to monitor captioning signals and transmissions to ensure the intact delivery of captions to viewers.<sup>346</sup> However, the record in this proceeding, as well as the hundreds of complaints received annually by the Commission, indicate that these practices – as holds true for the measures to ensure non-technical captioning quality – have not been adopted uniformly across the video industry. To ensure full technical compliance with the pass-through rule, we reaffirm our 1997 uncodified requirements for VPDs to take “any steps needed to monitor and maintain their equipment and signal transmissions as part of their obligation to ensure that the captioning included with video programming reaches consumers,” and to take any corrective measures necessary to ensure that such equipment is in proper working order.<sup>347</sup> In order to remove any possible ambiguity on this issue, we also codify these monitoring and maintenance requirements in our closed captioning rules. Finally, we adopt a new rule requiring technical equipment checks to take place in a manner that is sufficient to ensure that captions are passed through to viewers intact. We note that NCTA has urged such routine equipment checks and

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Refresh Comments; Lauren E. Storck, Ph.D. Refresh Comments; Daniel O’Toole Refresh Comments; Jennifer L. Thomas Refresh Comments; Kirwan Rockefeller, Ph.D. Refresh Comments; Michael J. Boucher Refresh Comments; Carol Ann Nemecek Refresh Comments; Catherine Berger Refresh Comments; Elizabeth Botts Refresh Comments; Rachel Mazique Refresh Comments; Kelly A. Scherf Refresh Comments; Daniel Geiger Refresh Comments.

<sup>341</sup> See 47 C.F.R. § 79.1(c).

<sup>342</sup> See generally 47 C.F.R. § 73.682 (television transmission standards); 47 C.F.R. § 79.101 (closed captioning decoder requirements for analog television receivers); 47 C.F.R. § 79.102 (closed captioning decoder requirements for digital television receivers and digital-to-analog converter boxes).

<sup>343</sup> See *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3368-69, ¶¶ 211-213.

<sup>344</sup> See 2004 Petition at 28; see also NCRA March 28, 2011 *Ex Parte* at 2 (advocating for “monitoring and reporting processes in addition to after-the-fact complaint procedures”).

<sup>345</sup> 2004 Petition at 29. See also WGBH/NCAM Comments at 13 (“greater attention to the caption data stream and heightened monitoring” could help avoid many of the technical problems that have been highlighted by the Petitioners).

<sup>346</sup> See e.g., NCTA July 26, 2013 *Ex Parte* at 1 (stating that cable operators perform “spot checks” to ensure captioning is being passed through”); CBS Reply Comments at 8 (program providers make “extensive and effective efforts” to deliver quality captions); NCTA Comments at 5-6 (noting ongoing efforts to monitor signals and equipment to ensure technical quality through routine checks); EchoStar Reply Comments at 3 (performs periodic equipment checks to ensure captions are transmitted to customers intact); DIRECTV Refresh Comments at 2, 4 (already monitors each of its channels for compliance by checking captioning on its national cable channels daily, checking local channels when they are launched, and checking channels in response to complaints or alerts from its automatic monitoring system); NAB Refresh Comments at 15

<sup>347</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3369, ¶ 212.

use of the complaint process as the way to ensure the reliability of captioning without imposing significant, unnecessary costs on the video programming industry.<sup>348</sup> We believe that this rule is consistent with other Commission rules requiring that VPDs maintain their equipment in working order.<sup>349</sup> We further believe that reaffirming and codifying the requirement that equipment be properly monitored and maintained to ensure the intact delivery of captions, as well as requiring technical equipment checks to ensure that equipment is operational and in good working order, will assist VPDs in detecting technical captioning errors at an earlier point in time. If problems do occur, these obligations will also give VPDs the opportunity to correct these errors before they are repeated.<sup>350</sup>

95. As part of their pass-through requirement, we remind MVPDs that they must also ensure that the customer premises equipment (*e.g.*, set-top boxes) that they provide to consumers must transmit all captions pursuant to the standards adopted under the CVAA.<sup>351</sup> Additionally, we encourage MVPDs to provide their installers and other employees who interact with consumers with information necessary to help those consumers effectively access closed captions through their MVPD-installed devices.

96. We are sensitive to the concerns raised by VPDs with respect to the resources that would be needed were every VPD required to hire full time employees to monitor every program on every channel at all times,<sup>352</sup> and for this reason the rules we adopt today do not require such level of monitoring. Rather, as noted above, VPDs are required to conduct technical equipment checks to ensure that their captioning equipment is operational and in good working order. We do not believe that the requirement to perform technical equipment checks imposes new costs on VPDs; as noted above, since 1997, VPDs have been required to take “any steps needed to monitor and maintain their equipment and

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<sup>348</sup> See NCTA Comments at 7 (urges routine equipment checks and the complaint process as the way to ensure the reliability of captioning without imposing significant, unnecessary costs); NCRA Comments at 7 (suggests having VPDs perform “daily, logged checks of the captioning to ensure that the captioning is delivered intact”).

<sup>349</sup> See, *e.g.*, 47 C.F.R. § 73.1400 (transmission system monitoring and control, requiring that broadcast station licensees assure that at all times the station operates within tolerances specified by applicable technical rules and in accordance with the terms of the station authorization). See also 47 C.F.R. § 73.1580 (transmission system inspections, requiring broadcast licensees to conduct periodic complete inspections of transmitting systems and all required monitors to ensure proper station operation).

<sup>350</sup> See Consumer Groups Reply Comments at 12 (“A requirement for proactive monitoring for technical problems should be implemented so that such problems are immediately recognized by the Distributor and corrected as quickly as possible.”).

<sup>351</sup> See CVAA, § 202(b); 47 U.S.C. § 613(c)(2)(D)(vi) (a VPD “shall be deemed in compliance if such entity enables the rendering or pass through of closed captions”). See also 47 C.F.R. §§ 79.1(c), 79.4(c)(2)(i); VPDs must ensure that any application, plug-in, or device that they provide to the consumer is capable of rendering or passing through closed captions). The CVAA also directs 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 . . . .” CVAA, § 203(b), codified at 47 U.S.C. § 303(z)(2). See also 47 C.F.R. §§ 79.103(d), 79.104(c); IP Captioning Report and Order, 27 FCC Rcd at 854-858, ¶¶ 115-119 (adopting a rule requiring that all 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).

<sup>352</sup> See NAB Comments at 14; NCTA Comments at 6 (“Operators nationwide would need equipment and personnel to monitor captions on nearly 2 million channels”); NCTA August 8, 2013 *Ex Parte* (stating that “requiring cable operators to monitor caption quality around-the-clock . . . would be a significant and costly undertaking and should not be required”); DIRECTV July 26, 2013 *Ex Parte*, at 1 (stating that DIRECTV and DISH Network do not have the capability to monitor closed captioning on all channels in real-time, and that “monitoring so many channels on a constant basis would be prohibitively expensive”; NCTA Reply Comments at 8 (“[T]he typical cable system carries hundreds of channels. None of the equipment described by WGBH is capable of simultaneously monitoring all those analog and digital channels”); NCTA Refresh Comments at 4.

signal transmissions” as part of their captioning obligations and to take any corrective measures necessary to ensure that such equipment is in proper working order.<sup>353</sup>

97. To the extent, however, that any new costs are associated with the technical equipment checks we now require, we believe that these will not impose an undue burden on regulated entities because the new rule is in keeping with the current practices of many VPDs in the video programming industry who are already monitoring to ensure that their equipment is operating effectively to transmit closed captions.<sup>354</sup> For example, MCS explains that it is not burdensome for local broadcasters and cable programmers to monitor their video to ascertain whether captions are present in their transmitted signals because they can display a decoded feed of their on-air program through their engineering and/or master control facilities.<sup>355</sup> Many other VPDs already report that they regularly engage in activities to monitor outgoing signals, equipment, and closed captioning transmissions.<sup>356</sup> For example, DIRECTV states that it monitors 540 national channels and over 2,700 local feeds for closed captioning compliance.<sup>357</sup> NCTA also reports that cable operators “in some cases have deployed equipment that can detect the presence or absence of captioning.”<sup>358</sup> We expect that the VPDs that already perform equipment checks and maintain adequate records to ensure that captions are passed through to their viewers should not have to change their practices as a result of these new rules. Others who have failed to perform technical equipment checks or do not currently maintain records will have to revise their practices to comply with the obligation to monitor their equipment for its proper maintenance. We believe that the approach we adopt today strikes the appropriate balance by taking measures to ensure that closed caption transmissions reach viewers intact while avoiding the burdens that would be associated with having to monitor every single hour of television programming.<sup>359</sup>

98. In the FNPRM, as proposed by the Consumer Groups,<sup>360</sup> we seek comment on a proposed rule to require notice of temporary captioning outages to viewers in real-time through the VPD’s website and a crawl during the outage, to provide viewers with up-to-date information containing the reason they are not receiving captions. Such communication would allow users to be kept informed about technical problems that might be occurring, so that they do not incorrectly assume that the lack of captions is the fault of their end user equipment.

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<sup>353</sup> 1997 Closed Captioning Report and Order, 13 FCC Rcd at 3369, ¶ 212.

<sup>354</sup> NCTA Comments at 5-6.

<sup>355</sup> MCS Comments at 10. See also ASDC Comments at 3 (asking for routine checks of equipment); WGBH/NCAM Comments at 18; Translate TV Comments at 5 (closed captions can be monitored using available software, making the cost of monitoring inexpensive); Consumer Groups Refresh Comments at 7.

<sup>356</sup> See, e.g., AZN Comments at 24-25; CBS Reply Comments at 3, 8 (their networks monitor outgoing closed captions, and integrity is confirmed by monitoring the return network feed; if needed, corrective action is promptly initiated with personnel who are on call 24 hours a day); DIRECTV Refresh Comments at 2.; NAB Refresh Comments at 15.

<sup>357</sup> DIRECTV Refresh Comments at 2.

<sup>358</sup> NCTA July 26, 2013 *Ex Parte*, at 1.

<sup>359</sup> Given that we are not requiring round-the-clock monitoring, we disagree with OPATSCO, which asserts that the costs and burdens of additional regulations would result in disproportionate impacts on small MVPDs and their customers, and asks that small MVPDs be exempted from any new rules, or in the alternative that expedited waivers be granted. See OPATSCO Refresh Reply Comments at 3-4. Nevertheless, to address OPATSCO’s concern, our rules permit VPD, VPPs and VPOs to obtain an exemption of the captioning rules if they can demonstrate that the provision of captioning would be economically burdensome. See 47 U.S.C. § 613(d)(3) (authorizing the Commission to grant exemptions based upon a showing of economic burden); 47 C.F.R. § 79.1(f) (establishing procedures for exemptions based upon the economically burdensome standard).

<sup>360</sup> Consumer Groups Reply Comments at 19.

## 2. Reporting and Recordkeeping

99. *Background.* In the *Closed Captioning Report and Order*, the Commission placed the responsibility for compliance with the closed captioning requirements on VPDs in order to increase the availability of captioning, facilitate compliance monitoring and enforcement, and designate a single entity as the recipient of complaints.<sup>361</sup> In addition, the Commission adopted a rule permitting VPDs to rely on certifications from programming suppliers to demonstrate compliance with the captioning requirements.<sup>362</sup> The Commission declined to adopt reporting requirements for VPDs to demonstrate compliance with the rules, because it concluded that such requirements would be unduly burdensome and administratively cumbersome.<sup>363</sup> Instead, the Commission required VPDs to “maintain records sufficient to demonstrate compliance.”<sup>364</sup> On reconsideration, the Commission affirmed this approach.<sup>365</sup>

100. In its petition, the Consumer Groups assert that the lack of reporting requirements “has seriously hampered the effectiveness of the captioning rules and the ability of captioning consumers, their advocates, and the Commission to monitor compliance with the captioning rules.”<sup>366</sup> The Consumer Groups propose that the Commission require MVPDs and broadcasters to certify compliance with the captioning rules to the Commission on a quarterly basis, within 30 days following the end of the previous quarter.<sup>367</sup> In the *2005 Closed Captioning NPRM*, the Commission sought comment on whether to require VPDs to file compliance reports with the Commission detailing the amount of closed captioned programming they provide.<sup>368</sup> The Commission further asked whether, if it did not impose a reporting requirement, it should place a greater burden on VPDs to ensure that the programming they carry is captioned, regardless of the assurances they receive through certifications from programmers.<sup>369</sup> Commenters are divided on these issues. While consumers generally support quarterly compliance reports,<sup>370</sup> programmers and VPDs maintain that such a requirement would be unduly burdensome and administratively cumbersome.<sup>371</sup>

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<sup>361</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286, ¶ 27. See also 47 C.F.R. § 79.1(a)(2).

<sup>362</sup> 47 C.F.R. § 79.1(g)(6). Specifically, this rule allows VPDs to rely on certifications from programming suppliers, including programming producers, programming owners, networks, syndicators and other distributors, to demonstrate compliance with the captioning rules, and relieves VPDs of liability where a program source falsely certifies that programming delivered to the VPD is in compliance, so long as the VPD is unaware that the certification is false. The Commission is permitted, however to take appropriate action against a program source with respect to deliberate falsification by the program source.

<sup>363</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3383, ¶ 244.

<sup>364</sup> *Id.* .

<sup>365</sup> *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 20026-27, ¶ 118.

<sup>366</sup> 2004 Petition at 16.

<sup>367</sup> 2004 Petition at 19. The Consumer Groups note that when the Commission elected not to adopt benchmark compliance reporting requirements, it stated that it would conduct compliance audits, but the Consumer Groups are unaware that any such audits have been conducted. The lack of compliance audits, the Consumer Groups assert, “seriously undermines enforcement of the captioning rules and [their] effectiveness[.]” *Id.* at 20.

<sup>368</sup> For example, the Commission asked whether such reports should include information relating to new nonexempt programming or only to pre-rule nonexempt, and Spanish language, programming. *2005 Closed Captioning NPRM*, 20 FCC Rcd at 13225, ¶ 43.

<sup>369</sup> *2005 Closed Captioning NPRM*, 20 FCC Rcd at 13225, ¶ 43.

<sup>370</sup> See TDI Paperwork Reduction Act (PRA) Comments, April 23, 2012, at 5 (TDI filed these comments on its own and not as part of the Consumer Groups); ASDC Comments at 2; Jason Altman Comments at 1; B. Fish Comments at 2; Dana Mulvany Comments at 5; Consumer Groups Reply Comments at 17-20, 22; NDRN Comments at 3; WGBH/NCAM Comments at 21; Michael J. Boucher Refresh Comments; Don Lee Hanaumi Refresh Comments; Bob Hawbaker Refresh Comments; Guy A. L’Heureux Refresh Comments; Hugh Lafler Refresh Comments; Kim

101. *Discussion.* At this time, we decline to impose a requirement for VPDs to report on their compliance with the captioning rules. However, as explained below, we adopt a requirement for VPDs to keep records of their activities related to the maintenance, monitoring and technical checks of their captioning equipment. Although we agree with the Consumer Groups that a reporting requirement may assist in confirming compliance with the closed captioning obligations,<sup>372</sup> we find that the completion of the Commission's transition schedule for 100 percent of all new programming and 75 percent of all pre-rule programming to be captioned as of January 1, 2012,<sup>373</sup> as well as the amended complaint process (adopted by the Commission since the Consumer Groups petitioned for a reporting obligation),<sup>374</sup> reduces the need for such a reporting requirement. In particular, we believe that the new complaint process, which allows consumers to skip the step of first contacting a VPD about a complaint and allows the initial filing of such complaints with the Commission, has made it easier for consumers to bring to the Commission's attention alleged violations of the captioning requirements. However, we continue to believe that each VPD should be required to maintain sufficient data to respond to consumer complaints and provide the Commission with information needed to make a determination as to the VPD's compliance with the closed captioning requirements.<sup>375</sup> Although such requirement already exists,<sup>376</sup> we now specify that such data must include (though it need not be limited to) information about the VPD's efforts to monitor, maintain, and conduct technical checks of its captioning equipment and other related equipment to ensure the pass through of captions to viewers. We further require each VPD to retain such records and documentation for a period of at least two years, in order to effectively respond to a consumer complaint or Commission inquiry addressing compliance with the Commission's captioning rules. Finally, we direct that VPDs be prepared to submit such data to the Commission upon request, if needed to resolve an enforcement proceeding. A VPD's efforts to dispute noncompliance alleged in a complaint or a Commission inquiry with conclusory or insufficiently supported assertions of compliance will not carry the VPD's burden of proof to show that it is in compliance with the Commission's rules.<sup>377</sup> In the event that the Commission finds that these recordkeeping obligations are insufficient to achieve compliance with the closed captioning obligations, the Commission may revisit whether to impose reporting requirements.

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Mihan Refresh Comments; Brian Morace Refresh Comments; Daniel M. O'Toole Refresh Comments; Brian Sturgis Refresh Comments; Nicolas Tegni Refresh Comments; Kirwan Rockefeller, Ph.D. Refresh Comments; Jennifer L. Thomas Refresh Comments; Carol Ann Nemecek Refresh Comments; Catherine Berger Refresh Comments; Elizabeth Botts Refresh Comments; Kelly A. Scherf Refresh Comments; Rachel Mazique Refresh Comments; Daniel Geiger Refresh Comments; Lauren E. Storck, Ph.D. Refresh Comments.

<sup>371</sup> See NAB PRA Comments, June 13, 2102, at 6-7; EchoStar Comments at 8; AZN Comments at 33-35; NCTA Comments at 12; HBO Comments at 10; HBI Comments at 12; KVMD Reply Comments at 3; Alamo Public Telecommunications Refresh Comments; Inclusive Technologies Refresh Comments at 3; DIRECTV Refresh Comments at 5; NAB Refresh Comments at 14-15 (broadcast multicasting would make it more costly); NCTA Refresh Comments at 9-10 (it would be particularly burdensome on cable operators that have hundreds of channels and thousands of hours of programming daily); NCTA Refresh Reply Comments at 5; OPASTCO Refresh Reply Comments at 3-4 (costs and burdens would disproportionately impact small MVPDs).

<sup>372</sup> See Consumer Groups Refresh Comments at 7-8; TDI PRA Comments at 5; Consumer Groups April 15, 2011 *Ex Parte* Attachment, Petition to FCC on Captioning Quality Issues, at 4.

<sup>373</sup> See 47 C.F.R. § 79.1(b).

<sup>374</sup> 47 C.F.R. § 79.1(g) (revised rule allows complaints to be filed directly with the Commission).

<sup>375</sup> See *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3383, ¶ 244.

<sup>376</sup> *Id.* (Commission noted that it will “require that video programming distributors maintain records sufficient to demonstrate compliance and will leave the specifics of recordkeeping to their discretion.”)

<sup>377</sup> See *IP Captioning Report and Order*, 27 FCC Rcd at 835, ¶ 84.

102. We believe that the additional recordkeeping rules adopted herein will provide greater clarity to the current requirement for VPDs to “maintain records sufficient to demonstrate compliance,”<sup>378</sup> while imposing minimal burden on the affected industry. First, it is likely that many covered entities already keep such records,<sup>379</sup> given the Commission’s directive to keep records in the *1997 Closed Captioning Report and Order*. Second, we do not mandate any specific format for keeping records, and in this manner, provide flexibility to entities to establish their own internal procedures for creating and maintaining records that demonstrate compliance efforts and allow for prompt response to complaints and inquiries. Allowing covered entities the flexibility to implement individual recordkeeping procedures takes into account the variances in their size and operations as well as existing methods they already may use to achieve compliance with other statutory and regulatory obligations. Additionally, we note that the obligation to keep records is less burdensome than the reporting obligations that have been requested by Petitioners and other parties to this proceeding.<sup>380</sup> On the other hand, we believe that the burdens associated with keeping records are outweighed by our need to ensure compliance with the obligations of covered entities to make their video programming fully accessible through the provision of closed captions.<sup>381</sup>

103. We note that the obligation to keep records, including the obligation to maintain such records for a period of two years and provide such data to the Commission upon request, is consistent with actions taken by the Commission to ensure compliance with other accessibility obligations. For example, such measures are required by the CVAA and Commission regulations implementing that law, to ensure compliance with mandates requiring advanced communications services and equipment to be accessible by people with disabilities.<sup>382</sup> There as well, the Commission found the preservation of such records for a term of two years to be a “reasonable time period.”<sup>383</sup> In determining what constitutes a reasonable time period in the captioning context, we believe that records should be retained for a length of time after programs have been aired that is sufficient to allow the Commission to initiate and complete an enforcement proceeding into alleged violations of the captioning rules based on information that consumers bring to the Commission’s attention. Because the statute of limitations to impose a penalty for captioning violations is one year for some VPDs,<sup>384</sup> and additional time is needed to obtain the records once the proceeding has commenced, we find that this two-year document retention rule is reasonable. Moreover, we believe covered entities will also benefit from the recordkeeping requirement because it

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<sup>378</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3383, ¶ 244.

<sup>379</sup> See, e.g., DIRECTV Comments at 7 (stating that DirecTV would need to maintain records in order to respond to consumer complaints); EchoStar Comments at 8 (stating that distributors recognize that they must collect information on the amount of captioned programming they provide in case they are faced with a consumer complaint or a Commission audit); HBO Comments at 10.

<sup>380</sup> 2004 Petition at 16-17; Consumer Groups Refresh Comments at 7-8; TDI PRA Comments at 5; Consumer Groups April 15, 2011 *Ex Parte* Attachment, Consumer Groups Reply Comments at 17-19.

<sup>381</sup> See 47 U.S.C. § 613(b).

<sup>382</sup> See 47 C.F.R. § 14.31(b)(3); 47 U.S.C. § 618(a)(5)(B); *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010; Amendments to the Commission’s Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1966; Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision*, CG Docket No. 10-213, WT Docket No. 96-198, CG Docket No. 10-145, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, 14586-87, ¶ 73 (2011) (*ACS Report and Order*) (“Congress made a determination, which we endorse and enforce, that these costs [associated with recordkeeping] are well justified to realize the accessibility benefits that the CVAA will bring about.”)

<sup>383</sup> See *ACS Report and Order*; 47 U.S.C. § 618(a)(5)(A);

<sup>384</sup> 47 CFR § 1.80(c); 47 USC § 503(b)(6).

ensures that they will have the necessary documentation to prove that they have satisfied their legal obligations in response to any complaint filed. These requirements will become effective upon the latter of a date announced in a public notice published in the Federal Register following approval by the Office of Management and Budget of the modified information collection requirements under the Paperwork Reduction Act of 1995<sup>385</sup> or January 15, 2015.

104. As mentioned above, the Commission also sought comment on whether, if it did not impose a reporting requirement, it should place a greater burden on VPDs to ensure that the programming they carry is captioned, regardless of the certifications they receive from programmers.<sup>386</sup> We now conclude that the adoption of rules codifying and reaffirming the requirement for VPDs to monitor and maintain their equipment and to keep records of these activities, will help achieve our objective of ensuring accessibility to television programming for individuals who are deaf and hard of hearing.

#### **D. Treatment of Multicast Streams**

105. *Background.* In 1997, the Commission adopted a closed captioning exemption for video programming channels that produced annual gross revenues of less than \$3 million during the previous calendar year.<sup>387</sup> At that time, the Commission specified that “[a]nnual gross revenues shall be calculated for *each channel* individually based on revenues received in the preceding calendar year from all sources related to the programming on that channel.”<sup>388</sup> The Commission did not determine, however, what constituted a “channel” for purposes of satisfying this self-implementing exemption. In 1997, broadcasters used their spectrum allocation to provide analog programming on a single channel; with the advent of digital broadcasting, broadcasters may use their digital allotment to provide simultaneously several streams of programming on the same 6 MHz of spectrum. This is known as “multicasting.”

106. In the *2008 Closed Captioning Decision*, the Commission sought comment on whether, for purposes of the \$3 million exemption, each programming stream on a multicast signal constitutes a separate channel for purposes of the captioning requirements, or whether the broadcaster’s entire operations attributable to its digital allotment should be considered one channel for captioning purposes.<sup>389</sup> The Commission also sought comment on the effect that treating each multicast programming stream as a separate channel would have on the amount of captioned programming,<sup>390</sup> program diversity, the airing of locally-originated programming, the airing of programming with little economic return, and the number of petitions for individual captioning exemptions that the Commission would be likely to receive using such an approach.<sup>391</sup>

107. *Discussion.* Based on a review of the comments and experience with the closed captioning rules, we conclude that, for purposes of section 79.1(d)(12), each programming stream on a multicast broadcast signal will be considered separately for purposes of determining whether the \$3 million annual gross revenue limit has been satisfied.<sup>392</sup> We agree with NAB’s contention that applying

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<sup>385</sup> 44 U.S.C. §§ 3501-3520.

<sup>386</sup> *2005 Closed Captioning NPRM*, 20 FCC Rcd at 13225, ¶ 43.

<sup>387</sup> 47 C.F.R. § 79.1(d)(12).

<sup>388</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3350, ¶ 165 (emphasis added).

<sup>389</sup> *2008 Closed Captioning Decision*, 23 FCC Rcd at 16687-88, ¶ 36.

<sup>390</sup> *Id.* at 16688, ¶ 37. For example, the Commission sought comment on what percentage of programming that airs on multicast streams, other than the main stream, is network programming, and how much of that programming is already captioned.

<sup>391</sup> *Id.* at 16689, ¶ 38. See 47 C.F.R. § 79.1(f) (permitting individual exemptions from the closed captioning obligations).

<sup>392</sup> Most commenters consider each programming stream on a multicast signal to be a separate channel for purposes of the closed captioning rules. See comments to *2008 Closed Captioning Decision and FNPRM*, 23 FCC Rcd. at

section 79.1(d)(12) to each multicast stream separately is consistent with our ruling in 1997, which calculated gross revenues for each channel individually.<sup>393</sup> We also find that multicast streams have yet to emerge as a real source of revenues for broadcasters.<sup>394</sup> As such, it may not be feasible for broadcasters to offer several streams of programming if they were required to close caption program streams that generate revenues of less than \$3 million.<sup>395</sup> In this regard, we agree with Joint Parties that considering all program streams in the aggregate for purposes of determining whether the \$3 million limit has been met may hinder independent broadcasters' abilities to develop specialized new programming at this time.<sup>396</sup> We further agree with those commenters who maintain that applying the \$3 million revenue exemption on a per multicast stream basis will promote the continued development of local programming on the multicast streams, while preventing the closed captioning requirements from becoming economically burdensome.<sup>397</sup> We note that this approach is consistent with the way the section 79.1(d)(12) exemption is applied to MVPDs.<sup>398</sup>

108. We acknowledge the point made by the Consumer Groups that television broadcasters have public interest obligations, which generally include the obligation to close caption their programming.<sup>399</sup> However, we reject their argument that applying the \$3 million annual gross revenue exemption to a broadcaster's overall operations is necessary to prevent millions of viewers who are deaf and hard of hearing from experiencing "a tremendous decrease in accessible video programming."<sup>400</sup> The

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16687-16689, ¶¶ 35-39 (Multicast Comments): Association of Public Television Stations (APTS) Multicast Comments at 3; KJLA, LLC and Rancho Palos Verdes Broadcasters, Inc. (collectively, "Joint Parties") Multicast Comments at 3-5; Maranatha Broadcasting Company, Inc. (Maranatha) Multicast Comments at 2; NAB Multicast Comments at 6-10; Trinity Christian Center of Santa Ana d/b/a Trinity Broadcasting Network Multicast Comments at 16-17 (consumers view each multicast stream as a distinct channel); COBI Multicast Comments. *See also* Alamo Public Telecommunications (Alamo) Refresh Comments; APTS, PBS and CPB Refresh Comments at 3-4; COBI Refresh Comments at 3; NAB Refresh Comments at 25-29; NewsChannel5 Refresh Comments at 2; RTDNA Refresh Comments at 6-8; NAB Refresh Reply Comments at 6-7; Maranatha Refresh Reply Comments at 5-8.

<sup>393</sup> *See* NAB Multicast Comments at 6. *See also* NAB Multicast Comments at 7-8 (economic support for multicast channels is fragile).

<sup>394</sup> *See* Maranatha Refresh Reply Comments at 5-6; NAB Refresh Comments at 26 (the average major network affiliate earned only \$66,520 in multicast revenue in 2009); COBI Multicast Reply Comments (most multicast streams are "without carriage rights or any steady history of revenue production").

<sup>395</sup> *See* COBI Refresh Comments at 3 (if each program stream were not considered separately for the purpose of the \$3 million exemption, it would need to eliminate its 24 hour weather service program stream); RTDNA Refresh Comments at 7-8 (sixty percent of commercial broadcast stations that responded to a survey offer local news and public affairs, including niche programming, on multicast channels, and if the \$3 million exemption for each individual program stream were not allowed, 40% would consider discontinuing local programming on multicast channels, and 15% would definitely discontinue it); Maranatha Refresh Reply Comments at 7-8; NewsChannel5 Refresh Comments at 2.

<sup>396</sup> *See* KVMD Licensee Co., LLC and Rancho Palos Verdes Broadcasters, Inc. "Joint Parties" Comments at 3. *See also* APS, PBS and CPB Refresh Comments at 3-4 (public stations are using multicast streams to offer innovative local services, many of these programs are extremely low budget, and it would be a burden to caption them).

<sup>397</sup> *See* NAB Refresh Comments at 26-27 (also noting that multicast channels do not have must carry rights). *See also* COBI Multicast Reply Comments at 1; RTDNA Refresh Comments at 6-7; Maranatha Refresh Reply Comments at 6-7.

<sup>398</sup> *See 1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3350, ¶ 165; 47 C.F.R. § 79.1(d)(12).

<sup>399</sup> Consumer Groups Multicast Comments at 2.

<sup>400</sup> Consumer Groups Refresh Comments at 14. *See also* Consumer Groups Multicast Comments at 2, 4-5 (it may be difficult to confirm whether an individual multicast stream has met the \$3 million threshold); Consumer Groups June 1, 2011 *Ex Parte*, Attachment, Closed Captioning Issues Before the FCC, at 1 (arguing that each TV broadcast

(continued...)

pass-through rule in Section 79.1(c) dictates that programming that is delivered with captions to a broadcaster for airing must be aired with the captions intact, regardless of the multicast stream on which the programming airs, and regardless of whether a VPD is exempt from the captioning rules.<sup>401</sup> Much of the programming presently delivered to broadcasters for airing on multicast streams is already captioned, and thus must be shown with captions when aired on these various streams.<sup>402</sup> We therefore agree with APTS, which states that considering multicast streams separately for purposes of the \$3 million exemption will “not lead to an epidemic of stations eliminating captioned programming on their multicast channels, or even to a scourge of stations choosing not to caption new local content.”<sup>403</sup>

109. We conclude that because a considerable amount of the programming appearing on multicast streams is already captioned, treating the individual multicast streams as separate streams for the purposes of the section 79.1(d)(12) exemption balances the public interest in providing video programming accessibility with ensuring the continued presence of multicast programming in the television marketplace. Accordingly, we amend section 79.1(d)(12) to ensure application of the \$3 million exemption to a channel or stream of programming when multiple streams of programming are offered by a broadcaster.<sup>404</sup> We remind multicasting television broadcasters, however, that once the annual revenues for a multicasting stream reach \$3 million, the captioning exemption will not apply to

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station’s digital allotment should be considered one channel); Consumer Groups July 26, 2013 *Ex Parte* at 3 (urging the Commission to clarify that revenue from all of a broadcaster’s digital allotment, including multicast channels, should be considered from the same “channel” for the purpose of determining qualification for the \$3 million exemption); Michael J. Boucher Refresh Comments; Don Lee Hanaumi Refresh Comments; Bob Hawbaker Refresh Comments; Guy A. L’Heureux Refresh Comments; Hugh Lafler Refresh Comments; Kim Mihan Refresh Comments; Brian Morace Refresh Comments; Daniel M. O’Toole Refresh Comments; Brian Sturgis Refresh Comments; Nicolas Tegni, Kirwan Rockefeller, Ph.D. Refresh Comments; Jennifer L. Thomas Refresh Comments; Carol Ann Nemecek Refresh Comments; Catherine Berger Refresh Comments; Elizabeth Botts Refresh Comments; Kelly A. Scherf Refresh Comments; Rachel Mazique Refresh Comments; Daniel Geiger Refresh Comments; Lauren E. Storck, Ph.D. Refresh Comments.

<sup>401</sup> 47 C.F.R. § 79.1(c). *See also* 2008 *Closed Captioning Decision*, 23 FCC Rcd at 16678-79, ¶ 11. *See also* 47 C.F.R. § 79.1(d)(12) (specifically requiring otherwise exempt VPDs to comply with the obligation, pursuant to 47 C.F.R. § 79.1(c), to pass through the captions of video programming when received).

<sup>402</sup> *See* Maranatha Multicast Comments at 2-3 (most content on multicast is captioned, and applying the \$3 million exemption to overall operations rather than individual programming streams will not increase the amount of captioned programming from non-network sources or program syndicators); APTS Multicast Comments at 4-5; APTS, PBS and CPB Multicast Comments at 3 (PBS, American Public Television, and the National Educational Telecommunications Association Program Service all require that programming submitted to them for distribution must be closed captioned, and many stations air such programming on their multicast channels); Joint Parties Multicast Comments at 4 (the type of programming appearing on digital multicast channels, such as older, previously-aired programs, and the programming of out-of-market television stations, is already captioned); APTS, PBS and CPB Refresh Comments at 3; NAB Refresh Comments at 27-29. *See also* TDI Multicast Comments at 7. (caption costs for multicast programming should be small since most multicast programming may have already been captioned).

<sup>403</sup> APTS Multicast Comments at 4. *See also* Joint Parties Multicast Comments at 5 (network multicast channels will most likely reach \$3 million in revenue and begin captioning before multicast channels provided by independent stations will reach that threshold, so the total amount of captioned programming will not likely suffer).

<sup>404</sup> Section 79.1(d)(12) of the Commission’s rules is amended as follows:

*Channels/Streams producing revenues of under \$3,000,000.* No video programming provider shall be required to expend any money to caption any channel or stream of video programming producing annual gross revenues of less than \$3,000,000 during the previous calendar year other than the obligation to pass through video programming already captioned when received pursuant to paragraph (c) of this section.

that stream and, at that point, all applicable captioning requirements will apply to that stream.<sup>405</sup> We will revisit the multicasting issue at a later time to determine whether the approach we are adopting today is still needed to assure the viability of multicasting, as well as the extent to which any change of policy is needed to ensure the availability of closed captioning on multicast programming for people who are deaf and hard of hearing.

## E. Other Matters

### 1. Penalties for Violation of the Closed Captioning Rules

110. *Background.* In adopting the closed captioning rules, the Commission indicated that determinations of captioning violations might result in the imposition of penalties, including forfeitures, where appropriate.<sup>406</sup> In the case of a flagrant rule violation, the Commission stated that it could also require VPDs to deliver captioned programming in excess of the established benchmarks.<sup>407</sup> Petitioners in this proceeding have requested that the Commission use its existing forfeiture guidelines to establish a base forfeiture amount of \$8,000 for each captioning violation, with each hour of programming below the applicable benchmark counted as a separate violation.<sup>408</sup> They also have asked the Commission to clarify that to the extent technical problems result in a portion of a program's captioning to be garbled or missing, such program not be counted toward the applicable captioning benchmark.<sup>409</sup> Petitioners argue that because the marketplace has failed to ensure captioning compliance, such "increased enforcement measures are required to provide incentives for the regulated industry to comply with the rules and to ensure captioning quality, reliability, and availability."<sup>410</sup> In the *2005 Closed Captioning NPRM*, the Commission sought comment on whether the Commission should establish specific per-violation forfeiture amounts for non-compliance with the captioning rules, and if so, what those amounts should be.<sup>411</sup>

111. *Discussion.* As we have done in the *IP Closed Captioning Order*, we decline to create sanctions or remedies for closed captioning enforcement proceedings that deviate from the Commission's flexible case-by-case approach governed by Section 1.80 of our rules.<sup>412</sup> The Commission already has

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<sup>405</sup> See, e.g., Joint Parties Multicast Comments at 5; NAB Refresh Comments at 28-29.

<sup>406</sup> *1997 Closed Captioning Report & Order*, 13 FCC Rcd at 3383, ¶ 243.

<sup>407</sup> *Id.*; 47 C.F.R. § 79.1(g)(8).

<sup>408</sup> 2004 Petition at 23; Consumer Groups Reply Comments at 22, citing 47 C.F.R. § 1.80; Consumer Groups Refresh Comments at 7. Many individual commenters support the Petitioners' proposal for base forfeiture amounts for non-compliance with the captioning rules, to ensure that VPDs monitor and correct captioning problems. See Helen Bishop Comments; C.M. Boryslawskij Comments; Jack Cassell Comments; Brenda Estes Comments; Claudia Foy Comments; Janice Hughes Comments; Dr. P.T. Newton Comments; D. Duane and Dorothy Rasmussen Comments; Brian Sturges Refresh Comments; Brian Morace Refresh Comments; Guy A. L'Heureux Refresh Comments; Hugh Lafler Refresh Comments; Kim Mihan Refresh Comments; Nicolas Tegni Refresh Comments; Bob Hawbaker Refresh Comments; Don Lee Hanaumi Refresh Comments; Lauren E. Storck, Ph.D. Refresh Comments; Daniel O'Toole Refresh Comments; Jennifer L. Thomas Refresh Comments; Kirwan Rockefeller, Ph.D. Refresh Comments; Michael J. Boucher Refresh Comments; Carol Ann Nemecek Refresh Comments; Catherine Berger Refresh Comments; Elizabeth Botts Refresh Comments; Rachel Mazique Refresh Comments; Kelly A. Scherf Refresh Comments; Daniel Geiger Refresh Comments.

<sup>409</sup> 2004 Petition at 30.

<sup>410</sup> *Id.* at 23-24.

<sup>411</sup> *2005 Closed Captioning NPRM*, 20 FCC Rcd at 13222-23, ¶¶ 36-39. The Commission's current guidelines for assessing forfeitures do not set specific forfeiture amounts for violations of the closed captioning rules. See 47 C.F.R. § 1.80(b): Guidelines for Assessing Forfeitures (*Forfeiture Guidelines*).

<sup>412</sup> See 47 C.F.R. § 1.80; *IP Closed Captioning Order*, 27 FCC Rcd at 836, ¶ 86. See also HBO Comments at 12.

sufficient authority to issue appropriate penalties,<sup>413</sup> and we will adjudicate complaints on the merits and employ the full range of sanctions and remedies available to the Commission under the Act.<sup>414</sup> In order to encourage compliance with our rules, we will consider a wide variety of factors to determine whether enforcement is warranted, such as history of monitoring and maintenance, complaints received from consumers, frequency of captioning errors, and impact of captioning errors on the viewers' understandability of the program.<sup>415</sup> In addition, as provided in section 79.1(g)(8), a forfeiture penalty may be in addition to any other penalty that the Commission may impose.<sup>416</sup>

## 2. Electronic Filing of Exemption Requests

112. *Background.* Section 713(d)(3) of the Communications Act permits video programming providers or owners to petition the Commission for an exemption from the closed captioning requirements where it can be shown that such requirements would be “economically burdensome.”<sup>417</sup> The Commission has required parties seeking such exemption to file their petitions in paper form.<sup>418</sup> Recognizing that the Internet and e-mail provide increased accessibility to Commission activities, the *1997 Closed Captioning Report and Order* encouraged petitioners also to place their filing on a disk in order to assist with the posting of the petition on the Commission’s website.<sup>419</sup> In the *2005 Closed Captioning NPRM*, the Commission sought comment on whether to require or allow the electronic filing of exemption petitions,<sup>420</sup> and asked about the impact electronic filing would have on entities filing such petitions and parties filing comments or oppositions to such petitions.<sup>421</sup>

113. *Discussion.* In the *2011 Electronic Filing Report and Order*,<sup>422</sup> the Commission amended certain of its procedural rules to increase the efficiency of Commission decision-making and modernize Commission procedures in the digital age, including adoption of a requirement to use electronic filing whenever technically feasible.<sup>423</sup> We agree with several commenters to this proceeding that requiring the electronic filing of petitions for closed captioning exemptions under Section 713(f)(1) of our rules<sup>424</sup> will streamline the petition process for all parties.<sup>425</sup> Moreover, the Commission already

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<sup>413</sup> See HBO Comments at 12; NCTA Refresh Comments at 8; OPASTCO Refresh Reply Comments at 3.

<sup>414</sup> See *IP Closed Captioning Order*, 27 FCC Rcd at 836, ¶ 86.

<sup>415</sup> See, e.g., Consumer Groups Reply Comments at 22-23 (“the case may arise where violation of non-technical standards could result in the failure to meet the benchmark requirements.”).

<sup>416</sup> 47 C.F.R. § 79.1(g)(8); *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3383, ¶ 243. See also 2004 Petition at 23 n.37, citing *Kelby Nathan Brick v. Comcast Cablevision of Maryland and Courtroom Television Network*, Memorandum Opinion & Order, 17 FCC Rcd 570, 575 n.32 (CGB 2002) (the Bureau may impose increased captioning requirements for failure to comply with the closed captioning rules).

<sup>417</sup> 47 U.S.C. § 613(d)(3).

<sup>418</sup> 47 C.F.R. § 79.1(f)(4).

<sup>419</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3365, ¶ 203.

<sup>420</sup> *2005 Closed Captioning NPRM*, 20 FCC Rcd at 13228, ¶ 53.

<sup>421</sup> *2005 Closed Captioning NPRM*, 20 FCC Rcd at 13228, ¶ 53. The Commission also asked whether an electronic filing requirement would expedite the processing of exemption petitions. *Id.*

<sup>422</sup> *Amendment of Certain of the Commission’s Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Report and Order, GC Docket No. 10-44, 26 FCC Rcd 1594, 1599-1602 at ¶¶ 14-21 (2011) (“*2011 Electronic Filing Report and Order*”).

<sup>423</sup> *2011 Electronic Filing Report and Order*, 26 FCC Rcd at 1599-1600, ¶ 15.

<sup>424</sup> 47 C.F.R. § 79.1(f).

requires the electronic filing of petitions for economically burdensome exemptions from rules requiring IP-delivered programming to be captioned.<sup>426</sup> Because the electronic filing of exemption petitions in a machine readable format will be consistent with the *2011 Electronic Filing Report and Order*<sup>427</sup> and the *IP Captioning Report and Order*, we amend our rules to require the electronic filing of individual closed captioning exemption requests in machine readable format, and further revise our rules to require that comments on and oppositions to such petitions also be filed electronically in machine readable format.<sup>428</sup> Pursuant to Section 79.1(f)(7),<sup>429</sup> however, any comment on or opposition to the petition, and any reply, must also be served on the other party and must include a certification that the filing was served on the other party. We retain this rule because we believe it is necessary to ensure that each party to the proceeding is aware of all filings that are submitted to the Commission. We therefore reject the suggestion of the Consumer Groups that because comments and replies are filed electronically, the requirement to send copies of comments and replies to the other parties should be eliminated.<sup>430</sup>

### 3. Correction to 47 C.F.R. § 79.1(i)(3)

114. The e-mail address in section 79.1(i)(3) of the Commission's rules that is provided for VPDs to submit contact information for closed captioning concerns and complaints<sup>431</sup> is inaccurate. The correct address is CLOSEDCAPTIONING\_POC@fcc.gov. The C.F.R. will be amended accordingly.<sup>432</sup>

## V. DECLARATORY RULING

### A. Mixed Language Programming

#### 1. Bilingual English-Spanish Language Programming

115. In its comments, KJLA, LLC, the licensee of KJLA(TV), Ventura, California, suggests that bilingual English-Spanish language programming should be treated as Spanish language programming for the purpose of captioning benchmark requirements.<sup>433</sup> KJLA made this request at a time when the benchmarks for English and Spanish language programming differed from one another,

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<sup>425</sup> See ASDC Comments at 2; Consumer Groups Reply Comments at 23; NAB Refresh Comments at 10; Consumer Groups *Ex Parte* Letter, March 11, 2013, at 4-6 (urging the Commission to permit electronic filing of petitions for exemption from the Commission's closed captioning requirements).

<sup>426</sup> See *IP Captioning Report and Order*, 27 FCC Rcd at 828, ¶ 66; 47 C.F.R. § 79.4(d)(4).

<sup>427</sup> *2011 Electronic Filing Report and Order*, 26 FCC Rcd at 1599-1600, 1602, ¶¶ 14-15, 20. See also NAB Comments at 6 (electronic filing "comports with the Commission's trend towards mandatory electronic filing").

<sup>428</sup> We delegate to the Chief, CGB the authority to implement the transition to the electronic filing of exemption petitions and all related filings and pleadings, including informing the public of the transition procedures via public notice. We also delegate to the Chief, CGB the authority to establish a web-based program other than ECFS for filing petitions for exemption from the closed captioning requirements and for filing responsive pleadings in the event the Chief, CGB finds such alternative web-based program to be in the public interest.

<sup>429</sup> 47 C.F.R. §§ 79.1(f)(7).

<sup>430</sup> See Consumer Groups Refresh Comments at 13.

<sup>431</sup> See 47 C.F.R. § 79.1(i)(3).

<sup>432</sup> Although we amend section 79.1(i)(3) to correct our e-mail address, we note that in the FNPRM section, we are proposing to require that all contact information submitted to the Commission be submitted through the web form method. If our FNPRM proposal is ultimately adopted, the e-mail method of submission of such information will no longer be available as an option.

<sup>433</sup> KJLA Comments at 5-6. *Accord* KVMD Reply Comments at 5-6. KVMD License Co., LLC is the permittee of Station KVMD-DT, Twenty-nine Palms, California. Rancho Palos Verdes Broadcasters, Inc., is the licensee of Station KXLA(TV), Rancho Palos Verdes, California. Their jointly-filed Reply Comments are referred to herein as KVMD Reply Comments.

with Spanish language programming having a longer captioning transition period than programs in English.<sup>434</sup> Now that the obligations for programming in both languages are identical, we confirm that bilingual English-Spanish programs, i.e., programs that have substantial amounts of dialogue in both English and Spanish,<sup>435</sup> is subject to the same obligations with respect to the amount of required captioned programming as programming that is entirely in English or entirely in Spanish. Accordingly, we confirm that all *new* bilingual English-Spanish programming must be closed captioned, and 75 percent of *pre-rule* bilingual English-Spanish programming must be closed captioned in their respective languages at this time.

## 2. Other Language Programming

116. Section 79.1(d)(3) exempts from the closed captioning requirements “. . . programming for which the audio is in a language other than English or Spanish, except that scripted programming that can be captioned using the ‘electronic news room’ technique is not exempt.”<sup>436</sup> As requested by Lincoln Broadcasting Company (Lincoln),<sup>437</sup> we confirm that programs that are in neither English nor Spanish but contain small amounts or “snippets” of English or Spanish words that account for only a small percentage of these programs, are also governed by section 79.1(d)(3) and need not to be captioned.<sup>438</sup> The insignificant amount of English or Spanish dialogue on such shows is not great enough to rise to the level of English or Spanish language programming under our captioning rules. By way of comparison, in the *1997 Closed Captioning Report and Order*, the Commission concluded that English language programs that contain discrete portions of non-English dialogue (such as where characters in an English language film speak in another language without translation), the discrete non-English dialogue need not be captioned.<sup>439</sup> We remind programmers and distributors, however, that section 79.1(d)(3) requires the use of ENT for closed captioning in instances where scripted programming would make this possible.<sup>440</sup>

### B. Providing VPD Contact Information Where VPD Is Exempt from Certain Requirements

117. It has come to our attention that some VPDs that are subject to certain of the captioning exemptions pursuant to section 79.1(d) of our rules<sup>441</sup> have not been making contact information available to consumers and the Commission. We take this opportunity to clarify that the Commission’s rules at section 79.1(i)<sup>442</sup> require all VPDs, even if they are exempt from certain closed captioning rules, to make contact information available to consumers and the Commission for the handling of immediate

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<sup>434</sup> While 100 percent of English language new programming was required to be captioned by 2006, 100 percent of Spanish language new programming was not required to be captioned until 2010. 47 C.F.R. §§ 79.1(b)(1)(iv) and (b)(3)(iv). The 75 percent benchmark for pre-rule programming took effect in 2008 for English language programs and 2012 for Spanish language programs. 47 C.F.R. §§ 79.1(b)(2)(ii) and (b)(4)(ii).

<sup>435</sup> We would not consider a program to be bilingual if it has just a few lines of dialogue in the program’s less predominant language.

<sup>436</sup> 47 C.F.R. § 79.1(d)(3).

<sup>437</sup> Lincoln Broadcasting Company is the licensee of KTSF-TV, San Francisco, CA.

<sup>438</sup> See Lincoln Reply Comments at 4-5 (captioning such portions in English or Spanish would not be productive because viewers watch the program for its foreign language content).

<sup>439</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3311, ¶ 83. We remind programmers and VPDs, however, that the captioning must indicate that the words are being spoken in a foreign language. See section IV.A.2.a, n.115 *supra*.

<sup>440</sup> See 47 C.F.R. § 79.1(d)(3).

<sup>441</sup> 47 C.F.R. § 79.1(d).

<sup>442</sup> 47 C.F.R. § 79.1(i).

concerns<sup>443</sup> and written complaints about closed captioning.<sup>444</sup> Section 79.1(i) was adopted in the *2008 Closed Captioning Decision* to assist consumers to more easily and promptly contact the appropriate VPD to report closed captioning problems or to file complaints.<sup>445</sup> Because all VPDs, including those that are exempt from certain captioning rules, are nevertheless required to provide captioning pursuant to the pass-through rule,<sup>446</sup> all VPDs are subject to the obligation to receive and respond to complaints. Therefore, all VPDs must make their contact information available pursuant to section 79.1(i).

### C. Obligation to Caption “On Demand” Video Programming

118. Commission guidance with respect to the captioning of “on demand” programming was first provided in 1997, when the obligation to caption a particular program depended in part on how many other hours of programming the VPD had captioned, or intended to caption, on its channel during the relevant quarter.<sup>447</sup> The Commission recognized that, with respect to “on demand” programming, where the content of the channel was dependent on subscriber requests, it might be difficult to schedule programming “with the advance knowledge that it would meet the applicable [captioning] standards.”<sup>448</sup> For this reason, the Commission concluded that “[i]n such situations, we will only require that a reasonable judgment be made in advance as to the likely output of the channel, with captioning provided based on this estimate.”<sup>449</sup> The Commission added that, to “the extent necessary, Commission guidance also may be sought in advance regarding the appropriate methodology for determining this estimate and for compliance with our captioning requirements.”<sup>450</sup>

119. The applicable captioning standards for English, Spanish, and bilingual English and Spanish language programming are now 100 percent for new programming<sup>451</sup> and 75 percent for pre-rule programming.<sup>452</sup> Because there is now certainty with respect to the amount of programming that must be captioned per channel on a quarterly basis for all video programming, subscriber requests for on-demand programming no longer affect the obligation to caption these programs. Accordingly, we confirm that all “on demand” programming not subject to an exemption must comply with the relevant captioning requirements for new and pre-rule programming.<sup>453</sup> More specifically, to the extent that “on demand” programming that airs today is “new programming,” it must be captioned unless it otherwise qualifies for

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<sup>443</sup> Section 79.1(i)(1) states in relevant part: “Video programming distributors should ensure that any staff reachable through this contact information has the capability to immediately respond to and address consumers’ concerns. To the extent that a distributor has personnel available, either on site or remotely, to address any technical problems that may arise, consumers using this dedicated contact information must be able to reach someone, either directly or indirectly, who can address the consumer’s captioning concerns.”

<sup>444</sup> 47 C.F.R. § 79.1(i).

<sup>445</sup> *2008 Closed Captioning Decision*, 23 FCC Rcd at 16684, ¶ 28. Consumers had reported confusion about whom to contact, along with dissatisfaction with the responsiveness of the VPDs. *Id.* at 16685, ¶ 30, n.81 (citing numerous comments from individual consumers, the Consumer Groups, NVRC, and MCS).

<sup>446</sup> *See* 47 C.F.R. § 79.1(c).

<sup>447</sup> *See* 47 C.F.R. §§ 79.1(b)(1) and (b)(3).

<sup>448</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3309, ¶ 80.

<sup>449</sup> *Id.*

<sup>450</sup> *Id.*

<sup>451</sup> 47 C.F.R. §§ 79.1(b)(1)(iv) and (b)(3)(iv).

<sup>452</sup> 47 C.F.R. §§ 79.1(b)(2)(ii) and (b)(4)(ii).

<sup>453</sup> *See also Motion Picture Association of America Petition for Expedited Special Relief; Petition for Waiver of the Commission’s Prohibition on the Use of Selectable Output Control (47 C.F.R. § 76.1903)*, Memorandum Opinion and Order, 25 FCC Rcd 4799, 4807 at ¶ 16 (MB 2010).

an exemption under our rules.<sup>454</sup> To the extent it is pre-rule programming, it must comply with our pre-rule 75 percent benchmark.<sup>455</sup>

#### **D. Application of Closed Captioning Requirements to LPTV Stations**

120. In the *1997 Closed Captioning Report and Order*, the Commission declined to adopt a specific exemption for low power television (LPTV) stations,<sup>456</sup> and included within the definition of VPD, “[a]ny broadcast station licensed by the Commission.”<sup>457</sup> Because that *Order* makes clear the Commission’s intent to require closed captioning of non-exempt programming on all television stations, including LPTV stations,<sup>458</sup> we remind LPTV stations that they must comply with Part 79 of our rules.

### **VI. FURTHER NOTICE OF PROPOSED RULEMAKING**

121. In this FNPRM, we seek comment on several additional matters regarding the delivery of closed captions. Because of the unique issues raised in Section VI.A of the FNPRM, we establish different comment deadlines for that section than for the remaining sections of the FNPRM. Comments on Section VI.A will be due 30 days after publication in the Federal Register, and replies 60 days after publication in the Federal Register. For the other sections of the FNPRM, comments will be due 90 days after publication in the Federal Register, and replies 120 days after publication in the Federal Register.

#### **A. Responsibilities for Meeting the Closed Captioning Obligations**

122. In the *1997 Closed Captioning Report and Order*, the Commission placed direct responsibility for compliance with the closed captioning requirements on VPDs.<sup>459</sup> While the Commission noted that section 713 of the Act authorizes the Commission to ensure the provision of closed captioning of video programming “by providers and owners of video programming,”<sup>460</sup> the Commission nevertheless chose to regulate VPDs because it believed that placing responsibility for compliance solely on VPDs would help expeditiously increase the availability of video programming with closed captioning and focus compliance responsibility on a single entity.<sup>461</sup> In contrast, in the *IP*

<sup>454</sup> See 47 C.F.R. §§ 79.1(b)(1)(iv) and (b)(3)(iv).

<sup>455</sup> See 47 C.F.R. §§ 79.1(b)(2)(ii) and (b)(4)(ii). Further, whenever on-demand programming is edited, captions must be reformatted if necessary to ensure that they are properly synchronized with the edited programming. See *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 20008 and 20009, ¶¶ 80, 82. See also section IV.A.2.b, *supra*.

<sup>456</sup> See *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3349-50, ¶¶ 162-165. The Commission noted that the general revenue based exemption contained in section 79.1(d)(12) might apply to many LPTV stations. *Id.*

<sup>457</sup> 47 C.F.R. § 79.1(a)(2),

<sup>458</sup> See *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3349-50, ¶¶ 162-165.

<sup>459</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286, ¶ 27.

<sup>460</sup> *Id.* (emphasis added) (citing sections 713(b)(2), (d)(2) and (d)(3) of the Act, 47 U.S.C. § 613(b)(2), (d)(2) and (d)(3). Section 713(b)(2) directs the Commission to prescribe regulations that “shall ensure” that “video programming providers or owners maximize the accessibility of video programming first published or exhibited prior to the effective date of such regulations through the provision of closed captions”) (emphasis added); Section 713(d)(2) and (3) authorizes the Commission to exempt classes of programs where “the provision of closed captioning would be economically burdensome to the provider or owner of such programming” and authorizing the “provider of video programming or program owner” to petition the Commission for an exemption from the captioning requirement) (emphasis added).

<sup>461</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286, ¶ 27. The Commission reasoned that placing compliance obligations on VPDs would promote more efficient monitoring and enforcement of the closed captioning rules because typically there would “be a single entity to which complaints must be addressed, and there would be no need for tracking the entities responsible for producing programs alleged to violate the rules.” *Id.* See also *IP Captioning Report and Order*, 27 FCC Rcd at 801, ¶ 20.

*Captioning Report and Order* (requiring television programs to retain their captions when re-shown over Internet protocol), the Commission extended some of the captioning responsibilities to VPOs. Specifically, VPOs must send program files used for the delivery of programming over Internet protocol to VPDs with all required captions.<sup>462</sup> Among other things, the Commission concluded that imposing responsibility on VPOs as well as VPDs<sup>463</sup> was necessary to further the statutory purpose of helping to “ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming,”<sup>464</sup> and that placing obligations on VPOs would ensure that the Commission could hold a responsible party accountable for violations of the CVAA.<sup>465</sup> Under the approach adopted in the IP Captioning Report and Order, the Commission concluded that VPDs were only responsible for rendering or passing through closed captions and exercising good faith efforts to identify programming subject to the IP captioning rules, and would be protected from liability so long as those two requirements are met.<sup>466</sup> Similarly, the Commission recently revised its emergency information rule<sup>467</sup> to add video programming providers – which includes program owners<sup>468</sup> – along with VPDs, as parties responsible for making emergency information available to individuals who are blind or visually impaired.<sup>469</sup>

123. We seek comment on whether we should extend some of the responsibilities for compliance with our the closed captioning quality standards adopted in the accompanying Report and Order for programming shown on television to video programmers, which are a subset of VPPs.<sup>470</sup> In the Report and Order, we define a video programmer as “entities that provide video programming that is intended for distribution to residential households including, but not limited to, broadcast or non-broadcast television networks and the owners of such programming.”<sup>471</sup> As an initial matter, we also seek comment on whether this definition is sufficiently broad in scope to hold accountable all entities with

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<sup>462</sup> *IP Captioning Report and Order*, 27 FCC Rcd at 798, ¶ 15.

<sup>463</sup> In this context, these are section 79.4 VPDs. See 47 C.F.R. §79.4(a)(3).

<sup>464</sup> *IP Captioning Report and Order*, 27 FCC Rcd at 798, ¶ 16.

<sup>465</sup> *Id.* at 799-800, ¶ 18.

<sup>466</sup> *Id.* at 798, ¶ 16.

<sup>467</sup> 47 C.F.R. §79.2.

<sup>468</sup> 47 C.F.R. §79.1(a)(3).

<sup>469</sup> *In the Matter of 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, Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, 28 FCC Rcd 4871, 4898-99, ¶ 34. The Commission ruled that the entity that creates the visual emergency information content and adds it to the programming stream is responsible for providing an aural representation of the information on a secondary audio stream, accompanied by an aural tone, whether that entity is the VPD or VPP. *Id.* at 4899-4900, ¶ 36. In addition, the Commission held VPDs responsible for ensuring that the aural representation of the emergency information gets passed through to consumers. It concluded that this approach would allow it “to take enforcement action not only against a non-compliant video programming distributor, but also against a program provider or owner that does not comply with its obligation to make visual emergency information accessible to consumers who are blind or visually impaired.” *Id.* Finally, the Commission ruled that both VPDs and VPPs “are responsible for ensuring that emergency information supersedes any other programming on a secondary audio channel, with each entity responsible only for its own actions or omissions in this regard.” *Id.* at 4900, ¶ 36.

<sup>470</sup> In the television captioning context, VPPs include VPDs as well as video programmers, *i.e.*, “any other entity that provides video programming that is intended for distribution to residential households including, but not limited to broadcast and nonbroadcast television network and the owners of such programming.” See 47 C.F.R. § 79.1(a)(3).

<sup>471</sup> See ¶ 52, *supra*.

direct control over caption quality or whether the Commission should expand the definition to cover other categories of entities and, if so, what other entities should be covered. Commenters advocating covering other entities should address the Commission's authority to regulate those entities.

124. We note that in addition to video program providers, the definition of video programmers also includes “the owners of such programming.” The Commission has defined the term video programming owners (VPOs) for purposes of ensuring captions on video programming delivered via Internet protocol, but not for purposes of delivering television programs with captions. In relevant part, the definition in the IP context includes any person or entity that “[l]icenses the video programming to a video programming distributor or provider that makes the video programming available directly to the end user through a distribution method that uses Internet protocol.”<sup>472</sup> We seek comment on whether the Commission should define the term VPO for purposes of the television closed captioning rules. We seek comment on an appropriate definition for VPOs in the television context with respect to the provision of closed captioning. For example, should we include in the definition of VPO a person or entity that licenses video programming to a video programming distributor or provider that makes the video programming available directly to the end user? What other entities should be covered under the definition of VPO in this context, and why?

125. Some interested parties already have expressed their support for having the Commission extend the responsibility for caption quality to other entities in the captioning chain, in addition to VPDs, in the television context. For example, Comcast/NBCUniversal (Comcast) has submitted a proposal for the Commission to adopt a “burden-shifting enforcement model” that extends some captioning responsibilities to VPOs.<sup>473</sup> This proposal would give a VPD the initial burden of addressing and investigating matters brought to its attention concerning the closed captioning quality rules adopted in the accompanying Report and Order. If the problem at issue is found to raise problems related to the pass-through of captions or the VPD's equipment, the VPD would be responsible for fixing it and bear any associated liability in an enforcement proceeding if one were to be initiated, because these are problems within the VPD's direct control. If, however, the VPD, upon investigating the captioning issue, learns that the problems raised are within the control of the VPO, the compliance burden would shift to the VPO, which would be charged with fixing the problem and bear any associated liability in an enforcement proceeding.

126. Comcast suggests that this approach is appropriate because of the important role that VPOs play with respect to implementing the Best Practices contained in this order, and because, they claim, VPOs are in a better position than VPDs in the distribution chain to address quality issues.<sup>474</sup> As

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<sup>472</sup> 47 C.F.R. §79.4(a)(4). In the IP context, the definition of VPO also includes any person or entity that “[a]cts as the video programming distributor or provider, and also possesses the right to license the video programming to a video programming distributor or provider that makes the video programming available directly to the end user through a distribution method that uses Internet protocol.” Inclusion of these latter entities in the IP context was designed to reach not only the entities that distribute the programming themselves but also those that have the right to license the video programming to a VPD or VPP.

<sup>473</sup> See Comcast/NBC January 28, 2014 *Ex Parte*. Although Comcast uses the term “VPOs” in its proposal, it does not define the term for purposes of its proposal. Nonetheless, based on the example of a VPO that Comcast includes in its proposal – *i.e.*, a program network – it appears that the category of entities Comcast proposes to reach would be covered under our definition of “video programmers” as defined in the accompanying Report and Order, *i.e.*, “entities that provide video programming that is intended for distribution to residential households including, but not limited to, broadcast or nonbroadcast television networks, and the owners of such programming.” See ¶ 52, *supra*; Comcast/NBC January 28, 2014 *Ex Parte* at 2.

<sup>474</sup> *Id.* See also, DISH Network and DIRECTV December 9, 2013 *Ex Parte*, at 2 (agreeing that it would be “far more efficient and appropriate” for the Commission to regulate VPOs directly, “rather than doing so indirectly through [VPDs]”). Similarly, Verizon contends that MVPDs have “limited ability to directly impact the closed

noted above, section 713 of the Act allows the Commission to place closed captioning obligations on multiple entities associated with the production and delivery of video programming to the public.<sup>475</sup> We seek comment on Comcast's burden-shifting proposal and whether it would result in an appropriate allocation of responsibilities for addressing failures to meet the Commission's captioning quality rules. Is this approach likely to achieve a prompt and more effective resolution of captioning quality problems brought to the VPD's attention? Will this model provide strong incentives for the various parties associated with program production and delivery to work cooperatively to improve captioning quality, as suggested by Comcast? Finally, we note that under the Comcast proposal, a VPD would be relieved of any liabilities associated with captioning problems once it determined that the problems raised are within the control of the VPO. We seek comment on how the Commission can be assured that when responsibility for captioning problems are shifted to other programming entities, VPDs will have appropriately transferred such liability? Should each VPD be obligated to report to the Commission when they shift this burden, with information about the results of its initial investigation to warrant this shift? Should the VPD remain jointly responsible with the programmer after informing the programmer about the need for the programmer to address the problem? We ask commenters generally to provide input on the advantages and disadvantages of adopting Comcast's proposal, including its feasibility, as well as the costs and benefits of shifting responsibility for direct compliance with our closed captioning requirements to other entities responsible for the production and delivery of video programming.

127. Aside from the approach proposed by Comcast, are there other approaches we should consider using to apportion responsibilities for compliance with the television caption quality rules among entities involved in the production and delivery of video programming? Should any changes to the apportionment of these responsibilities apply generally to all captioning obligations, or only to the newly adopted captioning quality rules? To what extent should responsibilities be joint and several among specific entities? For example, is it preferable to place the ultimate responsibility for compliance with a single entity (as the Commission did in the *1997 Closed Captioning Report and Order*), or are there benefits to imposing joint responsibility on or dividing up responsibility among the responsible entities? What effect would the sharing of obligations across multiple entities have on consumers and industry, and to what extent can any negative effects be mitigated?<sup>476</sup>

128. We also seek comment on the effect, if any, that extending responsibility for compliance to entities other than VPDs would have on the Commission's ability to efficiently monitor and enforce the closed captioning television rules.<sup>477</sup> To what extent would the Commission's earlier predictions that VPDs would privately negotiate with VPOs and other VPPs regarding "an efficient allocation of

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captioning quality, other than to effectively pass through the captions supplied by the content provider." Verizon *Ex Parte* Letter, December 13, 2013.

<sup>475</sup> See ¶¶ 51-52, *supra*. In addition, as we explain at the beginning of this section, video programmers are a subset of VPPs, and section 713 clearly provides the Commission with jurisdiction over VPPs. See 47 U.S.C. § 613(b)(2), (d)(2) and (d)(3). Finally, as Comcast points out, the legislative history of section 713 indicates that Congress intended for the captioning provisions to be applied broadly to include "the specific television station, cable operator, cable network or other service that provides programming to the public." Comcast/NBC January 28, 2014 *Ex Parte* at 2, citing H.R. Rep. No. 104-204, at 114 (1995).

<sup>476</sup> See, e.g., *IP Captioning Report and Order*, 27 FCC Rcd at 834, ¶ 82 (addressing concerns in the IP closed captioning context that consumers and the Commission would be faced with the potentially difficult task of identifying VPOs against whom to file a complaint or seek enforcement by allowing consumers to file any IP closed captioning complaint with the VPD or name the VPD in any complaint filed with the Commission, and stating that consumers are not required to name or otherwise identify the applicable VPO).

<sup>477</sup> As noted earlier, the Commission reasoned in 1997 that placing compliance obligations on VPDs would promote more efficient monitoring and enforcement of the closed captioning rules, because there would typically be a single entity to which complaints must be addressed. See *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286, ¶ 27.

captioning responsibilities” and that VPOs and other VPPs would “cooperate with distributors to ensure that nonexempt programming is closed captioned in accordance with our rules” apply to the caption quality context?<sup>478</sup> We note that in the IP captioning context, the Commission determined that although VPDs and VPOs may enter into private contracts placing some obligations on VPOs, leaving VPOs’ responsibilities to be defined entirely by private contractual arrangements would be more costly and less efficient than appropriately allocating certain responsibilities among both VPOs and VPDs by Commission rule.<sup>479</sup> Would a division of responsibilities for caption quality in the television context reduce or improve the Commission’s efficiencies in overseeing the captioning rules?<sup>480</sup> Is there a “liability gap” left by the Commission’s 1997 decision to limit regulatory oversight to VPDs that needs to be addressed with respect to the general implementation of our television captioning rules by extending regulatory oversight to VPOs, video programmers or other entities?<sup>481</sup> For example, as noted above, section 79.1(g)(6) of our rules permits VPDs to rely on certifications from programming suppliers to demonstrate compliance with our captioning requirements.<sup>482</sup> Will imposing shared responsibilities on other entities in the programming chain help to alleviate concerns that could arise if a VPD relies on such certifications without taking any additional steps to ensure that the programming at issue has in fact been delivered to the consumers with the captions intact and of a quality that now meets our captioning quality standards?<sup>483</sup>

129. To the extent the Commission decides to impose some obligations directly on other programming entities, we also seek comment on whether any changes to the rules or Best Practices adopted in the Report and Order are appropriate. For example, if we extend obligations for compliance with the captioning quality standards directly to programmers, should we allow such programmers to assert a safe harbor, which could then entitle them to take corrective actions to demonstrate compliance prior to being subject to enforcement action – akin to the compliance ladder adopted for stations in compliance with the new enhanced ENT procedures?<sup>484</sup> Should we similarly allow VPDs to assert a safe harbor, which would also entitle them to take corrective actions to demonstrate compliance prior to being subject to enforcement action, in the event certain obligations for compliance with the captioning quality standards are placed on VPDs? If we were to extend direct compliance responsibility with our closed captioning requirements to video programmers or other programming entities, would it no longer be necessary to include section 79.1(g)(6) in the Commission’s rules? In addition, we seek comment on whether there are similarities or differences between the television and the IP closed captioning contexts or the Commission’s emergency information rule that justify similar or different regulatory approaches.<sup>485</sup> We seek comment on any other issues related to extending some or all responsibility for compliance with our closed captioning requirements to other programming entities, and ask commenters to address the

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<sup>478</sup> 1997 *Closed Captioning Report and Order*, 13 FCC Rcd at 3363-3364, ¶ 199.

<sup>479</sup> *IP Captioning Report and Order*, 27 FCC Rcd at 799, ¶ 17. The Commission added that it would be “more efficient and less costly to place appropriate obligations on VPOs and on VPDs, rather than to expect the parties to enter into contracts mandating the same obligations.” *Id.* at 802-03, ¶ 22.

<sup>480</sup> *See 1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286-87, ¶ 28.

<sup>481</sup> *See IP Captioning Report and Order*, 27 FCC Rcd at 801, ¶ 20.

<sup>482</sup> 47 C.F.R. § 79.1(g)(6).

<sup>483</sup> We note that the certification rule at 47 C.F.R. § 79.1(g)(6) states: “Distributors will not be held responsible for situations where a program source falsely certifies that programming delivered to the distributor meets our captioning requirements if the distributor is unaware that the certification is false.”

<sup>484</sup> *See* section IV.B, *supra*.

<sup>485</sup> *See, e.g., IP Captioning Report and Order*, 27 FCC Rcd at 801, ¶ 20-23 (discussing “key differences” between the television and IP contexts justifying different regulatory treatment of VPOs in television closed captioning and IP closed captioning).

costs and benefits of making any such adjustments to our rules.

130. Finally, we invite parties generally to provide any information that they believe will contribute to a better understanding about which entities are ultimately better positioned to ensure compliance with our captioning quality standards. In the *IP Captioning Report and Order*, the Commission concluded that placing responsibilities on entities best positioned to fulfill the Commission's rules would lead to greater efficiencies and the improved implementation of such rules.<sup>486</sup> We believe the same holds true with respect to the effective implementation of the captioning standards.

## **B. Minimum Captioning Quality Standards**

### **1. Live Programming**

131. In the Report and Order, the standards we adopt indicate that captions should appear simultaneously with their corresponding spoken words, to the fullest extent possible,<sup>487</sup> and note that although we recognize the need for a slight delay in the delivery of captions for live programming, the delay in the presentation of live captions should be kept to a minimum, consistent with an accurate presentation of what is being said and the overall goal of ensuring that captions enable viewers to follow the program.<sup>488</sup> We now seek comment on technical solutions for improving the synchronicity between the audio track and captions on live programming to facilitate understanding of a program's content. For example, would providing the captioner advance delivery of the audio by a few seconds help to reduce captioning latency? We ask commenters to provide input on this and other techniques to achieve greater synchronicity, and to explain how the incremental costs and burdens of utilizing any of the techniques they propose compare with the benefits of greater accessibility to television programming.<sup>489</sup> Finally, we ask commenters to indicate whether VPDs, programmers or other entities should be responsible for implementing such technical solutions.

132. In the Report and Order, our standards also indicate that captions should run from the beginning to the end of the program to the fullest extent possible, given the nature of the program.<sup>490</sup> We recognize, however, that the delays inherent in sending caption transmissions on live programs to viewers pose particular challenges with respect to ensuring that the entire program is captioned. As a consequence, often such captions "cut off" when the program transitions to a commercial or the subsequent program.<sup>491</sup> In order to minimize such captioning omissions, in the Report and Order, our standards provide for the use of whatever techniques are necessary and available, given the type of the program, to provide captions that capture the entirety of the program's aural content. In this FNPRM, we seek additional information about such methods, including, for example (1) sending the audio feed to the live captioner in a way that alerts the captioner that the program's end is imminent, so that the captioner can paraphrase or abbreviate the remaining text before the program cuts off; (2) fading out the program after its last scene to add a few seconds for the transition to the next program or commercial content; (3) providing advance delivery of the audio to captioners by a few seconds; and (4) allowing captions remaining at the end of a program's audio to be placed in a location on the screen during the subsequent advertisement (or program) in a manner that does not overlap with the captions on that advertisement or

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<sup>486</sup> *IP Captioning Report and Order*, 27 FCC Rcd at 798-804.

<sup>487</sup> See Report and Order at section IV.A.2.b.

<sup>488</sup> See Report and Order at section IV.A.3.b.

<sup>489</sup> We note that the Commission has asked whether to impose synchronization requirements on apparatus manufacturers in the IP closed captioning proceeding. See *IP Captioning Reconsideration Order*, 28 FCC Rcd at 8805-8806, ¶¶ 32-34.

<sup>490</sup> See Report and Order at section IV.A.2.

<sup>491</sup> See Report and Order at section IV.A.3.b.

program.<sup>492</sup> We seek comment on the feasibility, costs and other concerns associated with requiring the use of one or more of these techniques to ensure that captioning of live programming is complete. Are there other technologies or techniques in addition to these that the Commission should consider requiring for this purpose, and if so, what are their costs, benefits and technical feasibility? If we adopt more specific latency requirements, should we also identify any exceptions for circumstances where it is not possible to ensure completeness, and if so, what circumstances would those be? If we require any new methods to ensure that captions capture the entirety of the program's aural content, should VPDs, programmers or other entities be responsible for implementing these methods? Finally, we ask commenters to explain how the incremental costs and burdens of utilizing any of the techniques they propose compare with the benefits of greater accessibility to television programming.

## 2. Near-Live Programming

133. In the Report and Order, we treat near-live programming as if it were live programming for the purposes of the non-technical quality standards. Our standards also identify measures that are likely to result in an improved quality of captions for both near-live programming and rebroadcasts of live programming. For example, we note that in advance of a program's airing, programmers may be able to provide a complete program script or a near-completed program to a captioning agency, which the agency can then use to create a caption file that is later combined simultaneously with the program when it is aired. Having the bulk of the program captioned in advance is likely to eliminate many of the errors that may be caused by real-time captioning. Alternatively, if a captioning agency can receive a live feed to the taping of a near-live program, it may be able to caption the program while it is being taped, and then improve the captions for accuracy, synchronicity, program completeness and placement prior to the program's airing. During the intervening hours, the programming provider also could inform the captioning agency about any edits made to the show prior to airing.<sup>493</sup> We seek comment on whether there are other measures in addition to these that can be used to improve the quality of near-live programming, as well as whether the Commission should require any such measures. In this regard, we request input on the feasibility, costs and other concerns that would be associated with such requirements, and how those compare with the benefits of greater accessibility to television programming. Finally, we ask commenters to indicate how to apportion responsibilities among VPDs, programmers or other entities for ensuring compliance with any measures adopted to improve the quality of near-live programming.

134. We also seek comment on whether our current definition of near-live programming is appropriate for purposes of the quality standards that we adopt herein. Our rules pertaining to the IP captioning requirements currently define near-live programming as programming that is performed and recorded within 24 hours prior to when it is first aired on television.<sup>494</sup> Consumer Groups argue that this definition of near-live programming was meant, "only for the purpose of identifying an appropriate schedule of deadlines for [the Commission's] IP captioning rules," and is inadequate for our purposes here.<sup>495</sup> Specifically, Consumer Groups argue that, "the Commission [in its IP Captioning Report and Order] did not consider the critical issue presented here: whether programming performed and recorded less than 24 hours prior to air *could* be captioned offline instead of in real-time."<sup>496</sup> Consumer Groups recommend that the Commission "presumptively limit 'near-live' programming to programming recorded and performed less than double its length prior to air – e.g., two hours before the airing of a one-hour program – and deem 'pre-recorded' all programming recorded and performed more than double its length

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<sup>492</sup> *See id.*

<sup>493</sup> *See* Report and Order at section IV.A.3.c.

<sup>494</sup> 47 C.F.R. § 79.4(a)(8).

<sup>495</sup> Consumer Groups Jan. 28 *Ex Parte* at 3. *See generally* *IP Captioning Report and Order*, 27 FCC Rcd at 823, ¶¶ 57-58.

<sup>496</sup> Consumer Groups Jan. 28 *Ex Parte* at 3 (emphasis in original).

prior to air.”<sup>497</sup> Consumer Groups also recommend that the Commission require the use of offline captioning where doing so is achievable and that “VPDs delivering near-live programming using real-time captions maintain records of the reason that offline captioning is not achievable.”<sup>498</sup> We note that although consumers recommend that VPDs be required to maintain such records, it may be more appropriate for programmers who are directly responsible for the delivery of programs with captions to bear this obligation. We seek comment on establishing such a requirement, as well as the other proposals made by the Consumer Groups. Is our current definition of near-live programming adequate to achieve the goal of promoting caption quality? Is it technically and financial feasible to caption programming performed less than 24 hours prior to air offline instead of in real-time? Is the Consumer Groups’ proposal to limit near-live programming to programming recorded and performed less than double its length prior to air feasible? Does it better promote quality captioning? We also seek specific cost information on the impact of changing the definition of near-live programming for purposes of our caption quality rules.

### 3. Live and Near-Live Program Re-feeds

135. In the Report and Order, we encourage the use of offline captioning or other measures for live and near-live programs that were originally captioned using real-time captioning techniques but that are later re-aired on television, in order to achieve improved accuracy, synchronicity, completeness and placement of captions on these program re-feeds. We now ask whether we should require some of these measures for programs shown after the effective date of the captioning quality standards. For example, should the Commission adopt a requirement to correct errors inadvertently made and timing lags that occurred when the program was first aired with real-time captions? Are there other measures that can be taken between the time of the first and subsequent showings that can help improve the caption viewer experience of such programs? If any rules were to be adopted requiring correction of captioning errors and timing lags on re-feeds of live and near-live programming, should such rules include threshold error rates or time lags before correction is required, and if so what should those thresholds be? We ask commenters to provide feedback on the feasibility, costs and burdens that would be associated with such requirements to take certain measures to improve captions on re-feeds, and to compare these with the benefits of greater accessibility to television programming. We also seek input on the minimum interval needed between the original airing and the re-feed that would make such measures feasible. Finally, we seek comment on who should be responsible for implementing measures that will improve the accuracy, synchronicity, completeness and placement of captions on program re-feeds – VPDs, programmers, or other entities.

#### C. Use of Electronic Newsroom Technique by Non-Broadcast Channels

136. As explained in the Report and Order<sup>499</sup> the ENT rule now prohibits the four major national broadcast networks, their affiliates in the 25 largest DMAs, and national non-broadcast networks serving at least 50 percent of all homes subscribing to MVPD services from using ENT to caption live programming.<sup>500</sup> The Report and Order amends section 79.1(e)(11) to define the components of ENT in accordance with the Electronic Newsroom Technique Best Practices submitted by the NAB.<sup>501</sup> As

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<sup>497</sup> *Id.* at 4.

<sup>498</sup> *Id.*

<sup>499</sup> See section IV.B, *supra*.

<sup>500</sup> See 47 C.F.R. § 79.1(e)(3).

<sup>501</sup> See *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 19991, ¶ 36. As noted above, in the 1997 Order, the Commission predicted that in the future, ENT would “by far be the exception rather than the general rule, and that only those entities that are so small or who present unusual circumstances will be permitted to continue to use EN[T] because live closed captioning would be an economic burden.” *Id.* at 19993, ¶ 40.

discussed in the Report and Order,<sup>502</sup> viewers have come to expect that when closed captions are added to a program, they will convey the full content of that program. The ENT requirements adopted in the Report and Order are designed to ensure that broadcasters relying on ENT for their live programming are providing individuals who are deaf and hard of hearing with access to live news and information to the greatest extent possible, including but not limited to, sports and weather updates, on-the-spot field reporting, interviews and dialogue between anchors.<sup>503</sup> We therefore seek comment on whether to apply the above ENT requirements adopted for broadcasters to non-broadcast networks. What effect, if any, will these proposals have on the availability of news and public affairs programming as well as other live programming on non-broadcast networks serving less than 50 percent of all homes subscribing to MVPD services? What are the benefits and disadvantages of these proposals for consumers seeking full access to news programming? We also seek other information that will help us to assess the costs and benefits if we were to apply these proposed obligations on non-broadcast networks.

## **D. Compliance**

### **1. Technical Equipment Checks**

137. In the Report and Order, we codify our 1997 uncodified requirements for VPDs to take “any steps needed to monitor and maintain their equipment and signal transmissions as part of their obligation to ensure that the captioning included with video programming reaches consumers,” and to take any corrective measures necessary to ensure that such equipment is in proper working order.<sup>504</sup> We are also requiring VPDs to conduct technical checks of their equipment in a manner that is sufficient to ensure that captions are passed through to viewers intact.<sup>505</sup> We seek comment on whether to establish specific intervals by which these equipment checks should take place and, if so, how frequently these checks should be performed to ensure that captioning is reliably delivered and video programming is fully accessible to consumers. Lastly, we seek comment on the extent to which measures other than regular equipment checks, such as automated technologies that can be used to ensure that captions are passed through to consumers, should be permitted as alternative methodologies for monitoring.<sup>506</sup> Commenters are asked to weigh the costs of these proposals as well as the costs of particular time intervals against the benefits of increasing reliable access to video programming by people who are deaf and hard of hearing.

### **2. Resolution of Consumer Complaints**

138. NCTA proposes in its Best Practices that VPDs take the following actions designed to improve the prompt resolution of consumer’s captioning concerns.

- *Consumer care awareness and training.* Maintain consumer support and escalation for captioning issues and provide targeted information or conduct training for customer care agents or television station personnel, as appropriate, to help with and assist in the resolution of caption quality and other captioning support issues.
- *Identification and remediation of recurring captioning issues.* Make reasonable efforts to identify consumer complaints received about captioning issues and periodically review these

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<sup>502</sup> See section IV.B, *supra*.

<sup>503</sup> See *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 19991, ¶ 35. See also Consumer Groups Refresh Comments at 8-12.

<sup>504</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3369, ¶ 212. See Report and Order, section IV.C.1, *supra*.

<sup>505</sup> See section IV.C.1, *supra*.

<sup>506</sup> See Letter from Jordan Goldstein, Executive Director, Regulatory Affairs, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 05-231, (Feb. 18, 2014).

complaints to identify and resolve recurring captioning problems.<sup>507</sup>

139. Although we are not adopting in the Report and Order Best Practices for VPDs at this time, we seek comment on whether to adopt these practices noted above that specifically address the handling of complaints. We ask commenters to address their experiences with the resolution of complaints filed directly with VPDs and whether adherence to the above practices would affect either positively or negatively the resolution of such complaints. We ask commenters to also address the costs and benefits of requiring VPDs to implement these complaint handling practices.

140. On a related matter, Consumer Groups recommend that the Commission provide the public with information about all captioning-related complaints as part of a Commission-wide “dashboard.”<sup>508</sup> They suggest that this information “could provide a useful snapshot of trends and specific program areas as they arise, such [as] complaint types, particular quality issues, and pendency periods, and ultimate resolutions.”<sup>509</sup> We seek comment on having the Commission make such information available to the public.

### 3. Outages

141. Even where a VPD’s captioning equipment is properly maintained, unanticipated break downs may cause closed captioning outages. In their Reply Comments, the Consumer Groups recommend that we require VPDs to provide an outage report to the Commission in the event a VPD has an unexpected equipment failure that results in complete loss of captioning.<sup>510</sup> Such an outage report, urge the consumers, would assist the Commission and the VPD in resolving complaints related to the outage, as well as help identify VPDs that may not be meeting the Commission’s technical standards.<sup>511</sup> The Consumer Groups also suggest that captioning outages be communicated to viewers in real-time, for example, through the VPD’s website and a crawl that appears at the top or bottom of the TV screen during the outage, so that consumers can understand the reason for a lack of captions in a particular instance.<sup>512</sup> Finally, the Consumer Groups propose that two outage reports be filed with the Commission – an initial report within three hours of the outage’s discovery that notes the programs and geographic location affected, as well as the start time of the outage, and a final report that includes the end time of the outage and an explanation for its cause.<sup>513</sup>

142. Over the past several years, the Commission generally has become aware of captioning outages through complaints; some of these outages have lasted for hours; in a few instances, the outages have lasted for days.<sup>514</sup> Such outages deny access to video programming by people who rely on captions to understand a program’s content. When an outage occurs, consumers are left to wonder where the source of the problem arises – *e.g.*, with the program, the station, the VPD, or their viewing equipment. Having timely information that a captioning outage has occurred as a result of technical difficulties, via a crawl on each program affected by the outage and a conspicuous notification on the VPD’s web site, could inform consumers, first, that the problem is not one that they need to address through their

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<sup>507</sup> NCTA Best Practices at 4-5.

<sup>508</sup> Consumer Groups February 10, 2014 *Ex Parte* at 3.

<sup>509</sup> *Id.*

<sup>510</sup> Consumer Groups Reply Comments at 19.

<sup>511</sup> *Id.*

<sup>512</sup> The Consumer Groups provide an example of such a crawl: “Please stand by. We are experiencing technical difficulties with our closed captioning.” *Id.*

<sup>513</sup> Consumer Groups Reply Comments at 20.

<sup>514</sup> Some of the information on outages has come from VPDs themselves, who have come to the Commission seeking guidance on how and to whom they should report an outage.

equipment, and second, that their VPD is aware of the problem. This information would not only inform consumers about the source of the captioning problem; armed with the knowledge that the problem is being addressed, they may be more likely to wait until the problem is solved, rather than file complaints with their VPD or the Commission.

143. A captioning outage notification requirement would be consistent with other Commission actions addressing outages by regulated entities. For example, providers of Internet-based telecommunications relay services (iTRS) must (1) notify CGB in the event of unforeseen service interruptions of any iTRS service within two business days of the start of such service interruption, and (2) provide notification of such service outages to consumers on an accessible website, including timely updates of service status.<sup>515</sup> In adopting the iTRS outage notification requirements, the Commission explained that “all iTRS consumers have an interest in robust iTRS services and in knowing when and how often such services offered by certain providers are interrupted.”<sup>516</sup> Similarly, both consumers who are deaf and hard of hearing and the Commission have an interest in knowing when captioning services are suspended.

144. For these reasons, we seek comment on whether VPDs should be required to notify both consumers and CGB when captioning outages occur.<sup>517</sup> As an initial matter, given that some programming is exempt from our captioning rules, we seek comment on whether and how consumers should be informed when captions are not required on particular programs, so that they will not expect an outage notification when captions are omitted from such programs. To the extent that captioning outages may be necessary, we also seek input on the duration and frequency of outages that should trigger any notification requirements. We request that parties provide comments on the practical and technical feasibility of notifying the public of a captioning outage on VPD websites and via periodic crawls on affected programs. For example, to what extent do the causes of outages impact the ability of the VPD to notify customers of the outage? Should VPDs be required to provide timely updates of service status that they are working on so that consumers are aware while watching the program. In this regard, we also seek comment about the length of time it generally takes to repair an outage after it has been discovered. Next, we seek comment on the appropriate passage of time after such outage commences before a VPD should be required to notify consumers and the Commission that an outage has occurred. VPDs should also comment on how they can become aware of captioning outages and how that will affect their ability to notify consumers. How do the costs and burdens of providing such notifications compare with the benefits of greater consumer access to information about captioning outages?

145. We also seek comment on whether we should require the VPD to submit an outage report to CGB, on the contents and timing of such a report, and how the report should be filed. What minimum outage time should trigger the filing of a report? If outage reports are required, what information should be included in the report? For example, should it include a list of the VPD’s affected programs, the geographic locations affected by the outage, the dates and times for the start and end of the outage, and the cause of the outage? If the outage lasts for more than one day, should the VPD be required to seek out other captioning sources while repairing equipment? How soon after the outage starts and ends should the report be filed with CGB? As an alternative to submitting outage reports, should VPDs be required to

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<sup>515</sup> See *Structure and Practices of the Video Relay Service Program*, Second Report and Order and Order, CG Docket No. 10-51, 26 FCC Rcd 10898, 10920 at ¶ 54 (2011) (*iTRS Certification Order*); 47 C.F.R. § 64.606(h).

<sup>516</sup> *iTRS Certification Order*, 26 FCC Rcd at 10920, ¶ 54. See also *The Proposed Extension of Part 4 of the Commission’s Rules Regarding Outage Reporting To Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers*, PS Docket No. 11-82, Report and Order, 27 FCC Rcd 2650 (2012) (extending outage reporting requirements to interconnected Voice over Internet Protocol (VoIP) service providers).

<sup>517</sup> Such outage reporting would only be required where there is an underlying obligation to provide captions, not where programming entities are exempt or otherwise excused from the captioning obligations.

maintain records of their outages and for what length of time? We seek comment on these recordkeeping proposals. How do the costs and burdens of filing captioning outage reports with CGB or keeping outage records compare with the benefits of achieving improved enforcement of the closed captioning obligations for consumers?<sup>518</sup> Finally, as noted above,<sup>519</sup> we seek comment on the extent to which other entities, including programmers and program owners, should share some of the responsibilities for ensuring good quality captions. We ask interested parties also to provide comment on how any responsibilities associated with the outage reporting obligations should be apportioned among VPDs, programmers, program owners, or other entities.

#### 4. Amending Section 79.1(i)(3) to Require All Contact Information Be Submitted to the VPD Registry

146. In the *2008 Closed Captioning Decision*, the Commission amended its rules to add section 79.1(i)(3), requiring VPDs to submit contact information for the receipt and handling of both immediate captioning concerns raised by consumers while they are watching television, and closed captioning complaints.<sup>520</sup> At that time, the Commission gave VPDs the option of filing this information with the Chief of the Disability Rights Office, CGB or by sending an e-mail to [CLOSEDCAPTIONING\\_POC@fcc.gov](mailto:CLOSEDCAPTIONING_POC@fcc.gov).<sup>521</sup> In 2009, the Commission added a third option for such filings in its *Captioning Contact Webform Order*, which announced the creation of a VPD Registry to which VPDs could directly provide their contact information via a web form located on the Commission's website.<sup>522</sup> At the time, the Commission noted the benefits of having VPDs enter this information on their own into this Registry:

[T]his approach uses a step-by-step process to ensure that all required information is submitted – the web form will not accept any entry that does not contain all required information entered in the proper format. In addition, all information entered by VPDs [is] secure and only authorized persons with access to a VPD's FRN and password may enter data or make changes to data previously entered. Further, because the VPD enters the contact information directly, Commission staff need not manually enter the data and then post the information to the web, thus reducing the chance of human error in transcribing VPD contact information. Information submitted via webform [is] available for public searches on the FCC's website almost immediately.<sup>523</sup>

147. Over the past three years, the Commission has found that the VPD Registry offers the most efficient and accurate means of collecting the requisite information from VPDs, thereby allowing

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<sup>518</sup> In addition, we note that the obligation under section 79.2 to make emergency information visually accessible exists even if closed captioning is not available, and that the VPD may use scrolls, crawls, or other visual alternatives to fulfill that obligation. See 47 C.F.R. § 79.2. Finally, we note that we do not intend for the notification and reporting requirements proposed herein to relieve VPDs of their obligations to prevent foreseeable and avoidable situations created by inaction or delay. VPDs should be mindful of their duty to maintain the proper functioning of their equipment generally and effectuate regular life cycle replacements and repairs; multiple or extended closed captioning outages that occur because of a VPD's failure to properly maintain equipment may be subject to enforcement action.

<sup>519</sup> See discussion Section VI.A, *supra*.

<sup>520</sup> *2008 Closed Captioning Decision*, 23 FCC Rcd at 16686-87, ¶ 34 (adding 47 C.F.R. § 79.1(i)(3) to the Commission's rules). See also 47 C.F.R. § 79.1(i)(1) (requiring contact information for immediate captioning concerns); 47 C.F.R. § 79.1(i)(2) (requiring contact information for captioning complaints).

<sup>521</sup> *2008 Closed Captioning Decision*, 23 FCC Rcd at 16687, ¶ 34. In the Report and Order, we correct the e-mail address specified in 47 C.F.R. § 79.1(i)(3). See section IV.E.3, *supra*.

<sup>522</sup> *Captioning Contact Webform Order*, 24 FCC Rcd 14837.

<sup>523</sup> *Id.* at 14838, ¶ 4.

such information to become available more quickly to the public. Moreover, requiring the submission of contact information using the web form method is consistent with the *2011 Electronic Filing Report and Order*, wherein the Commission adopted a policy to require the use of electronic filing whenever technically feasible.<sup>524</sup> We therefore propose, consistent with the *2011 Electronic Filing Report and Order*, that section 79.1(i)(3) be amended to require VPD contact information required under sections 79.1(i)(1) and (2) to be submitted to the Commission directly to the VPD Registry through the web form method. We seek comment on this proposal. How do the costs of transitioning to a mandatory web form method of filing compare with the ease and accuracy of filing and benefits derived from such mandatory system?

## 5. Treatment of Consumer Complaints by a VPD that Is Not the Responsible Party

148. In the *2008 Closed Captioning Decision*, the Commission adopted Section 79.1(g)(3) of the Commission's rules,<sup>525</sup> which requires a VPD that receives a closed captioning complaint for a program for which it does not have closed captioning responsibility, to forward that complaint to the responsible entity within seven days of receiving the complaint, and then to notify the complainant that the complaint was forwarded.<sup>526</sup> The purpose of this change was to make it easier and more expeditious for consumers to have their captioning complaints addressed.<sup>527</sup>

149. On June 10, 2009, Time Warner Cable (Time Warner) filed an *ex parte* letter identifying potential conflicts between the Commission's amended section 79.1(g)(3) and the obligations of cable companies to protect a subscriber's privacy under section 631 of the Act.<sup>528</sup> Section 631 prohibits any cable operator from disclosing "personally identifiable information" without the prior consent of the subscriber.<sup>529</sup> Time Warner explained that with the subscriber's consent, cable operators would be permitted to disclose personal information, but that it would not be practicable for operators to obtain

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<sup>524</sup> *2011 Electronic Filing Report and Order*, 26 FCC Rcd at 1599-1600, ¶¶ 14-15 (anticipating the addition of the electronic filing requirement to new categories of proceedings in the future).

<sup>525</sup> 47 C.F.R. § 79.1(g)(3).

<sup>526</sup> *2008 Closed Captioning Decision*, 23 FCC Rcd at 16683-16684, ¶ 25. As noted *infra*, the Commission has stayed the effective date of section 79.1(g)(3), pending the outcome of this rulemaking.

<sup>527</sup> See *2008 Closed Captioning Decision*, 23 FCC Rcd at 16684, ¶ 25. The earlier captioning complaint process, as adopted in the *1997 Closed Captioning Report and Order*, had required VPDs that receive complaints regarding programming by a television broadcast station or other programming for which the VPD is exempt from closed captioning responsibility pursuant to 47 C.F.R. § 79.1(e)(9), to either (i) forward the complaint to the programmer and notify the complainant and the Commission that it had forwarded the complaint or (ii) send written instructions to the complainant on how to re-file the complaint with the programmer. See former rule 47 C.F.R. § 79.1(g)(1). See also *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3276, ¶ 7. The 2008 revision was intended to shorten and simplify this process and lessen the added confusion that could occur if the complaint is sent back to the consumer. The Commission made this change because it believed that the VPD would be in a better position to re-direct the complaint. *2008 Closed Captioning Decision*, 23 FCC Rcd at 16684, ¶ 25.

<sup>528</sup> See Letter from Christina Pauzé, Vice President, Federal Regulatory Affairs, Time Warner Cable, to Amelia Brown, dated June 10, 2009 (*Time Warner Ex Parte Letter*).

<sup>529</sup> See 47 U.S.C. § 551(c)(1), which states: "Except as provided in paragraph (2), a cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator." A comparable provision exists for satellite providers at 47 U.S.C. § 338(i)(4)(A): "A satellite carrier shall not disclose personally identifiable information concerning any subscriber without prior written or electronic consent of the subscriber concerned." The Act does not define the term "personally identifiable information," and only notes that this term "does not include any record of aggregate data which does not identify particular persons." 47 U.S.C. § 551(a)(2).

consent within seven days, as required by the forwarding requirement specified in section 79.1(g)(3).<sup>530</sup> Time Warner further stated that if subscribers did not provide consent, the operators would be left with no recourse and therefore would have to choose between violating section 631 of the Act or section 79.1(g)(3) of the Commission's rules.<sup>531</sup> Time Warner pointed out that while the Act permits disclosure under certain circumstances – e.g., where “necessary to render, or conduct a legitimate business activity related to, a cable service,”<sup>532</sup> the Commission previously interpreted this provision not to apply to the release of subscriber complaints.<sup>533</sup> Accordingly, Time Warner requested guidance from the Commission.<sup>534</sup>

150. On December 11, 2009, the Commission released an Order temporarily staying the effective date of the forwarding provision of amended section 79.1(g)(3).<sup>535</sup> Noting the potential conflict between amended section 79.1(g)(3) and sections 631(c) and 338(i)(4) of the Act (the latter creating the same prohibitions for satellite providers), the Commission found good cause to temporarily suspend the effective date for section 79.1(g)(3), pending the completion of further rulemaking proceedings to determine how closed captioning complaints sent to the incorrect entity should be handled.<sup>536</sup>

151. Maintaining the privacy of cable consumers' information is a high priority for the Commission.<sup>537</sup> However, in order for a third party video programming provider to respond to a forwarded complaint, that complaint must include the complainant's name, address, telephone number and other personally identifiable information. While sections 631(c)(2) and 338(i)(4)(B) of the Act do permit the disclosure of consumer information for cable and satellite providers under certain circumstances,<sup>538</sup> none of these exceptions appear to apply to the instant situation.<sup>539</sup> Forwarding a closed captioning complaint to a broadcaster would be difficult to categorize as “necessary to render, or conduct

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<sup>530</sup> *Time Warner Ex Parte Letter*.

<sup>531</sup> *Id.*.

<sup>532</sup> 47 U.S.C. § 551(c)(2)(A). *See also* 47 U.S.C. § 338(i)(4)(B)(1) (permits disclosure where “necessary to render, or conduct a legitimate business activity related to, a satellite service...”).

<sup>533</sup> *See Cable Television Technical and Operational Requirements*, Memorandum Opinion and Order, 7 FCC Rcd 8676, 8862 at ¶ 39 (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, n.348 (1993).

<sup>534</sup> *Time Warner Ex Parte Letter*.

<sup>535</sup> *See Closed Captioning of Video Programming*, Order Suspending Effective Date, 24 FCC Rcd 14777 (2009). (*2009 Suspension Order*).

<sup>536</sup> *2009 Suspension Order*, 24 FCC Rcd at 14777, ¶ 1.

<sup>537</sup> *See, e.g., Cable Television Technical and Operational Requirements*, Memorandum Opinion and Order, 7 FCC Rcd 8676, 8681 ¶ 39 (1992) (*Cable Requirements Order*).

<sup>538</sup> 47 U.S.C. § 551(c)(2); 47 U.S.C. § 338(i)(4)(B).

<sup>539</sup> The disclosure of personally identifiable information is permitted if the disclosure is (1) necessary to render a legitimate business activity related to a cable (or satellite) service or other service provided by the cable (or satellite) operator to the subscriber; (2) made pursuant to a court order authorizing such disclosure; (3) a disclosure of the names and addresses of subscribers if the subscriber had the prior opportunity to prohibit or limit the disclosure, and the disclosure does not reveal the extent of any viewing or other use by the subscriber or the nature of any transaction made by the subscriber over the cable (or satellite) operator's system; (4) to a government entity under chapters 119 (Wire and Electronic Communications Interception and Interception of Oral Communications), 121 (Stored Wired and Electronic Communications and Transactional Records Access) or 206 (Pen Registers and Trap and Trace Devices) of title 18 (Crimes and Criminal Procedure) of the United States Code. 47 U.S.C. § 551(c)(2)(D); 47 U.S.C. § 338(i)(4)(B)(iv).

a legitimate business activity related to, a cable [or satellite] service,”<sup>540</sup> there is no court order or statutorily-recognized governmental entity involved,<sup>541</sup> the rule does not provide for advance notification to the subscriber, leaving no prior opportunity for the subscriber to prohibit or limit the disclosure,<sup>542</sup> and forwarding of consumer complaints is unrelated to the U.S. Criminal Code.<sup>543</sup>

152. Accordingly, in this FNPRM we seek comment on amending section 79.1(g)(3) to eliminate any conflicts between this section and the subscriber privacy protections contained in sections 631(c) and 338(i)(4) of the Act. Specifically, we propose amending section 79.1(g)(3) to require that within seven days after a VPD receives a complaint regarding programming of a broadcast television licensee or programming over which the VPD does not exercise editorial control, it be required to notify the complainant – using the complainant’s preferred method of communication – of the appropriate party to whom the complaint should be sent, and give the complainant the option of either (1) asking the VPD to forward the complaint to the appropriate party electronically or in writing, or (2) submitting the complaint directly to the appropriate party on his or her own. In addition, we propose that the VPD, after taking such action, inform the Commission that it has so notified the complainant by providing the Commission with copies of all written or electronic correspondence or a written description of all communications that were not either in electronic or written form. Under this proposal, if the VPD is asked by the complainant to forward the complaint to the appropriate party, the VPD would be required to do so within seven days of receiving such request, and if the VPD is not asked to forward the complaint, it would have no further responsibility.<sup>544</sup> We seek comment on these proposals, including whether the second prong of the proposed requirement – requiring the VPD to notify the Commission that it has informed the complainant of the available options – would itself be a violation of sections 631(c)(1) and 338(i)(4) of the Act in instances where the consumer files his or her complaint with the VPD only and does not authorize the VPD to provide a copy to the Commission. If we decide to require the VPD to notify the Commission, we seek comment on the method a VPD must use to notify the Commission. How do the costs of forwarding complaints upon consumer request and notifying the Commission of actions taken compare with the benefits of providing a consumer-friendly way to get the complaints to the correct parties? Finally, we request commenters to submit any alternative proposals for amending section 79.1(g)(3) to avoid breaching the consumer protections contained in sections 631(c)(1) and 338(i)(4) of the Act.

## **E. Captioning Exemptions**

### **1. Elimination of the New Network Exemption**

153. In the *Closed Captioning Report and Order*, the Commission adopted a self-implementing exemption for new networks, broadcast or non-broadcast, for the first four years after the network’s launch date.<sup>545</sup> In adopting this exemption, the Commission recognized that “new programming networks face significant start-up costs” and the “additional costs of captioning could pose

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<sup>540</sup> 47 U.S.C. § 551(c)(2)(A); 47 U.S.C. § 338(i)(4)(B)(i). *See, e.g., Cable Requirements Order*, 7 FCC Rcd at 8682, ¶ 39 (rejecting local governments’ arguments that the resolution of subscriber complaints involved a disclosure that was “necessary to render, or conduct a legitimate business activity related to, a cable service,” and instead requiring the provision of aggregate data without personally identifiable information).

<sup>541</sup> *See* 47 U.S.C. § 551(c)(2)(B); 47 U.S.C. § 338(i)(4)(B)(ii).

<sup>542</sup> *See* 47 U.S.C. § 551(c)(2)(C); 47 U.S.C. § 338(i)(4)(B)(iii).

<sup>543</sup> *See* 47 U.S.C. § 551(c)(2)(D); 47 U.S.C. § 338(i)(4)(B)(iv).

<sup>544</sup> This is assuming that the VPD is at no point deemed to be the party responsible for providing captions discussed in the complaint.

<sup>545</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3346, ¶ 154. *See* 47 C.F.R. § 79.1(d)(9).

an economic burden that might deter entry by some networks.”<sup>546</sup> The Commission did not define “network” for purposes of this exemption. Sixteen years after these rules became effective, we question the continued need for the new network exemption.

154. At the time the Commission adopted the new network exemption in 1997, it was responding to concerns by new or soon-to-be-launched non-broadcast networks that had not calculated the costs of captioning into initial business plans that had been formulated prior to the adoption of the closed captioning mandates in 1996.<sup>547</sup> In contrast, entities are now aware of the Commission’s closed captioning obligations when preparing for the launch of a new network because closed captioning has become an integral part of the video production process. Additionally, over the past sixteen years, consumers have developed an expectation that the programs they watch on television will be captioned.<sup>548</sup> For these reasons, we seek comment on the merits of continuing to allow all new networks to receive a four year exemption from the closed captioning rules. Should newly launched networks build the costs of captioning into their business plans during the planning of their networks? If we were to eliminate the new network exemption, should we adopt a phase-in period to provide an opportunity for networks that are about to commence operations to plan for the required captioning? If so, what should this phase-in be? We note that even were we to eliminate this exemption, other exemptions, including section 79.1(d)(12), which allows an exemption for a channel producing less than \$3 million in annual revenues,<sup>549</sup> section 79.1(d)(11), which limits the captioning obligations of a video programming provider to up to 2 percent of its annual gross revenues per channel,<sup>550</sup> and section 79.1(f), which permits a video programming provider, producer or owner to petition the Commission for a full or partial exemption from the closed captioning requirements based upon a showing of economic burden,<sup>551</sup> would still be available to a new network. We seek comment on the costs and benefits of eliminating the new network exemption.

155. As an alternative, we seek comment on modifying the new network exemption. Currently, the exemption is for four years.<sup>552</sup> Would a one or two year exemption be more appropriate? We seek comment on these or any other time periods that might be appropriate for a revised new network exemption. It would seem, given that the purpose of the new network exemption is to allow start-up networks to get off the ground before being subject to the captioning obligations, that any exemption should be limited to only those new networks that do not have the sophistication or financial backing required to plan for the dissemination of captioned programming. Accordingly, even if we retain the new network exemption, should the exemption apply only to new networks that have certain other indicia of a start-up network, *e.g.*, local or regional in nature, accessible by a small number of households, and ownership by a small business? If we take this approach, how do we define each of these or other

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<sup>546</sup> *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3346, ¶ 154. As with all other exemptions, the new network exemption does not exempt a new network from passing through captions on programming that it receives with captioning. *See* 47 C.F.R. § 79.1(c).

<sup>547</sup> *See, e.g.*, Outdoor Life Network, Speedvision Network, The Golf Channel, BET on JAZZ, and America’s Health Network Comments filed in MM Docket No. 95-176, at 28-31, 36 (Feb. 28, 1997).

<sup>548</sup> As noted above, at present, 100% of all new English and Spanish language programming and 75% of all pre-rule English and Spanish language programming must be captioned. *See* 47 C.F.R. §§ 79.1(b)(1)(iv), (b)(2)(ii), (b)(3)(iv) and (b)(4)(ii).

<sup>549</sup> *See* 47 C.F.R. § 79.1(d)(12).

<sup>550</sup> *See* 47 C.F.R. § 79.1(d)(11).

<sup>551</sup> *See* 47 C.F.R. § 79.1(f).

<sup>552</sup> When the Commission adopted the four-year new network exemption, it opted for an easily quantifiable threshold based on a time period “calculated from the new network’s launch date.” *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 19994-95, ¶ 44.

proposed criteria for limiting the new network exemption? Alternatively, should networks with significant financial backing be deemed ineligible for the new network exemption? For example, should the exemption not apply to new networks that are owned, in whole or part, by one of the four major national broadcast networks or the top ten non-broadcast networks? How do the relative costs and burdens of requiring new networks to provide captioning under each of these alternatives compare with the benefits of greater accessibility to television programming?

156. If we do retain this exemption, we also seek comment on the definition of “network” for purposes of the closed captioning rules, which remained undefined by the *1997 Closed Captioning Report and Order*.<sup>553</sup> To begin with, we seek comment on the extent to which we should rely on other definitions of “network,” contained elsewhere in the Commission’s rules. For example, section 73.3613(a)(1) of the Commission’s rules defines “network” with respect to broadcast network affiliation agreements that must be filed with the Commission as “any person, entity, or corporation which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states.”<sup>554</sup> Alternatively, section 76.5(m), pertaining to cable operators providing network non-duplication protection to television stations, defines a “network program” as “. . . any program delivered simultaneously to more than one broadcast station regional or national, commercial or noncommercial.”<sup>555</sup> We seek comment on whether these or a different definition of “network” would be appropriate for purposes of section 79.1(d)(9), and whether to apply the same definition to broadcast and non-broadcast networks.

157. Next, we note that MVPDs serving U.S. subscribers increasingly offer video programming networks that were initially launched in foreign markets. We recognize that closed captioning could impose new costs on such networks, especially where the originating country does not require closed captioning of its video programming. In the event we retain the new network exemption, we seek comment on whether a network that has operated in a foreign market and that moves to distribution or “launches” in the U.S., should be eligible for a new network exemption for a certain period of time after it launches in the U.S. and, if so, what the duration of that exemption should be. We also seek feedback on how to calculate the exemption period for such a new network, specifically, whether such network should be considered new as of the date that it begins distribution in the U.S., or whether its launch date should be considered the date that it initially began viewing in its originating country. We ask commenters that believe we should calculate an exemption upon moving the network’s programming to the U.S. to explain why this exemption is necessary, given that such networks will have been in operation (and presumably generating revenues) and will have advance notice of U.S. captioning obligations prior to launching in the U.S. How do the costs and burdens of providing captioning on networks showing programming in the U.S. after first showing programming in foreign countries compare with the benefits of greater accessibility to television programming?

158. Last, in the event we retain the new network exemption, we seek comment on the application of the new network exemption to networks created as the result of a merger of two or more existing networks. We seek comment on whether the original launch dates of networks that merged

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<sup>553</sup> The exemption for new networks is based on the number of years that a programming network has been in operation rather than the number of subscribers. 47 C.F.R. § 79.1(d)(9). Further, this exemption applies to different types of networks – broadcast, nonbroadcast, national, and regional. *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3346, ¶ 154. *See also Closed Captioning Reconsideration Order*, 13 FCC Rcd at 19997, ¶ 52, where the Commission stated that a “definition based on the ability of a network to reach fewer than 20 million subscribers or homes, as suggested by [one petitioner], would unnecessarily exempt many regional networks permanently and provide no exemption for new national broadcast networks.”

<sup>554</sup> 47 C.F.R. § 73.3613(a)(1). *See also* 47 C.F.R. § 76.55(f) (similar definition for purposes of the cable “must carry” rules).

<sup>555</sup> 47 C.F.R. § 76.5(m).

should be considered the applicable date for purposes of determining the exemption period for the merged entity. We also seek comment on which date should control in those situations where the merged entities had different original launch dates. As stated above, because captioning has been required since 1998 on television programming shown in the United States, we believe that all stakeholders in the video production process are well aware of the rules, and should be factoring the costs of captioning into their production budgets. As such, if we retain a new network exemption and apply this exemption to merged networks, should the duration of the exemption be calculated based on the individual network that has been in existence for the longest period of time?<sup>556</sup> Is this approach appropriate because the new network exemption applies for a limited number of years – four years under the current rules so that no component part of the combined network would have the benefit of the exemption for longer than the maximum length of time provided by the rule? We also seek comment on whether the new network exemption should apply or be extended in the event of a restructuring of a network.<sup>557</sup> Because the captioning rules were promulgated sixteen years ago, each network will have known about captioning requirements since its inception, has the network had sufficient time to integrate closed captioning into its production process and costs? We seek comment on this issue including its costs and benefits.

## 2. Consumer Groups' 2011 Petition Requesting Elimination of Certain Self-Implementing Exemptions from the Captioning Rules

159. On January 27, 2011, the Consumer Groups filed a joint petition for rulemaking (2011 Petition) seeking amendment to the Commission's captioning rules regarding an exclusion and several categorical self-implementing exemptions from the obligation to caption television programming.<sup>558</sup> The Consumer Groups requested, in light of modern technology, the reduced costs of captioning, and other changed circumstances, that the Commission eliminate the exclusion for advertisements of five minutes duration or less<sup>559</sup> and the self-implementing exemptions provided for the following types of programming: late night programming,<sup>560</sup> locally produced and distributed non-news programming with no repeat value,<sup>561</sup> interstitials, promotional announcements, and public service announcements that are 10 minutes or less in duration,<sup>562</sup> and channels producing revenues under \$3 million.<sup>563</sup> We seek comment on the Consumer Groups' proposal to eliminate the advertising exclusion and the specified self-implementing exemptions from the closed captioning rules. We ask commenters to address the merits as well as the costs and benefits of each proposal put forth by the Consumer Groups.

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<sup>556</sup> For example, if we adopt a one year exemption for new networks, if Network A (launched February 10, 2012), merges with Network B (launched February 10, 2013), we would look at Network A's launch date for the purpose of deciding whether the merged entity is a new network.

<sup>557</sup> A name change alone is not considered to be a restructuring, and would not initiate or extend a new network exemption.

<sup>558</sup> TDI, *et al* Petition for Rulemaking, CG PRM-11 (January 27, 2011). The Consumer Groups participating in the 2011 Petition include TDI, HLAA, ALDA, DHHCAN, CCASDHH, American Association of the Deaf-Blind, American Association of People with Disabilities, and Tucson Citizens for Better Captioning.

<sup>559</sup> See 47 C.F.R. § 79.1(a)(1). Advertisements of five minutes duration or less are not included within the definition of video programming subject to the Commission's captioning rules. *Id.*

<sup>560</sup> See 47 C.F.R. § 79.1(d)(5). This exemption applies to programming shown between 2:00 a.m. and 6:00 a.m. local time, although there is some flexibility to use any 4-hour period between 12:00 a.m. and 7:00 a.m. for programming that is shown simultaneously over multiple time zones. *Id.*

<sup>561</sup> See 47 C.F.R. § 79.1(d)(8).

<sup>562</sup> See 47 C.F.R. § 79.1(d)(6).

<sup>563</sup> See 47 C.F.R. § 79.1(d)(12). The issues raised in this petition regarding the Electronic Newsroom Technique (ENT), 2011 Petition at 19-27 are addressed in the Report and Order at section IV.B, *supra*.

## F. Technical Standards for the Display of Closed Captions

160. In 2000, the Commission adopted technical standards for the display of closed captions on digital television (DTV) receivers.<sup>564</sup> Before 2000, all captions were created for use with analog television transmissions, pursuant to CEA-608,<sup>565</sup> a standard created by the Electronics Industries Alliance and adopted by the Commission.<sup>566</sup> In the *2000 DTV Closed Captioning Order*, the Commission adopted, with some modifications, section 9 of CEA-708, to provide guidelines for encoder and decoder manufacturers and caption providers to implement closed captioning services with digital television technology.<sup>567</sup> The standards require DTV closed caption decoders to support certain advanced features, including different caption sizes,<sup>568</sup> fonts,<sup>569</sup> character background and foreground colors,<sup>570</sup> and other similar features,<sup>571</sup> to allow viewers to customize the display of closed captions on their televisions. The purpose of adopting these standards was to ensure that viewers who were deaf and hard of hearing would benefit from innovations made possible by advanced digital technologies to the same extent that hearing viewers could.<sup>572</sup> However, anecdotal evidence brought to the attention of the Commission during the intervening years suggests that often it is challenging for consumers to figure out how to access the features made available through the CEA-708 display standards. We now seek comment on the experiences that caption users have had since adoption of these standards, including the extent that such consumers have succeeded in using these features to improve their television experience.

161. In addition to allowing users to control the appearance of captions, CEA-708 allows programmers more options for the display of captions, such as multiple windows, fonts, and styles. We seek information on current practices for such formatting of closed captions. To what extent was the Commission correct in its earlier expectation that CEA-708 captions would be provided and its prediction that “programmers and caption providers” would have incentives to provide CEA-708 captions?<sup>573</sup> To what extent are VPDs, video programmers, captioners, or other entities each involved in the production process for formatting closed captions in a manner that provides the advanced features adopted by the Commission in the *2000 DTV Closed Captioning Order*, such as delivering captions in programmer-selected size, font, character background colors, and foreground colors of closed captions? What other entities are involved in the process, and how so? If VPDs, video programmers, captioners, or other

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<sup>564</sup> See *Closed Captioning Requirements for Digital Television Receivers; Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, ET Docket No. 99-254, MM Docket No. 95-176, 15 FCC Rcd 16788 (July 31, 2000) (*2000 DTV Closed Captioning Order*); see also 47 C.F.R. § 79.102.

<sup>565</sup> In 2000, CEA-608 and CEA-708 were named EIA-608 and EIA-708, respectively. In the intervening time, both standards have been renamed; for clarity, we use the current name to refer to both current and past versions of the standard.

<sup>566</sup> See *2000 DTV Closed Captioning Order*, 15 FCC Rcd at 16789 ¶ 3; 47 C.F.R. § 15.119 (2000).

<sup>567</sup> *Id.* at 16789, 16790, ¶ 4, Summary of Requirements.

<sup>568</sup> *Id.* at 16795-96, ¶ 20. Section 9 of CEA-708 contains the industry’s minimum recommendations regarding the functions that a DTV closed caption decoder should be capable of performing. *Id.* at 16789, 16791, ¶ 6.

<sup>569</sup> *Id.* at 16796-97, ¶¶ 21-22.

<sup>570</sup> *Id.* at 16797-98, ¶¶ 23-25.

<sup>571</sup> *Id.* at 16799, ¶¶ 28-32. The standard does not allow viewers to alter the placement of the closed captions, however. See *id.* at 16798-99, ¶¶ 26-27.

<sup>572</sup> *2000 DTV Closed Captioning Order*, 15 FCC Rcd at 16794, ¶ 12 (“Only by requiring decoders to respond to these various features can we . . . achieve Congress’s vision that to the fullest extent made possible by technology, people who are deaf or hard of hearing have equal access to the television medium.”).

<sup>573</sup> *Id.* at 16809, ¶ 62.

entities involved in the production process are not formatting closed captions to use CEA-708 capabilities, why not? What action, if any can the Commission take to ensure the effective implementation of the CEA-708 capabilities so that television viewers who use captions can take full advantage of the capabilities this standard was intended to provide?

### **G. Caption Obstructions**

162. Some caption viewers have raised concerns about closed captions being partially or completely blocked by other visual information, such as graphics, that appear on the screen.<sup>574</sup> When an overlay obscures captions, it would appear that the problem lies with the consumer's video apparatus, rather than within the control of the video programmer's equipment or signal routing. We seek comment on the extent to which on-screen visual changes or textual depictions, including, but not limited to, split screens, pop-on advertisements and promotions, credits, graphic overlays, or contact information, have caused a problem for caption viewers. To the extent that these problems exist, we ask for comment on their causes and possible solutions. We will review the comments received to determine whether further action is needed to prevent viewers who rely on captions from being denied access to programming content.

### **H. New Technologies**

#### **1. Captioning on 3D Television Programming**

163. Three-dimensional television (3D TV) allows consumers to enjoy three-dimensional television programs in their homes.<sup>575</sup> 3D TV employs techniques of 3D presentation to project a television program into a realistic 3D field.<sup>576</sup> The technology requires the purchase of new television equipment, including a 3D-capable television.<sup>577</sup> Although 3D technology has existed for some time, it is only within the last few years that many television manufacturers have begun to introduce television sets with 3D capability for sale to the public.

164. VPDs must be able to reliably encode, transport, and render closed captions on video programming, including programming delivered using 3D protocols, in accordance with Commission requirements governing technical standards for the provision of closed captioning.<sup>578</sup> Also, in accordance with the Commission's captioning rules, such VPDs and providers must permit the pass through or rendering of closed captions in a manner that will allow viewers to activate and deactivate such captions when video programming is played back on television receivers with 3D capability. Finally, interconnection mechanisms and standards for video source devices, including 3D video source devices, must be capable of conveying from the source device to the consumer equipment the information necessary to permit or render the display of closed captions.<sup>579</sup>

165. As television programming advances into new frontiers, VPDs, as well as manufacturers of television receivers, must continue to provide devices, services and content that are consistent with the

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<sup>574</sup> See, e.g., *2010 Closed Captioning Complaint Report* at 8 (reporting the following captioning problems: "Captions lost or repositioned due to weather alert crawl," "Captions lost during squeeze back for election coverage," "Captions lost during 3-hour crawl showing election results," and "Graphic promoting 10 pm news prevented pass through of captions").

<sup>575</sup> See Forrest Hartman, What Is 3D TV?, [http://tv.about.com/od/frequentlyaskedquestions/f/3DTV\\_FAQ.htm](http://tv.about.com/od/frequentlyaskedquestions/f/3DTV_FAQ.htm) (last visited January 29, 2014).

<sup>576</sup> See *id.*

<sup>577</sup> See *id.*

<sup>578</sup> See 47 C.F.R. § 79.101 (setting forth the closed caption decoder requirements for analog television receivers); 47 C.F.R. § 79.102 (setting forth the closed caption decoder requirements for digital television receivers).

<sup>579</sup> 47 U.S.C. § 303(z)(2); *IP Captioning Report and Order*, 27 FCC Rcd at 855, ¶ 115.

Act's mandate to provide television access for people who are deaf and hard of hearing.<sup>580</sup> We understand that the development of standards for closed captioning functionality in television receivers with 3D capability is an ongoing process and that there are several issues associated with the display of closed captioning in such receivers. To better understand current practices and capabilities with regard to closed captioning of 3D TV programming, we seek comment on the following:

- How are DTV manufacturers ensuring that captions continue to work when 3D TV programming is shown on television sets with 3D capability?
- Are there issues regarding the placement of captions in a 3D picture? What steps must manufacturers take to ensure that captioning in 3D TV programming is inserted and placed at an appropriate depth of field in the 3D image? Do user-selected changes to font size and location of the captions operate differently in a 3D image?
- With regard to television sets with 3D capability, will captions display properly when the user switches between 2D and 3D modes?
- How do the costs and burdens of providing closed captioning in 3D TV programming compare with the benefits of greater accessibility to television programming?
- We seek input on any other matters that could affect the availability of closed captioning on 3D TV programming.

## 2. Captioning on Ultra High Definition Television Programming

166. Ultra high definition television (Ultra HDTV) allows consumers to enjoy television programming at higher resolutions than are currently provided by HDTV.<sup>581</sup> Ultra HDTV is an umbrella term that describes two different resolutions: 4K Ultra HD and 8K Ultra HD.<sup>582</sup> 4K Ultra HDTV has a resolution of 3,840 x 2,160 pixels, which is four times the number of pixels as HDTV, while 8K Ultra HDTV has a resolution of 7,680 x 4,320 pixels, or sixteen times the number of pixels as HDTV.<sup>583</sup> Currently, 4K Ultra HDTV television sets are available to consumers from several companies.<sup>584</sup>

167. As noted above, the Communications Act requires that evolving television technologies ensure the continued provision of access by people who are deaf and hard of hearing.<sup>585</sup> To better

<sup>580</sup> See 47 U.S.C. § 613(b); 47 U.S.C. § 330(b).

<sup>581</sup> Ty Pendlebury, Ultra High Definition Officially Replaces 4K, CNET, Oct. 18, 2012, [http://reviews.cnet.com/8301-33199\\_7-57535570-221/ultra-high-definition-officially-replaces-4k/](http://reviews.cnet.com/8301-33199_7-57535570-221/ultra-high-definition-officially-replaces-4k/) (last visited February 11, 2014).

<sup>582</sup> See The Ultimate Guide to 4K and 8K Ultra HD, Ultra HDTV, <http://www.ultrahd.tv/the-ultimate-guide-to-4k-and-8k-ultra-hd/> (last visited February 11, 2014); Consumer Electronics Industry Announces Ultra High-Definition, Consumer Electronics Association, Oct. 18, 2012, <http://www.ce.org/News/News-Releases/Press-Releases/2012-Press-Releases/Consumer-Electronics-Industry-Announces-Ultra-High.aspx> (last visited February 11, 2014).

<sup>583</sup> Ultra HDTV: What is Ultra High Definition?, Ultra HDTV, <http://www.ultrahd.tv/what-is-ultra-hdtv/> (last visited February 11, 2014).

<sup>584</sup> See, e.g., Sony.com, 4K Ultra HD TVs, <http://store.sony.com/xbr-4k-ultra-hd-tvs/cat-27-catid-XBR-4K-Ultra-HD-TVs> (last visited February 11, 2014); Samsung.com, 4K Ultra High Definition TV, <http://www.samsung.com/us/topic/4k-ultra-hd-tv> (last visited February 11, 2014); Seiki.com, Seiki 4K Ultra HD, <http://www.seiki.com/products/seiki4kUltraHD/> (last visited February 11, 2014); Toshiba.com, 4K Ultra HD TV, <http://www.toshiba.com/us/4k-tvs> (last visited February 11, 2014); LG.com, LG UHD TV: Discover Ultra HD Television, <http://www.lg.com/us/tv-audio-video/premium-entertainment/ultrahd4k-tvs.jsp> (last visited February 11, 2014).

<sup>585</sup> See 47 U.S.C. § 330(b).

understand current practices and capabilities with regard to closed captioning of Ultra HDTV programming, we seek comment on the following:

- How are Ultra HDTV manufacturers ensuring that captions continue to appear legibly when programming is shown on Ultra HDTV television sets?
- Do the standards for Ultra HDTV programming have the same capabilities for the transmission or pass-through of captions as HDTV and SDTV programming?
- Does the increased resolution present new challenges related to the display of captions, particularly with respect to font size of the captions? If so, what are these new challenges, and how can they be addressed?
- How do the costs and burdens of additional requirements concerning closed captioning for Ultra HDTV programming compare with the benefits of greater accessibility to television programming?

We seek input on any other matters that could affect the availability of closed captioning on Ultra HDTV programming.

## VII. PROCEDURAL MATTERS

### A. Comment Filing Procedures

168. Pursuant to sections 1.415 and 1.419 of the Commission's rules,<sup>586</sup> 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).<sup>587</sup>

- 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 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 St., SW, Washington, DC 20554.

169. 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](mailto:fcc504@fcc.gov) or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

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<sup>586</sup> 47 C.F.R. §§ 1.415, 1.419.

<sup>587</sup> See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

**B. Ex Parte Presentations.**

170. The FNPRM proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>588</sup> 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 consistent with section 1.1206(b) of the Commission’s rules.<sup>589</sup> In proceedings governed by section 1.49(f) of the rules<sup>590</sup> 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.

**C. Regulatory Flexibility**

171. *Final Regulatory Flexibility Analysis.* With respect to this Report and Order, a Final Regulatory Flexibility Analysis (FRFA) is contained in Appendix C. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared a FRFA of the expected impact on small entities of the requirements adopted in this Report and Order. The Commission will send a copy of the Report and Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

172. *Initial Regulatory Flexibility Analysis.* With respect to this FNPRM, an Initial Regulatory Flexibility Analysis (IRFA) is contained in Appendix D. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an IRFA of the expected impact on small entities of the proposals contained in the FNPRM. Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the FNPRM. The Commission will send a copy of the FNPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.<sup>591</sup>

**D. Paperwork Reduction Act**

173. *Paperwork Reduction Act of 1995 Analysis.* The Report and Order adopts modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.<sup>592</sup> It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA.<sup>593</sup> OMB, the general public, and other Federal agencies are invited to comment on

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<sup>588</sup> 47 C.F.R. §§ 1.200 *et seq.*

<sup>589</sup> 47 C.F.R. § 1.1206(b).

<sup>590</sup> 47 C.F.R. § 1.49(f).

<sup>591</sup> See 5 U.S.C. § 603(a). In addition, the FNPRM and IRFA (or summaries thereof) will be published in the *Federal Register*.

<sup>592</sup> The PRA is codified at 44 U.S.C. §§ 3501-3520.

<sup>593</sup> 44 U.S.C. § 3507(d).

the new or modified information collection requirements contained in this proceeding. In addition, we note that, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198,<sup>594</sup> we previously sought comment on how the Commission might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

174. In this Report and Order, we have assessed the impact of requiring electronic filing instead of paper filing of exemption requests, and find that the impact on all affected entities, including small businesses, is minimal and may actually be less burdensome than the current paper filing requirement.

175. *Initial Paperwork Reduction Act of 1995.* This FNPRM seeks comment on proposed rule amendments that may result in new or revised information collection requirements. If the Commission adopts any such proposals, the Commission will publish a separate notice in the Federal Register inviting the public to comment on the requirement, as mandated by the Paperwork Reduction Act of 1995.<sup>595</sup> In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198,<sup>596</sup> we seek comment on how the Commission might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”<sup>597</sup>

#### **E. Congressional Review Act**

176. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.<sup>598</sup>

### **VIII. ORDERING CLAUSES**

177. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 303(r) and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 613, this Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking IS ADOPTED and the Commission’s Rules ARE HEREBY AMENDED as set forth in Appendix B.

178. IT IS FURTHER ORDERED that the Report and Order adopted herein SHALL BE EFFECTIVE 30 days after publication in the *Federal Register* unless otherwise noted.

179. IT IS FURTHER ORDERED that the rules contained in 47 CFR 79.1(c)(3), (j), and (k) SHALL BE EFFECTIVE upon publication in the *Federal Register* of a notice announcing the approval by the Office of Management and Budget of the modified information collection requirements under the Paperwork Reduction Act of 1995<sup>599</sup> and an effective date of the rule amendment, and such effective date shall be no sooner than January 15, 2015.

180. IT IS FURTHER ORDERED that the rules contained in 47 CFR 79.1(e)(11)(i) and (ii) SHALL BE EFFECTIVE 90 days after publication in the Federal Register.

181. IT IS FURTHER ORDERED that the rules contained in 47 CFR 79.1(e)(11)(iii), (iv), and (v) SHALL BE EFFECTIVE upon publication in the *Federal Register* of a notice announcing the approval by the Office of Management and Budget of the modified information collection requirements under the Paperwork Reduction Act of 1995<sup>600</sup> and an effective date of the rule amendment.

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<sup>594</sup> 44 U.S.C. § 3506(c)(4).

<sup>595</sup> Pub. L. 104-13; 44 U.S.C. § 3501 *et. seq.*

<sup>596</sup> 44 U.S.C. § 3506(c)(4).

<sup>597</sup> 44 U.S.C. § 3506(c)(4).

<sup>598</sup> 5 U.S.C. § 801(a)(1)(A).

<sup>599</sup> Pub. L. No. 104-13, 109 Stat. 163 (May 22, 1995), *codified at* 44 U.S.C. §§ 3501 *et seq.*

<sup>600</sup> *Id.*

182. IT IS FURTHER ORDERED that the Declaratory Ruling adopted herein shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## List of Commenters

**Comments and Date Filed**

Accessible Media Industry Coalition (AMIC)	11/9/05
Alexander Graham Bell Association for the Deaf and Hard of Hearing (AG Bell)	11/9/05
American Cable Association (ACA)	11/10/05
American Society for Deaf Children (ASDC)	11/10/05
AZN Television and several networks (AZN)	11/10/05
Casino & Gambling Television	
Comcast SportsNet (Mid-Atlantic)	
Comcast SportsNet (Philadelphia)	
E! Entertainment Television	
G-4 Videogame TV	
The Golf Channel	
Inspirational Life Television	
The Inspiration Network	
Outdoor Life Network	
Style Network	
TV One	
Block Communications, Inc. (Block)	10/3/05
Caption Colorado, L.L.C. (Caption Colorado)	11/8/05
CaptionMax	11/10/05
Caption Perfect, Inc. (Caption Perfect)	11/10/05
Cosmos Broadcasting Corporation, Cox Broadcasting, Inc., Media General Communications, Inc., and Meredith Corporation (Cosmos)	11/10/05
DirectTV, Inc. (DirecTV)	11/10/05
Disability Rights Network	11/10/05
EchoStar Satellite, LLC (EchoStar)	11/10/05
ENCO Systems, Inc. (Enco)	8/17/05
Florida Association of Broadcasters (FAB)	11/10/05
Global Translation, Inc. (Global)	11/7/05
Home Box Office, Inc. (HBO)	11/10/05
Hubbard Broadcasting, Inc. (HBI)	11/10/05
KJLA, LLC (KJLA)	11/10/05
Lincoln Broadcasting Company (Lincoln)	11/10/05
Media Captioning Services (MCS)	11/9/05
Motion Picture Association of America (MPAA)	11/10/05

National Association of Broadcasters (NAB)	11/10/05
NBC/Telemundo License Co. (NBC/Telemundo)	11/10/05
National Cable & Telecommunications Assoc. (NCTA)	11/10/05
National Court Reporters Association (NCRA)	11/5/05
Radio-Television News Directors Assoc. (RTNDA)	11/10/05
United States Telecom Association (USTelecom)	11/10/05
WGBH/ National Center for Accessible Media (WGBH/NCAM)	11/10/05

### **Late-Filed Comments**

Association of Public Television Stations (APTS)	5/11/06
California Association of the Deaf	11/28/05
Connecticut Association of the Deaf	11/29/05
D.C. Association of the Deaf	11/15/05
Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN)	2/1/06
Empire State Association of the Deaf	11/29/05
Florida Association of the Deaf	11/28/05
Georgia Association of the Deaf	11/25/05
National Captioning Institute (NCI)	11/14/05
National Educational Telecommunications Assn (NETA) and Organization of State Broadcasting Executives (OSBE)	6/1/06
New Jersey Division on Civil Rights	11/23/05
New Mexico Association of the Deaf	11/30/05
North Carolina Association of the Deaf	11/28/05
Ohio Association of the Deaf	11/29/05
Oklahoma Association of the Deaf	12/1/05
PA Society for the Advancement of the Deaf	11/14/05
Vermont Association of the Deaf	11/29/05
West TX Association of the Deaf	11/29/05
Wisconsin Association of the Deaf	11/28/05

### **Reply Comments**

AMIC	12/14/05
CBS Broadcasting, Inc. (CBS)	12/16/05
Communication Service for the Deaf (CSD)	12/16/05
Consumer Groups	
Telecommunications for the Deaf and Hard of Hearing, Inc.	
Deaf and Hard of Hearing Consumer Advocacy Network	
Hearing Loss Association of America, Association of Late Deafened Adults, Inc.	

National Association of the Deaf	12/16/05
DirectTV	12/16/05
EchoStar	12/16/05
Hearing Access Program	12/16/05
HBO	12/16/05
HBI	12/16/05
KVMD Licensee Co., LLC and Rancho Palos Verdes Broadcasters, Inc. (KVMD)	12/16/05
Lincoln	12/16/05
Local Market Broadcasters (LMB)	12/16/05
Marantha Broadcasting Company, Inc. (Marantha)	12/16/05
MPAA	
NAB	12/16/05
NCTA	12/16/05
Northern Virginia Resource Center for Deaf and Hard of Hearing Persons (NVRCC)	12/16/05
RTNDA	12/16/05
Time Warner Cable Inc., and Bright House Networks, LLC (Time Warner/ Bright House)	12/16/05
The Walt Disney Co., ESPN, Disney ABC Cable Networks, ABC Television Network, and ABC-owned Television Stations (Disney)	12/16/05
Verizon	12/16/05
WGBH National Center for Accessible Media (WGBH/NCAM)	12/16/05
<b><u>Refresh Comments</u></b>	
Alamo Public Telecommunications Council (Alamo)	11/4/10
California Oregon Broadcasting, Inc. (COBI)	11/24/10
Consumer Groups	11/24/10
Adding to Coalition: Association of Late-Deafened Adults and California Coalition of Agencies Serving the Deaf and Hard of Hearing	
APTS, Public Broadcasting Service (PBS), and Corporation for Public Broadcasting (CPB)	11/24/10
Caption Colorado	11/24/10
DirectTV	11/24/10
Inclusive Technologies	11/24/10
KUSI-TV (KUSI)	11/24/10

Lincoln	11/24/10
Marantha	11/24/10
MCS	11/24/10
NAB	11/24/10
NCTA	11/24/10
NewsChannel 5 Network, LLC (NewsChannel 5)	11/24/10
Radio Television Digital News Association (RTDNA)	11/24/10
Verizon	11/24/10
WGBH/NCAM	11/24/10

**Refresh Reply Comments**

Collaborative for Communications Access via Captioning	12/2/10
Entravision Holdings, LLC (Entravision)	12/9/10
NAB	12/9/10
NCTA	12/9/10
Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) and Western Telecommunications Alliance (WTA)	12/9/10
Time Warner	12/9/10

**Late-Filed Refresh Comments and Late-Filed Refresh Reply Comments**

Hearing Access Program	2/3/11
Oregon Group	2/5/11
Hearing Loss Association of Oregon	
Oregon Communication Access Project	
LNS Captioning	

**Note: The Commission also has received hundreds of comments, reply comments, refresh comments and refresh reply comments from concerned individuals in this proceeding. These comments are available through the Commission's electronic comment filing system.**

## APPENDIX B

## Final Rules

The Federal Communications Commission amends Part 79 of Title 47 of the Code of Federal Regulations (CFR) 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 79.1 by revising the section heading and paragraphs (a), (d)(12), (e)(3), (f)(4) and (7), and (i)(3), by re-designating paragraph (c) as (c)(1), and by adding paragraphs (c)(2), (c)(3), (e)(11), (j) and (k), to read as follows:

**§ 79.1 Closed captioning of televised video programming.**

(a) \* \* \*

- (1) Captioning vendor. Any entity that is responsible for providing captioning services to a video programmer.
- (2) Closed captioning, or captioning. The visual display of the audio portion of video programming pursuant to the technical specifications set forth in this part.
- (3) Live programming. Video programming that is shown on television substantially simultaneously with its performance.
- (4) Near-live programming. Video programming that is performed and recorded less than 24 hours prior to the time it is first aired on television.
- (5) New programming. Video programming that is first published or exhibited on or after January 1, 1998.
  - (i) Analog video programming that is first published or exhibited on or after January 1, 1998.
  - (ii) Digital video programming that is first published or exhibited on or after July 1, 2002.
- (6) Non-exempt programming. Video programming that is not exempt under paragraph (d) of this section and, accordingly, is subject to closed captioning requirements set forth in this section.
- (7) Prerecorded programming. Video programming that is not “live” or “near-live”.
- (8) Pre-rule programming.
  - (i) Analog video programming that was first published or exhibited before January 1, 1998.
  - (ii) Digital video programming that was first published or exhibited before July 1, 2002.
- (9) Video programmer. Any entity that provides video programming that is intended for distribution to residential households including, but not limited to, broadcast or nonbroadcast television networks and the owners of such programming.
- (10) Video programming. Programming provided by, or generally considered comparable to programming provided by, a television broadcast station that is distributed and exhibited for residential use. Video programming includes advertisements of more than five minutes in duration but does not include advertisements of five minutes' duration or less.
- (11) Video programming distributor. Any television broadcast station licensed by the Commission and any multichannel video programming distributor as defined in §76.1000(e) of this chapter, and any other

distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission. An entity contracting for program distribution over a video programming distributor that is itself exempt from captioning that programming pursuant to paragraph (e)(9) of this section shall itself be treated as a video programming distributor for purposes of this section. To the extent such video programming is not otherwise exempt from captioning, the entity that contracts for its distribution shall be required to comply with the closed captioning requirements of this section.

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

\* \* \* \* \*

(c) *Obligation to pass through captions of already captioned programs; obligation to maintain equipment and monitor for captions.*

\* \* \* \* \*

(2) Video programming distributors shall take any steps needed to monitor and maintain their equipment and signal transmissions associated with the transmission and distribution of closed captioning to ensure that the captioning included with video programming reaches the consumer intact. In any enforcement proceeding involving equipment failure, the Commission will require video programming distributors to demonstrate that they have monitored their equipment and signal transmissions, have performed technical equipment checks, and have promptly undertaken repairs as needed to ensure that equipment is operational and in good working order.

(3) Each video programming distributor shall maintain records of the video programming distributor's monitoring and maintenance activities, which shall include, without limitation, information about the video programming distributor's monitoring and maintenance of equipment and signal transmissions to ensure the pass through and delivery of closed captioning to viewers, and technical equipment checks and other activities to ensure that captioning equipment and other related equipment are maintained in good working order. Each video programming distributor shall maintain such records for a minimum of two years and shall submit such records to the Commission upon request.

(d) \* \* \*

\* \* \* \* \*

(12) Channels/Streams producing revenues of under \$3,000,000. No video programming provider shall be required to expend any money to caption any channel or stream of video programming producing annual gross revenues of less than \$3,000,000 during the previous calendar year other than the obligation to pass through video programming closed captioned when received pursuant to paragraph (c) of this section. For the purposes of this paragraph (d)(12), each programming stream on a multicast digital television channel shall be considered separately for purposes of the \$3,000,000 revenue limit.

(13) \* \* \*

(e) Responsibility for and determination of compliance.

\* \* \* \* \*

(3) The major national broadcast television networks (*i.e.*, ABC, CBS, Fox and NBC), affiliates of these networks in the top 25 television markets as defined by Nielsen's Designated Market Areas (DMAs) and national nonbroadcast networks serving at least 50% of all homes subscribing to multichannel video programming services shall not count electronic newsroom captioned programming towards compliance with these rules. The live portions of noncommercial broadcasters' fundraising activities that use automated software to create a continuous captioned message will be considered captioned;

\* \* \* \* \*

(11) Use of “Electronic Newsroom Technique” (ENT).

(i) A broadcast station that uses ENT to provide closed captioning for live programming or programming originally transmitted live and that is not subject to the current prohibition on the use of ENT in paragraph (e)(3) of this section shall be deemed in compliance with the Commission’s rules requiring captioning of live programming or programming originally transmitted live if it adheres to the following procedures in the ordinary course of business:

(A) In-studio produced news, sports, weather, and entertainment programming will be scripted.

(B) For weather interstitials where there may be multiple segments within a news program, weather information explaining the visual information on the screen and conveying forecast information will be scripted, although the scripts may not precisely track the words used on air.

(C) Pre-produced programming will be scripted (to the extent technically feasible).

(D) If live interviews or live on-the scene or breaking news segments are not scripted, stations will supplement them with crawls, textual information, or other means (to the extent technically feasible).

(E) The station will provide training to all news staff on scripting for improving ENT.

(F) The station will appoint an “ENT Coordinator” accountable for compliance.

(ii) Nothing in this paragraph (e)(11) shall relieve a broadcast station of its obligations under § 79.2 of this chapter regarding the accessibility of programming providing emergency information.

(iii) Informal complaints. The Commission will forward an informal complaint regarding captioning to a broadcast station that utilizes ENT to provide captioning pursuant to the procedures set forth in paragraph (e)(11)(i) of this section only if the informal complaint contains the television channel number, network, or call sign, the name of the subscription service, if relevant, the date and time of the captioning problems, the name of the affected program, and a detailed and specific description of the captioning problems, including the frequency and type of problem.

(iv) Compliance.

(A) Initial response to pattern or trend of noncompliance. If the Commission notifies a broadcast station that the Commission has identified a pattern or trend of possible noncompliance by the station with this paragraph (e)(11), the station shall respond to the Commission within 30 days regarding such possible noncompliance, describing corrective measures taken, including those measures the station may have undertaken in response to informal complaints and inquiries from viewers.

(B) Corrective action plan. If, after the date for a broadcast station to respond to a notification under paragraph (e)(11)(iv)(A) of this section, the Commission subsequently notifies the broadcast station that there is further evidence indicating a pattern or trend of noncompliance with this paragraph (e)(11), the broadcast station shall submit to the Commission, within 30 days of receiving such subsequent notification, an action plan describing specific measures it will take to bring the station’s ENT performance into compliance with this paragraph (e)(11). In addition, the station shall be required to conduct spot checks of its ENT performance and report to the Commission on the results of such action plan and spot checks 180 days after the submission of such action plan.

(C) Continued evidence of a pattern or trend of noncompliance. If, after the date for submission of a report on the results of an action plan and spot checks pursuant to paragraph (e)(11)(iv)(B) of this section, the Commission finds continued evidence of a pattern or trend of noncompliance, additional enforcement actions may be taken, which may include admonishments, forfeitures, and other corrective actions, including, but not limited to, requiring the station to cease using ENT and to use real-time captioning for live programming.

(v) Progress report. No later than one year after the effective date of this paragraph (e)(11), broadcast stations that adhere to the procedures set forth in paragraph (e)(11)(i) shall jointly prepare and submit to the Commission, in consultation with individuals who rely on captions to watch television and organizations representing such individuals, a report on their experiences with following such procedures, and the extent to which they have been successful in providing full and equal access to live programming.

(f) \* \* \*

\* \* \* \* \*

(4) A petition requesting an exemption based on the economically burdensome standard, and all subsequent pleadings, shall be filed electronically in accordance with § 0.401(a)(1)(iii) of this chapter.

\* \* \* \* \*

(7) Comments or oppositions to the petition shall be filed electronically and served on the petitioner and shall include a certification that the petitioner was served with a copy. Replies to comments or oppositions shall be filed electronically and served on the commenting or opposing party and shall include a certification that the commenting or opposing party was served with a copy. Comments or oppositions and replies may be served upon a party, its attorney, or other duly constituted agent by delivering or mailing a copy to the last known address in accordance with § 1.47 of this chapter or by sending a copy to the e-mail address last provided by the party, its attorney, or other duly constituted agent.

\* \* \* \* \*

(i) \* \* \*

(3) Providing contact information to the Commission. Video programming distributors shall file the contact information described in this section with the Commission in one of the following ways: through a web form located on the FCC website; with the Chief of the Disability Rights Office, Consumer and Governmental Affairs Bureau; or by sending an e-mail to [CLOSEDCAPTIONING\\_POC@fcc.gov](mailto:CLOSEDCAPTIONING_POC@fcc.gov). Contact information shall be available to consumers on the FCC website or by telephone inquiry to the Commission's Consumer Center. Distributors shall notify the Commission each time there is a change in any of this required information within 10 business days.

(j) Captioning quality obligation; standards.

(1) A video programming distributor shall exercise best efforts to obtain a certification from each video programmer from which the distributor obtains programming stating (i) that the video programmer's programming satisfies the caption quality standards of paragraph (j)(2) of this section; (ii) that in the ordinary course of business, the video programmer has adopted and follows the Best Practices set forth in paragraph (k)(1) of this section; or (iii) that the video programmer is exempt from the closed captioning rules under one or more properly attained exemptions. For programmers certifying exemption from the closed captioning rules, the video programming distributor must obtain a certification from the programmer that specifies the exact exemption that the programmer is claiming. Video programming distributors may satisfy their best efforts obligation by locating a programmer's certification on the programmer's website or other widely available locations used for the purpose of posting widely available certifications. If a video programming distributor is unable to locate such certification on the programmer's website or other widely available location used for the purpose of posting such certification, the video programming distributor must inform the video programmer in writing that it must make widely available such certification within 30 days after receiving the written request. If a video programmer does not make such certification widely available within 30 days after receiving a written request, the video programming distributor shall promptly submit a report to the Commission identifying such non-certifying video programmer for the purpose of being placed in a publicly available database. A video programming distributor that meets each of the requirements of this paragraph shall not be liable for violations of paragraphs (j)(2) and (3) of this section to the extent that any such violations are outside the

control of the video programming distributor.

(2) Captioning quality standards. Closed captioning shall convey the aural content of video programming in the original language (i.e. English or Spanish) to individuals who are deaf and hard of hearing to the same extent that the audio track conveys such content to individuals who are able to hear. Captioning shall be accurate, synchronous, complete, and appropriately placed as those terms are defined herein.

(i) Accuracy. Captioning shall match the spoken words (or song lyrics when provided on the audio track) in their original language (English or Spanish), in the order spoken, without substituting words for proper names and places, and without paraphrasing, except to the extent that paraphrasing is necessary to resolve any time constraints. Captions shall contain proper spelling (including appropriate homophones), appropriate punctuation and capitalization, correct tense and use of singular or plural forms, and accurate representation of numbers with appropriate symbols or words. If slang or grammatical errors are intentionally used in a program's dialogue, they shall be mirrored in the captions. Captioning shall provide nonverbal information that is not observable, such as the identity of speakers, the existence of music (whether or not there are also lyrics to be captioned), sound effects, and audience reaction, to the greatest extent possible, given the nature of the program. Captions shall be legible, with appropriate spacing between words for readability.

(ii) Synchronicity. Captioning shall coincide with the corresponding spoken words and sounds to the greatest extent possible, given the type of the programming. Captions shall begin to appear at the time that the corresponding speech or sounds begin and end approximately when the speech or sounds end. Captions shall be displayed on the screen at a speed that permits them to be read by viewers.

(iii) Completeness. Captioning shall run from the beginning to the end of the program, to the fullest extent possible.

(iv) Placement. Captioning shall be viewable and shall not block other important visual content on the screen, including, but not limited to, character faces, featured text (e.g., weather or other news updates, graphics and credits), and other information that is essential to understanding a program's content when the closed captioning feature is activated. Caption font shall be sized appropriately for legibility. Lines of caption shall not overlap one another and captions shall be adequately positioned so that they do not run off the edge of the video screen.

(3) Application of captioning quality standards. Captioning shall meet the standards of paragraph (j)(2) of this section for accuracy, synchronicity, completeness and placement, except for de minimis captioning errors. In determining whether a captioning error is de minimis, the Commission will consider the particular circumstances presented, including the type of failure, the reason for the failure, whether the failure was one-time or continuing, the degree to which the program was understandable despite the errors, and the time frame within which corrective action was taken to prevent such failures from recurring. When applying such standards to live and near-live programming, the Commission will also take into account, on a case-by-case basis, the following factors:

(i) Accuracy. The overall accuracy or understandability of the programming, the ability of the captions to convey the aural content of the program in a manner equivalent to the aural track, and the extent to which the captioning errors prevented viewers from having access to the programming.

(ii) Synchronicity. The extent to which measures have been taken, to the extent technically feasible, to keep any delay in the presentation of captions to a minimum, consistent with an accurate presentation of what is being said, so that the time between when words are spoken or sounds occur and captions appear does not interfere with the ability of viewers to follow the program.

(iii) Completeness. The delays inherent in sending captioning transmissions on live programs, and whether steps have been taken, to the extent technically feasible, to minimize the lag between the time a program's audio is heard and the time that captions appear, so that captions are not cut off when the program transitions to a commercial or a subsequent program.

(iv) Placement. The type and nature of the programming and its susceptibility to unintentional blocking by captions.

(4) Complaints. The Commission will forward an informal complaint regarding captioning quality to a video programming distributor only if the informal complaint contains the channel number, channel name, network, or call sign; the name of the multichannel video program distributor, if applicable; the date and time when the captioning problem occurred; the name of the program with the captioning problem; and a detailed description of the captioning problem, including specifics about the frequency and type of problem (e.g., garbling, captions cut off at certain times or on certain days, and accuracy problems).

(k) Captioning Best Practices.

(1) Video Programmer Best Practices. Video programmers adopting Best Practices will adhere to the following practices.

(i) Agreements with captioning services. Video programmers adopting Best Practices will take the following actions to promote the provision of high quality television closed captions through new or renewed agreements with captioning vendors.

(A) Performance requirements. Include performance requirements designed to promote the creation of high quality closed captions for video programming, comparable to those described in paragraphs (k)(2), (k)(3) and (k)(4) of this section.

(B) Verification. Include a means of verifying compliance with such performance requirements, such as through periodic spot checks of captioned programming.

(C) Training. Include provisions designed to ensure that captioning vendors' employees and contractors who provide caption services have received appropriate training and that there is oversight of individual captioners' performance.

(ii) Operational Best Practices. Video programmers adopting Best Practices will take the following actions to promote delivery of high quality television captions through improved operations.

(A) Preparation materials. To the extent available, provide captioning vendors with advance access to preparation materials such as show scripts, lists of proper names (people and places), and song lyrics used in the program, as well as to any dress rehearsal or rundown that is available and relevant.

(B) Quality audio. Make commercially reasonable efforts to provide captioning vendors with access to a high quality program audio signal to promote accurate transcription and minimize latency.

(C) Captioning for prerecorded programming. The presumption is that pre-recorded programs, excluding programs that initially aired with real-time captions, will be captioned offline before air except when, in the exercise of a programmer's commercially reasonable judgment, circumstances require real-time or live display captioning. Examples of commercially reasonable exceptions may include instances when (1) a programmer's production is completed too close to initial air time to be captioned offline or may require editorial changes up to air time (e.g., news content, reality shows), (2) a program is delivered late, (3) there are technical problems with the caption file, (4) last minute changes must be made to later network feeds (e.g., when shown in a later time zone) due to unforeseen circumstances, (5) there are proprietary or confidentiality considerations, or (6) video programming networks or channels with a high proportion of live or topical time-sensitive programming, but also some pre-recorded programs, use real-time captioning for all content (including pre-recorded programs) to allow for immediate captioning of events or breaking news stories that interrupt scheduled programming. The video programmer will make reasonable efforts to employ live display captioning instead of real-time captioning for prerecorded programs if the complete program can be delivered to the caption service provider in sufficient time prior to airing.

(iii) Monitoring and Remedial Best Practices. Video programmers adopting Best Practices will take the following actions aimed at improving prompt identification and remediation of captioning errors when

they occur.

(A) Pre-air monitoring of offline captions. As part of the overall pre-air quality control process for television programs, conduct periodic checks of offline captions on prerecorded programs to determine the presence of captions.

(B) Real-time monitoring of captions. Monitor television program streams at point of origination (*e.g.*, monitors located at the network master control point or electronic monitoring) to determine presence of captions.

(C) Programmer and captioning vendor contacts. Provide to captioning vendors appropriate staff contacts who can assist in resolving captioning issues. Make captioning vendor contact information readily available in master control or other centralized location, and contact captioning vendor promptly if there is a caption loss or obvious compromise of captions.

(D) Recording of captioning issues. Maintain a log of reported captioning issues, including date, time of day, program title, and description of the issue. Beginning one year after the effective date of the captioning quality standards, such log should reflect reported captioning issues from the prior year.

(E) Troubleshooting protocol. Develop procedures for troubleshooting consumer captioning complaints within the distribution chain, including identifying relevant points of contact, and work to promptly resolve captioning issues, if possible.

(F) Accuracy spot checks. Within 30 days following notification of a pattern or trend of complaints from the Commission, conduct spot checks of television program captions to assess caption quality and address any ongoing concerns.

(iv) Certification procedures for video programmers. Video programmers adopting Best Practices will certify to video programming distributors that they adhere to Best Practices for video programmers and will make such certifications widely available to video programming distributors, for example, by posting on affiliate websites.

(2) Real-Time (Live) Captioning Vendors Best Practices.

(i) Create and use metrics to assess accuracy, synchronicity, completeness, and placement of real-time captions.

(ii) Establish minimum acceptable standards based upon those metrics while striving to regularly exceed those minimum standards.

(iii) Perform frequent and regular evaluations and sample audits to ensure those standards are maintained.

(iv) Consider “accuracy” of captions to be a measurement of the percentage of correct words out of total words in the program, calculated by subtracting number of errors from total number of words in the program, dividing that number by total number of words in the program and converting that number to a percentage. For example, 7,000 total words in the program minus 70 errors equals 6,930 correct words captioned, divided by 7,000 total words in the program equals 0.99 or 99% accuracy.

(v) Consider, at a minimum, mistranslated words, incorrect words, misspelled words, missing words, and incorrect punctuation that impedes comprehension and misinformation as errors.

(A) Captions are written in a near-as-verbatim style as possible, minimizing paraphrasing.

(B) The intended message of the spoken dialogue is conveyed in the associated captions in a clear and comprehensive manner.

(C) Music lyrics should accompany artist performances.

(vi) Consider synchronicity of captions to be a measurement of lag between the spoken word supplied by the program origination point and when captions are received at the same program origination point.

(vii) Ensure placement of captions on screen to avoid obscuring on-screen information and graphics (*e.g.*,

sports coverage).

(viii) Ensure proper screening, training, supervision, and evaluation of captioners by experienced and qualified real-time captioning experts.

(ix) Ensure there is an infrastructure that provides technical and other support to video programmers and captioners at all times.

(x) Ensure that captioners are qualified for the type and difficulty level of the programs to which they are assigned.

(xi) Utilize a system that verifies captioners are prepared and in position prior to a scheduled assignment.

(xii) Ensure that technical systems are functional and allow for fastest possible delivery of caption data and that failover systems are in place to prevent service interruptions.

(xiii) Regularly review discrepancy reports in order to correct issues and avoid future issues.

(xiv) Respond in a timely manner to concerns raised by video programmers or viewers.

(xv) Alert video programmers immediately if a technical issue needs to be addressed on their end.

(xvi) Inform video programmers of appropriate use of real-time captioning (*i.e.*, for live and near-live programming, and not for prerecorded programming) and what is necessary to produce quality captions, including technical requirements and the need for preparatory materials.

(xvii) For better coordination for ensuring high quality captions and for addressing problems as they arise, understand the roles and responsibilities of other stakeholders in the closed-captioning process, including broadcasters, producers, equipment manufacturers, regulators, and viewers, and keep abreast of issues and developments in those sectors.

(xviii) Ensure that all contracted captioners adhere to the Real-Time Captioners Best Practices contained in paragraph (k)(4) of this section.

(3) Real-Time Captioners Best Practices.

(i) Caption as accurately, synchronously, completely, and appropriately placed as possible, given the nature of the programming.

(ii) Ensure they are equipped with a failover plan to minimize caption interruption due to captioner or equipment malfunction.

(iii) Be equipped with reliable, high speed Internet.

(iv) Be equipped with multiple telephone lines.

(v) Prepare as thoroughly as possible for each program.

(vi) File thorough discrepancy reports with the captioning vendor in a timely manner.

(vii) To the extent possible given the circumstances of the program, ensure that real-time captions are complete when the program ends.

(viii) Engage the command that allows captions to pass at commercials and conclusion of broadcasts.

(ix) Monitor captions to allow for immediate correction of errors and prevention of similar errors appearing or repeating in captions.

(x) Perform frequent and regular self-evaluations.

(xi) Perform regular dictionary maintenance.

(xii) Keep captioning equipment in good working order and update software and equipment as needed.

(xiii) Possess the technical skills to troubleshoot technical issues.

- (xiv) Keep abreast of current events and topics that they caption.
- (4) Offline (Prerecorded) Captioning Vendors Best Practices.
- (i) Ensure offline captions are verbatim.
  - (ii) Ensure offline captions are error-free.
  - (iii) Ensure offline captions are punctuated correctly and in a manner that facilitates comprehension.
  - (iv) Ensure offline captions are synchronized with the audio of the program.
  - (v) Ensure offline captions are displayed with enough time to be read completely and that they do not obscure the visual content.
  - (vii) Ensure offline captioning is a complete textual representation of the audio, including speaker identification and non-speech information.
  - (viii) Create or designate a manual of style to be applied in an effort to achieve uniformity in presentation.
  - (ix) Employ frequent and regular evaluations to ensure standards are maintained.
  - (x) Inform video programmers of appropriate uses of real-time and offline captioning and strive to provide offline captioning for prerecorded programming.
- (A) Encourage use of offline captioning for live and near-live programming that originally aired on television and re-feeds at a later time.
- (B) Encourage use of offline captioning for all original and library prerecorded programming completed well in advance of its distribution on television.
- (x) For better coordination for ensuring high quality captions and for addressing problems as they arise, understand the roles and responsibilities of other stakeholders in the closed-captioning process, including video program distributors, video programmers, producers, equipment manufacturers, regulators, and viewers, and keep abreast of issues and developments in those sectors.

## APPENDIX C

## Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA)<sup>1</sup> Initial Regulatory Flexibility Analyses (IRFAs) were incorporated in the Notices of Proposed Rulemaking (NPRMs) in the *2005 Closed Captioning NPRM*<sup>2</sup> and the *2008 Closed Captioning Decision*<sup>3</sup> in this proceeding. The Commission sought written public comment on the proposals in the two NPRMs, including comment on the two IRFAs. The Commission received one comment on the IRFA incorporated in the *2005 Closed Captioning NPRM*, as discussed below. No comments were received on the IRFA incorporated in the *2008 Closed Captioning Decision*. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>4</sup> The Report and Order and FRFA (or summaries thereof) will be published in the Federal Register.<sup>5</sup>

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

2. The purpose of this proceeding is to examine the current status of the Commission's closed captioning rules<sup>6</sup> with the goal of ensuring that video programming is fully accessible to deaf and hard of hearing Americans. The rulemaking also serves as a follow-up to the Commission's prior assurances at the time the closed captioning rules were adopted in 1997 that certain captioning provisions would be reviewed and evaluated at a future date<sup>7</sup> and has sought to determine whether any revisions should be made to enhance the effectiveness of such provisions. This Report and Order makes certain modifications to the closed captioning rules after consideration of the comments and reply comments received in response *2005 Closed Captioning NPRM*, the *2008 Closed Captioning Decision*, and the 2010 *Refresh Public Notice*.

3. The *2005 Closed Captioning NPRM*<sup>8</sup> was issued in response to a 2004 Petition for Rulemaking that was filed by Telecommunications for the Deaf, Inc. and several other consumer advocacy groups. The *2005 Closed Captioning NPRM* sought comment on several aspects of the rules, including (1) whether to establish standards for the non-technical quality of closed captioning, the potential costs for programmers and distributors and the availability of competent captioners to meet a non-technical quality standard mandate, and establishing different non-technical quality standards for pre-

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

<sup>2</sup> *Closed Captioning of Video Programming, Telecommunications for the Deaf, Inc., Petition for Rulemaking*, Notice of Proposed Rulemaking, 20 FCC Rcd 13211, 13234, Appendix B – Initial Regulatory Flexibility Analysis (2005) (“*2005 Closed Captioning NPRM*”).

<sup>3</sup> *Closed Captioning and Video Programming, Closed Captioning Requirements for Digital Television Receivers*, Declaratory Ruling, Order and Notice of Proposed Rulemaking, 23 FCC Rcd 16674, 16713, Appendix D – Initial Regulatory Flexibility Analysis (2008) (“*2008 Closed Captioning Decision*”).

<sup>4</sup> See 5 U.S.C. § 604.

<sup>5</sup> See 5 U.S.C. § 604(b).

<sup>6</sup> 47 C.F.R. § 79.1.

<sup>7</sup> *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, Report and Order, 13 FCC Rcd 3272, 3375, ¶ 225 (1997) (*1997 Closed Captioning Report and Order*), recon. granted in part, Order on Reconsideration, 13 FCC Rcd 19973 (1998) (*Closed Captioning Reconsideration Order*).

<sup>8</sup> *Closed Captioning of Video Programming, Telecommunications for the Deaf, Inc., Petition for Rulemaking*, Notice of Proposed Rulemaking, 20 FCC Rcd 13211 (2005) (“*2005 Closed Captioning NPRM*”).

recorded versus live programming; (2) video programming distributors' (VPDs') responsibility to monitor and maintain their equipment and signal transmissions; (3) whether to further limit the circumstances under which electronic newsroom technique (ENT) is allowed to count as captioning on live programming;<sup>9</sup> (4) whether the Commission should establish specific per-violation forfeiture amounts for non-compliance with the closed captioning rules, and if so, what those amounts should be; (5) whether to require VPDs to file compliance reports detailing the amount of closed captioning they provide; and (6) whether to require or allow the electronic filing of exemption petitions and the impact electronic filing would have on entities filing such petitions and parties filing comments or oppositions to such petitions.

4. In the *2008 Closed Captioning Decision*,<sup>10</sup> the Commission sought comment on the extent to which the self-implementing exemption in section 79.1(d)(12) of the rules, for video programming channels that produce annual gross revenues of less than \$3 million during the previous calendar year,<sup>11</sup> should apply to digital broadcasters that multicast.

5. In the 2010 *Refresh Public Notice*,<sup>12</sup> the Consumer and Governmental Affairs Bureau (CGB) issued a Public Notice seeking to refresh the record in this proceeding. Specifically, CGB asked interested parties to provide updated information on: (1) whether there should be quality standards for non-technical aspects of closed captioning; (2) the need for mechanisms and procedures, over and above the "pass through" rule,<sup>13</sup> to prevent technical captioning problems and to remedy technical problems that do arise; (3) whether to establish specific per violation forfeiture amounts for non-compliance; (4) whether VPDs should be required to file compliance reports; (5) whether the rules should be revised to disallow the use of ENT for DMAs beyond the top 25 DMAs;<sup>14</sup> (6) whether petitions for captioning exemptions should be filed electronically; and (7) whether the captioning exemption for channels producing under \$3,000,000 annually should apply to individual programming streams of a multicast channel.<sup>15</sup>

6. The Commission's decision in this Report and Order ensures that video programming is fully accessible to Americans who are deaf and hard of hearing. Specifically, in the Report and Order, the Commission adopts rules governing non-technical quality standards for closed captioning; Best Practices for video programmers, captioning vendors and captioners designed to ensure high quality closed captioning; certifications that VPDs must obtain from video programmers attesting to video programmers' compliance with the captioning quality standards or video programmer Best Practices or that the video programmer is exempt from the closed captioning rules; enhanced requirements for the use of ENT and a compliance ladder process for broadcasters that follow these practices; VPD monitoring and maintenance of equipment and signal transmissions, and technical equipment checks to ensure greater technical compliance; maintenance of records of such monitoring, maintenance, and technical equipment checks; applicability of the \$3 million exemption to multicast program streams; and electronic filing of economically burdensome exemption requests. The Commission declines to adopt at this time base forfeiture amounts for violation of the closed captioning rules as well as any requirements for VPDs to

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<sup>9</sup> ENT is a technique that can convert the dialogue included on a teleprompter script into captions; however, portions of a live program that are not part of the teleprompter script are not captioned when ENT is utilized.

<sup>10</sup> *2008 Closed Captioning Decision*.

<sup>11</sup> 47 C.F.R. § 79.1(d)(12).

<sup>12</sup> *Consumer & Governmental Affairs Bureau Seeks to Refresh the Record on Notices of Proposed Rulemaking Regarding Closed Captioning Rules*, Public Notice, 25 FCC Rcd 15056 (CGB 2010) ("2010 Refresh Public Notice").

<sup>13</sup> See 47 C.F.R. § 79.1(c).

<sup>14</sup> See 47 C.F.R. § 79.1(e)(3).

<sup>15</sup> See 47 C.F.R. § 79.1(d)(12).

annually file reports or certifications with the Commission. These modifications to the closed captioning rules will serve the public interest by improving the availability and quality of closed captioning and making it easier for the public to learn whether a petition for exemption from the closed captioning rules has been filed.

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

7. Media Captioning Services (MCS) filed the only comment in this proceeding responding to the IRFA,<sup>16</sup> arguing that the IRFA does not include any discussion of the impact that proposed regulations would have on closed captioning companies.<sup>17</sup> MCS notes that, at the time, the SBA considered companies providing real-time captioning services<sup>18</sup> with annual gross receipts of \$6 million or less to be small entities,<sup>19</sup> and considered companies earning \$25 million or less from pre-production business<sup>20</sup> to be small entities.<sup>21</sup> Using these Standard Industry Classifications, MCS asserts that virtually all companies in the closed captioning industry would be classified as small businesses.<sup>22</sup> MCS states that the definitions are deficient since an “element of the definition of ‘small business’ is that the entity not be dominant in its field of operation.”<sup>23</sup> However, according to MCS, three dominant companies in the industry would be classified as small entities if the definition were based solely on the annual gross receipts standards noted above.<sup>24</sup>

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<sup>16</sup> See Media Captioning Services (MCS) Comments. Several other commenters raised concerns regarding the impact of the proposals on small entities, but not in the regulatory flexibility context. Some of these commenters would be considered small businesses. In general, these commenters stated that the proposals set forth in the *2005 Closed Captioning NPRM* could result in increased costs and decreased local programming. For example, Hubbard Broadcasting commented that real-time captioning services are “disproportionately burdensome” to smaller broadcasters, and that the proposals in the *2005 Closed Captioning NPRM* would “vastly increase the costs of local news production.” Hubbard Broadcasting Reply Comments at 4-5. Similarly, Maranatha Broadcasting, the licensee of WFMZ-TV, Allentown, Pennsylvania, commented that further “limitations on the ability to count electronic newsroom technique-captioned programming as compliance with the closed-captioning requirements would be prohibitively expensive for independent television stations such as WFMZ-TV and would result in less local news programming.” Maranatha Broadcasting Reply Comments at 2. In its Comments, Block Communications, Inc., the licensee of four small to mid-sized market television stations in Kentucky, Indiana, Ohio and Idaho, commented that its revenues do not allow for the increased costs associated with the non-technical quality standards suggested in the *2005 Closed Captioning NPRM*. See generally Block Communications Comments. As explained in the Report and Order, to the extent any VPD believes that the requirements we adopt today would adversely impact its ability to deliver programming, it is free to file a request for exemption from the requirement to use real-time captioning (rather than the use of ENT) based upon the economically burdensome standard. See 47 C.F.R. § 79.1(f).

<sup>17</sup> MCS Comments at 19-20.

<sup>18</sup> See U.S. Census Bureau, 2012 NAICS Definitions, “561492 Court Reporting and Stenotype Services”; <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 3, 2014).

<sup>19</sup> MCS Comments at 19. The SBA now considers entities providing Court Reporting and Stenotype Services with annual gross receipts of \$14 million or less to be small entities. See 13 C.F.R. § 121.201, NAICS Code 561492 (2012).

<sup>20</sup> See U.S. Census Bureau, 2012 NAICS Definitions, “512191 Teleproduction and Other Postproduction Services”; <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 3, 2014).

<sup>21</sup> MCS Comments at 19-20. The SBA now considers entities providing Teleproduction and Other Postproduction Services with annual gross receipt of \$29.5 million or less to be small entities. See 13 C.F.R. § 121.201, NAICS Code 512191 (2012).

<sup>22</sup> MCS Comments at 20.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

8. The Commission appreciates the comments filed by MCS in this regard. We note that VPDs are the entities directly responsible for compliance with closed captioning rules, and may air programming that is not captioned only if the programming is not subject to a captioning benchmark or is exempt from the rules pursuant to section 79.1(d) or 79.1(f).<sup>25</sup> Even with regard to programming that is not produced by a VPD, the VPD is responsible for ensuring that the program owner has certified that it or its programming is exempt from the closed captioning rules.<sup>26</sup> Although closed captioning companies play a vital role in the closed captioning regime, they are not the entities that are directly affected by the Commission's requirements that video programming be captioned, because they are not the entities ultimately responsible for compliance with the closed captioning rules. The IRFA included all multichannel video programming distributors (MVPDs) and broadcasters;<sup>27</sup> these are the entities that are ultimately responsible for closed captioning. In addition to captioners, program owners and producers that are not the video programming distributors were also omitted from the IRFA, for the same reason – they are merely indirectly affected by the rules and are not ultimately responsible for compliance with the rules. However, in order to better inform the public about our actions and to create a more complete record, we are including captioners and video programming producers in this FRFA.<sup>28</sup>

### C. Description and Estimate of the Number of Small Entities Impacted

9. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules.<sup>29</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>30</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>31</sup> 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.<sup>32</sup>

10. *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 that encompass entities that could be directly affected by the proposals under consideration.<sup>33</sup> As of 2009, small businesses represented 99.9% of the 27.5 million businesses in the United States, according to the SBA.<sup>34</sup> Additionally, a “small organization” is generally “any not-for-profit enterprise which is independently

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<sup>25</sup> 47 C.F.R. §§ 79.1(d) and (f).

<sup>26</sup> See 47 C.F.R. § 79.1(g)(6).

<sup>27</sup> 2005 *Closed Captioning NPRM*, Appendix B, ¶¶ 5, 14.

<sup>28</sup> See Section C, *infra*.

<sup>29</sup> 5 U.S.C. § 604(a)(4).

<sup>30</sup> 5 U.S.C. § 601(6).

<sup>31</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>32</sup> 5 U.S.C. § 632.

<sup>33</sup> See 5 U.S.C. § 601(3)–(6).

<sup>34</sup> See SBA, Office of Advocacy, “Frequently Asked Questions,” available at <http://web.sba.gov/faqs/faqindex.cfm?areaID=24> (last visited Aug. 31, 2012).

owned and operated and is not dominant in its field.”<sup>35</sup> Nationwide, as of 2007, there were approximately 1,621,315 small organizations.<sup>36</sup> Finally, the term “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”<sup>37</sup> Census Bureau data for 2007 indicate that there were 89,527 governmental jurisdictions in the United States.<sup>38</sup> We estimate that, of this total, as many as 88,761 entities may qualify as “small governmental jurisdictions.”<sup>39</sup> Thus, we estimate that most governmental jurisdictions are small.

11. *Cable Television Distribution Services.* These services have been included within the broad economic census category of Wired Telecommunications Carriers, which 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.”<sup>40</sup> The SBA has developed a small business size standard for this category, which is all such firms having 1,500 or fewer employees.<sup>41</sup> To gauge small business prevalence for the Cable Television and Distribution service, the Commission relies on data from the U.S. Census Bureau for the year 2007, the most recent year currently available.<sup>42</sup> According to that source, there were 3,188 Wired Telecommunications Carrier firms that operated for the entire year in

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<sup>35</sup> 5 U.S.C. § 601(4).

<sup>36</sup> INDEPENDENT SECTOR, *THE NEW NONPROFIT ALMANAC & DESK REFERENCE* (2010).

<sup>37</sup> 5 U.S.C. § 601(5).

<sup>38</sup> U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2011*, Table 427 (2007).

<sup>39</sup> 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 local 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 52,095. If we make the same population assumption about special districts, specifically that they are likely to have a population of 50,000 or less, and also assume that special districts are different from county, municipal, township, and school districts, in 2007 there were 37,381 such special districts. Therefore, there are a total of 89,476 local government organizations. As a basis of estimating how many of these 89,476 local government organizations were small, in 2011, we note that there were a total of 715 cities and towns (incorporated places and minor civil divisions) with populations over 50,000. CITY AND TOWNS TOTALS: VINTAGE 2011 – U.S. Census Bureau, *available at* <http://www.census.gov/popest/data/cities/totals/2011/index.html>. If we subtract the 715 cities and towns that meet or exceed the 50,000 population threshold, we conclude that approximately 88,761 are small. U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES 2011*, Tables 427, 426 (Data cited therein are from 2007).

<sup>40</sup> U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers,” (partial definition), <http://www.census.gov/cgi-bin/sssd/naics/naicsreh> (last visited February 3, 2014).

<sup>41</sup> See 13 C.F.R. § 121.201, NAICS code 517110 (2012).

<sup>42</sup> The Census Bureau conducts the Economic Census, an official five-year measure of American business and economy, for years ending in ‘2’ and ‘7.’ U.S. Census Bureau, *Economic Census Frequently Asked Questions*, <http://www.census.gov/econ/census/faqs.html> (last visited February 4, 2014). In December 2013, the Census Bureau began publishing the Advance Report of the 2012 Economic Census, which provides the preliminary totals for all economic sectors, and the U.S. Census Bureau will publish additional results from the 2012 Economic Census over the next few years. *Id*; see also U.S. Census Bureau, *Data Release Schedule – 2012 Economic Census*, <https://www.census.gov/econ/census/schedule.html> (last visited February 4, 2014). Currently, the American FactFinder, which provides comprehensive data from Census Bureau censuses and surveys, contains all data from the 2007 Economic Census, but not the 2012 Economic Census. U.S. Census Bureau, *Data Release Schedule – 2007 Economic Census*, [http://www.census.gov/econ/census07/www/data\\_release\\_schedule/index.html](http://www.census.gov/econ/census07/www/data_release_schedule/index.html) (last visited February 4, 2014).

2007.<sup>43</sup> Of these, 3,144 operated with less than 1,000 employees, and 44 operated with 1,000 or more employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees.<sup>44</sup> Thus, under this category and the associated small business size standard, the majority of firms can be considered small.

12. *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.<sup>45</sup> Industry data shows that there are 1,100 cable companies.<sup>46</sup> Of this total, all but 10 incumbent cable companies are small under this size standard.<sup>47</sup> In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.<sup>48</sup> Current Commission records show 4,945 cable systems nationwide.<sup>49</sup> Of this total, 4,380 cable systems have less than 20,000 subscribers, and 565 systems have 20,000 subscribers or more, based on the same records. Thus, under this second size standard, most cable systems are small.

13. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate

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<sup>43</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ5&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table) (last visited February 3, 2014).

<sup>44</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ5&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table) (last visited February 3, 2014).

<sup>45</sup> 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 at ¶ 28 (1995).

<sup>46</sup> NCTA, Industry Data, Number of Cable Operating Companies, <http://www.ncta.com/industry-data> (last visited February 3, 2014). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505, ¶ 24 (2013) (*15<sup>th</sup> Annual Competition Report*).

<sup>47</sup> See *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 15258, 15267, ¶ 8 (2013) ("*CALM Act FNPRM*") (citing SNL Kagan, "Top Cable MSOs – 12/12 Q"; available at <http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2012Q4&sortcol=subscribersbasic&sortorder=desc>). We note that, when applied to an MVPD operator, under this size standard (*i.e.*, 400,000 or fewer subscribers) all but 14 MVPD operators would be considered small. See NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), <http://www.ncta.com/industry-data> (last visited February 3, 2014). The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. See *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17245-46, ¶ 37 (2011) (*CALM Act Report and Order*) (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

<sup>48</sup> 47 C.F.R. § 76.901(c).

<sup>49</sup> See *CALM Act FNPRM*, 28 FCC Rcd 15258, 15268, ¶ 8 (citing information from the Commission's Cable Operations and Licensing System (COALS) database on Aug. 28, 2013 and noting that "[a] cable system is a physical system integrated to a principal headend").

exceed \$250,000,000.”<sup>50</sup> There were approximately 56.4 million incumbent cable video subscribers in the United States as of 2012.<sup>51</sup> Accordingly, an operator serving fewer than 564,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>52</sup> Based on available data, we find that all but 10 incumbent cable operators are small under this size standard.<sup>53</sup> 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.<sup>54</sup> Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

14. *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 of Wired Telecommunications Carriers,<sup>55</sup> which was developed for small wireline firms. Under this category, the SBA deems a Wired Telecommunications Carrier to be small if it has 1,500 or fewer employees.<sup>56</sup> Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.<sup>57</sup> Each currently offers subscription services. DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

15. *Wireless Cable Systems – Broadband Radio Service and Educational Broadband Service.* Wireless cable systems use the Broadband Radio Service (BRS)<sup>58</sup> and Educational Broadband Service (EBS)<sup>59</sup> to transmit video programming to subscribers. In connection with the 1996 BRS auction, the

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<sup>50</sup> 47 U.S.C. § 543(m)(2). See also 47 C.F.R. § 76.901(f) and nn.1-3.

<sup>51</sup> See NCTA, Industry Data, Cable Video Customers, <http://www.ncta.com/industry-data> (last visited February 3, 2014).

<sup>52</sup> 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).

<sup>53</sup> See NCTA, Industry Data, Top 25 Multichannel Video Service Customers, <http://www.ncta.com/industry-data> (last visited February 3, 2014).

<sup>54</sup> 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).

<sup>55</sup> See 13 C.F.R. § 121.201, NAICS code 517110 (2012). The 2012 NAICS definition of the category of “Wired Telecommunications Carriers” is discussed under Cable Television Distribution Service, *supra*.

<sup>56</sup> 13 C.F.R. § 121.201, NAICS code 517110 (2012).

<sup>57</sup> See *15<sup>th</sup> Annual Competition Report*, 28 FCC Rcd at 10507, ¶ 27. As of June 2012, DIRECTV was the largest DBS operator and the second largest MVPD in the United States, serving approximately 19.9 million subscribers. DISH Network was the second largest DBS operator and the third largest MVPD, serving approximately 14.1 million subscribers. *Id.* at 10507, 10546, ¶¶ 27, 110-11.

<sup>58</sup> BRS was previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS). See *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, ¶ 7 (1995).

<sup>59</sup> EBS was previously referred to as the Instructional Television Fixed Service (ITFS). See *id.*

Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.<sup>60</sup> The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.<sup>61</sup> After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.<sup>62</sup> The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.<sup>63</sup> Auction 86 concluded in 2009 with the sale of 61 licenses.<sup>64</sup> Of the 10 winning bidders, two bidders that claimed small business status won four licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

16. In addition, the SBA's placement of Cable Television Distribution Services in the category of Wired Telecommunications Carriers is applicable to cable-based Educational Broadcasting Services. These services have been defined within the broad economic census category of Wired Telecommunications Carriers, which was developed for small wireline businesses. This category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services."<sup>65</sup> The SBA has

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<sup>60</sup> See *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9668-9669, ¶¶ 191-192 (1995).

<sup>61</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1,500 or fewer employees.

<sup>62</sup> *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

<sup>63</sup> *Id.* at 8296.

<sup>64</sup> *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

<sup>65</sup> U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition) at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 3, 2014). Examples of this category are: broadband Internet service providers (e.g., cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television ("CCTV") services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system ("DTH")

(continued...)

developed a small business size standard for this category, which is all such businesses having 1,500 or fewer employees.<sup>66</sup> Census Bureau data for 2007, the most recent year available, shows that there were 3,188 Wired Telecommunications Carrier firms that operated for the entire year in 2007.<sup>67</sup> Of these, 3,144 operated with less than 1,000 employees, and 44 operated with 1,000 or more employees.<sup>68</sup> However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees.<sup>69</sup> Therefore, under this size standard, we estimate that the majority of these businesses can be considered small entities. In addition to Census Bureau data, the Commission's internal records indicate that as of September 2012, there are 2,239 active EBS licenses.<sup>70</sup> The Commission estimates that of these 2,239 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.<sup>71</sup>

17. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.<sup>72</sup> The 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.<sup>73</sup> The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Although some entities have filed for certifications to operate OVS systems, the Commission believes that most OVS subscribers are included in cable MVPD subscriber data, and the Commission does not have a way to count them separately.<sup>74</sup> Because OVS operators provide subscription services,<sup>75</sup> OVS falls within the SBA small business size standard covering cable services, which is Wired Telecommunications Carriers.<sup>76</sup> The SBA has developed a small business size standard for this category, which is all such firms having 1,500 or fewer employees.<sup>77</sup> To gauge small business prevalence for the OVS service, the Commission relies on data from the U.S. Census for the year 2007, the most recent year currently available. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with 1,000 or more

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services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services ("MMDS").

<sup>66</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110 (2012).

<sup>67</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ5&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table) (last visited February 4, 2014).

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> <http://wireless2.fcc.gov/UlsApp/UlsSearch/results.jsp>.

<sup>71</sup> The term "small entity" within SBREFA applies to small organizations (non-profits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6).

<sup>72</sup> See 47 U.S.C. § 573.

<sup>73</sup> 47 U.S.C. § 571(a)(3)-(4). See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, 24 FCC Rcd 542, 606, ¶ 135 (2009) (*Thirteenth Annual Cable Competition Report*).

<sup>74</sup> *15<sup>th</sup> Annual Competition Report*, 28 FCC Rcd at 10509, ¶ 32.

<sup>75</sup> See 47 U.S.C. § 573.

<sup>76</sup> U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers"; <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 3, 2014).

<sup>77</sup> 13 C.F.R. § 121.201, NAICS code 517110 (2012).

employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees.<sup>78</sup> Based on this data, the majority of these firms can be considered small.

18. *Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than \$35.5 million in annual receipts.<sup>79</sup> Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.”<sup>80</sup> The Commission has estimated the number of licensed full power commercial television stations to be 1,388.<sup>81</sup> To gauge the number of broadcast stations that are owned by small businesses, the Commission relies on data from the U.S. Census for the year 2007, the most recent year currently available. According to that source, there were 2,076 television broadcasting establishments in 2007.<sup>82</sup> Of these, 1,515 establishments had receipts under \$ 10 million, and 561 had receipts of \$10 million or more.<sup>83</sup> However, as to the latter 561 there is no data available that shows how many had receipts in excess of \$35.5 million.<sup>84</sup> Based on this data, the majority of these establishments can be considered small. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business control affiliations must be included.<sup>85</sup> Because many of these stations may be held by large group owners, and the revenue figures on which our estimate is based does not include or aggregate revenues from control affiliates, our estimate likely overstates the number of small entities that might be affected by our action.

19. The Commission has estimated the number of licensed noncommercial educational (NCE) full power television stations to be 396.<sup>86</sup> The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities. There are also 428 Class A television stations and

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<sup>78</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ5&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table) (last visited February 3, 2015).

<sup>79</sup> See 13 C.F.R. § 121.201, NAICS Code 515120 (2012).

<sup>80</sup> U.S. Census Bureau, 2012 NAICS Definitions “515120 Television Broadcasting,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 3, 2014).” This category description continues, “These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources.” *Id.* Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Postproduction Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

<sup>81</sup> See *Broadcast Station Totals as of December 31, 2013*, News Release, January 8, 2014 (*Broadcast Station Totals*), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0108/DOC-325039A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0108/DOC-325039A1.pdf) (last visited February 11, 2014).

<sup>82</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Receipts Size of Establishments for the United States: 2007, NAICS code 515120, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ1&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ1&prodType=table) (last visited February 3, 2014). We recognize that this total differs from that contained in *Broadcast Station Totals*; however, we are using the U.S. Census Bureau estimate for purposes of this revenue comparison.

<sup>83</sup> See *id.*

<sup>84</sup> See *id.*

<sup>85</sup> “[Business concerns] are affiliates of each other when one controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 121.103(a)(1).

<sup>86</sup> See *Broadcast Station Totals*.

1,986 low power television stations (LPTV).<sup>87</sup> Given the nature of these services, the Commission will presume that all Class A television and LPTV licensees qualify as small entities under the SBA definition, even though a number of these stations may be owned by entities that do not qualify as small entities.

20. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation.<sup>88</sup> The Commission is unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and is therefore over-inclusive to that extent. Also as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated.<sup>89</sup> The Commission notes that it is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

21. *Incumbent Local Exchange Carriers (ILECs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for ILECs. 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<sup>90</sup> and “is not dominant in its field of operation.”<sup>91</sup> The SBA’s Office of Advocacy contends that, for RFA purposes, small ILECs are not dominant in their field of operation because any such dominance is not “national” in scope.<sup>92</sup> The Commission has therefore included small ILECs in this RFA analysis, although the Commission emphasizes that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

22. Census Bureau data for 2007, the most recent year currently available, show that there were 3,188 firms in this category that operated for the entire year.<sup>93</sup> Of this total, 3,144 had employment of less than 1000 employees, and 44 firms had had employment of 1,000 or more.<sup>94</sup> According to Commission data, 1,307 carriers have reported that they are engaged in the provision of ILEC services.<sup>95</sup> Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.<sup>96</sup> Consequently, the Commission estimates that most providers of ILEC service are small

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<sup>87</sup> *See id.*

<sup>88</sup> 5 U.S.C. § 632.

<sup>89</sup> *Id.*

<sup>90</sup> 13 C.F.R. § 121.201, NAICS code 517110 (2012).

<sup>91</sup> 15 U.S.C. § 632.

<sup>92</sup> 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).

<sup>93</sup> *See* U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ5&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table) (last visited February 4, 2014).

<sup>94</sup> *See id.*

<sup>95</sup> *See Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-301823A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf) (last visited February 4, 2014).

<sup>96</sup> *See Trends in Telephone Service* at Table 5.3.

entities that may be affected by the rules and policies adopted. The Commission estimates that three large ILECs, each of which employ more than 1,500 people, currently provide video programming.<sup>97</sup>

23. *Competitive Local Exchange Carriers (CLECs), 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.<sup>98</sup> Census Bureau data for 2007, the most recent year currently available, show that there were 3,188 firms in this category that operated for the entire year.<sup>99</sup> Of this total, 3,144 had employment of less than 1000 employees, and 44 firms had had employment of 1,000 employees or more.<sup>100</sup> According to Commission data, 1,442 carriers reported that they were engaged in the provision of either CLEC services or CAP services.<sup>101</sup> Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.<sup>102</sup> In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.<sup>103</sup> Seventy-two carriers have reported that they are Other Local Service Providers,<sup>104</sup> and of the 72, 70 have 1,500 or fewer employees and 2 have more than 1,500 employees.<sup>105</sup> Consequently, most CLECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers can be considered small entities.

24. *Electric Power Distribution Companies.* These entities can provide video services over power lines (BPL).<sup>106</sup> The Census Bureau defines Electric Power Distribution companies as “electric power establishments primarily engaged in either (1) operating electric power distribution systems (i.e., consisting of lines, poles, meters, and wiring) or (2) operating as electric power brokers or agents that arrange the sale of electricity via power distribution systems operated by others.”<sup>107</sup> These types of MVPDs serve few subscribers and their subscriber base is declining.<sup>108</sup> To gauge small business prevalence in the Electric Power Distribution category, the Commission relies on data from the U.S. Census Bureau for the year 2007, the most recent year currently available. The SBA has developed a small business size standard for this category, which is all such firms having 1,000 or fewer employees.<sup>109</sup>

<sup>97</sup> See *15<sup>th</sup> Annual Competition Report*, 28 FCC Rcd at 10549-10551, ¶¶ 118-124.

<sup>98</sup> 13 C.F.R. § 121.201, NAICS code 517110 (2012).

<sup>99</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ5&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table) (last visited February 4, 2014).

<sup>100</sup> See *id.*

<sup>101</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>102</sup> See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> See *id.*

<sup>105</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>106</sup> See *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems, Carrier Current Systems, Including Broadband Over Power Line Systems*, 19 FCC Rcd 21265 (2004).

<sup>107</sup> U.S. Census Bureau, 2012 NAICS Definitions, 221122 Electric Power Distribution, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 4, 2014).

<sup>108</sup> See *15<sup>th</sup> Annual Competition Report*, 28 FCC Rcd at 10508-10509, ¶ 31.

<sup>109</sup> 13 C.F.R. § 121.201, NAICS Code 221122 (2012).

Census Bureau data for 2007 show that there were 1,174 firms that operated for the entire year in this category.<sup>110</sup> Of these firms, 50 had 1,000 employees or more, and 1,124 had fewer than 1,000 employees.<sup>111</sup> Based on this data, a majority of these firms can be considered small.

25. *Cable and Other Subscription Programming.* These entities may be indirectly affected by our action. 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.”<sup>112</sup> To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data from the Census Bureau for the year 2007, the most recent year currently available. The size standard established by the SBA for this business category is that annual receipts of \$35.5 million or less determine that a business is small.<sup>113</sup> According to 2007 Census Bureau data there were 396 firms that were engaged in production of Cable and Other Subscription Programming.<sup>114</sup> Of these, 349 had annual receipts below \$25 million, 12 had annual receipts ranging from \$25 million to \$49,999,999, and 35 had annual receipts of \$50 million or more.<sup>115</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small.

26. *Motion Picture and Video Production.* These entities may be indirectly affected by our action. 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.”<sup>116</sup> 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 VPDs. To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data from the Census Bureau for the year 2007, the most recent year currently available. The size standard established by the SBA for this business category is that annual receipts of \$30 million or less determine that a business is small.<sup>117</sup> According to 2007 Census Bureau data, there were 9,095 firms that were engaged in Motion Picture and Video Production.<sup>118</sup> Of these, 8,995 had annual receipts of less than \$25 million, 43 had annual receipts

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<sup>110</sup> See U.S. Census Bureau, American FactFinder, Utilities: Subject Series - Establishment and Firm Size: Summary Statistics by Revenue Size of Firms for the United States: 2007, NAICS code 221122, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_22SSSZ5&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_22SSSZ5&prodType=table) (last visited February 4, 2014).

<sup>111</sup> See *id.*

<sup>112</sup> U.S. Census Bureau, 2012 NAICS Definitions, 515210 Cable and Other Subscription Programming, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 4, 2014).

<sup>113</sup> 13 C.F.R. § 121.201, NAICS Code 515210 (2012).

<sup>114</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2007, NAICS code 515210, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ4&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table) (last visited February 4, 2014).

<sup>115</sup> See *id.*

<sup>116</sup> U.S. Census Bureau, 2012 NAICS Definitions, NAICS Code 512110, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 4, 2014).

<sup>117</sup> 13 C.F.R. § 121.201, NAICS Code 512110 (2012).

ranging from \$25 million to \$49,999,999, and 57 had annual receipts of \$50 million or more.<sup>119</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small.

27. *Internet Publishing and Broadcasting and Web Search Portals.* These entities may be indirectly affected by our action. 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.”<sup>120</sup>

28. 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.<sup>121</sup> For this category of manufacturers, Census Bureau data for 2007, the most recent year currently available, show that there were 2,705 such firms that operated that year.<sup>122</sup> Of those 2,705 firms, 2,682 (approximately 99%) had fewer than 500 employees, and 23 had 500 or more employees.<sup>123</sup> Accordingly, the majority of establishments in this category can be considered small under that standard.

29. *Closed Captioning Services.* These entities may be indirectly affected by our 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.”

30. 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.”<sup>124</sup> The relevant size standard for small businesses in these services is annual revenue of less than \$29.5 million.<sup>125</sup> For this category, Census Bureau data for 2007, the most recent year currently

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<sup>118</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Receipts Size of Firms for the United States: 2007, NAICS code 512110, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ4&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table) (last visited February 4, 2014).

<sup>119</sup> See *id.*

<sup>120</sup> See U.S. Census Bureau, 2012 NAICS Definitions, “519130 Internet Publishing and Broadcasting and Web Search Portals,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 4, 2014).

<sup>121</sup> 13 C.F.R. § 121.201, NAICS Code 519130 (2012).

<sup>122</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Firms for the United States: 2007, NAICS code 519130, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ5&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table) (last visited February 4, 2014).

<sup>123</sup> See *id.*

<sup>124</sup> U.S. Census Bureau, 2007 NAICS Definitions, “512191 Teleproduction and Other Postproduction Services,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 4, 2014).

<sup>125</sup> 13 C.F.R. § 121.201, NAICS Code 512191 (2012).

available, indicate that there were 1,605 firms that operated in this category for the entire year.<sup>126</sup> Of that number, 1,587 had annual receipts totaling less than \$25 million, 9 had annual receipts ranging from \$25 million to \$49,999,999, and 9 had annual receipts of \$50 million or more.<sup>127</sup> Consequently, we estimate that the majority of Teleproduction and Other Postproduction Services firms are small entities that might be affected by our action.

31. 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.”<sup>128</sup> The size standard for small businesses in these services is annual revenue of less than \$14 million.<sup>129</sup> For this category, Census Bureau data for 2007 show that there were 2,706 firms that operated for the entire year.<sup>130</sup> Of this total, 2,687 had annual receipts of under \$10 million, 11 firms had annual receipts of \$10 million to \$24,999,999, and 8 had annual receipts of \$25 million or more.<sup>131</sup> Consequently, we estimate that the majority of Court Reporting and Stenotype Services firms are small entities that might be affected by our action.

#### **D. Description of Projected Reporting, Record Keeping and other Compliance Requirements**

32. Certain rule changes adopted in the Report and Order modify rules or add requirements governing reporting, recordkeeping and other compliance obligations. In the Order, the Commission takes the following actions to improve the quality of closed captions:

- (1) Establishes non-technical captioning quality standards (*e.g.*, accuracy, synchronicity, program completeness and placement) to improve the quality of closed captioning, but does not adopt any reporting requirements along these lines.
- (2) Adopts Best Practices for video programmers, captioning vendors and captioners.
  - Video programmers that choose to follow the Best Practices must include certain provisions in their agreements with captioning vendors, including performance requirements comparable to the captioning vendor Best Practices adopted in the Order; follow certain operational, monitoring, and remedial best practices; and make certifications to VPDs that they comply with the video programmer Best Practices widely available.
  - Captioning vendors and captioners following the Best Practices or performance requirements comparable to the Best Practices must take actions to improve the quality of closed captions, including but not limited to actions regarding evaluation of captioning accuracy, captioner screening, training, and supervision, and technical systems and expertise.

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<sup>126</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Receipts Size of Firms for the United States: 2007, NAICS code 512191, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ4&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table) (last visited February 4, 2014).

<sup>127</sup> See *id.*

<sup>128</sup> U.S. Census Bureau, 2012 NAICS Definitions, “561492 Court Reporting and Stenotype Services”; <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 4, 2014).

<sup>129</sup> 13 C.F.R. § 121.201, NAICS Code 561492 (2012).

<sup>130</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Receipts Size of Firms for the United States: 2007, NAICS code 561492, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_56SSSZ4&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table) (last visited February 4, 2014).

<sup>131</sup> See *id.*

- There are no reporting requirements associated with the Best Practices adopted in the Order.
- (3) Requires VPDs to make best efforts obtain certifications from the video programmers from which they receive programming attesting that the video programmers (1) comply with the captioning quality standards, (2) adhere to the video programmer Best Practices, or (3) are exempt from the closed captioning rules under one or more properly attained and specified exemptions.
  - VPDs are not required to report to the Commission regarding their efforts to obtain certifications from video programmers.
  - However, if a video programmer does not provide either of the two certifications noted above, the VPD must report the non-certifying programmer to the Commission.
- (4) Requires broadcasters that use ENT to follow certain practices in order to be deemed in compliance with the Commission's rules requiring captioning of live programming.
- (5) Adopts a compliance ladder that broadcasters following these ENT practices may use in the event of a Commission inquiry or investigation.
  - The compliance ladder calls for broadcasters to respond to notifications of noncompliance within 30 days by describing corrective measures. If a pattern or trend of noncompliance continues, the compliance ladder calls for broadcasters to respond to a subsequent notification of noncompliance within 30 days by setting forth an action plan describing specific measures it will take to bring the station's ENT performance into compliance with the Commission's regulations regarding ENT. In addition, the station shall be required to conduct spot checks of its ENT performance and report to the Commission on the results of such action plan and spot checks 180 days after submission of such action plan. If, after the date for submission of such report on the results of an action plan, the pattern or trend of noncompliance continues, the Commission will then consider, through its Enforcement Bureau, appropriate enforcement action.
- (6) Requires broadcasters to create a report on their experiences using these ENT practices within one year of the implementation of these practices.
  - Such report shall be prepared in consultation with Consumer Groups and may be prepared by the National Association of Broadcasters (NAB) on behalf of the affected broadcasters.
- (7) Specifies that each multicast program stream of a digital television station be considered separately for the purpose of the captioning exemption for channels producing revenues of less than \$3 million, but does not adopt any reporting requirements along these lines.
- (8) Requires VPDs to monitor and maintain their equipment and data streams and perform technical equipment checks to ensure greater technical compliance, and to maintain records of such monitoring, maintenance, and technical equipment checks for at least two years, but does not adopt any reporting requirements in this regard.
- (9) Requires that petitions for exemption from the closed captioning rules, as well as comments or oppositions to such petitions, be filed electronically rather than on paper.

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

33. The RFA requires an agency to describe any significant, specifically small business, 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 and reporting requirements under the rule for such 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 such small entities.<sup>132</sup>

34. In amending our closed captioning rules, we believe that we have minimized the effect on small entities while making video programming more accessible to persons who are deaf and hard of hearing. These efforts are consistent with the Congressional goal of increasing the availability of captioned programming while preserving the diversity of available programming. Consistent with our conclusions in 1997, when the closed captioning rules were first adopted, we have limited the exemptions to the closed captioning rules because we have determined that all VPDs are technically capable of delivering captioning.

35. However, consistent with the RFA, several steps were taken to minimize the impact on small entities. The captioning quality standards adopted in the Order are performance-orientated and avoid mandating the use of particular technologies. In addition, because the captioning quality standards are qualitative rather than quantitative, they afford the industry, including small entities, flexibility when complying and do not require monitoring of every program on every channel at all times. The captioning quality standards also take into consideration the extent to which compliance with the standards can be achieved for various types of programming, further enhancing the flexibility provided to the industry, including small entities, when complying with the standards. Moreover, the record in this proceeding shows that many entities already have undertaken practices to ensure caption quality,<sup>133</sup> thereby minimizing any additional costs imposed by the new captioning quality standards.

36. Additionally, although the Order places the obligation to ensure compliance with the captioning quality standards on VPDs, VPDs can do so by making best efforts to obtain certifications from the video programmers from which they receive programming attesting that the video programmer (1) complies with the captioning quality standards, (2) adheres to the video programmer Best Practices, or (3) is exempt from the closed captioning rules under one or more properly attained and specified exemptions. The certification approach adopted by the Order imposes only a minimal burden on VPDs, including small entities. We permit the use of widely available certifications for this purpose, to obviate the need for individual contractual certifications, thus greatly reducing the burden on VPDs. Use of widely available certifications generally reduces the burden on small VPDs, who will generally rely upon widely available certifications arranged by the larger VPDs for programming that is nationwide or regional. In addition, VPDs that locate a programmer's certification on the programmer's website or other widely available location used for the purpose of posting certification will be deemed in compliance with the best efforts obligation even if the VPD did not supply prior notification of the need for this certification to such programmer. While the Order requires VPDs to report to the Commission those video programmers whose programming the VPD carries who do not provide the certification noted above, this requirement is less burdensome to VPDs than alternatives such as having VPDs bear the risk of substandard caption quality of programming from video programmers who refuse to provide the certification.

37. The certification approach and Best Practices adopted by the Order may also impose additional compliance obligations on video programmers, including small entities, that elect to certify to compliance with either the standards or the Best Practices because they may be required to implement practices and incur some additional costs to ensure that the captioning they provide meets the Commission's caption quality standards or Best Practices. The Best Practices may also impose additional compliance obligations on captioning vendors and captioners, including small entities. Nevertheless, we believe the overall burden on video programmers that choose to certify and on captioning vendors and

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<sup>132</sup> 5 U.S.C. §§ 603(c)(1)-(4).

<sup>133</sup> NCTA Comments at 3; NCTA Refresh Comments at 3; CBS Reply Comments at 2; HBO Comments at 5; AZN Comments at 12; Caption Colorado Comments at 18; MPAA Comments at 3.

captioners will be minimal for several reasons. First, the Best Practices are voluntary. The Order gives video programmers a choice between certifying to compliance with the caption quality standards or Best Practices. Video programmers that do not want to follow the video programmer Best Practices can instead certify that they comply with the captioning quality standards. Second, the Best Practices provide video programmers, captioning vendors, and captioners with flexibility in establishing performance requirements that are designed to promote the creation of high quality closed captions for video programming by requiring practices that are comparable, but not necessarily identical, to the captioning vendor Best Practices. Third, the overall cost burden on video programmers that choose to certify will be relatively minimal, because, as demonstrated by the record, caption prices have “fallen dramatically” since the Commission first implemented its 1997 captioning rules. Fourth, as noted above, the Order permits video programmers to provide widely available certifications, rather than having to provide individual certifications to each requesting VPD, which will substantially minimize the burden on video programmers choosing to certify.

38. The Order declines to extend the prohibition on ENT to markets beyond the top 25. In declining to extend the prohibition on ENT, the Commission has considered the burden that real-time captioning would impose on broadcast stations in markets beyond the top 25, including small businesses. However, the Order does require broadcast stations that use ENT to follow certain procedures designed to improve the quality of captions created using ENT. The ENT procedures will impose minimal burdens on broadcasters because they are generally achievable without additional cost<sup>134</sup> and, for those stations with older equipment, software upgrades necessary for compliance with the ENT procedures are available for relatively nominal cost.<sup>135</sup> In addition, the Order adopts a compliance ladder for determining compliance with the ENT procedures, offering broadcast stations additional flexibility in complying with the Commission’s ENT requirements. The Order does require broadcast stations that rely on the enhanced ENT procedures to prepare and submit to the Commission, within one year after the effective date of the rules pertaining to ENT, a report on their experiences and the extent to which they have been successful in providing full and equal access to news programming. To minimize the burden on small entities, the Order specifies that the report may be prepared by the NAB jointly on behalf of the affected broadcasters.

39. The Order reduces the captioning requirements for television stations that multicast by extending the provision in section 79.1(d)(12) of the rules, which exempts video programming providers from closed captioning where the distributor’s annual gross revenues from the channel did not exceed \$3 million for the previous calendar year,<sup>136</sup> to each programming stream of a multicast digital television channel. The Order does not disturb the existing exemption in section 79.1(d)(11) of the rules, which excuses a video programming provider from spending more than 2 percent of its annual gross revenues received from a channel on closed captioning.<sup>137</sup> Sections 79.1(f), 79.1(d)(11) and 79.1(d)(12) are all intended to address the problems of small video programming providers that are not in a position to devote significant resources toward closed captioning by relieving small entities of any burdensome obligation to provide closed captioning. The section 79.1(f) mechanism in particular allows the Commission to address the impact of these rules on individual entities and grant exemptions to the rules to accommodate individual circumstances.

40. The Order declines to adopt any requirements for VPDs to annually file reports or certifications with the Commission. By declining to adopt reporting requirements, the Commission has

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<sup>134</sup> See NAB January 17, 2014 *Ex Parte* at 2.

<sup>135</sup> See *id.*

<sup>136</sup> 47 C.F.R. § 79.1(d)(12).

<sup>137</sup> 47 C.F.R. § 79.1(d)(11).

taken into consideration the burdens that reporting requirements would impose on VPDs, including small businesses.

41. However, the Order does require VPDs to maintain records of equipment monitoring and maintenance and technical equipment checks. These recordkeeping requirements will impose minimal burdens on VPDs because it is likely that many covered entities already keep such records,<sup>138</sup> and the Order does not mandate any specific format for keeping records, providing covered entities with flexibility to establish their own recordkeeping procedures. Furthermore, the monitoring, maintenance, and technical equipment checks adopted in the Order are performance-orientated and avoid mandating the use of particular technologies or processes.

42. The Order does modify the procedures for filing exemption petitions with the Commission pursuant to section 79.1(f) of the rules<sup>139</sup> by requiring that such petitions and responsive pleadings be filed electronically rather than on paper. This procedure will make it easier for VPDs to file such petitions and consumers to respond to such petitions. Moreover, in the event any VPD or consumer finds it burdensome to file electronically, such VPD or consumer may ask the Commission for authorization to file on paper at the time it makes the filing.

**F. Federal Rules Which Duplicate, Overlap, or Conflict With, the Commission's Proposals**

43. None

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<sup>138</sup> The *1997 Closed Captioning Report and Order* directed VPDs to take “any steps needed to monitor and maintain their equipment and signal transmissions to ensure that the captioning included with the video programming reaches consumers.” 13 FCC Rcd at 3369, ¶ 212. The Order codified this already existing requirement for equipment monitoring and maintenance. *See also* DirecTV Comments at 7 (stating that DirecTV would need to maintain records in order to respond to consumer complaints); EchoStar Comments at 8 (stating that distributors recognize that they must collect information on the amount of captioned programming they provide in case they are faced with a consumer complaint or a Commission audit); HBO Comments at 10.

<sup>139</sup> 47 C.F.R. § 79.1(f).

## APPENDIX D

**Initial Regulatory Flexibility Analysis**

1. As required by the Regulatory Flexibility Act of 1980, as amended,<sup>1</sup> the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of 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 on the FNPRM provided in the item. The Commission will send a copy of the entire FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).<sup>2</sup> In addition, the FNPRM and the IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

**A. Need For, and Objectives of, the Proposed Rules.**

2. The Commission initiates this further review relating to closed captioning in response to several comments that were filed in this proceeding as well as issues that have arisen since this rulemaking proceeding was initiated, including a 2011 Petition for Rulemaking filed by Consumer Groups.<sup>4</sup> This proceeding will continue to examine the current status of the Commission’s closed captioning rules with the goal of ensuring that video programming is fully accessible to deaf and hard of hearing Americans. As described more fully below, this FNPRM seeks to determine whether any additional revisions should be made to enhance the effectiveness of the closed captioning rules.

3. The FNPRM seeks comment on (1) whether the Commission should impose some responsibilities for compliance with the Commission’s closed captioning quality rules on video programmers and other entities; (2) whether the Commission should require specific measures to ensure program completeness and synchronicity for live and near-live programming and how the Commission should define near-live programming; (3) whether the Commission should require the use of offline captioning or other measures to achieve improved accuracy, synchronicity, placement and program completeness of captions prior to the re-airing of live and near-live programming first shown after the effective date of any such rule; (4) whether to apply the electronic newsroom technique (ENT) requirements adopted for broadcasters to non-broadcast networks that use ENT and serve less than 50 percent of all MVPD homes to achieve greater accessibility to news programming; (5) whether to establish specific maximum intervals for technical equipment checks or to allow alternatives to such technical equipment checks ; (6) whether to adopt a proposal for improving the prompt resolution of consumers’ captioning concerns by video program distributors (VPDs), and whether to create a publicly available “dashboard” that would provide information about all captioning-related complaints; (7) whether to require that captioning outages be communicated to viewers in real-time and be reported to the Commission, consistent with the reporting requirements for other types of outages; (8) whether to require that all contact information already required to be submitted by VPDs to the Commission for the VPD registry be submitted using the Commission’s web form system only; (9) how to amend the

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See *id.*

<sup>4</sup> Petition for Rulemaking, PRM11CG, filed January 27, 2011. The Consumer Groups include Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), Hearing Loss Association of America (HLAA), Association of Late-Deafened Adults (ALDA), American Association of the Deaf-Blind (AADB), American Association of People with Disabilities (AAPD), Tucson Citizens for Better Captioning (TCBC), Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), and California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH).

Commission's rules regarding the forwarding of consumer complaints to ensure subscriber privacy when the VPD receiving an informal complaint is not the responsible party; (10) whether to eliminate or retain the four-year exemption contained in section 79.1(d)(9) of the rules pertaining to new networks,<sup>5</sup> and if retained, whether to reduce the term of the exemption or limit its availability based on certain criteria indicative of a start-up network, how to define network, how to calculate the start date of the network for purposes of the exemption, and whether and how the exemption should be applied to networks created as the result of a merger of two or more existing networks; (11) whether to eliminate or retain the exclusion contained in section 79.1(a)(1)<sup>6</sup> for advertisements of five minutes duration or less and certain self-implementing exemptions contained in section 79.1(d),<sup>7</sup> including exemptions for late night programming,<sup>8</sup> locally produced and distributed non-news programming with no repeat value,<sup>9</sup> interstitials, promotional announcements, and public service announcements that are 10 minutes or less in duration,<sup>10</sup> and channels producing revenues under \$3 million<sup>11</sup>; (12) current practices with regard to technical standards for the display of closed captioning; (13) the extent to which onscreen visual changes or textual depictions have caused a problem for caption viewers; and (14) current practices and capabilities with regard to closed captioning of 3D and ultra high definition television (Ultra HDTV) programming.

**B. Legal Basis.**

4. The authority for this proposed rulemaking is contained in sections 4(i), 303(r) and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 613.

**C. Description and Estimate of the Number of Small Entities Impacted**

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 and policies, if adopted.<sup>12</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>13</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>14</sup> 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.<sup>15</sup>

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

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<sup>5</sup> 47 C.F.R. § 79.1(d)(9).

<sup>6</sup> 47 C.F.R. § 79.1(a)(1).

<sup>7</sup> 47 C.F.R. § 79.1(d).

<sup>8</sup> See 47 C.F.R. § 79.1(d)(5).

<sup>9</sup> See 47 C.F.R. § 79.1(d)(8).

<sup>10</sup> See 47 C.F.R. § 79.1(d)(6).

<sup>11</sup> See 47 C.F.R. § 79.1(d)(12).

<sup>12</sup> 5 U.S.C. § 603(b)(3).

<sup>13</sup> 5 U.S.C. § 601(6).

<sup>14</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

<sup>15</sup> 15 U.S.C. § 632.

describe here, at the outset, three comprehensive, statutory small entity size standards that encompass entities that could be directly affected by the proposals under consideration.<sup>16</sup> As of 2009, small businesses represented 99.9% of the 27.5 million businesses in the United States, according to the SBA.<sup>17</sup> Additionally, a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”<sup>18</sup> Nationwide, as of 2007, there were approximately 1,621,315 small organizations.<sup>19</sup> Finally, the term “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”<sup>20</sup> Census Bureau data for 2007 indicate that there were 89,527 governmental jurisdictions in the United States.<sup>21</sup> We estimate that, of this total, as many as 88,761 entities may qualify as “small governmental jurisdictions.”<sup>22</sup> Thus, we estimate that most governmental jurisdictions are small.

7. *Cable Television Distribution Services.* These services have been included within the broad economic census category of Wired Telecommunications Carriers, which 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.”<sup>23</sup> The SBA has developed a small business size standard for this category, which is all such firms having 1,500 or fewer employees.<sup>24</sup> To gauge small business prevalence for the Cable Television Distribution service, the Commission relies on data from the U.S. Census Bureau for the year 2007, the most recent year currently available.<sup>25</sup> According to that

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<sup>16</sup> See 5 U.S.C. § 601(3)–(6).

<sup>17</sup> See SBA, Office of Advocacy, “Frequently Asked Questions,” available at <http://web.sba.gov/faqs/faqindex.cfm?areaID=24> (last visited Aug. 31, 2012).

<sup>18</sup> 5 U.S.C. § 601(4).

<sup>19</sup> INDEPENDENT SECTOR, THE NEW NONPROFIT ALMANAC & DESK REFERENCE (2010).

<sup>20</sup> 5 U.S.C. § 601(5).

<sup>21</sup> U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, Table 427 (2007).

<sup>22</sup> 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 local 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 52,095. If we make the same population assumption about special districts, specifically that they are likely to have a population of 50,000 or less, and also assume that special districts are different from county, municipal, township, and school districts, in 2007 there were 37,381 such special districts. Therefore, there are a total of 89,476 local government organizations. As a basis of estimating how many of these 89,476 local government organizations were small, in 2011, we note that there were a total of 715 cities and towns (incorporated places and minor civil divisions) with populations over 50,000. CITY AND TOWNS TOTALS: VINTAGE 2011 – U.S. Census Bureau, available at <http://www.census.gov/popest/data/cities/totals/2011/index.html>. If we subtract the 715 cities and towns that meet or exceed the 50,000 population threshold, we conclude that approximately 88,761 are small. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2011, Tables 427, 426 (Data cited therein are from 2007).

<sup>23</sup> U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers,” (partial definition), <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>, NAICS Search (last visited February 3, 2014).

<sup>24</sup> See 13 C.F.R. § 121.201, NAICS code 517110 (2012).

<sup>25</sup> The Census Bureau conducts the Economic Census, an official five-year measure of American business and economy, for years ending in ‘2’ and ‘7.’ U.S. Census Bureau, Economic Census Frequently Asked Questions, <http://www.census.gov/econ/census/faqs.html> (last visited February 4, 2014). In December 2013, the Census Bureau began publishing the Advance Report of the 2012 Economic Census, which provides the preliminary totals

source, there were 3,188 Wired Telecommunications Carrier firms that operated for the entire year in 2007.<sup>26</sup> Of these, 3,144 operated with less than 1,000 employees, and 44 operated with 1,000 or more employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees.<sup>27</sup> Thus, under this category and the associated small business size standard, the vast majority of firms can be considered small.

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.<sup>28</sup> Industry data shows that there are 1,100 cable companies.<sup>29</sup> Of this total, all but 10 incumbent cable companies are small under this size standard.<sup>30</sup> In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.<sup>31</sup> Current Commission records show 4,945 cable systems nationwide.<sup>32</sup> Of this total, 4,380 cable systems have less than 20,000 subscribers, and 565 systems have 20,000 subscribers or more, based on the same records. Thus, under this second size standard, most cable systems are small.

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for all economic sectors, and the U.S. Census Bureau will publish additional results from the 2012 Economic Census over the next few years. *Id.*; see also U.S. Census Bureau, Data Release Schedule – 2012 Economic Census, <https://www.census.gov/econ/census/schedule.html> (last visited February 4, 2014). Currently, the American FactFinder, which provides comprehensive data from Census Bureau censuses and surveys, contains all data from the 2007 Economic Census, but not the 2012 Economic Census. U.S. Census Bureau, Data Release Schedule – 2007 Economic Census, [http://www.census.gov/econ/census07/www/data\\_release\\_schedule/index.html](http://www.census.gov/econ/census07/www/data_release_schedule/index.html) (last visited February 4, 2014).

<sup>26</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ5&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table) (last visited February 3, 2014).

<sup>27</sup> See *id.*

<sup>28</sup> 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 at ¶ 28 (1995).

<sup>29</sup> NCTA, Industry Data, Number of Cable Operating Companies (June 2012), <http://www.ncta.com/industry-data> (last visited February 3, 2014). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505, ¶ 24 (2013) (*15<sup>th</sup> Annual Competition Report*).

<sup>30</sup> See *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 15258, 15267, ¶ 8 (2013) ("*CALM Act FNPRM*") (citing SNL Kagan, "Top Cable MSOs – 12/12 Q"; available at <http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2012Q4&sortcol=subscribersbasic&sortorder=desc>). We note that, when applied to an MVPD operator, under this size standard (*i.e.*, 400,000 or fewer subscribers) all but 14 MVPD operators would be considered small. See NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), <http://www.ncta.com/industry-data> (last visited February 3, 2014). The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. See *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17245-46, ¶ 37 (2011) (*CALM Act Report and Order*) (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

<sup>31</sup> 47 C.F.R. § 76.901(c).

<sup>32</sup> See *CALM Act FNPRM*, 28 FCC Rcd 15258, 15268, ¶ 8 (citing information from the Commission's Cable Operations and Licensing System (COALS) database on Aug. 28, 2013 and noting that "[a] cable system is a physical system integrated to a principal headend").

9. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”<sup>33</sup> There were approximately 56.4 million incumbent cable video subscribers in the United States as of 2012.<sup>34</sup> Accordingly, an operator serving fewer than 564,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>35</sup> Based on available data, we find that all but 10 incumbent cable operators are small under this size standard.<sup>36</sup> 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.<sup>37</sup> Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

10. *Direct Broadcast Satellite (DBS) Service*. DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. DBS, by exception, is now included in the SBA’s broad economic census category of Wired Telecommunications Carriers,<sup>38</sup> which was developed for small wireline firms. Under this category, the SBA deems a Wired Telecommunications Carrier to be small if it has 1,500 or fewer employees.<sup>39</sup> Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.<sup>40</sup> Each currently offers subscription services. DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

11. *Wireless Cable Systems – Broadband Radio Service and Educational Broadband Service*. Wireless cable systems use the Broadband Radio Service (BRS)<sup>41</sup> and Educational Broadband Service

<sup>33</sup> 47 U.S.C. § 543(m)(2). See also 47 C.F.R. § 76.901(f) and nn.1-3.

<sup>34</sup> See NCTA, Industry Data, Cable Video Customers, <http://www.ncta.com/industry-data> (last visited February 3, 2014).

<sup>35</sup> 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).

<sup>36</sup> See NCTA, Industry Data, Top 25 Multichannel Video Service Customers, <http://www.ncta.com/industry-data> (visited February 3, 2014).

<sup>37</sup> 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).

<sup>38</sup> See 13 C.F.R. § 121.201, NAICS code 517110 (2012). The 2012 NAICS definition of the category of “Wired Telecommunications Carriers” is discussed under Cable Television Distribution Service, *supra*.

<sup>39</sup> 13 C.F.R. § 121.201, NAICS code 517110 (2012).

<sup>40</sup> See *15<sup>th</sup> Annual Competition Report*, 28 FCC Rcd at 10507, ¶ 27. As of June 2012, DIRECTV was the largest DBS operator and the second largest MVPD in the United States, serving approximately 19.9 million subscribers. DISH Network was the second largest DBS operator and the third largest MVPD, serving approximately 14.1 million subscribers. *Id.* at 10507, 10546, ¶¶ 27, 110-11.

<sup>41</sup> BRS was previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS). See *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and*

(EBS)<sup>42</sup> to transmit video programming to subscribers. In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.<sup>43</sup> The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.<sup>44</sup> After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.<sup>45</sup> The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.<sup>46</sup> Auction 86 concluded in 2009 with the sale of 61 licenses.<sup>47</sup> Of the 10 winning bidders, two bidders that claimed small business status won four licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

12. In addition, the SBA's placement of Cable Television Distribution Services in the category of Wired Telecommunications Carriers is applicable to cable-based Educational Broadcasting Services. These services have been defined within the broad economic census category of Wired Telecommunications Carriers, which was developed for small wireline businesses. This category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable)

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*Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, ¶ 7 (1995).

<sup>42</sup> EBS was previously referred to as the Instructional Television Fixed Service (ITFS). *See id.*

<sup>43</sup> *See Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9668-9669, ¶¶ 191-192 (1995).

<sup>44</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1,500 or fewer employees.

<sup>45</sup> *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

<sup>46</sup> *Id.* at 8296.

<sup>47</sup> *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

audio and video programming distribution; and wired broadband Internet services.”<sup>48</sup> The SBA has developed a small business size standard for this category, which is all such businesses having 1,500 or fewer employees.<sup>49</sup> Census Bureau data for 2007, the most recent year currently available, shows that there were 3,188 Wired Telecommunications Carrier firms that operated for the entire year in 2007.<sup>50</sup> Of these, 3,144 operated with less than 1,000 employees, and 44 operated with 1,000 or more employees.<sup>51</sup> However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees.<sup>52</sup> Therefore, under this size standard, we estimate that the majority of these businesses can be considered small entities. In addition to Census Bureau data, the Commission’s internal records indicate that as of September 2012, there are 2,239 active EBS licenses.<sup>53</sup> The Commission estimates that of these 2,239 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.<sup>54</sup>

13. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.<sup>55</sup> The 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.<sup>56</sup> The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Although some entities have filed for certifications to operate OVS systems, the Commission believes that most OVS subscribers are included in cable MVPD subscriber data and the Commission does not have a way to count them separately.<sup>57</sup> Because OVS operators provide subscription services,<sup>58</sup> OVS falls within the SBA small business size standard covering cable services, which is Wired Telecommunications

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<sup>48</sup> U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition) at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited November 8, 2013). Examples of this category are: broadband Internet service providers (e.g., cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television (CCT) services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (DTH) services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (MMDS).

<sup>49</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>50</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ5&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table) (last visited February 3, 2014).

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> <http://wireless2.fcc.gov/UlsApp/UlsSearch/results.jsp> (last searched February 10, 2014) (active, regular licenses, excluding spectrum leases, were included in the search).

<sup>54</sup> The term “small entity” within SBREFA applies to small organizations (non-profits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6).

<sup>55</sup> See 47 U.S.C. § 573.

<sup>56</sup> 47 U.S.C. § 571(a)(3)-(4). See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, 24 FCC Rcd 542, 606, ¶ 135 (2009) (*Thirteenth Annual Cable Competition Report*).

<sup>57</sup> 15<sup>th</sup> Annual Competition Report, 28 FCC Rcd at 10509, ¶ 32.

<sup>58</sup> See 47 U.S.C. § 573.

Carriers.<sup>59</sup> The SBA has developed a small business size standard for this category, which is all such firms having 1,500 or fewer employees.<sup>60</sup> To gauge small business prevalence for the OVS service, the Commission relies on data from the U.S. Census for the year 2007, the most recent year currently available. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with 1,000 or more employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees.<sup>61</sup> Based on this data, the majority of these firms can be considered small.

14. *Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than \$35.5 million in annual receipts.<sup>62</sup> Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.”<sup>63</sup> The Commission has estimated the number of licensed full power commercial television stations to be 1,388.<sup>64</sup> To gauge the number of broadcast stations that are owned by small businesses, the Commission relies on data from the U.S. Census for the year 2007, the most recent year currently available. According to that source, there were 2,076 television broadcasting establishments in 2007.<sup>65</sup> Of these, 1,515 establishments had receipts under \$ 10 million, and 561 had receipts of \$10 million or more.<sup>66</sup> However, as to the latter 561 there is no data available that shows how many had receipts in excess of \$35.5 million.<sup>67</sup> Based on this data, the majority of these establishments can be considered small. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business control

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<sup>59</sup> U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2012>, NAICS Search (last visited February 3, 2014).

<sup>60</sup> 13 C.F.R. § 121.201, NAICS code 517110 (2012).

<sup>61</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ5&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table) (last visited February 3, 2014).

<sup>62</sup> See 13 C.F.R. § 121.201, NAICS Code 515120 (2012).

<sup>63</sup> U.S. Census Bureau, 2012 NAICS Definitions “515120 Television Broadcasting,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 3, 2014). This category description continues, “These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.” *Id.* Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Postproduction Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

<sup>64</sup> See *Broadcast Station Totals as of December 31, 2013*, News Release, January 8, 2014 (*Broadcast Station Totals*), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0108/DOC-325039A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0108/DOC-325039A1.pdf) (last visited February 11, 2014).

<sup>65</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Receipts Size of Establishments for the United States: 2007, NAICS code 515120, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ1&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ1&prodType=table) (last visited February 3, 2014). We recognize that this total differs from that contained in *Broadcast Station Totals*; however, we are using the U.S. Census Bureau estimate for purposes of this revenue comparison.

<sup>66</sup> See *id.*

<sup>67</sup> See *id.*

affiliations must be included.<sup>68</sup> Because many of these stations may be held by large group owners, and the revenue figures on which our estimate is based does not include or aggregate revenues from control affiliates, our estimate likely overstates the number of small entities that might be affected by our action.

15. The Commission has estimated the number of licensed noncommercial educational (NCE) full power television stations to be 396.<sup>69</sup> The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities. There are also 428 Class A television stations and 1,986 low power television stations (LPTV).<sup>70</sup> Given the nature of these services, the Commission will presume that all Class A television and LPTV licensees qualify as small entities under the SBA definition, even though a number of these stations may be owned by entities that do not qualify as small entities.

16. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation.<sup>71</sup> The Commission is unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and is therefore over-inclusive to that extent. Also as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated.<sup>72</sup> The Commission notes that it is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

17. *Incumbent Local Exchange Carriers (ILECs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for ILECs. 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<sup>73</sup> and “is not dominant in its field of operation.”<sup>74</sup> The SBA’s Office of Advocacy contends that, for RFA purposes, small ILECs are not dominant in their field of operation because any such dominance is not “national” in scope.<sup>75</sup> The Commission has therefore included small ILECs in this RFA analysis, although the Commission emphasizes that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

18. Census Bureau data for 2007, the most recent year currently available, show that there were 3,188 firms in this category that operated for the entire year.<sup>76</sup> Of this total, 3,144 had employment

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<sup>68</sup> “[Business concerns] are affiliates of each other when one controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 121.103(a)(1).

<sup>69</sup> See *Broadcast Station Totals*.

<sup>70</sup> See *id.*

<sup>71</sup> 5 U.S.C. § 632.

<sup>72</sup> *Id.*

<sup>73</sup> 13 C.F.R. § 121.201, NAICS code 517110 (2012).

<sup>74</sup> 15 U.S.C. § 632.

<sup>75</sup> 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).

<sup>76</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ5&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table) (last visited February 3, 2014).

of less than 1000 employees, and 44 firms had had employment of 1,000 or more.<sup>77</sup> According to Commission data, 1,307 carriers have reported that they are engaged in the provision of ILEC services.<sup>78</sup> Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.<sup>79</sup> Consequently, the Commission estimates that most providers of ILEC service are small entities that may be affected by the rules and policies adopted. The Commission estimates that three large ILECs, each of whom employ more than 1,500 people, currently provide video programming.<sup>80</sup>

19. *Competitive Local Exchange Carriers (CLECs), 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.<sup>81</sup> Census Bureau data for 2007, the most recent year currently available, show that there were 3,188 firms in this category that operated for the entire year.<sup>82</sup> Of this total, 3,144 had employment of less than 1000 employees, and 44 firms had had employment of 1,000 employees or more.<sup>83</sup> According to Commission data, 1,442 carriers reported that they were engaged in the provision of either CLEC services or CAP services.<sup>84</sup> Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.<sup>85</sup> In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.<sup>86</sup> Seventy-two carriers have reported that they are Other Local Service Providers,<sup>87</sup> and of the 72, 70 have 1,500 or fewer employees and 2 have more than 1,500 employees.<sup>88</sup> Consequently, most CLECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers can be considered small entities.

20. *Electric Power Distribution Companies.* These entities can provide video services over power lines (BPL).<sup>89</sup> The Census Bureau defines Electric Power Distribution companies as “electric power establishments primarily engaged in either (1) operating electric power distribution systems (i.e., consisting of lines, poles, meters, and wiring) or (2) operating as electric power brokers or agents that

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<sup>77</sup> See *id.*

<sup>78</sup> See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-301823A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf) (last visited February 4, 2014).

<sup>79</sup> See *id.*

<sup>80</sup> See *15<sup>th</sup> Annual Competition Report*, 28 FCC Rcd at 10549-10551, ¶¶ 118-124.

<sup>81</sup> 13 C.F.R. § 121.201, NAICS code 517110 (2012).

<sup>82</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ5&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table) (last visited February 3, 2014).

<sup>83</sup> See *id.*

<sup>84</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*

<sup>87</sup> See *id.*

<sup>88</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>89</sup> See *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems, Carrier Current Systems, Including Broadband Over Power Line Systems*, 19 FCC Rcd 21265 (2004).

arrange the sale of electricity via power distribution systems operated by others.”<sup>90</sup> These types of MVPDs serve few subscribers and their subscriber base is declining.<sup>91</sup> To gauge small business prevalence in the Electric Power Distribution category, the Commission relies on data from the U.S. Census Bureau for the year 2007, the most recent year currently available. The SBA has developed a small business size standard for this category, which is all such firms having 1,000 or fewer employees.<sup>92</sup> Census Bureau data for 2007 show that there were 1,174 firms that operated for the entire year in this category.<sup>93</sup> Of these firms, 50 had 1,000 employees or more, and 1,124 had fewer than 1,000 employees.<sup>94</sup> Based on this data, a majority of these firms can be considered small.

21. *Cable and Other Subscription Programming.* These entities may be directly or indirectly affected by our action. 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.”<sup>95</sup> To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data from the U.S. Census Bureau for the year 2007, the most recent year currently available. The size standard established by the SBA for this business category is that annual receipts of \$35.5 million or less determine that a business is small.<sup>96</sup> According to 2007 Census Bureau data, there were 396 firms that were engaged in production of Cable and Other Subscription Programming.<sup>97</sup> Of these, 349 had annual receipts below \$25 million, 12 had annual receipts ranging from \$25 million to \$49,999,999, and 35 had annual receipts of \$50 million or more.<sup>98</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small.

22. *Motion Picture and Video Production.* These entities may be directly or indirectly affected by our action. 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.”<sup>99</sup> We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many

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<sup>90</sup> U.S. Census Bureau, 2012 NAICS Definitions, 221122 Electric Power Distribution, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 4, 2014).

<sup>91</sup> See *15<sup>th</sup> Annual Competition Report*, 28 FCC Rcd at 10508-10509, ¶ 31.

<sup>92</sup> 13 C.F.R. § 121.201, NAICS Code 221122 (2012).

<sup>93</sup> See U.S. Census Bureau, American FactFinder, Utilities: Subject Series - Establishment and Firm Size: Summary Statistics by Revenue Size of Firms for the United States: 2007, NAICS code 221122, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_22SSSZ5&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_22SSSZ5&prodType=table) (last visited February 4, 2014).

<sup>94</sup> See *id.*

<sup>95</sup> U.S. Census Bureau, 2012 NAICS Definitions, 515210 Cable and Other Subscription Programming, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 4, 2014).

<sup>96</sup> 13 C.F.R. § 121.201, NAICS Code 515210 (2012).

<sup>97</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2007, NAICS code 515210, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ4&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table) (last visited February 4, 2014).

<sup>98</sup> See *id.*

<sup>99</sup> U.S. Census Bureau, 2012 NAICS Definitions, NAICS Code 512110, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 4, 2014).

of these firms produce and/or distribute programming for VPDs. To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data from the U.S. Census Bureau for the year 2007, the most recent year currently available. The size standard established by the SBA for this business category is that annual receipts of \$30 million or less determine that a business is small.<sup>100</sup> According to 2007 Census Bureau data, there were 9,095 firms that were engaged in Motion Picture and Video Production.<sup>101</sup> Of these, 8,995 had annual receipts of less than \$25 million, 43 had annual receipts ranging from \$25 million to \$49,999,999, and 57 had annual receipts of \$50 million or more.<sup>102</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small.

23. *Internet Publishing and Broadcasting and Web Search Portals.* These entities may be indirectly affected by our action. 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.”<sup>103</sup>

24. 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.<sup>104</sup> For this category of manufacturers, Census Bureau data for 2007, the most recent year currently available, show that there were 2,705 such firms that operated that year.<sup>105</sup> Of those 2,705 firms, 2,682 (approximately 99%) had fewer than 500 employees, and 23 had 500 or more employees.<sup>106</sup> Accordingly, the majority of establishments in this category can be considered small under that standard.

25. *Closed Captioning Services.* These entities may be indirectly affected by our 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.”

26. 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

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<sup>100</sup> 13 C.F.R. § 121.201, NAICS Code 512110 (2012).

<sup>101</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Receipts Size of Firms for the United States: 2007, NAICS code 512110, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ4&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table) (last visited February 4, 2014).

<sup>102</sup> See *id.*

<sup>103</sup> See U.S. Census Bureau, 2012 NAICS Definitions, « 519130 Internet Publishing and Broadcasting and Web Search Protals, » <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 4, 2014).

<sup>104</sup> 13 C.F.R. § 121.201, NAICS Code 519130 (2012).

<sup>105</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Firms for the United States: 2007, NAICS code 519130, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ5&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table) (last visited February 4, 2014).

<sup>106</sup> See *id.*

special effects.”<sup>107</sup> The relevant size standard for small businesses in these services is annual revenue of less than \$29.5 million.<sup>108</sup> For this category, Census Bureau data for 2007, the most recent year currently available, indicate that there were 1,605 firms that operated in this category for the entire year.<sup>109</sup> Of that number, 1,587 had annual receipts totaling less than \$25 million, 9 had annual receipts ranging from \$25 million to \$49,999,999, and 9 had annual receipts of \$50 million or more.<sup>110</sup> Consequently, we estimate that the majority of Teleproduction and Other Postproduction Services firms are small entities that might be affected by our action.

27. 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.”<sup>111</sup> The size standard for small businesses in these services is annual revenue of less than \$14 million.<sup>112</sup> For this category, Census Bureau data for 2007 show that there were 2,706 firms that operated for the entire year.<sup>113</sup> Of this total, 2,687 had annual receipts of under \$10 million, 11 firms had annual receipts of \$10 million to \$24,999,999, and 8 had annual receipts of \$25 million or more.<sup>114</sup> Consequently, we estimate that the majority of Court Reporting and Stenotype Services firms are small entities that might be affected by our action.

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

28. Certain rule changes proposed in the FNPRM, if adopted by the Commission, would modify rules or add requirements governing reporting, recordkeeping and other compliance obligations.

29. If the Commission were to adopt rules extending responsibilities for compliance with the Commission’s closed captioning requirements to video programmers or entities other than VPDs, such regulations would impose new compliance obligations and may impose additional reporting and recordkeeping obligations on video programmers, video programming owners, and other entities, including small entities.

30. If the Commission were to adopt rules requiring the use of certain measures to ensure program completeness and synchronicity of closed captions for live and near-live programming and changing the Commission’s current definition of near-live programming for purposes of the quality standards adopted in the Order, such regulations would impose additional compliance obligations on VPDs, including small entities.

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<sup>107</sup> U.S. Census Bureau, 2012 NAICS Definitions, “512191 Teleproduction and Other Postproduction Services,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 4, 2014).

<sup>108</sup> 13 C.F.R. § 121.201, NAICS Code 512191 (2012).

<sup>109</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Receipts Size of Firms for the United States: 2007, NAICS code 512191, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_51SSSZ4&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table) (last visited February 4, 2014).

<sup>110</sup> See *id.*

<sup>111</sup> U.S. Census Bureau, 2012 NAICS Definitions, “561492 Court Reporting and Stenotype Services”; <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 4, 2014).

<sup>112</sup> 13 C.F.R. § 121.201, NAICS Code 561492 (2012).

<sup>113</sup> See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Receipts Size of Firms for the United States: 2007, NAICS code 561492, <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited February 4, 2014).

<sup>114</sup> See *id.*

31. If the Commission were to adopt rules requiring the use of offline captioning or other measures to achieve improved accuracy, synchronicity, placement and program completeness of the captions prior to the re-airing of live and near-live programs, such regulations would impose additional compliance obligations on VPDs, including small entities.

32. If the Commission were to apply the ENT requirements adopted in the Order for broadcasters to non-broadcast networks that use ENT and serve less than 50 percent of all MVPD homes, such regulations would impose new compliance obligations that may pose a financial burden on some non-broadcast networks, including smaller entities.

33. If the Commission were to establish maximum intervals for technical equipment checks, or to allow alternatives to such technical equipment checks, such regulations would impose additional compliance obligations on VPDs, including small entities.

34. If the Commission were to adopt the practices proposed by the National Cable and Telecommunications Association (NCTA) for improving the prompt resolution of consumers' captioning concerns, including requiring VPDs to make reasonable efforts to identify consumer complaints received about captioning issues and periodically review those complaints to identify and resolve recurring captioning problems, VPDs, including small entities, would be subject to the recordkeeping requirements associated with the proposal.

35. If the Commission were to adopt rules requiring VPDs experiencing a captioning outage to notify consumers of the outage and file outage reports with the Commission, VPDs, including small entities, would be subject to the reporting and recordkeeping requirements associated with such outage reports

36. If the Commission were to adopt a rule requiring that all contact information already required to be submitted by VPDs to the Commission for the VPD registry<sup>115</sup> be submitted using the Commission's web form system, VPDs, including small entities, would not be subject to additional reporting and recordkeeping requirements, since they are already required to submit their contact information to the Commission. However, VPDs, including small entities, may be required to alter their reporting and recordkeeping associated with such submissions in order to comply with the rule.

37. If the Commission were to adopt a rule requiring a VPD, upon receipt of a complaint where the VPD is not the responsible party, to (1) notify the consumer within seven days; (2) offer the consumer a choice of either asking the VPD in writing to forward the complaint to the appropriate party or submitting the complaint directly to the appropriate party on his or her own; and (3) inform the Commission that it has so notified the complainant by providing the Commission with copies of all written or electronic correspondence or a written description of all communications that were not in electronic or written form, VPDs, including small entities, would be subject to the reporting and recordkeeping requirements associated with such complaint forwarding and notifications.

38. If the Commission were to eliminate the four-year exemption contained in section 79.1(d)(9) of the rules pertaining to new networks,<sup>116</sup> or retain but alter the four-year exemption pertaining to new networks,<sup>117</sup> it would impose new compliance obligations that may pose a financial burden on some smaller entities.

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<sup>115</sup> See 47 C.F.R. § 79.1(i)(3).

<sup>116</sup> 47 C.F.R. § 79.1(d)(9).

<sup>117</sup> The FNPRM proposes modifying the new network exemption if it is retained to reduce the term of the exemption or limit its availability based on certain criteria indicative of a start-up network, define "network" for the purposes of the closed captioning rules, establish how to calculate the start date of the network for purposes of the exemption, and determine whether and how the exemption should be applied to networks created as the result of a merger of two or more existing networks.

39. If the Commission were to eliminate the exclusion from the definition of video programming for advertisements of five minutes duration or less,<sup>118</sup> and if the Commission were to eliminate certain self-executing exemptions contained in section 79.1(d), including exemptions for late night programming,<sup>119</sup> locally produced and distributed non-news programming with no repeat value,<sup>120</sup> interstitials, promotional announcements, and public service announcements that are 10 minutes or less in duration,<sup>121</sup> and channels producing revenues under \$3 million,<sup>122</sup> it would impose new compliance obligations that may pose a financial burden on VPDs, including small entities.

40. If the Commission were to adopt additional rules governing the technical standards for the display of closed captioning, it may impose additional compliance obligations on television manufacturers and VPDs, including small entities.

41. If the Commission were to adopt rules governing on-screen visual changes or textual depictions that obstruct closed captioning, it may impose additional compliance obligations on VPDs and video programmers, including small entities.

42. If the Commission were to adopt additional rules governing closed captioning of 3D television and Ultra HDTV, it may impose additional compliance obligations on television manufacturers and VPDs, including small entities.

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

43. 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.<sup>123</sup>

44. First, the rules already allow small entities to take advantage of various possible exemptions: (1) the exemption for annual revenues under \$3 million,<sup>124</sup> (2) the exemption limiting the captioning requirement to 2% of gross revenues,<sup>125</sup> and (3) the individual exemption process that uses the “economically burdensome” analysis.<sup>126</sup>

45. If the Commission were to adopt rules extending responsibilities for compliance with the Commission’s closed captioning requirements to video programmers and entities other than VPDs, such regulations would impose new compliance obligations and may impose additional reporting and recordkeeping obligations on video programmers, video programming owners, and other entities, including small entities. However, extending responsibilities for compliance with the Commission’s

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<sup>118</sup> 47 C.F.R. § 79.1(a)(1).

<sup>119</sup> See 47 C.F.R. § 79.1(d)(5).

<sup>120</sup> See 47 C.F.R. § 79.1(d)(8).

<sup>121</sup> See 47 C.F.R. § 79.1(d)(6).

<sup>122</sup> See 47 C.F.R. § 79.1(d)(12).

<sup>123</sup> 5 U.S.C. § 603(b).

<sup>124</sup> 47 C.F.R. § 79.1(d)(12). However, the FNPRM seeks comment on whether to eliminate this exemption.

<sup>125</sup> 47 C.F.R. § 79.1(d)(11).

<sup>126</sup> 47 C.F.R. § 79.1(f).

closed captioning requirements to video programmers and other entities may benefit certain small entities through more efficient regulations that reach those entities with greatest control over closed captioning quality. In addition, in determining whether to extend responsibility for compliance with the Commission's closed captioning requirements to video programmers or other entities involved in the production and delivery of video programming, the Commission will consider the costs of and benefits of such extension of responsibilities.

46. If the Commission were to adopt rules requiring the use of certain measures to ensure program completeness and synchronicity of closed captions for live and near-live programming and changing the Commission's current definition of near-live programming for purposes of the quality standards adopted in the Order, such regulations would impose additional compliance obligations on VPDs, video programmers, or other entities, including small entities. However, such regulations are less burdensome than the alternative of regulations imposing specific metrics for captioning synchronicity and program completeness. In addition, in determining whether to require certain techniques for improving the quality of real-time captioning of live programming, the Commission will consider the incremental costs and burdens of using any of the proposed techniques compared with the benefits of greater accessibility to television programming.

47. If the Commission were to adopt rules requiring the use of offline captioning or other measures to achieve improved accuracy, synchronicity, placement and program completeness of the captions prior to the re-airing of live and near-live programming first shown after the effective date of any such rule, such regulations would impose additional compliance obligations on VPDs, video programmers, or other entities including small entities. In determining whether to require certain techniques for improving the quality of captioning of live or near-live programming that is later re-aired, the Commission will consider the costs and burdens of using any of the proposed techniques compared with the benefits of greater accessibility to television programming.

48. If the Commission were to apply the ENT requirements adopted in the Order to non-broadcast networks that use ENT and serve less than 50 percent of all MVPD homes to ensure greater accessibility to news programming, such regulations would impose new compliance obligations that may pose a financial burden on some non-broadcast networks, including small entities. However, the Commission's proposal to apply the ENT requirements to non-broadcast channels serving less than 50 percent of all MVPD homes provides a less burdensome alternative to a phase-out of ENT, which would impose higher burdens and costs on small entities under the current rules. In addition, networks with small budgets would still be able to take advantage of various possible exemptions: (1) the exemption for annual revenues under \$3 million,<sup>127</sup> (2) the exemption limiting the captioning requirement to 2% of gross revenues,<sup>128</sup> and (3) the individual exemption process that uses the "economically burdensome" analysis.<sup>129</sup>

49. If the Commission were establish maximum intervals for technical equipment checks, or other measures that can be used to ensure that captions are passed on to consumers, such regulations would impose additional compliance obligations on VPDs, including small entities. In determining whether to require intervals for such checks or other measures, the Commission will consider the costs and burdens of these requirements compared with the value of this maintenance to greater accessibility to television programming.

50. If the Commission were to adopt the practices proposed by NCTA for improving the prompt resolution of consumers' captioning concerns, VPDs, including small entities, would be subject to

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<sup>127</sup> See 47 C.F.R. § 79.1(d)(12). The FNPRM also seeks comment on whether to eliminate the exemption for annual revenues under \$3 million.

<sup>128</sup> See 47 C.F.R. § 79.1(d)(11).

<sup>129</sup> See 47 C.F.R. § 79.1(f).

the recordkeeping requirements associated with the proposal. However, the proposal would impose no reporting requirements and does not require specific measures for identifying and reviewing consumer complaints related to closed captioning problems. In addition, such a requirement may benefit small entities because it may reduce consumer complaints regarding captioning, because the VPDs may be addressing problems earlier as a result of these procedures.

51. If the Commission were to adopt rules requiring VPDs experiencing a captioning outage to notify consumers in real time of the outage and file outage reports with the Commission, VPDs, including small entities, would be subject to the reporting and recordkeeping requirements associated with such outage reports. Adopting such a requirement would be in the public interest because it would provide greater consumer access to information about captioning outages. In addition, such a requirement may benefit small entities because it may reduce consumer complaints regarding captioning outages, because the outage notifications would inform consumers that the VPD is aware of and addressing the problem.

52. If the Commission were to adopt a rule requiring that all contact information already required to be submitted by VPDs to the Commission for the VPD registry<sup>130</sup> be submitted using the Commission's web form system only, VPDs, including small entities, would not be subject to additional reporting and recordkeeping requirements, since they are already required to submit their contact information to the Commission. However, VPDs, including small entities, may be required to alter their reporting and recordkeeping associated with such submissions in order to comply with the rule. In determining whether to require VPDs to submit their contact information via the web form, the Commission will consider the costs of transitioning to a mandatory web form method of filing compared with the ease and accuracy of filing and the benefits derived from a mandatory system.

53. If the Commission were to adopt a rule requiring a VPD, upon receipt of a complaint where the VPD is not the responsible party, to (1) notify the consumer within seven days; (2) offer the consumer a choice of either asking the VPD in writing to forward the complaint to the appropriate party or submitting the complaint directly to the appropriate party on his or her own; and (3) inform the Commission that it has so notified the complainant by providing the Commission with copies of all written or electronic correspondence or a written description of all communications that were not in electronic or written form, VPDs, including small entities, would be subject to the reporting and recordkeeping requirements associated with such complaint forwarding and notifications. This rule is intended to allow for the forwarding of consumer complaints as required by section 79.1(g)(3) of the Commission's rules<sup>131</sup> without violating the consumer protections contained in sections 631(c)(1) and 338(i)(4) of the Act.<sup>132</sup> Nevertheless, in determining whether to adopt this rule, the Commission will consider the costs of forwarding complaints upon consumer request and notifying the Commission of actions taken compared to the benefits of providing a consumer-friendly way to get the complaints to the correct parties.

54. If the Commission were to eliminate the four-year exemption contained in section 79.1(d)(9) of the rules pertaining to new networks,<sup>133</sup> or retain but alter the four-year exemption pertaining to new networks,<sup>134</sup> it would impose new compliance obligations that may pose a financial

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<sup>130</sup> See 47 C.F.R. § 79.1(i)(3).

<sup>131</sup> 47 C.F.R. § 79.1(g)(3).

<sup>132</sup> 47 U.S.C. § 551(c)(1), 47 U.S.C. § 338(i)(4)(A).

<sup>133</sup> 47 C.F.R. § 79.1(d)(9).

<sup>134</sup> The FNPRM proposes modifying the new network exemption if it is retained to reduce the term of the exemption or limit its availability based on certain criteria indicative of a start-up network, define "network" for the purposes of

(continued...)

burden on some small entities. However, under the current rules, networks with small budgets would still be able to take advantage of various possible exemptions: (1) the exemption for annual revenues under \$3 million,<sup>135</sup> (2) the exemption limiting the captioning requirement to 2% of gross revenues,<sup>136</sup> and (3) the individual exemption process that uses the “economically burdensome” analysis.<sup>137</sup>

55. If the Commission were to eliminate the exclusion from the definition of video programming for advertisements of five minutes duration or less,<sup>138</sup> and if the Commission were to eliminate certain self-executing exemptions contained in section 79.1(d), including exemptions for late night programming,<sup>139</sup> locally produced and distributed non-news programming with no repeat value,<sup>140</sup> interstitials, promotional announcements, and public service announcements that are 10 minutes or less in duration,<sup>141</sup> and channels producing revenues under \$3 million,<sup>142</sup> it would impose new compliance obligations that may pose a financial burden on VPDs, including small entities. However, under the current rules, entities with small budgets would still be able to take advantage of other possible exemptions: (1) the exemption limiting the captioning requirement to 2% of gross revenues<sup>143</sup> and (2) the individual exemption process that uses the “economically burdensome” analysis.<sup>144</sup>

56. If the Commission were to adopt additional rules governing the technical standards for the display of closed captioning, it may impose additional compliance obligations on television manufacturers and VPDs, including small entities. In determining whether to require any other practices governing technical standards for the display of closed captioning, the Commission will consider the costs and burdens of such practices compared with the benefits of greater accessibility to television programming.

57. If the Commission were to adopt rules governing on-screen visual changes or textual depictions that obstruct closed captioning, it may impose additional compliance obligations on VPDs and video programmers, including small entities. In determining whether to require any other practices governing on-screen visual changes or textual depictions that obstruct closed captioning, the Commission will consider the costs and burdens of such practices compared with the benefits of greater accessibility to television programming.

58. If the Commission were to adopt rules governing display of closed captioning, closed captioning of 3D television or Ultra HDTV programming, it may impose additional compliance obligations on television manufacturers and VPDs, including small entities. However, VPDs are already subject to rules governing the display of closed captioning and are required to reliably encode, transport,

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the closed captioning rules, establish how to calculate the start date of the network for purposes of the exemption, and determine whether and how the exemption should be applied to networks created as the result of a merger of two or more existing networks.

<sup>135</sup> See 47 C.F.R. § 79.1(d)(12). The FNPRM also seeks comment on whether to eliminate the exemption for annual revenues under \$3 million.

<sup>136</sup> See 47 C.F.R. § 79.1(d)(11).

<sup>137</sup> See 47 C.F.R. § 79.1(f).

<sup>138</sup> 47 C.F.R. § 79.1(a)(1).

<sup>139</sup> See 47 C.F.R. § 79.1(d)(5).

<sup>140</sup> See 47 C.F.R. § 79.1(d)(8).

<sup>141</sup> See 47 C.F.R. § 79.1(d)(6).

<sup>142</sup> See 47 C.F.R. § 79.1(d)(12).

<sup>143</sup> See 47 C.F.R. § 79.1(d)(11).

<sup>144</sup> See 47 C.F.R. § 79.1(f).

and render closed captions on 3D and Ultra HDTV video programming in accordance with Commission rules.<sup>145</sup> Also, in accordance with the Commission's captioning rules, such VPDs and providers must permit the pass through or rendering of closed captions in a manner that will allow viewers to exercise control over various display features and to activate and deactivate captions when video programming is played back on television receivers with 3D or Ultra HDTV capability. Finally, interconnection mechanisms and standards for 3D and Ultra HDTV video source devices must be capable of conveying from the source device to the consumer equipment the information necessary to permit or render the display of closed captions.<sup>146</sup> In determining whether to require any other practices for the display of closed captioning or captioning 3D television or Ultra HDTV, the Commission will consider the costs and burdens of such practices compared with the benefits of greater accessibility to television programming.

**F. Federal Rules Which Duplicate, Overlap, or Conflict With, the Commission's Proposals.**

59. None.

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<sup>145</sup> See 47 C.F.R. § 79.101 (setting forth the closed caption decoder requirements for analog television receivers); 47 C.F.R. § 79.102 (setting forth the closed caption decoder requirements for digital television receivers).

<sup>146</sup> 47 U.S.C. § 303(z)(2); *IP Captioning Report and Order*, 27 FCC Rcd at 855, ¶ 115.

**STATEMENT OF  
CHAIRMAN TOM WHEELER**

Re: *Closed Captioning of Video Programming*, CG Docket No. 05-231; *Telecommunications for the Deaf and Hard of Hearing, Inc. Petition for Rulemaking*, PRM11CG.

Today's item on Closed Captioning offers a great example of why what we do at the FCC matters – how our work has a meaningful impact on the lives of the American people.

We've heard from 12-year-old Tai Jensen, who described how her ability to develop problem-solving skills, talk with her friends, *and even learn a new language* is dependent on the quality of captioning on television. Claude Stout spoke about how closed captioning impacts everything from relating to his children to deciding whom to vote for. As Claude said in one of our meetings – “Closed captioning is what allows deaf people to hear.”

Their stories remind us that reliable and consistent access to news and information for deaf and hard-of-hearing communities is a *right*.

Thank you to Tai and Claude for sharing your stories, and thank you to everyone who made today's action possible.

Members of the deaf and hard-of-hearing community, alongside industry—NCTA, NAB, and MPAA—stepped up to the plate to help craft a set of rules that moves us toward improving captioning quality, while also assuring that vital news and other types of programming provide captioning.

This remains a work in progress. For example, I recognize that consumer groups are skeptical about whether the enhanced Electronic Newsroom Transcript procedures will be sufficient. At the same time, distributors and programmers are concerned about whether a single complaint might lead to unreasonable fines. With this accord, however, both have said, “Let's give it a try.” We will, of course, revisit the path that we've forged here to adjust it as new information becomes available. We all share the same goal: full and equal access to video programming for all Americans.

Almost all of us in the hearing world have benefited from advancements in audio technology. Today, we extend the benefits of new technology and new standards to deaf and hard-of-hearing persons.

While this process is not complete, our actions today are a strong step in the right direction. I applaud the leadership of NCTA, NAB, and MPAA and thank the Consumer and Governmental Affairs Bureau and the staff of the Disability Rights Office for their superb work on this item. Together with their colleagues in the Media Bureau, the Enforcement Bureau and the Office of the General Counsel, we have advanced the ball in a significant way.

Ensuring universal access is a critical and enduring value of this Commission. I am excited and hopeful for the future as we continue to take steps to advance this mission.

**STATEMENT OF  
COMMISSIONER MIGNON L. CLYBURN**

Re: *Closed Captioning of Video Programming*, CG Docket No. 05-231; *Telecommunications for the Deaf and Hard of Hearing, Inc. Petition for Rulemaking*, PRM11CG.

Three weeks ago, our nation reached an historic high mark when the first legally deaf offensive player in the NFL took the field in Super Bowl 48. Derrick Coleman's debut as fullback for the Seattle Seahawks was yet another breakthrough for full and equal inclusion of those who are deaf and hard of hearing. Coleman's battle for parity with hearing players on the football field represents a hard earned victory, of which we are all proud. Not only is he a champion on the field, Coleman is a champion and role model off the field for many who face similar challenges in their lives.

Today, the quest for parity remains in other arenas. One comes in an area most of us take for granted — and that is watching television. Our communications laws require that communications providers make greater efforts to provide the 54 million Americans who live with disabilities access to video services and programs, especially as video programming plays an increasingly important role in our homes, schools and businesses.

It is hard to believe, but it was only sixteen years ago when the Commission adopted its first set of closed captioning rules. For the hearing impaired, our work back then was long overdue.

But much has changed since then, and today, it is only right and just that we refresh those rules to reflect the technological and societal changes which have transpired. The deaf and hard of hearing community has waited a long time for the Commission to play catch up and address some basic concerns, which seemed to have gone unheard since the captioning rules were enacted.

By statute, we are tasked with adopting standards and technical compliance rules to make sure that video programming is fully accessible through closed captioning. While few would argue about the importance of this mandate, the true challenge lies in how we craft and implement the rules. Today's Report and Order establishes a benchmark for four non-technical quality standards, which make sure that closed captions fully and effectively convey the content of programming for the deaf and hard of hearing in the same way audio conveys that content to the hearing community. The quality standards of: (1) accuracy; (2) synchronicity; (3) program completeness, and (4) placement will help video program distributors to achieve these goals.

Most experts agree that effective close captioning in live programming presents its own set of challenges. But, our Order will require live programming to live up to quality standards, as well.

I want to acknowledge the level of cooperation and collaboration, which has existed among the industry players and the deaf and hard of hearing community, led by FCC staff. The Best Practices presented in the order represent an exemplary step forward by industry. "The hardest thing about being in the deaf community, is getting over wall one," Coleman said last month.

And, while there are elements of the Order and the Further Notice of Proposed Rulemaking that we need to watch carefully, this item reflects well on our commitment to the public interest and I am glad to add my full support to this item.

I would like to commend Kris Monteith and her team in the Consumer and Governmental Affairs Bureau, and Bill Lake and his team in the Media Bureau, for their outstanding work on this item. Thank you.

**STATEMENT OF  
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Closed Captioning of Video Programming*, CG Docket No. 05-231; *Telecommunications for the Deaf and Hard of Hearing, Inc. Petition for Rulemaking*, PRM11CG.

Over the next several years, television will change more than over the last several decades. The way we watch will change—when we watch, where we watch, and how we watch. Families huddling together in one room basking in the glow of a single screen will give way to gatherings with many screens and multiple programs. I know. It is already happening with my family, in my home.

But as opportunities to view video expand, old problems can linger. Today we address one of those problems. We address closed captioning.

It has been more than a decade and a half since the Commission adopted its first rules governing the provision of television closed captioning. These rules, put in place in the aftermath of the Telecommunications Act of 1996, sought to make widespread access to technology that facilitates television viewing by the deaf and hard of hearing. Over time, however, captioning quality was uneven and our enforcement was limited. So a decade ago a group of advocates representing individuals who are deaf or hard of hearing filed a petition for rulemaking and asked us to fix these problems.

That is what we do, at long last, today. Our new rules put in place captioning standards for accuracy, synchronicity, program completeness, and placement. We establish best practices for video programmers and captioners. We update policies involving live programming and Electronic Newsroom Technique. And we seek comment on a range of issues to further enhance accessibility and improve our procedural rules.

It has taken time, but we are finally making good on the promise that television programming should be understandable to the non-hearing person as it is to the person who can hear. Our actions will improve television accessibility for the estimated 36 million Americans who are deaf or have hearing loss—and the 40 million Americans over the age of 65 who experience varying degrees of hearing loss at some point in their lives.

Going forward, I believe we also have other promises to keep. Today we address the closed captioning problems that plagued us in the past. But we also must address the way we will watch going forward. Television viewing is changing fast, our policies must keep pace.

Three years ago, Congress passed the 21<sup>st</sup> Century Communications and Video Accessibility Act. Among other things, this law directed the Commission to require closed captioning of IP-delivered video programming that is also available on television. That means programming that is aired on television and later available online also comes with closed captioning. We made good on this promise for full-length programming, but we fell short for television video clips. I think this is something we need to fix. Because our accessibility policies must be about more than just how we watch now—they must be about the future. And the future of viewing, for all of us, including the deaf and hard of hearing, will involve more than gathering around the traditional television screen for programs of uniform 30- or 60-minute length. It will involve many screens, with more television programming sliced and diced into smaller increments, for later viewing online.

Still, today is an important milestone in our accessibility policies. We would not be crossing the finish line but for the steadfast advocacy of so many Americans with disabilities. They had to wait too long. But kudos to the Chairman for picking up that slack with speed and bringing us to where we need to be. Thank you also to Karen Peltz Strauss and the efforts of the Disability Rights Office of the Consumer and Governmental Affairs Bureau as well as the Media Bureau.

Finally, thank you to Claude Stout and Tai Jenson for joining us today. Claude is one the heroes who walks among us, a tireless champion for access for all. And Tai, you are following in his footsteps—at an early age. So thank you, too, for your presentation today.

**STATEMENT OF  
COMMISSIONER AJIT PAI**

Re: *Closed Captioning of Video Programming*, CG Docket No. 05-231; *Telecommunications for the Deaf and Hard of Hearing, Inc. Petition for Rulemaking*, PRM11CG.

I would like to start off by extending my gratitude to this morning's speakers. Claude Stout and Tai Jensen's testimony illustrates the critical role captioning plays in bringing the universal medium of television to those who are hearing impaired. For the medium is universal only if captions actually work to make video programming accessible.

Today's item is a solid step towards improving captioning. First, the industry-derived best practices set high expectations for video programming, and I hope they will make superior captions the norm rather than a pleasant surprise. Second, the rules recognize the limited ability of video programming distributors to control caption quality and focus their energy on ensuring those parts of the captioning process that *are* under their control work. Third, the item also helps bring our captioning rules into the 21<sup>st</sup> century by requiring that petitions for exemptions, along with comments on those petitions, be filed electronically. This is a big step forward for transparency.

Looking to the future, I am pleased that the Further Notice has been split into two parts—one that's needed to complete today's Report and Order, and another teeing up many of the thornier, longer-term issues. The near-term portion directs the public's attention to the question of which entities are responsible for compliance with the rules. This will ensure that the Commission will have a focused, well-reasoned record on which to resolve the critical issue of responsibility more quickly. And in turn, giving the public more time to respond to the Commission's more complex questions will allow them to develop better, more thoughtful answers to those queries.

Additionally, I am glad that the item seeks comment on creating an online dashboard to provide information about the status of closed captioning complaints. This is a particularly good example of how the FCC Dashboard I have proposed could advance the goals of transparency and accountability. A dashboard would allow consumers to monitor the status of their own closed captioning complaints, view the resolution of other, similar complaints, and see broader industry trends. In short, it would allow the public to see how we are doing and to keep us on track. I am very grateful to Claude, Blake Reid of the Technology Law & Policy Clinic at Colorado Law School, Andrew Phillips of the National Association of the Deaf, and Lise Hamlin of the Hearing Loss Association of America for their public support of my proposal.<sup>1</sup>

So far, so good on substance. But a brief note on process. The path to today's item has been far from smooth. It's been almost 10 years since the Consumer Groups filed their initial petition for rulemaking. And it's been over three years since the Consumer and Governmental Affairs Bureau issued a Public Notice to "refresh the record" in this proceeding. This delay doesn't just deny the petitioners the fair and timely hearing they deserve and frustrate hardworking Commission staff who know and care deeply about these issues. It also forces us to work from a less-than-current record. While the flurry of *ex parte* presentations and the industry's diligent efforts to arrive at a consensus give me hope that we're striking a good balance here, this isn't the way we should do business.

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<sup>1</sup> See Letter from Blake E. Reid, Director, Samuelson-Glushko Technology Law & Policy Clinic, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 05-231, PRM11CG, at 2 (Feb. 6, 2014), *available at* <http://apps.fcc.gov/ecfs/document/view?id=7521071501>.

Let me convey my thanks to the staff of the Consumer and Governmental Affairs Bureau, especially Karen Peltz Strauss, Elliot Greenwald, Aaron Garza, and Greg Hlibok, for all of your hard work on today's item. Thanks as well to the captioners hiding behind the glass. As we've all seen on the screens beside us today, and at every past meeting for as long as I've been a Commissioner, captioning a live event with jargon-filled, pop-culture-infused, and occasionally rambling statements is quite a challenge. We appreciate your efforts.

**STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

Re: *Closed Captioning of Video Programming*, CG Docket No. 05-231; *Telecommunications for the Deaf and Hard of Hearing, Inc. Petition for Rulemaking*, PRM11CG.

Video programming plays an important role in our daily lives. It provides entertainment, influences our culture, and, most importantly, informs us. In fact, this medium can be a valuable public safety tool. For example, I remember as a kid relying on blizzard and frostbite warnings during the winter months from our local television station. And that mattered not just for me, but for the thousands of people in our town who worked outside, as my dad often did, who was extremely hard of hearing.

For those in our country who are deaf or hard of hearing—a population that is growing as the baby boomers age—this tool can be limited without effective closed captioning to timely and correctly relay what is being said on the screen. We are fortunate that our current technological capabilities readily enable this service. With this in mind, Congress required closed captioning in the Telecommunications Act of 1996 so that television content would be made more accessible to all Americans. For over sixteen years, the Commission has implemented such rules, and today we build upon this foundation to better ensure that television captions are of sufficient quality, without putting undue burden on providers. This item is the result of a tremendous amount of input and cooperation from industry participants and from the advocacy community. It strives to achieve a workable balance, and I am, therefore, pleased to support it.

While the order adopts new quality standards and technical compliance rules, the further notice seeks comment on a number of outstanding issues that demand quick resolution. To that end, I am pleased that the Commission has set an effective date of January 15, 2015 so that all of the pieces can come together at the same time, which will make compliance easier.

On the longer term, more difficult questions that are teed up in the notice, such as outage reporting, we need more data and analysis before they can be resolved. I encourage commenters to provide the Commission with a robust record.

Today's item took a great deal of hard work and leadership to get across the finish line. I applaud Commissioner Clyburn, who I understand set the wheels in motion when she was interim chairwoman. Chairman Wheeler also deserves credit for placing it on the agenda. Finally, I thank the dedicated staff who worked on this important effort.