

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

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

**SECOND ORDER ON RECONSIDERATION AND
SECOND FURTHER NOTICE OF PROPOSED RULEMAKING**

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By the Commission: Chairman Wheeler and Commissioners Clyburn and Rosenworcel issuing separate statements; Commissioner Pai concurring and issuing a separate statement; and Commissioner O’Rielly approving in part, concurring in part and issuing a separate statement.

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I. INTRODUCTION

1. One of the Commission’s priorities is to ensure that all individuals, especially individuals with disabilities, are able to enjoy the full benefits of broadband technology, including the services that broadband enables such as online video programming. Online viewing of video programming is becoming increasingly significant, and one aspect of this development is that more and more consumers are receiving news, sports, and entertainment programming in the form of online video clips.¹ In this Second Order on Reconsideration (“*Video Clips Order*”), as part of our continued implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”),² we conclude that clips of video programming covered by the statute must be captioned when delivered using Internet protocol (“IP”) and set out a schedule of deadlines.

2. When the Commission initially adopted IP closed captioning requirements pursuant to its responsibilities under the CVAA it applied the requirements to full-length video programming and not to video clips.³ The Commission said that it might in the future extend the IP closed captioning requirements to video clips if it found that consumers who are deaf or hard of hearing are denied access to critical areas of programming, such as news, because the programming is posted online as video clips.⁴ In response to a petition for reconsideration filed by consumer groups, and at the Commission’s direction, the Media Bureau issued a Public Notice seeking updated information on the closed captioning of IP-delivered video clips, including the extent to which the industry has voluntarily captioned these clips.⁵ After reviewing the record compiled in this proceeding, we find that a significant percentage of video clips continue to remain inaccessible to consumers who are deaf or hard of hearing. In addition, we have reconsidered the Commission’s earlier interpretation of the statute and conclude that Congress intended

¹ See, e.g., CEA News Release, Change is in the Air: U.S. Households Viewing TV Programming only via the Internet are Poised to Surpass those Viewing only via Antenna, Finds New CEA Study, June 5, 2014, available at https://www.cea.org/News/News-Releases/Press-Releases/2014/OTA-Study_060514.aspx (last visited June 11, 2014) (citing the study’s finding that “viewership of video programming on connected devices continues to grow”); Global Web Index, Chart of the Day from March 14, 2014, available at https://www.globalwebindex.net/products/chart_of_the_day/14th-march-2014-77-percent-of-internet-users-watching-video-clips (last visited June 11, 2014) (“We track the rising popularity of watching video clips. By the end of 2013, 77% of [I]nternet users said they had done this in the last month – a figure which corresponds to more than 1.152 billion people (up from 711 million back in early 2011).”); Consumer Groups, Report on the State of Closed Captioning of Internet Protocol-Delivered Video Programming, MB Docket No. 11-154 and CG Docket No. 05-231 (May 16, 2013) (evaluating a variety of online video clips, including news clips and clips of entertainment programming, to determine the volume of captioned online video clips).

² Pub. L. No. 111-260, 124 Stat. 2751 (2010). See also Amendment of the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA).

³ *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787, 816-18, ¶¶ 44-48 (2012) (“*IP Closed Captioning Order*”).

⁴ *Id.* at 818, ¶ 48.

⁵ *Media Bureau Seeks Comment on Application of the IP Closed Captioning Rules to Video Clips*, Public Notice, 28 FCC Rcd 16699 (MB, 2013) (“*Video Clips PN*”).

the IP closed captioning requirements to extend to all covered video programming including clips, but left to our discretion the timeline for compliance with this requirement. Accordingly, to implement the statute fully, and in furtherance of Congress's intent to ensure that individuals who are deaf or hard of hearing have better access to online video programming,⁶ we reconsider the Commission's earlier decision and revise our regulations to require the provision of closed captioning on video clips delivered using IP when the programming was published or exhibited on television with captions. As discussed in Section III below, this *Video Clips Order* imposes closed captioning requirements on IP-delivered video clips by adopting rules that will:

- Extend the IP closed captioning requirements to IP-delivered video clips if the video programming distributor or provider⁷ posts on its website or application ("app") a video clip of video programming that it published or exhibited on television in the United States with captions, regardless of the content or length of the video clip.
- Pursuant to our authority to establish an appropriate schedule of deadlines for purposes of the IP closed captioning requirements,⁸ adopt a compliance deadline of January 1, 2016 for "straight lift" clips, which contain a single excerpt of a captioned television program with the same video and audio that was presented on television, and January 1, 2017 for "montages," which contain multiple straight lift clips.
- After the applicable deadlines, require IP-delivered video clips to be provided with closed captions at the time the clips are posted online, except as otherwise provided.
- For clips of video programming previously shown live or near-live on television with captions,⁹ require captions beginning July 1, 2017 and for the present time allow a grace period of 12 hours after the live programming is shown on television and eight hours after the near-live programming is shown on television before the clip must be captioned online.
- Find that compliance with the new requirements would be economically burdensome for video clips that are in the video programming distributor's or provider's online library before January 1, 2016 for straight lift clips, and January 1, 2017 for montages, and thus exempt this class of video clips from coverage; and
- Generally apply the IP closed captioning requirements to video clips in the same manner that they apply to full-length video programming, which among other things means that the quality requirements applicable to full-length IP-delivered video programming will apply to video clips.

⁶ See S. Rep. No. 111-386, 111th Cong., 2d Sess. at 1 (2010) ("Senate Committee Report") (indicating that Congress sought to "update the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming"); H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 19 (2010) ("House Committee Report") (same); 156 Cong. Rec. H6004 (daily ed. Jul. 26, 2010) (statement of then-Rep. Markey) (noting the "whole series of legislative initiatives aimed at broadening the disabled community's access to technologies that can help them do things that most Americans take for granted"); *id.* at H6005 (statement of Rep. Stearns) ("[I]t's important that people with disabilities are not left behind, have access and are afforded the opportunity to enjoy this wide variety of technology.").

⁷ When we use the term "video programming distributor or provider" herein, we invoke the definition of that term in the Commission's IP closed captioning rules, which is "[a]ny 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).

⁸ 47 U.S.C. § 613(c)(2)(B).

⁹ Industry refers to these video clips as "time-sensitive." See *infra* n. 116 (defining "live programming" and "near-live programming").

3. Additionally, in Section IV below, the attached Second Further Notice of Proposed Rulemaking (“*Further Notice*”) explores the following four issues related to closed captioning of IP-delivered video clips:

- Application of the IP closed captioning rules to the provision of video clips by third party video programming providers and distributors;
- Whether in the future we should decrease or eliminate the 12-hour timeframe within which IP-delivered video clips of video programming previously shown live on television must be captioned and the eight-hour timeframe within which IP-delivered video clips of video programming previously shown near-live on television must be captioned;
- Application of the IP closed captioning requirements to files that contain a combination of one or more video clips that have been shown on television with captions and online-only content that has not (“mash-ups”); and
- Application of the IP closed captioning rules to video clips that are added to the video programming distributor’s or provider’s library on or after January 1, 2016 for straight lift clips and January 1, 2017 for montages, but before the associated video programming is shown on television with captions (“advance” video clips).

II. BACKGROUND

4. In the *IP Closed Captioning Order*, the Commission implemented Section 202 of the CVAA by imposing closed captioning requirements on the owners, providers, and distributors of IP-delivered video programming with respect to full-length video programming.¹⁰ The Commission defined “full-length video programming” covered by the rules as video programming that appears on television and is distributed to end users, substantially in its entirety, via IP.¹¹ By “substantially in its entirety,” the Commission “mean[t] to reference video programming that is distributed via IP as a complete video programming presentation, such as an episode of a television show or movie.”¹² Accordingly, “full-length video programming” includes, for example, a full-length half-hour program that is missing a few minutes when it is distributed via IP, as well as a full-length program that is posted online in its entirety in multiple segments for easy viewing.¹³ The definition of “full-length video programming” excludes “video clips,” which the Commission defined as excerpts of full-length video programming.¹⁴

5. Although the Commission excluded video clips in the *IP Closed Captioning Order*, it interpreted the legislative history of the CVAA as signaling Congress’s intent to leave open the extent to

¹⁰ *IP Closed Captioning Order*, 27 FCC Rcd at 816-18, ¶¶ 44-48; 47 C.F.R. § 79.4(b). When we use the term “video programming owner” herein, we invoke the definition of that term in the Commission’s IP closed captioning rules, which is the person or entity that either (i) licenses 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; or (ii) acts 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. 47 C.F.R. § 79.4(a)(4).

¹¹ *IP Closed Captioning Order*, 27 FCC Rcd at 816, ¶ 44; 47 C.F.R. § 79.4(a)(2). The CVAA defines “video programming” as “programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media.” 47 U.S.C. § 613(h)(2). *See also* 47 C.F.R. § 79.4(a)(1).

¹² *IP Closed Captioning Order*, 27 FCC Rcd at 816, ¶ 44.

¹³ *Id.* at 816-17, ¶ 45.

¹⁴ *Id.* at 816, ¶ 45; 47 C.F.R. § 79.4(a)(12).

which the IP closed captioning rules should cover video clips at some point in the future.¹⁵ Hence, the Commission indicated that it might in the future determine that the IP closed captioning requirements should apply to video clips if necessary to provide access to this programming.¹⁶ Specifically, the Commission stated, “If we find that consumers who are deaf or hard of hearing are not getting access to critical areas of programming, such as news, because of the way the programming is posted (*e.g.*, through selected segments rather than full-length programs), we may reconsider this issue to ensure that our rules meet Congress’s intent to bring captioning access to individuals viewing IP-delivered video programming.”¹⁷

6. In addition, although the Commission did not require closed captioning of IP-delivered video clips, it encouraged video programming owners, providers, and distributors to provide closed captions on such content where they are able to do so.¹⁸ In particular, the Commission “encourage[d] the industry to make captions available on all TV news programming that is made available online, even if it is made available through the use of video clips.”¹⁹ The Commission also said that it might find a violation of the IP closed captioning rules if an entity exhibited a pattern of using video clips as a means of avoiding its closed captioning obligations.²⁰

7. A coalition of consumer groups filed a Petition for Reconsideration of the *IP Closed Captioning Order*, arguing, among other things, that the Commission should require captioning of IP-delivered video clips.²¹ In an order responding to the Consumer Groups Petition, the Commission noted that consumers were particularly concerned about the availability of captioned news clips, which tend to be live or near-live.²² Nevertheless, because full-length live and near-live programming became subject to the IP closed captioning requirements only about a month before Consumer Groups filed their petition, the Commission expressed its expectation that entities subject to the IP closed captioning rules would caption an increasing volume of video clips, particularly news clips, given that they would be developing more efficient processes for the captioning of live and near-live programming.²³ The Commission further

¹⁵ *IP Closed Captioning Order*, 27 FCC Rcd at 817, ¶ 48. Specifically, the language of both the Senate Committee Report and the House Committee Report states that Congress “intends, *at this time*, for the regulations to apply to full-length programming and not to video clips or outtakes.” Senate Committee Report at 13-14 (emphasis added); House Committee Report at 30 (emphasis added). As discussed below, we now reconsider that interpretation of the statute and legislative history, concluding instead that Congress intended to cover all video programming, as defined, including clips, but allowed the Commission to give the industry more time to caption IP-delivered video clips.

¹⁶ *IP Closed Captioning Order*, 27 FCC Rcd at 818, ¶ 48.

¹⁷ *Id.*

¹⁸ *Id.* at 817, ¶ 46.

¹⁹ *Id.* at 818, ¶ 48.

²⁰ *Id.* at 817, ¶ 46.

²¹ Consumer Groups, Petition for Reconsideration of the Commission’s Report and Order, at iii, 1-17 (filed Apr. 27, 2012) (“Consumer Groups Petition”). We use the term “Consumer Groups” to reference the signatories of the Consumer Groups Petition or a subset thereof: Telecommunications for the Deaf and Hard of Hearing, Inc.; National Association of the Deaf; Deaf and Hard of Hearing Consumer Advocacy Network; Association of Late-Deafened Adults; Hearing Loss Association of America; Cerebral Palsy and Deaf Organization; and Technology Access Program at Gallaudet University. The Consumer Groups’ petition for reconsideration was published in the Proposed Rules section of the Federal Register. See *Petitions for Reconsideration of Action in Rulemaking Proceeding*, MB Docket No. 11-154; Rpt No. 2951, 77 Fed. Reg. 30,485 (2012).

²² *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Order on Reconsideration and Further Notice of Proposed Rulemaking, 28 FCC Rcd 8785, 8804, ¶ 30 (2013) (“*IP Closed Captioning Order on Recon*”).

²³ *Id.*

indicated that it would monitor industry actions on the captioning of IP-delivered video clips, and it directed the Media Bureau to issue a Public Notice to seek updated information on the topic within six months.²⁴ If the record developed from the Public Notice “demonstrates that consumers are denied access to critical areas of video programming due to lack of captioning of IP-delivered video clips,” the Commission indicated that it might reconsider its decision not to subject video clips to the IP closed captioning rules.²⁵

8. At the Commission’s direction, the Media Bureau issued a Public Notice seeking updated information on the closed captioning of IP-delivered video clips, including the extent to which industry has voluntarily captioned these clips.²⁶ In the Public Notice, the Media Bureau asked whether the Commission should require captioning of IP-delivered video clips, and it invited comment on any issues relevant to this determination.²⁷ Commenters representing both the industry and consumer groups submitted detailed filings on these issues. The record demonstrates the large volume of IP-delivered video clips currently available to consumers, culled from a multitude of full-length video programs.²⁸

III. DISCUSSION

9. As discussed fully below, we hereby reconsider our prior decision and conclude that the CVAA covers video clips as well as full-length video programming shown online. Accordingly, at this time we apply the IP closed captioning requirements to video clips if the video programming distributor or provider posts on its website or app a video clip of video programming that it published or exhibited on television in the United States with captions. Specifically, for “straight-lift” clips, which contain a single excerpt of a captioned television program with the same video and audio that was presented on television, the IP closed captioning requirements will apply beginning January 1, 2016. For “montage” clips, a single file containing multiple straight lift clips, we adopt an extended compliance deadline of January 1, 2017.²⁹ We find that it would be economically burdensome to apply the new requirements to video clips that are in the video programming distributor’s or provider’s library before the relevant compliance deadline, and accordingly we exempt such video clips from coverage.³⁰ Further, we will require

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Video Clips PN.*

²⁷ *Id.* at 16700-01. Comments were due on February 3, 2014, and replies were due on March 5, 2014. *See Deadline Extended for Comment on Media Bureau Public Notice on Application of the IP Closed Captioning Rules to Video Clips*, Public Notice, 29 FCC Rcd 440 (MB, 2014).

²⁸ *See, e.g.*, Comments of the Digital Media Association at 7 (“DiMA Comments”) (“One full-length program can be chopped up into any number of clips, and [video programming distributors] routinely place online many clips from a single full-length program. A [video programming distributor] could literally have hundreds of thousands or even millions of video clips in its video catalogue.”); Reply Comments of the National Cable and Telecommunications Association at 6 (“NCTA Reply”) (noting the “sheer volume of online video clips”); Letter from Diane B. Burstein, Vice President and Deputy General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, at 1 (Apr. 25, 2014) (“NCTA Apr. 25 *Ex Parte* Letter”) (“We further explained that thousands of clips of varying lengths are created and posted weekly.”).

²⁹ We distinguish here between a single file containing multiple straight lift clips and situations where one or more single files are played sequentially, such as through a playlist. For example, a video programming distributor might automatically begin playing a related video file immediately after the initial video retrieved by the consumer concludes, such as another news clip about the same topic or another highlight from the same sporting event. That would not be an example of a montage, but rather, would be straight lift clips that are played in sequence.

³⁰ As in the *IP Closed Captioning Order*, herein we use the term “library” to describe the collection of content a video programming provider or distributor makes available to consumers online. In the *Further Notice* below, we seek comment on application of the IP closed captioning requirements to video clips that are added to the video programming distributor’s or provider’s library after the relevant compliance deadline but before the programming is shown on television with captions (“advance” video clips).

captioning for video clips of live and near-live programming beginning July 1, 2017, and we will permit such clips to be posted online initially without captions, but require that captions be added to clips of live programming within 12 hours and to clips of near-live programming within eight hours after the conclusion of the television display of the associated video programming³¹ that contained the clip.³² Finally, we generally apply the Commission's IP closed captioning rules for full-length programming, including the quality requirements, to video clips.³³ Below, before addressing the substance of our video clips requirements, we first discuss threshold issues regarding legal authority and procedure, as well as the benefits of requiring closed captioning for IP-delivered video clips.

A. Threshold Issues Regarding Legal Authority and Procedure

10. We find that the CVAA mandates that all "video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of such regulations," including clips of that programming, be provided with closed captioning.³⁴ The statutory text, quoted above, does not distinguish between full-length video programming and video clips; therefore, as explained below, we believe the statute is most reasonably interpreted as covering excerpts of full-length programming as well as complete and substantially complete programs. To the extent the *IP Closed Captioning Order* stated that the CVAA's captioning provisions did not cover clips of video programming or did not cover them until some future date, we reconsider and reject that statutory interpretation. Rather, we find that video clips are included within the definition of video programming, and thus the statute mandates that clips of video programming covered by the statutory definition be captioned when delivered by IP.

11. Clips of programming *shown on television* meet the statute's definition of "video programming," which is "programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media (as defined in section 153 of this title)."³⁵ As we stated in the *IP Closed Captioning Order*, "programming 'that was published or exhibited on television' by definition constitutes 'video programming,' since anything that was published or exhibited on television must be provided by, or be comparable to programming provided by, a television broadcast station."³⁶ There is nothing in the definition of "video programming" that expressly excludes video clips or excerpts of programming. Indeed, only one category of programming is expressly excluded from the definition and that is "consumer-generated media," a category not relevant for purposes here. The CVAA does not further explain what is meant by programming that is "generally considered comparable to programming provided by a television broadcast station." However, nothing in the statutory text suggests an excerpt of programming may not be considered "comparable" to broadcast

³¹ When we use the term "associated video programming" or "associated video program," we mean the televised programming from which the video clip was excerpted.

³² Throughout this item, when we discuss grace periods of a certain number of hours after the programming is shown on television with captions within which video clips must be captioned online, we will consider the grace period to begin upon the conclusion of the television display of the associated video program. Given the current state of captioning technology, waiting until the conclusion of the program is the most reasonable approach at this juncture since, at that time, the caption file is complete.

³³ We also adopt a *Further Notice* considering the four specific issues listed above. See *supra* Section I. Among the issues considered in the *Further Notice* is application of the IP closed captioning requirements to "mash-ups," which occur when a single file contains a compilation of one or more video clips that have been shown on television with captions along with additional content that has not been shown on television with captions. We thus defer, at this time, application of our rules with respect to mash-ups.

³⁴ 47 U.S.C. § 613(c)(2)(A).

³⁵ *Id.* § 613(h)(2).

³⁶ *IP Closed Captioning Order*, 27 FCC Rcd at 814-15, ¶ 41; see also *id.* at n.186 ("The Act and our rules establish that programming aired by MVPDs is 'video programming.'").

programming under Section 202.³⁷ To the contrary, Section 202 instructs us to take into account, in establishing compliance deadlines, whether the programming is “edited for Internet distribution,” indicating that Congress contemplated that the version of a television program provided online may differ, and in fact, be provided in truncated form, from the original airing shown on television.³⁸ We therefore reject the argument that the term “video programming” does not encompass video clips on the theory that “television broadcasters and multi-channel video programming distributors do not transmit free-standing clips.”³⁹ For the reasons stated herein, we believe the better reading of the statute is that clips of video programming are covered by Section 202.

12. We also reject the contention that the legislative history of the CVAA compels us to interpret Section 202 to exclude video clips from the IP closed captioning requirements. The Senate and House Committee Reports state that Congress “intends, at this time, for the regulations to apply to full-length programming and not to video clips or outtakes.”⁴⁰ On reconsideration, we reject the Commission’s statements in the *IP Closed Captioning Order* suggesting that this legislative history indicated Congress’s intent to authorize the Commission to adopt rules requiring closed captioning of IP-delivered video clips at some future time.⁴¹ After examining this issue in more detail, we believe the better reading of this language is that Congress intended that the statutory captioning requirements cover video clips, but gave the Commission discretion to defer the compliance deadline for video clips when the

³⁷ A similar definition of “video programming” appears in other provisions of the Communications Act of 1934, as amended (the “Act”). See, e.g., 47 U.S.C. § 522(20) (“‘video programming’ means programming provided by, or generally considered comparable to programming provided by, a television broadcast station”). We note the Commission has not construed that term in other contexts to exclude excerpts or clips from the definition. See, e.g., *Closed Captioning and Video Description of Video Programming*, Report and Order, 13 FCC Rcd 3272 (1997) (“1997 Closed Captioning Order”) (implementing the requirement of Section 713 of the Act that video programming be closed captioned on television); *Closed Captioning of Video Programming*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 2221 (2014) (“*Caption Quality Order*”) (adopting captioning quality standards and technical compliance rules for video programming).

³⁸ See 47 U.S.C. § 613(c)(2)(B). Of course, to the extent programming was provided by a television broadcast station, it falls into the category of programming “by . . . a television broadcast station.” See 47 U.S.C. § 613(h)(2) (defining video programming as “programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media”).

³⁹ See DiMA Comments at 3; see also NCTA Reply at 3. DiMA asserts that “a 2-minute clip from ‘The Late Show with David Letterman’ is not ‘comparable to’ a full-length television show any more than 2-pages from a compilation of the Communications Act is ‘comparable to’ the full text of the statute.” Letter from Gregory Alan Barnes, General Counsel, DiMA, to Marlene H. Dortch, Secretary, FCC, at 1 (Mar. 20, 2014) (“DiMA Mar. 20 *Ex Parte* Letter”). We disagree, and conclude instead that a portion of a program that was shown on television with captions is no less “comparable to programming provided by a television broadcast station” than the complete program itself. Contrary to DiMA’s interpretation, the CVAA is not limited to programming comparable to *full-length* programming provided by a television broadcast station. See also Reply Comments of the Association of Public Television Stations and the Public Broadcasting Service at 3 (“PTV Reply”) (arguing that the dictionary meaning of “programming” and “program” implies that “programs” subject to the CVAA’s IP closed captioning requirements are full-length shows and not video clips). We disagree with PTV’s approach because, as explained above, we find it consistent with the statutory text to conclude that “video programming” encompasses video clips.

⁴⁰ Senate Committee Report at 13-14; House Committee Report at 30.

⁴¹ *IP Closed Captioning Order*, 27 FCC Rcd at 817-18, ¶ 48. We are unpersuaded by Consumer Groups’ argument that the legislative history’s reference to “video clips” meant to refer to material that is exempt from the television closed captioning rules. Letter from Blake E. Reid, Counsel to Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), to Marlene H. Dortch, Secretary, FCC, at 2 (Mar. 28, 2014) (“Consumer Groups Mar. 28 *Ex Parte* Letter”). The television closed captioning rules exempt “[i]nterstitial material, promotional announcements, and public service announcements that are 10 minutes or less in duration.” 47 C.F.R. § 79.1(d)(6). Had Congress merely meant to carry over this exemption to IP-delivered programming, it would have cited that rule or used similar language. This exemption does not use the term “video clips.”

Commission set the schedule of compliance deadlines under Section 202.⁴² This interpretation is consistent with the statute, which gives the Commission considerable discretion in establishing “an appropriate schedule of deadlines for the provision of closed captioning” and directs the Commission to consider factors that may affect compliance.⁴³ If Congress had intended to exclude excerpts from the scope of Section 202, we would expect it to have expressly done so in the statute, as it did with respect to “consumer-generated media.”⁴⁴ Similarly, if Congress had intended to delay to some future date Commission authority to adopt rules for video clips, we would expect it to have included such a limitation in the statute.⁴⁵ For these reasons, we believe our reading of the legislative history on reconsideration is most consistent with the statutory language. As discussed below, we now set phased-in compliance deadlines for captioning of IP-delivered video clips that fall within the definition of video programming (“programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media (as defined in section 153 of this title)”⁴⁶

13. Commenters who argue that Congress did not intend the Commission to apply the IP closed captioning regulations to video clips ignore the statutory language.⁴⁷ For example, the Digital Media Association (“DiMA”) disagrees with the Commission’s interpretation of “at this time” in the legislative history, and asserts instead that the phrase actually means that video clips are not covered “under this statute.”⁴⁸ To the contrary, had Congress intended to carve out video clips from coverage of video programming, it could have said so clearly, rather than using the phrase “at this time,” which suggests merely a temporal meaning. If the reports had said that Congress “intends for the regulations to apply to full-length programming and not to video clips,” that would suggest that Congress understood video clips not to be covered by the statutory language. But the use of the phrase “at this time” suggests that the Commission’s regulations could require captioning in the future. That could only happen if video clips fall within the ambit of “video programming.” Further, applying the IP closed captioning requirements to video clips is consistent with both the text and stated purpose of the CVAA, which was “to help ensure that individuals with disabilities are able to fully utilize communications services and better access video programming.”⁴⁹ Requiring closed captioning of IP-delivered video clips will help ensure that individuals who are deaf or hard of hearing will have access to all covered video programming. And, as discussed above, the temporal reference in the legislative history is consistent with

⁴² See 47 U.S.C. § 613(c)(2)(B).

⁴³ *Id.*

⁴⁴ See *id.* § 613(h)(2).

⁴⁵ See, e.g., 47 U.S.C. § 613(f)(4)(C)(iv) (“Ten years after October 8, 2010, the Commission shall have the authority . . . to phase in the video description regulations for up to an additional 10 designated market areas each year”).

⁴⁶ 47 U.S.C. § 613(h)(2).

⁴⁷ See DiMA Comments at 2; Comments of DIRECTV, LLC at 1-2 (“DIRECTV Comments”); Comments of the National Association of Broadcasters at 13 (“NAB Comments”); Comments of the National Cable and Telecommunications Association at 7, n. 26 (“NCTA Comments”); NCTA Reply at 2-3; PTV Reply at 2-5.

⁴⁸ DiMA Comments at 4. According to DiMA, the reference to outtakes in the legislative history supports its interpretation because it argues outtakes are never shown on television, and thus it cannot be that Congress intended the Commission to reconsider covering outtakes at some point in the future. *Id.* at 5. Neither the statute nor the legislative history indicates what the Congressional reports mean by use of the term “outtakes.” For purposes of the IP captioning rules the Commission defined “outtakes” not covered by the rules as “[c]ontent that is not used in an edited version of video programming shown on television.” 47 C.F.R. § 79.4(a)(2), (13). Thus, outtakes that have never been shown on television need not be captioned when provided online. To the extent content that could be described in common parlance as “outtakes” does appear on television with captions, however, it must be captioned when provided online.

⁴⁹ Senate Committee Report at 1; House Committee Report at 19.

the text of the statute, which gives the Commission discretion to adopt an appropriate schedule of compliance deadlines taking into consideration factors that may warrant a longer compliance period.

14. Further, we conclude that it is procedurally appropriate for us to act on this issue now. We disagree with those commenters who suggest that the Consumer Groups Petition was procedurally defective under Section 1.429(b) of the Commission's rules.⁵⁰ Consumer Groups argued earlier in the proceeding that video clips (as the Commission has defined the term)⁵¹ should be subject to the IP closed captioning rules, and Consumer Groups requested reconsideration, arguing that the Commission wrongly decided the issue. We find that the Consumer Groups Petition does not rely entirely on arguments that the Commission already considered and rejected because it explicitly describes how the video clips exemption is denying consumers who are deaf or hard of hearing access to critical areas of programming, and it presents more up-to-date information than that available at the time the Commission released the *IP Closed Captioning Order*.⁵² In any event, even if the petition does rely on facts or arguments not previously presented to the Commission, grant of the petition still would be proper under our rules because of the clear public interest benefits of requiring closed captioning of IP-delivered video clips, as discussed below.⁵³ The Commission's rules provide that grant of a petition for reconsideration that "relies on facts or arguments which have not previously been presented to the Commission" is permissible if "[t]he Commission determines that consideration of the facts or arguments relied on is required in the public interest."⁵⁴ For these reasons, it is procedurally appropriate to consider the Consumer Groups Petition.

15. We do not believe that seeking further comment is necessary or appropriate before we can impose any closed captioning requirements on IP-delivered video clips. DiMA claims that the Commission should issue a notice of proposed rulemaking before imposing any closed captioning requirement on IP-delivered video clips, to provide interested parties with an opportunity to comment and

⁵⁰ The National Association of Broadcasters ("NAB") asserts that Consumer Groups' failure to raise the claim that the CVAA requires the Commission to cover video clips in the course of the proceeding violates Section 1.429(b)'s preclusion of granting "[a] petition for reconsideration which relies on facts or arguments which have not previously been presented to the Commission" except under certain circumstances. NAB Comments at 11, 14; 47 C.F.R. § 1.429(b). The Association of Public Television Stations and the Public Broadcasting Service ("PTV") asserts that the Consumer Groups Petition cites statistics that could have been offered earlier in the proceeding, and that the Commission already considered and rejected Consumer Groups' arguments that the IP closed captioning rules should apply to video clips. Opposition of the Association of Public Television Stations and the Public Broadcasting Service to the Consumer Groups Petition at 2, 6. Consumer Groups disagree with these procedural arguments. See, e.g., Consumer Groups, Reply Comments to the Oppositions of the Association of Public Television Stations and Public Broadcasting Service, the National Association of Broadcasters, and the National Cable & Telecommunications Association to the Petition for Reconsideration Regarding "Video Clips," at 2, 8 (filed June 18, 2012).

⁵¹ Consumer Groups did, however, previously support a narrow exclusion for video clips under 30 seconds in length that contain only promotional materials or advertising for full-length programming. See Comments of the Consumer Groups on the *NPRM* at 18-20.

⁵² Consumer Groups Petition at 12-17.

⁵³ See 47 C.F.R. § 1.429(b)(3); Comments of Consumer Groups at v ("Consumer Groups Comments") ("Our observations led us to three conclusions. First, the high rates of captioning we observed among some [video programming providers and distributors] suggest that it is technically feasible for [video programming providers and distributors] to caption all or nearly all of their news content. Second, the near-total lack of clip captioning from other [video programming providers and distributors] nevertheless indicates that a substantial proportion of IP-delivered content will not be captioned in the absence of rules requiring clips to be captioned. Third, the alarmingly high percentage of uncaptioned non-news clips that we observed demonstrates the need for the Commission's rules to apply to all content types.").

⁵⁴ See 47 C.F.R. § 1.429(b)(3).

to obtain feedback on specific proposed rules.⁵⁵ We find that a further notice of proposed rulemaking is neither procedurally necessary nor useful prior to imposing the requirements we adopt in this *Video Clips Order*. This proceeding has included a petition for reconsideration filed by Consumer Groups urging the Commission to require IP-delivered video clips to be captioned.⁵⁶ Following the filing of that petition, the Commission released an order on reconsideration deferring a final ruling on the video clips issue raised in the Consumer Groups Petition and directing the Media Bureau to seek updated information on this issue.⁵⁷ A public notice was published in the Federal Register seeking comment to further inform the Commission's consideration of the video clips issue and asking "whether, as a legal and/or policy matter, the Commission should require captioning of IP-delivered video clips."⁵⁸ Thus, adequate notice of the proposed rules has been provided and issuing a further notice of proposed rulemaking before imposing the closed captioning requirements for IP-delivered video clips adopted herein would be redundant.⁵⁹ Instead, we proceed to this *Video Clips Order* based on the ample record already compiled, including the additional comments filed recently in response to the public notice. In contrast, for those issues on which we do not have an adequate record for a decision, we seek further comment in the attached Further Notice of Proposed Rulemaking.

B. Impact of Requiring Closed Captioning of Internet Protocol-Delivered Video Clips

16. While we commend the industry for its voluntary efforts to caption IP-delivered video clips, we also recognize that many such video clips remain uncaptioned.⁶⁰ The record demonstrates that over the past few years, industry has been exhibiting an increasing volume of online video programming in the form of video clips, and these clips are increasingly captioned.⁶¹ Specifically, while Consumer Groups found in May 2013 that 23 percent of news clips and 10 percent of non-news clips were captioned,⁶² the more recent data that Consumer Groups submitted in February 2014 indicates that 57 percent of news clips and 18 percent of non-news clips are captioned.⁶³ Nonetheless, despite this increase

⁵⁵ DiMA Comments at 2, 8-9.

⁵⁶ See *Petitions for Reconsideration of Action in Rulemaking Proceeding*, MB Docket No. 11-154; Rpt No. 2951, 77 Fed. Reg. 30,485 (2012).

⁵⁷ *IP Closed Captioning Order on Recon*, 28 FCC Rcd at 8803-04, ¶ 30.

⁵⁸ *Video Clips PN*, 28 FCC Rcd 16699. The *Video Clips PN* was published in the proposed rules section of the Federal Register. In seeking comment on the video clips proposal, the *Video Clips PN* also referenced the Initial Regulatory Flexibility Analysis included in the *NPRM* in this proceeding, which identified small entities that might be affected. See *Media Bureau Seeks Comment on Application of the IP Closed Captioning Rules to Video Clips*, MB Docket No. 11-154; 78 Fed. Reg. 78,319 (2013). We received comments from both the industry and consumer groups in response to the *Video Clips PN*.

⁵⁹ See Reply Comments of Consumer Groups at 5-6 ("Consumer Groups Reply") (explaining that further delay is unjustified and the necessary record already exists).

⁶⁰ See Consumer Groups Comments at 9; Comments of Public Citizen at 2 ("Public Citizen Comments"); Comments of Ron Bibler ("Bibler Comments"); Comments of Sherri Kramp ("Kramp Comments"); Consumer Groups Reply at 9.

⁶¹ See NAB Comments at 8-9; NCTA Comments at 2, 4-5, 8; NCTA Reply at 3-4; Letter from Justin L. Faulb, Assistant General Counsel, Legal and Regulatory Affairs, NAB, to Marlene H. Dortch, Secretary, FCC, at 1 (Mar. 24, 2014) ("NAB Mar. 24 *Ex Parte* Letter"); Letter from Diane B. Burstein, Vice President and Deputy General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, at 1 (Mar. 24, 2014); NCTA Apr. 25 *Ex Parte* Letter at 1.

⁶² Consumer Groups Comments at 2.

⁶³ *Id.* at v. We acknowledge that some errors in the Consumer Groups study detract from Consumer Groups' claims, such as the study's inclusion of some clips of programming that were not shown on television in this country with captions, its failure to consider that some closed captioning problems experienced may have resulted from the use of apparatus that were not yet required to comply with the Commission's rules governing the accessibility of video apparatus (see 47 C.F.R. § 79.103), and its failure to properly categorize certain material as "clips" that were not

(continued....)

in captioning of IP-delivered video clips, many consumers are denied access to the large volume of clips that remain uncaptioned. A Commission requirement for captioning IP-delivered video clips will ensure that the content, including critical news programming, will be accessible to individuals who are deaf or hard of hearing, thus significantly benefiting consumers and serving the stated public interest goal of the CVAA.⁶⁴ Such a requirement is particularly important because, as stated above, more and more consumers are receiving news, sports, and entertainment programming in the form of online video clips.⁶⁵ Consumer Groups explain that a Commission requirement is necessary because, although some video programming providers and distributors “have greatly increased their use of captions for video clips, many others captioned few or none of their clips.”⁶⁶ The record demonstrates that because of the large volume of IP-delivered video programming that is posted online as video clips, much of which is not captioned, consumers who are deaf or hard of hearing are being denied access to critical areas of programming, such as news, contrary to the intent of the CVAA.⁶⁷

17. Contrary to the suggestions of some commenters,⁶⁸ accessing captioned full-length programming online or reading an article about the topic covered in an uncaptioned video clip is not a full substitute for viewing a captioned video clip.⁶⁹ If such suggestions were true, the Internet would not contain the large volume of video clips that it does because access to such alternatives would adequately serve viewers who are not deaf or hard of hearing. Public Citizen states that the lack of closed captioning on IP-delivered video clips “disadvantages and marginalizes deaf and hard of hearing people.”⁷⁰ We agree that the very fact that programmers make video clips available when the full-length program is also

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required to be captioned as opposed to “segments” for which captioning was required. *See* Reply Comments of the National Association of Broadcasters at 6-8 (“NAB Reply”); NCTA Reply at 5. *See also* NAB Comments at 15-16. Notwithstanding these shortcomings, the remaining data provided by the Consumer Groups confirms that a significant number of IP-delivered video clips today are not captioned. *See also* Consumer Groups Mar. 28 *Ex Parte* Letter at 3-4 (“Unfortunately, several of our industry colleagues made the disappointing decision to prioritize attacking our credibility and nitpicking our findings over providing their own data [P]rogrammers are in a far better position than consumers to identify the extent to which they have engaged in systematic efforts to voluntarily caption clips.”) (footnotes omitted).

⁶⁴ *See supra* ¶ 13; *see also* Bibler Comments; Kramp Comments; Public Citizen Comments at 2; Comments of the Regional Center for Independent Living (“RCIL Comments”).

⁶⁵ *See supra* ¶ 1.

⁶⁶ Consumer Groups Comments at 17.

⁶⁷ *See* Consumer Groups Mar. 28 *Ex Parte* Letter at 2. An additional benefit of requiring closed captioning of IP-delivered video clips relates to the Commission’s current distinction between video clips and segments. Specifically, while the *IP Closed Captioning Order* exempted video clips from the IP closed captioning requirements, it required that IP-delivered video programming be captioned when the full-length video program is posted online in multiple segments. *See IP Closed Captioning Order*, 28 FCC Rcd at 817, ¶ 45. Today’s decision to require closed captioning of IP-delivered video clips and not just segments will eliminate confusion for consumers looking for captioning and for industry seeking to comply with our requirements, since there will be no need to determine whether a particular piece of short-form content is a video clip or a segment.

⁶⁸ *See* NAB Comments at 5; NCTA Comments at 3 and n. 8; NAB Reply at 4-5; NCTA Reply at 8; PTV Reply at 3, 6-7; Letter from Lonna Thompson, Executive Vice President, Chief Operating Officer, and General Counsel, Association of Public Television Stations, and Thomas Rosen, Senior Counsel, Public Broadcasting Service, to Marlene H. Dortch, Secretary, FCC, at 2 (June 26, 2014) (“APTS/PBS June 26 *Ex Parte* Letter”).

⁶⁹ *See, e.g.*, Letter from Blake E. Reid, Counsel to TDI, to Marlene H. Dortch, Secretary, FCC, at 1-2 (June 27, 2014) (“Consumer Groups June 27 *Ex Parte* Letter”) (“It should not be incumbent on viewers who are deaf or hard of hearing seeking to view a clip to scour the Internet for the corresponding full-length program – which may only be available via a paid service to which the viewer does not subscribe – and scrub through the program to find the content from the clip.”).

⁷⁰ Public Citizen Comments at 2.

available online demonstrates the intrinsic value of these clips. For these reasons, we believe that interpreting Section 202 to cover video clips is necessary to fully effectuate the statutory purpose and that it is appropriate to require compliance with the statute under the schedule we adopt in this order.

18. As explained above, we interpret the statute as requiring closed captioning of IP-delivered video clips and we find that there are obvious public interest benefits of imposing such a requirement. Industry commenters assert, however, that they will face some financial and technical challenges in complying with such a requirement. One of the biggest challenges, they claim, is ensuring that the captions are properly synchronized.⁷¹ Synchronization is of particular concern because if captions lag behind the audio, which often occurs during live programming, part of the applicable captions may be missing when a clip is excerpted from the programming.⁷² As a result, some industry commenters indicate that they must re-author the caption file for video clips.⁷³ Some industry commenters assert that captioning online clips is time-consuming, labor-intensive, and costly,⁷⁴ particularly given the enormous volume of IP-delivered video clips.⁷⁵ While future technological developments will likely automate the process, they report that the development of this technology remains ongoing.⁷⁶ Industry commenters also caution that a requirement to caption video clips might cause some entities to cease posting video clips online.⁷⁷ Contrary to the industry's claims about the time-consuming nature of captioning video clips, however, one captioning company, VITAC, indicates that it captions over 50 short-form videos (30-

⁷¹ See DiMA Comments at 6-7; NAB Comments at 6 (explaining that an individual would need to review the video file and add metadata, such as time stamps and markings showing the beginning and end of each clip). See also *infra* Section III.C.5.

⁷² See DiMA Mar. 20 *Ex Parte* Letter at 2; DIRECTV Comments at 2.

⁷³ See DIRECTV Comments at 2; NCTA Comments at 5-6; Reply Comments of U.S. Captioning Company at 2 (“U.S. Captioning Company Reply”); NCTA Apr. 25 *Ex Parte* Letter at 1.

⁷⁴ See DiMA Comments at 5-6; DIRECTV Comments at 2; NAB Comments at 3 and 4-5, n. 7; NCTA Reply at 6. According to NAB, for every two minutes of short-form IP content, it takes more than 15 minutes of manual labor to reformat and encode the closed captions. NAB Comments at 4-5, n. 7. Similarly, DiMA states that “[t]he time and cost of enabling captions is not substantially less for a 2-minute clip than for a 2-hour full-length movie.” DiMA Mar. 20 *Ex Parte* Letter at 2.

⁷⁵ See DiMA Comments at 7; Letter from Gerald J. Waldron and Daniel Kahn, Counsel for Hulu, LLC, to Marlene Dortch, Secretary, FCC, at 1 (Apr. 1, 2014) (“Hulu Apr. 1 *Ex Parte* Letter”); NCTA Apr. 25 *Ex Parte* Letter at 1.

⁷⁶ See NAB Comments at 10; NCTA Comments at 8; RCIL Comments; NCTA Apr. 25 *Ex Parte* Letter at 1-2; Letter from Diane B. Burstein, Vice President and Deputy General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, at 1 (May 28, 2014). See also U.S. Captioning Company Reply at 2. *But see* Letter from Giovanni Galvez, Technical Developer, to Marlene H. Dortch, Secretary, FCC, at 1-2 (Apr. 2, 2014) (“Galvez Apr. 2 *Ex Parte* Letter”) (detailing existing software solutions); Letter from Heather York, Vice President, Marketing, VITAC, to Marlene Dortch, Secretary, FCC, at 3 (Apr. 3, 2014) (“Captioning Companies Apr. 3 *Ex Parte* Letter”) (explaining that there are existing, albeit often expensive, software solutions); Letter from Blake E. Reid, Counsel to TDI, to Marlene H. Dortch, Secretary, FCC, at 2 (June 5, 2014) (“Consumer Groups June 5 *Ex Parte* Letter”) (“the record in this proceeding . . . is replete with evidence that repurposing captions, including for clips of all types, is possible using existing technology”).

⁷⁷ See NAB Comments at 10; NCTA Comments at 8; NCTA Reply at 7. See also Hulu Apr. 1 *Ex Parte* Letter at 1-2 (“Although clips greatly outnumber full-length episodes, clips account for only a small fraction of total views Hulu expressed the concern that many content owners may decide that the costs of compliance outweigh their revenues from clips and consequently would pull or hold back some or all of their clips from Hulu.”). Similarly, one commenter asserts that small broadcasters that currently voluntarily caption certain televised programming might cease doing so, to avoid triggering a requirement for captioning of online clips of that programming. See PTV Reply at 2, 5-6.

60 seconds each) per day for one client, and that captioners create the captions for each of these videos within 15-20 minutes of receiving them.⁷⁸

19. Based on the record before us, we find that compliance with a captioning requirement for IP-delivered video clips will not be overly burdensome.⁷⁹ This is particularly true given the reasonable timeframes we are providing for entities to come into compliance,⁸⁰ as well as the grace period within which captions may be added to video clips of live and near-live programming.⁸¹ Further, consistent with the text of the CVAA, the scope of the IP closed captioning requirements is limited to video programming “that was published or exhibited on television with captions,”⁸² such that online captions only will be required for content that already has been televised with captions. The fact that some video programming distributors already caption a portion of their video clips demonstrates that the necessary technology exists and that captioning video clips is economically feasible.⁸³ We expect that the lengthy compliance deadlines of January 1, 2016 for straight lift clips and January 1, 2017 for montages will alleviate the asserted difficulties with captioning IP-delivered video clips, particularly given information provided on the record by captioners and others indicating that solutions already exist to facilitate captioning of IP-delivered video clips.⁸⁴

C. Closed Captioning Requirements for Internet Protocol-Delivered Video Clips

1. Covered Video Clips

20. The CVAA directs the Commission to require closed captioning of IP-delivered video programming when the programming “was published or exhibited on television with captions after the effective date of [the] regulations.”⁸⁵ Accordingly, while the closed captioning requirements for IP-delivered video clips will apply to clips of video programming that was shown on television with captions, they will not apply to clips of video programming that was not shown on television with captions.⁸⁶ To the extent that a video clip posted online contains an audio track that is substantially different from that aired on television, we will not consider the video clip to have been shown on television with captions and thus captions will not be required online.⁸⁷ For example, we understand that sometimes a video clip from a sporting event is later posted online with different audio than the audio that accompanied the same video on television.⁸⁸ The online version of the video clip with different audio would not be covered by the CVAA because the video programming at issue was not shown on television

⁷⁸ See Captioning Companies Apr. 3 *Ex Parte* Letter at 2.

⁷⁹ See *supra* ¶¶ 16, 18 (detailing industry effort to increase volume of captioned clips despite cost and technical adjustments).

⁸⁰ See *infra* Section III.C.2.

⁸¹ See *infra* Section III.C.3.

⁸² 47 U.S.C. § 613(c)(2)(A).

⁸³ See Consumer Groups Comments at v.

⁸⁴ See Captioning Companies Apr. 3 *Ex Parte* Letter at 1-2; Galvez Apr. 2 *Ex Parte* Letter at 1-2.

⁸⁵ 47 U.S.C. § 613(c)(2)(A).

⁸⁶ See NCTA Comments at 7, n. 26; DiMA Mar. 20 *Ex Parte* Letter at 2. We clarify, however, that the addition of a brief introduction or advertisement to an otherwise covered video clip will not exempt the clip from the IP closed captioning rules.

⁸⁷ See NCTA Apr. 25 *Ex Parte* Letter at 2 (stating that the IP closed captioning rules would not apply to “clips including video that may have been shown on TV with captions, but with a new or different audio track online”).

⁸⁸ See, e.g., Letter from Susan L. Fox, Vice President, Government Relations, The Walt Disney Company, to Marlene H. Dortch, Secretary, FCC, at 2 (June 18, 2014) (“Disney June 18 *Ex Parte* Letter”).

with captions; rather, where the audio is substantially different, the televised captions would not correspond to the audio that accompanies the online clip.

21. We interpret the CVAA to require closed captioning of IP-delivered video clips regardless of the content or length of the clip.⁸⁹ Some commenters have argued that we should apply the closed captioning requirements only to clips with certain content⁹⁰ or only to clips above a certain length.⁹¹ We disagree. Rather, we find that it was Congress's intent in enacting the CVAA to ensure that consumers who are deaf or hard of hearing have access to video programming that is shown on television with captions, including video programming posted online as video clips, regardless of whether the video clips contain news, sports, entertainment, or any other type of content. A finding to the contrary is not supported by the CVAA's overarching goal to provide full programming access to individuals who are deaf or hard of hearing.⁹² Similarly, we do not limit the applicability of the closed captioning requirements only to clips of a certain length. We find no basis on which to distinguish between clips that last 10 seconds and those that last 10 minutes. By deciding to make a clip available via the Internet, a video programming distributor or provider has made a decision that it has value for the general public, and the CVAA requires that when the same programming was shown on television with captions, the clip must also be made accessible online to consumers who are deaf or hard of hearing. This comprehensive approach will be more administratively efficient for industry because companies will not need to determine whether clips contain certain content or are of a certain minimum length.

22. At the present time, the closed captioning requirements for IP-delivered video clips will apply if the video programming provider or distributor (as those terms are defined in the IP closed captioning rules)⁹³ posts on its website or app a video clip of video programming that it published or exhibited on television in the United States with captions on or after the applicable compliance deadline. NAB and the National Cable and Telecommunications Association ("NCTA") propose that the requirements for closed captioning IP-delivered video clips only apply to a person or entity that (a) exhibits the television program with captions on its linear channel or network; (b) has the rights to exhibit a clip of that program with captions via IP; and (c) makes the clip available via a website or app operated

⁸⁹ Except as otherwise provided herein, as with IP closed captioning of full-length video programming, once the captioning requirement is triggered we will expect captions to be available immediately for IP-delivered video clips. *See infra* ¶ 28.

⁹⁰ *See, e.g.*, DiMA Comments at 2, 11-12 (arguing that the captioning requirement should only apply to news programs because the public interest in captioning non-news video clips is not as strong as the public interest in captioning news video clips); DIRECTV Comments at 2, 4 (arguing that we should not require captioning for IP-delivered video clips of live sporting events, since fans are more interested in viewing the plays than the commentary and since live sporting event coverage currently "includes an increasingly rich set of on-screen graphics that already provide the most salient information to viewers in a non-audio format").

⁹¹ *See, e.g.*, DiMA Comments at 2, 9-10 (arguing that the Commission should only apply the captioning requirements to IP-delivered video clips that are more than five minutes long); Hulu Apr. 1 *Ex Parte* Letter at 3 (agreeing with DiMA's proposal); Letter from Diane B. Burstein, Vice President and Deputy General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, at 3-4 (June 3, 2014) ("NCTA June 3 *Ex Parte* Letter") (arguing that the Commission should only apply the captioning requirements to IP-delivered video clips that are longer than 15 seconds); Letter from Ann West Bobeck, Senior VP and Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, at 2 (June 9, 2014) ("NAB June 9 *Ex Parte* Letter") (same). *But see* Consumer Groups Reply at 10 (explaining that the Commission should reject DiMA's proposal); RCIL Comments (asserting that all video clips should be captioned, regardless of length).

⁹² *See* Senate Committee Report at 1; House Committee Report at 19. Consumer Groups have stated that "it would be absurd and arbitrary to conclude that the civil rights of viewers who are deaf or hard of hearing are confined to the newsroom and do not extend to the critical cultural, informational, and economic opportunities that stem from non-news programming." Consumer Groups Reply at 10 (footnote omitted).

⁹³ *See supra* n. 7 (defining video programming distributor or provider).

solely by the person or entity.⁹⁴ NAB and NCTA are concerned that a broader application of the IP closed captioning rules to video clips may hold entities responsible for issues that they do not control.⁹⁵ In recognition of these concerns, we will limit the current application of the rules as described above. For example, if XYZ Network posts a video clip on a website or app that it operates, and the video clip is from programming that appeared on XYZ Network with captions after the compliance date, then the IP closed captioning requirements would apply. If, however, XYZ Network posts the video clip on a third party website, then the IP closed captioning requirements would not apply. We defer application of the IP closed captioning rules with respect to the provision of video clips by third party video programming providers and distributors, such as Hulu, or other services that may embed or host video programming, such as news websites, pending action on the *Further Notice*.

2. Compliance Deadline

23. At the outset, we clarify that there are several types of video clips at issue. First, the industry uses the term “straight lift” clips to reference a single excerpt of a captioned television program with the same video and audio that was presented on television.⁹⁶ Such video clips will be subject to the January 1, 2016 deadline discussed below. Second, the industry uses the term “montage” to reference a single file⁹⁷ that contains multiple straight lift clips, and as explained below, the industry has persuasively argued that compliance may be more difficult with regard to such clips. Accordingly, montages will be subject to an extended deadline of January 1, 2017. Third, the industry uses the term “mash-up” to reference a single file that contains a compilation of one or more video clips that have been shown on television with captions and additional content that has not been shown on television with captions. For the reasons discussed below, we seek further comment on the proper treatment of this category of video clips in the attached *Further Notice*. With respect to closed captioning of IP-delivered video clips of video programming shown live or near-live on television, we require captions beginning July 1, 2017. At the same time, due to the time-sensitive nature of the posting of a live or near-live video clip we grant a grace period that requires that captions be added to clips of live programming within 12 hours and to clips of near-live programming within eight hours after the associated video programming is published or exhibited on television in the United States with captions. As discussed below, the later deadlines for montages and video clips taken from associated live and near-live television programming provide additional time because of the challenges associated with captioning these types of clips, and to allow for the development of technological advances that will facilitate a streamlined process for posting these clips

⁹⁴ Letter from Diane B. Burstein and Ann West Bobeck to Marlene H. Dortch, Secretary, FCC, at 1-2 (June 13, 2014) (“NCTA/NAB June 13 *Ex Parte* Letter”). See also Letter from Gerald J. Waldron and Daniel Kahn, Counsel for Microsoft Corp., to Marlene Dortch, Secretary, FCC, at 2 (June 25, 2014) (“Microsoft June 25 *Ex Parte* Letter”) (supporting NCTA and NAB’s proposal that the Commission not regulate video clips on third party websites and applications). NAB and NCTA have not explained the meaning or relevance of some terms in their proposal. Specifically, we are unclear what they mean by “linear” channel or network and by “rights to exhibit.” Accordingly, we believe our formulation stated above better captures the universe of covered entities.

⁹⁵ See, e.g., NCTA June 3 *Ex Parte* Letter at 3 (requesting that any IP closed captioning rules for video clips only apply to video clips that a video programming owner shows on television and then posts online, and “that are available on the [video programming owner’s] website or made available through the [video programming owner’s] applications”); NAB June 9 *Ex Parte* Letter at 2 (supporting NCTA’s proposal); NCTA/NAB June 13 *Ex Parte* Letter at 2 (“broadcast [and] nonbroadcast program networks and television licensees should only be responsible in situations where they have control over both the airing of the captioned television program and the posting of the clip online”); Letter from Ann West Bobeck, Senior VP and Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, at 2 (June 13, 2014) (“NAB June 13 *Ex Parte* Letter”) (“licensees or programmers cannot be held responsible for compliance for online captioning obligations (including captioning quality) for clips that are not within their immediate control”).

⁹⁶ See, e.g., NCTA June 3 *Ex Parte* Letter at 2.

⁹⁷ See *supra* n. 29 (distinguishing between montages and straight lift clips).

with captions online.⁹⁸ If we receive a petition seeking to extend these deadlines and find that technology has not progressed as expected with respect to posting these clips online, we will act promptly on the petition and extend the compliance deadlines if the petition demonstrates that technology is not available to achieve compliance.

24. As stated above, we will require compliance with the new requirements for closed captioning of IP-delivered video clips by January 1, 2016 for “straight lift” video clips. We define “straight lift” video clips as those that contain a single excerpt of a captioned television program with the same video and audio that was presented on television. As of that date, IP-delivered video clips must be provided with closed captions if the associated video programming is published or exhibited on television in the United States with captions on or after January 1, 2016. Consumer Groups and captioning companies support a one-year deadline.⁹⁹ In contrast, some members of the industry have requested a two-year phase-in because of the volume of video clips and the difficulty in captioning them,¹⁰⁰ while others have supported a deadline of 18 months after adoption of the rules.¹⁰¹ Members of the industry have cautioned that they may have compliance difficulties if faced with a requirement for captioning IP-delivered video clips at this juncture, when they are still working to implement the IP closed captioning requirements for full-length video programming.¹⁰² Balancing consumers’ desire for prompt access to this content and the industry’s claims about the difficulty with compliance, we adopt a deadline of January 1, 2016 for closed captioning of IP-delivered “straight lift” video clips. The first compliance deadline for closed captioning of full-length IP-delivered video programming was six months after the date the *IP Closed Captioning Order* was published in the Federal Register, as supported by the Video Programming Accessibility Advisory Committee (“VPAAC”), which consisted of representatives from both the industry and from consumer groups.¹⁰³ Given that in general the same requirements that apply to captioning a full-length IP-delivered video program will apply to captioning an IP-delivered video clip,¹⁰⁴ and that the industry has now had nearly two years of experience with captioning programming online, we find that the January 1, 2016 deadline will be sufficient for the industry to achieve compliance. During this time, we encourage the industry to work toward automating closed captioning of IP-delivered

⁹⁸ See *infra* ¶ 25 and Section III.C.3.

⁹⁹ Consumer Groups Reply at 11; Captioning Companies Apr. 3 *Ex Parte* Letter at 4.

¹⁰⁰ See, e.g., DiMA Comments at 2, 13; NCTA June 3 *Ex Parte* Letter at 4 (requesting a two-year deadline for the easier situation in which a single video clip is at issue and includes embedded or time-coded captions, and a three-year deadline for the harder situation in which a single video clip is at issue and does not include time-coded captions); NAB June 9 *Ex Parte* Letter at 3 (supporting NCTA’s proposal). See also Hulu Apr. 1 *Ex Parte* Letter at 2 (recommending a two year period, but “[i]f a faster pace is deemed necessary,” suggesting “a percentage-based phase-in, in which 50% of covered clips must be captioned after one year and all covered clips must be captioned after two years”). In the absence of record information on the NCTA proposal, including for example the volume of clips that do not include time-coded captions (that is, captions which directly reference the pieces of video they describe), the difficulties with captioning clips that do not include time-coded captions, and why solutions to such difficulties cannot be implemented prior to the compliance deadline, we decline to adopt a distinction between video clips that include embedded or time-coded captions and those that do not.

¹⁰¹ See APTS/PBS June 26 *Ex Parte* Letter at 1-2.

¹⁰² See DiMA Comments at 2, 5-7; NCTA Comments at 8. The IP closed captioning requirements for full-length programming that is in the video programming distributor’s or provider’s library before it is shown on television with captions were not triggered until after the release of the *Video Clips PN*. See 47 C.F.R. § 79.4(b)(4). The Commission’s rules contain decreasing timeframes within which captions must be added to such content, with the final timeframe applicable to content that is shown on television with captions on or after March 30, 2016. See *id.*

¹⁰³ *IP Closed Captioning Order*, 27 FCC Rcd at 819, ¶ 51. See also Captioning Companies Apr. 3 *Ex Parte* Letter at 2 (“captioning clips is very much like any other caption job”).

¹⁰⁴ See *infra* Section III.C.5.

video clips and to eliminate problems associated with distorting closed caption files that may occur when video clips are created, thus reducing the labor and costs involved.¹⁰⁵

25. We find that an extended compliance deadline of January 1, 2017 is justified for “montages.” We define a montage as programming contained in a single file that includes multiple straight lift clips.¹⁰⁶ That is, a montage is a single online file containing multiple video clips “taken from different parts of a captioned full-length TV program or from different captioned TV programs.”¹⁰⁷ The record demonstrates that an extended compliance deadline is needed for such programming because industry is concerned that technology does not currently exist to use the same caption files that were used on television.¹⁰⁸ The record supports our expectation that by January 1, 2017, technology will be better able to automate this process, enabling the industry to modify the televised captions associated with each video clip, rather than re-authoring captions where a single file contains multiple straight lift clips.¹⁰⁹ Accordingly, closed captions will be required where a single IP-delivered file contains multiple straight lift clips beginning January 1, 2017, if the associated video programming is published or exhibited on television in the United States with captions on or after January 1, 2017. We expect that the industry will not use this extended compliance deadline to delay compliance with the closed captioning requirements, for example, by creating a single file that contains two video clips that otherwise would have been posted separately with captions and then claiming that it is subject to the later January 1, 2017 compliance deadline.

26. We find the addition of a brief introduction or advertisement to an otherwise covered video clip will not exempt the clip from the IP closed captioning rules, regardless of whether the video clip is a straight clip or a montage.¹¹⁰ At the same time, we understand that often, a single file may contain a compilation of one or more video clips that have been shown on television with captions, interspersed with additional content that has not been shown on television with captions. The industry refers to such program files as “mash-ups.”¹¹¹ We seek comment on the application of the CVAA to mash-ups in the *Further Notice*.

27. Commenters have expressed concerns about captioning IP-delivered video clips that serve a promotional purpose, but these concerns are largely focused on promotional clips that are posted online before the programming is shown on television, an issue that will be explored in the *Further*

¹⁰⁵ See NAB Mar. 24 *Ex Parte* Letter at 2 (“[T]he majority of local stations would need regulatory relief until an automated captioning video clip solution comes to market If the Commission acts . . . it should refrain from requiring compliance until a technical solution exists that creates captions at an acceptable quality.”). *But see* Consumer Groups Mar. 28 *Ex Parte* Letter at 7 (noting the continued availability of an economic burden exemption under the CVAA and the Commission’s rules).

¹⁰⁶ These multiple straight lift clips may be sequential (*i.e.*, in the same order in which they appeared on television) or non-sequential (*i.e.*, in a different order than the order in which they appeared on television).

¹⁰⁷ NCTA Apr. 25 *Ex Parte* Letter at 2.

¹⁰⁸ *Id.*; NCTA June 3 *Ex Parte* Letter at 2-3; Consumer Groups June 5 *Ex Parte* Letter at 3 (“[I]f programmers are able to demonstrate that captioning montages requires additional workflow modifications above and beyond ‘straight clips,’ we would not oppose a slightly longer phase-in period to accommodate.”).

¹⁰⁹ See, *e.g.*, NAB Comments at i, 10; NCTA Comments at 8. If industry finds that sufficient automation does not exist by the deadline, it may file a request to extend the deadline.

¹¹⁰ Of course, a brief introduction that was not captioned on television would not be required to be captioned when accompanying an IP-delivered video clip. Only the portion of the video clip that was televised with captions would need to be captioned online.

¹¹¹ See, *e.g.*, NCTA June 3 *Ex Parte* Letter at 3 (“ensuring that ‘mash-ups’ containing original content are captioned online would require [video programming owners] to recaption content from scratch – a costly and time-consuming process”); NCTA Apr. 25 *Ex Parte* Letter at 2 (discussing “short-form video content produced for online that may combine TV content and original content never aired on TV”).

Notice.¹¹² A non-advance promotional video clip may be a single “straight-lift” excerpt of captioned televised content, in which case we see no reason that the January 1, 2016 deadline discussed above should not apply. Once the IP closed captioning requirements are triggered by the content being shown on television with captions, the CVAA does not differentiate between clips of promotional material and other types of clips, but rather, broadly requires video programming that has been shown on television with captions to be made accessible to those consumers who are deaf or hard of hearing. We see nothing in the CVAA or its legislative history that suggests Congress intended to exclude from coverage video clips that are promotional in nature. For the same reasons, a non-advance promotional video clip that contains multiple straight lift clips of video programming that has been shown on television with captions, and thus is a montage, will be subject to the January 1, 2017 deadline discussed above.

3. Video Clips of Live and Near-Live Programming

28. In general, as with IP closed captioning of full-length video programming, once the captioning requirement is triggered we will expect captions to be available immediately for IP-delivered video clips.¹¹³ In other words, at the time of being posted online, covered video clips must be closed captioned. While Hulu has indicated that a “grace period” may be necessary in some instances if technical, editorial, or administrative issues arise,¹¹⁴ we expect industry to work prior to the compliance deadline to develop processes that will enable them to make captions available for IP-delivered video clips without any delay once the video programming has been shown on television with captions. The record does not support a contrary approach, with an exception for video clips of live or near-live programming.

29. We find that there are unique concerns with IP-delivered video clips of live and near-live programming given its time sensitivity.¹¹⁵ If distributors were prohibited from posting video clips of live

¹¹² See, e.g., Letter from Anne Lucey, Senior Vice President for Regulatory Policy, CBS Corporation, to Marlene Dortch, Secretary, FCC, at 2-3 (May 22, 2014) (“CBS May 22 *Ex Parte* Letter”) (discussing the “severe burden that would be created if the numerous preview or promotional clips that are posted online to create consumer interest in upcoming broadcast programs were required to be captioned once the programming was broadcast with captions,” and explaining that “[t]o track down and caption such ‘advance clips’ would be a costly and inefficient use of resources [I]t would also create an anomalous situation in which the very same promotion drawn from material contained in the program that is to be broadcast would not have to be captioned on television, but would have to be captioned online, and only after the greatest part of its promotional value had ended.”); Letter from Diane B. Burstein, Vice President and Deputy General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, at 2, n. 3 (June 18, 2014) (“NCTA June 18 *Ex Parte* Letter”) (“Programmers should not be required to caption the same promotional material from scratch if it remains online after the full program aired on television with captions.”); Microsoft June 25 *Ex Parte* Letter at 1 (“promotional ‘trailers’ have a short shelf life and limited economic value and are of less utility to consumers”). We note that at this time, any difficulty with tracking down video clips will be minimized by the fact that application of the requirement to caption advance clips is under consideration in the *Further Notice*, and because the requirement currently only applies where the video programming provider or distributor posts on its website or app a video clip of video programming that it published or exhibited on television. See *supra* Section III.C.1, *infra* Section III.C.4.

¹¹³ See Consumer Groups Mar. 28 *Ex Parte* Letter at 6.

¹¹⁴ See Hulu Apr. 1 *Ex Parte* Letter at 2-3.

¹¹⁵ See, e.g., Letter from Diane B. Burstein, Vice President and Deputy General Counsel, NCTA, and Ann West Bobeck, Senior Vice President and Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, at 1 (June 23, 2014) (“NCTA/NAB June 23 *Ex Parte* Letter”) (“Currently, uncaptioned clips of live programming may be posted at or around the same time the program airs on television with captions. If the FCC were to require the captioning of such clips, a video programmer would have to take several time-consuming steps, including either recaptioning the clip from scratch or repurposing existing captions where possible and reposting another version of the clip with captions (or removing the clip from the web altogether). Few programmers have the resources to create captioned time-sensitive clips in-house, and vendors have not had experience handling the volume of time-sensitive clips that would have to be recaptioned if a mandate were to be adopted.”); *id.* (cautioning that the Commission must adopt a reasonable grace period and a sufficiently long compliance deadline to ensure that the

(continued....)

and near-live programming¹¹⁶ online until captions are available, then all consumers would be denied access to potentially time-sensitive information during that time. A grace period would provide distributors with flexibility to post time-sensitive clips online without delay. CBS requests a “grace period of several hours” before we require video clips of live or near-live programming to be captioned online, explaining that otherwise entities other than the authorized video programming providers and distributors may be the first to distribute the content online.¹¹⁷ CBS explains that “[t]his is not important simply to help build a programmer’s solid ‘first-to-the-news’ reputation, but it is also important from an accessibility perspective. If a clip goes viral and generates a large number of views over time, it is important that it be a version controlled by the station, which can augment the clip with online captions once they are generated.”¹¹⁸ In contrast, NAB and NCTA acknowledge the feasibility of a 12-hour grace period,¹¹⁹ while DIRECTV requests a 24-hour grace period.¹²⁰ Further, DiMA indicates that it is more difficult to caption video clips of live programming than to caption video clips of prerecorded programming.¹²¹

30. Given the above difficulties associated with captioning video clips of live and near-live programming, we will not require compliance for this category of video clips until July 1, 2017.¹²² Additionally, for the present time, we will permit closed captions to be provided on IP-delivered video clips of live programming up to 12 hours after the associated video programming is published or exhibited on television in the United States with captions, and we will permit closed captions to be provided on IP-delivered video clips of near-live programming up to eight hours after the associated

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“rules do not act as a deterrent to programmers posting time-sensitive material online”). *But see* Letter from Blake E. Reid, Counsel to TDI, to Marlene H. Dortch, Secretary, FCC, at 2 (July 1, 2014) (“Consumer Groups July 1 *Ex Parte* Letter”) (“[I]t is possible, using existing software, to extract captions from any type of full-length programming, including live programming, for inclusion with video clips.”) (footnote omitted).

¹¹⁶ “Live programming” is “[v]ideo programming that is shown on television substantially simultaneously with its performance.” 47 C.F.R. § 79.4(a)(7). “Near-live programming” is “[v]ideo programming that is performed and recorded less than 24 hours prior to the time it was first aired on television.” 47 C.F.R. § 79.4(a)(8).

¹¹⁷ CBS May 22 *Ex Parte* Letter at 2.

¹¹⁸ CBS May 22 *Ex Parte* Letter at 2.

¹¹⁹ *See* NCTA/NAB June 23 *Ex Parte* Letter at 2 (“if the Commission were to adopt an aggressive turn-around time – 12 hours – for posting captioned clips, many programmers that post time-sensitive clips would likely be able to post a captioned version if sufficient implementation lead time were provided (by year end 2017).”); Letter from Justin Faulb, Assistant General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, at 2 (June 27, 2014) (“NAB June 27 *Ex Parte* Letter”) (“If the Commission decides to adopt a shorter timeframe 12 business hours would be an aggressive, but potentially reasonable timeframe if the FCC provides sufficient lead time for the effective date of any requirement (i.e., mid 2017).”).

¹²⁰ *See* Letter from William M. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC, at 1 (Apr. 14, 2014) (“DIRECTV Apr. 14 *Ex Parte* Letter”).

¹²¹ *See* DiMA Mar. 20 *Ex Parte* Letter at 2 (indicating that to caption video clips of live programming, video programming owners, providers, and distributors “would need to expend significant effort that is not necessary for full-length programs to provide an acceptable user experience”).

¹²² Consumer Groups argue that we should consider a more limited category of video clips than clips of live and “near live” programming, and “that the industry should bear the onus of articulating a workable definition that encompasses only *truly* time-sensitive’ clips . . .” Letter from Blake E. Reid, Counsel to TDI, to Marlene H. Dortch, Secretary, FCC, at 1 (June 24, 2014) (“Consumer Groups June 24 *Ex Parte* Letter”) (emphasis in original); *see also* Consumer Groups June 27 *Ex Parte* Letter at 2. We disagree, and find instead that industry’s concerns about captioning this category of video clips apply broadly to video clips of live and near-live programming. Additionally, attempting to define this category based on video clips with content that has the potential to “go viral,” as Consumer Groups suggest, would be inherently subjective and inevitably reflect the perspective and values of the person evaluating the content.

video programming is published or exhibited on television in the United States with captions.¹²³ This means that unlike other IP-delivered video clips, video clips of live and near-live programming may be posted online without captions initially, with captions added within 12 hours (for live) or eight hours (for near-live) of the video programming being shown on television.¹²⁴ We find that the 12- and eight-hour grace periods appropriately balance industry's concern with captioning time-sensitive IP-delivered video clips, with the fact that it is just as important for individuals who are deaf or hard of hearing to have access to these clips as it is for other members of the general public.¹²⁵ One company has indicated that a

¹²³ We reiterate that we will consider the grace period to begin upon the conclusion of the television display of the associated video program. In addition, while NAB and NCTA have requested that we limit the 12-hour grace period to business hours, we decline to do so because many programs are captioned around the clock, and a 12-hour grace period will allow daytime staff to assist with captioning of video clips posted online overnight. See NCTA/NAB June 23 *Ex Parte* Letter at 2; NAB June 27 *Ex Parte* Letter at 2; Captioning Companies Apr. 3 *Ex Parte* Letter at 2 (describing one captioning company, VITAC, as "a 24-hour operation"). The 12-hour grace period for video clips of live programming will address DIRECTV's concerns with what we refer to as "NFL Highlight Clips" and "Short Cuts." When a viewer is watching one National Football League ("NFL") game on a mobile device, he or she may opt to view NFL Highlight Clips from another game. Letter from William M. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC, at 1 (May 9, 2014) ("DIRECTV May 9 *Ex Parte* Letter"). Short Cuts are commercial-free replay compilations of highlights from every NFL regular season game, allowing subscribers to view a game in 30 minutes or less by removing all broadcast "down time," such as huddles, time-outs, and instant replay review. See DIRECTV Comments at 3-4. DIRECTV expresses concerns about captioning IP-delivered NFL Highlight Clips and Short Cuts. Specifically, DIRECTV explains that the volume of NFL Highlight Clips and the speed at which they are created and distributed makes DIRECTV unable to provide them with "intelligible captioning." See *id.* at 3. For both Short Cuts and NFL Highlight Clips, DIRECTV states that "[t]he process of breaking the game feed into such video clip highlights can cause the captioning to become garbled and unrecognizable" and that the process of recreating or restoring the captions "would introduce delays that would substantially undermine the business rationale for these time-sensitive products." DIRECTV Apr. 14 *Ex Parte* Letter at 1. The rules for video clips of live programming will apply to NFL Highlight Clips and thus will address DIRECTV's concerns. The rules for video clips of live programming also will apply to Short Cuts to the extent Short Cuts are not televised with captions. We understand that a version of Short Cuts is made available on television without captions, and DIRECTV states that "[t]he television version of Short Cuts is exempt from the captioning requirement due to the very limited gross revenues associated with this service." DIRECTV May 9 *Ex Parte* Letter at 1. We take no position in this *Video Clips Order* as to whether a television closed captioning exemption in fact applies to Short Cuts. We clarify, however, that if the televised version of Short Cuts is captioned when shown on television in the future, then the online version will be subject to the IP closed captioning rules already applicable to full-length programming to the extent that they are in essence the same program. See 47 C.F.R. § 79.4(b). In other words, once Short Cuts become subject to the IP closed captioning requirements for full-length programming (*i.e.*, they are televised with captions), the extended compliance deadline and grace period applicable to video clips of live programming will no longer apply.

¹²⁴ To the extent that a straight lift clip contains video clips of live or near-live programming, it will be subject to the later July 1, 2017 compliance deadline and may utilize the 12-hour or eight-hour grace period. To the extent that a montage contains video clips of live or near-live programming, the portions of the montage that contain such programming will be subject to the later July 1, 2017 compliance deadline, and those portions may utilize the applicable grace period.

¹²⁵ See Consumer Groups June 5 *Ex Parte* Letter at 3-4 ("[W]e believe that viewers who are deaf or hard of hearing have a right to access critical programming on equal terms as everyone else [W]e would urge the Commission to require such programming to be captioned as soon as technically possible, and in no case longer than one hour.") (footnote omitted); Letter from Blake E. Reid, Counsel to TDI, to Marlene H. Dortch, Secretary, FCC, at 3 (June 13, 2014) ("Consumer Groups June 13 *Ex Parte* Letter") ("Should the Commission conclude that a grace period is appropriate, it should be on the order of minutes and in no event longer than one hour."). *But see* Consumer Groups June 27 *Ex Parte* Letter at 2 ("denying viewers who are deaf or hard of hearing access to time-sensitive clips for a period of 12 business hours would plainly contravene Congressional intent to ensure *equal* access to critical areas of programming."); Consumer Groups July 1 *Ex Parte* Letter at 5. Both CBS and DIRECTV emphasize the importance of providing certain video clips nearly immediately, as explained above.

grace period of “several hours” is workable.¹²⁶ We find that 12 and eight hours are reasonable timeframes for all companies subject to the requirement to follow beginning July 1, 2017. To the extent that a video programming provider or distributor is unable to post video clips of live programming within these grace periods by July 1, 2017 because, for example, it lacks the resources to do so, it may petition for an exemption of this requirement.¹²⁷ We find that a shorter grace period is appropriate for video clips of near-live programming than for video clips of live programming, because we find that there is more time to add captions to an IP-delivered video clip of programming that is produced and recorded even a short time before it is shown on television with captions.¹²⁸ In addition, we encourage the industry to make video clips of live and near-live programming available with captions at the time the clips are posted online, or as soon as possible thereafter, whenever possible, especially if such captioning already is being done.¹²⁹ In the future, we intend to decrease or eliminate this grace period for video clips of live and near-live programming, because we expect that technology will automate the process such that a grace period for captioning is no longer needed.¹³⁰ Accordingly, in the *Further Notice* we seek comment on the timeframe within which we should decrease or eliminate the grace period applicable to video clips of live and near-live programming.

4. Video Clips in the Online Library before the Compliance Deadline

31. We recognize that some video programming providers and distributors will have a large number of video clips in their online library¹³¹ before the compliance deadline of January 1, 2016 for straight lift clips and January 1, 2017 for montages. As explained fully below, we find that compliance with the closed captioning requirements for IP-delivered video clips would be economically burdensome for this class of video clips, and accordingly we exempt this class from coverage of our rules.¹³²

¹²⁶ See CBS May 22 *Ex Parte* Letter at 2.

¹²⁷ See 47 C.F.R. § 79.4(d) (setting forth procedures for individual exemptions based on economic burden). See also NCTA/NAB June 23 *Ex Parte* Letter at 2 (noting that some programmers, especially smaller programmers, may be unable to comply with a 12-hour grace period by year end 2017); NAB June 27 *Ex Parte* Letter at 2; Letter from Diane B. Burstein, Vice President and Deputy General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, at 1 (June 27, 2014) (stating that local cable news channels and other programmers may need a grace period of longer than 12 hours to provide a captioned version of a video clip of live programming).

¹²⁸ One captioning company, VITAC, indicates that it captions over 50 short-form videos (30-60 seconds each) per day for one client, and that captioners create the captions for each of these videos within 15-20 minutes of receiving them. See Captioning Companies Apr. 3 *Ex Parte* Letter at 2. While this 15-20 minute timeframe does not include time necessary to post video clips online, it does indicate the speed with which captions can be created for video clips.

¹²⁹ See, e.g., NCTA June 3 *Ex Parte* Letter at 4 (“[D]ue to the need to quickly convey certain information to consumers, programmers may post certain time sensitive clips without captions even as a program airs with captions on television. The Commission should avoid any rules that would interfere with a [video programming owner’s] ability to continue to serve the public in this manner.”) (footnote omitted).

¹³⁰ See, e.g., DIRECTV May 9 *Ex Parte* Letter at 2 (“In the future, it may be possible for DIRECTV to include the same closed captioning data with these highlight clips that accompanied the video feed when it was originally transmitted over broadcast television.”); NCTA/NAB June 23 *Ex Parte* Letter at 1-2; Consumer Groups June 24 *Ex Parte* Letter at 1; Consumer Groups July 1 *Ex Parte* Letter at 3.

¹³¹ As in the *IP Closed Captioning Order*, herein we use the term “library” to describe the collection of content a video programming provider or distributor makes available to consumers online.

¹³² Separately, in the *Further Notice* below, we seek comment on application of the IP closed captioning rules to video clips that are added to the video programming distributor’s or provider’s library on or after January 1, 2016 for straight lift clips and January 1, 2017 for montages, but before the associated video programming is shown on television with captions. We refer to such video clips as “advance” video clips, and we find that further information on the technological challenges of captioning advance video clips would be useful before we resolve this issue.

32. The CVAA permits the Commission to exempt from coverage of its IP closed captioning rules “any service, class of service, program, class of program, equipment, or class of equipment for which the Commission has determined that the application of such regulations would be economically burdensome for the provider of such service, program, or equipment.”¹³³ The Commission has interpreted the comparable statutory provision applicable to television closed captioning.¹³⁴

33. On balance, we find that the costs of captioning video clips that are in the video programming distributor’s or provider’s online library before the compliance deadline (January 1, 2016 for straight lift clips and January 1, 2017 for montages) outweigh the benefits to be derived from captioning such programming at this time. Some video programming distributors may have hundreds of thousands or even millions of video clips currently in the libraries on their websites or apps.¹³⁵ Some commenters have suggested that the industry would face significant difficulty complying with closed captioning requirements for this category of IP-delivered video clips. Stated challenges with captioning this category of IP-delivered video clips include the enormous volume of existing video clips in some video programming provider and distributor’s online libraries, which have been posted over a period of years,¹³⁶ and difficulty determining potentially years after the clips were first posted online whether such clips originated as part of a program that later appeared on television with captions after the effective date of the video clip captioning rules.¹³⁷ We are concerned about the impact that requiring closed captioning for this class of video clips may have on entities subject to the rules, including smaller entities that may lack the financial resources to comply.¹³⁸ In contrast, we find that the benefits of requiring captioning of these clips may be minimal since video clips may “have a shorter shelf life for viewership than long-form content.”¹³⁹ We believe that the resources of the entities subject to the rules thus would be better spent captioning clips added to their libraries on a prospective basis. Accordingly, we find that it would be an economic burden to require closed captioning of video clips that are in the video programming

¹³³ 47 U.S.C. § 613(c)(2)(D)(ii).

¹³⁴ *1997 Closed Captioning Order*, 13 FCC Rcd at 3342, ¶¶ 143-145. The Commission assesses economic burden more broadly in the context of an entire class than it does in the context of an individual exemption petition. *See Anglers for Christ Ministries, Inc.*, Memorandum Opinion and Order, Order, and Notice of Proposed Rulemaking, 26 FCC Rcd 14941, 14958-60, ¶¶ 33-36 (2011) (“*Anglers Reversal Order*”).

¹³⁵ *See, e.g.*, DiMA Comments at 6; NAB Reply at 9.

¹³⁶ *See, e.g.*, DiMA Comments at 14 (discussing the “challenges of identifying and adding captions to archival programming” and stating that “[t]his process would be far more complex for video clips than for full-length video. First, there simply are far more video clips than full-length programs online. Second, it is necessary to identify the program from which a particular clip derives in order to determine whether such clip needs to be captioned, adding a significant layer of complexity that is not present for full-length programs.”).

¹³⁷ *See id.* at 2, 6, 13-14; NAB Reply at 9; NAB June 9 *Ex Parte* Letter at 2; NCTA June 18 *Ex Parte* Letter at 1.

¹³⁸ *See, e.g.*, APTS/PBS June 26 *Ex Parte* Letter at 2 (explaining that a requirement to caption IP-delivered video clips already on a distributor’s website prior to the compliance deadline “would impose an enormous financial cost on local public television stations and would require significant personnel resources, which would risk impeding many ongoing initiatives to serve local communities”).

¹³⁹ *See* Hulu Apr. 1 *Ex Parte* Letter at 3; NAB June 9 *Ex Parte* Letter at 2. We recognize Consumer Groups’ argument that many video clips “are likely to live on the Internet indefinitely,” and while that may be true for some video clips, we expect that many of the video clips that will be online prior to the compliance deadlines will be of lesser interest to consumers than more recent clips that are posted online after the applicable compliance deadline. *See* Consumer Groups Mar. 28 *Ex Parte* Letter at 6. Accordingly, we decline to adopt the Consumer Groups’ request to adopt rules requiring captioning for this category of video clips. *See* Consumer Groups Reply at 10-11.

distributor's or provider's online library before the compliance deadline with minimal benefits,¹⁴⁰ and we thus exempt this class from coverage of our IP closed captioning rules.

5. Application of General IP Closed Captioning Rules to Video Clips

34. Except as otherwise discussed above, the IP closed captioning requirements will apply to video clips in the same manner that they apply to full-length video programming shown online. For example, entities may file a petition for exemption from the IP closed captioning rules based on economic burden.¹⁴¹ Additionally, this means that video programming owners must provide captions of at least the same quality as the televised captions for the same programming, and video programming distributors and providers must maintain the quality of the captions provided by the video programming owner.¹⁴² Consumer Groups support the application of existing quality requirements for full-length IP-delivered video programming to IP-delivered video clips.¹⁴³ The Commission previously stated that an evaluation of whether IP-delivered captions are of at least the same quality as the televised captions may involve the consideration of “such factors as completeness, placement, accuracy, and timing.”¹⁴⁴ Along these lines, the Commission recently adopted new requirements governing the quality of television closed captioning that incorporate these factors.¹⁴⁵ Thus, while some commenters have asserted that there are problems with the quality of the captioning of IP-delivered video clips,¹⁴⁶ it is likely that the Commission's new rules governing captioning quality on television will improve the quality of closed captioning on programming delivered via IP as well.¹⁴⁷ For example, when a televised program is in compliance with the new requirement that captions be accurate and complete, then all of the audio accompanying a particular clip of the television program also must be captioned.¹⁴⁸ In recognition of the fact that video clips may in some instances have to be recaptioned, however,¹⁴⁹ we will permit *de minimis* differences between the closed captions accompanying an IP-delivered video clip and the closed captions that appeared on television.¹⁵⁰ We recognize that providing captions for video clips may present technical challenges

¹⁴⁰ See *1997 Closed Captioning Order*, 13 FCC Rcd at 3342, ¶ 143 (“In order to make sure that the exemption process does not undermine the broad goals of Section 713, we believe exemptions should be limited to only those situations where captioning truly is an economic burden.”).

¹⁴¹ See 47 C.F.R. § 79.4(d) (setting forth the procedures for exemptions based on economic burden, and stating that the Commission will consider the following factors: “(i) The nature and cost of the closed captions for the programming; (ii) The impact on the operation of the video programming provider or owner; (iii) The financial resources of the video programming provider or owner; and (iv) The type of operations of the video programming provider or owner.”). Entities also may avail themselves of the statutory requirement that a *de minimis* failure to comply with the IP closed captioning regulations will not be treated as a violation. See 47 U.S.C. § 613(c)(2)(D)(vii).

¹⁴² See *IP Closed Captioning Order*, 27 FCC Rcd at 812, ¶ 37; 47 C.F.R. § 79.4(c)(1)(i) and (2)(i).

¹⁴³ See Consumer Groups June 24 *Ex Parte* Letter at 2.

¹⁴⁴ See *IP Closed Captioning Order*, 27 FCC Rcd at 812, ¶ 37.

¹⁴⁵ See *Caption Quality Order*, 29 FCC Rcd at 2239-40, ¶ 25.

¹⁴⁶ See Consumer Groups Comments at 12-14; Kramp Comments.

¹⁴⁷ See NAB Reply at 8. See also NCTA Reply at 6, n. 29 (acknowledging that there are currently problems with the quality of captions of online video clips, but stating that the industry is seeing improvements and is confident that the problems will be resolved).

¹⁴⁸ See 47 C.F.R. §§ 79.1(j), 79.4(c)(1)(i), 79.4(c)(2)(i).

¹⁴⁹ See NCTA June 18 *Ex Parte* Letter at 2 (“[P]rogrammers may not be able to repurpose television captions for use in online clips and therefore it would be unreasonable to compare the captioning for online clips to that used for full-length television programming.”) (footnote omitted); NCTA/NAB June 23 *Ex Parte* Letter at 2.

beyond those associated with captioning full-length programs.¹⁵¹ We will take this difficulty into account in the event of complaints.¹⁵² It is our hope, however, that advancements in technology by the time the compliance deadlines arrive may substantially ameliorate these challenges. The Commission, through its Consumer and Governmental Affairs Bureau, will work to resolve any informal complaints of noncompliance with the new requirements to caption video clips, but would typically consider enforcement action by its Enforcement Bureau when there is a pattern or trend of possible noncompliance by a covered entity. Importantly, we note that the *IP Closed Captioning Order* makes clear that entities are not responsible for quality issues outside of their control.¹⁵³ Thus, it is not necessary for us to adopt specific rules to address NAB's concern that problems with captions of IP-delivered video clips may result from technical problems beyond a station's control.¹⁵⁴

35. When a video programming provider or distributor provides applications or plug-ins for viewing video programming, it must comply with Section 79.103(c) of our rules, which requires the inclusion of certain consumer tools such as the ability to change caption font, size, and color.¹⁵⁵ The Commission's rules refer to these consumer tools as "technical capabilities."¹⁵⁶ We understand that some applications include video players that display only video clips, and these players were not designed with closed captioning capability. DiMA has explained that extension of the IP closed captioning rules to video clips will require upgrades to these video players,¹⁵⁷ and in some instances a single video

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¹⁵⁰ See 47 U.S.C. § 613(c)(2)(D)(vii) (a *de minimis* failure to comply with the IP closed captioning regulations will not be treated as a violation). See also DIRECTV Apr. 14 *Ex Parte* Letter at 1 ("The process of breaking the game feed into such video clip highlights can cause the captioning to become garbled and unrecognizable. Recreating or restoring that captioning to a level acceptable to a hearing-impaired audience would require a new, separate captioning session for each clip."). Accordingly, voice recognition technology can be used to recaption video clips, but only to the extent that the quality requirements are met, with permissible *de minimis* differences between the closed captions accompanying an IP-delivered video clip and the closed captions that appeared on television. We thus decline Disney's request that we permit entities to use "the best available voice recognition technology," because the record contains no evidence to suggest that "the best available voice recognition technology" today would produce captions that meet the captioning quality requirements. See Disney June 18 *Ex Parte* Letter at 3; Letter from Blake E. Reid, Counsel to TDI, to Marlene H. Dortch, Secretary, FCC, at 1-2 (July 7, 2014) ("Even the 'best available' currently-existing voice recognition technology . . . provides captions often riddled with errors and pales in comparison to high-quality offline captioning.").

¹⁵¹ See NCTA June 18 *Ex Parte* Letter at 2 ("[C]lips taken from live programming may well include delays and other features of live captioning. The Commission should take these circumstances into account in considering quality issues in this developing area."); Letter from Justin Faulb, Assistant General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, at 1-2 (July 2, 2014) (noting the necessity of "substantial reformatting").

¹⁵² We understand that the captions for live programming may appear on-screen with a delay. In such instances, to ensure that the captions available with an IP-delivered video clip are complete, the caption file may be synchronized to the clip's audio, or the captions may continue on-screen after the clip has concluded until all of the associated captions have appeared.

¹⁵³ See *IP Closed Captioning Order*, 27 FCC Rcd at 812, ¶ 37. See also *id.* at 805, n. 128; NAB June 9 *Ex Parte* Letter at 2 ("NAB urged the FCC to make clear that licensees or programmers cannot be held responsible for compliance with online captioning obligations (including captioning quality) for clips that are not within their immediate control.").

¹⁵⁴ See NAB Comments at 9.

¹⁵⁵ See 47 C.F.R. §§ 79.4(c)(2)(i) ("A video programming distributor or provider that provides applications, plug-ins, or devices in order to deliver video programming must comply with the requirements of § 79.103(c) and (d)."), 79.103(c) (setting forth the required technical capabilities, such as the ability to change caption text font, size, and color).

¹⁵⁶ See *id.* § 79.103(c).

¹⁵⁷ See DiMA Comments at 6.

programming distributor may need to upgrade multiple video players.¹⁵⁸ DiMA asserts that it would be difficult for video programming provider- or distributor-provided applications or plug-ins that play video clips but not full-length programming to comply with Section 79.103(c) of our rules and that, in any event, the technical capabilities set forth in our rules are less useful when consumers view video clips as opposed to full-length programming.¹⁵⁹ We are not persuaded by these assertions. Rather, we expect that video programming providers and distributors will be able to comply with the requirements for their applications and plug-ins that play video clips, and we agree with Consumer Groups that the Commission should not enshrine in our rules an exception based on a video programming provider or distributor's decision not to include closed captioning capability in the earlier versions of its video players.¹⁶⁰ To the extent that a video programming provider or distributor determines that compliance with the IP closed captioning requirements for its application or plug-in that only plays video clips would be economically burdensome, it may file an exemption request.¹⁶¹ The CVAA provides that during the pendency of a petition for exemption from the IP closed captioning rules due to economic burden, the "provider or owner shall be exempt from the requirements The Commission shall act to grant or deny any such petition, in whole or in part, within 6 months after the Commission receives such petition, unless the Commission finds that an extension of the 6-month period is necessary to determine whether such requirements are economically burdensome."¹⁶²

IV. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

36. In the following Second Further Notice of Proposed Rulemaking ("*Further Notice*") we explore four issues related to closed captioning of IP-delivered video clips: (1) application of the IP closed captioning rules to the provision of video clips by third party video programming providers and distributors, when the associated video programming has been shown on television with captions; (2) whether in the future we should decrease or eliminate the 12-hour timeframe within which captions may be added to IP-delivered video clips of live programming and the eight-hour timeframe within which captions may be added to IP-delivered video clips of near-live programming; (3) application of the IP closed captioning requirements to files that contain a combination of video clips that have been shown on television with captions and online-only content ("mash-ups"); and (4) application of the IP closed captioning rules to video clips that are first added to the video programming distributor's or provider's library on or after January 1, 2016 for straight lift clips or January 1, 2017 for montages, but before the associated video programming is shown on television with captions, and which then remain online in the distributor's or provider's library after being shown on television.

A. Third Party Video Programming Providers and Distributors

37. Entities such as news websites that do not distribute full-length video programming may sometimes make video clips available on their websites. In addition, some entities, such as Hulu, may distribute full-length video programming online but do not also distribute such programming on television. We do not have an adequate record for purposes of applying the IP closed captioning rules to the provision of video clips by these and similar entities, which we refer to as "third party" distributors.¹⁶³

¹⁵⁸ See DiMA Mar. 20 *Ex Parte* Letter at 2.

¹⁵⁹ See DiMA Comments at 2, 12.

¹⁶⁰ See Consumer Groups Reply at 11 ("The Commission should not reward the inaction of player designers and programmers at the expense of the CVAA's promise of equal access . . .").

¹⁶¹ 47 U.S.C. § 613(d)(3); 47 C.F.R. § 79.4(d).

¹⁶² 47 U.S.C. § 613(d)(3).

¹⁶³ The attached order imposes closed captioning requirements for IP-delivered video clips, at the present time, to instances in which the video programming provider or distributor (as those terms are defined in the IP closed captioning rules) posts on its website or app a video clip of video programming that it published or exhibited on television in the United States with captions on or after the applicable compliance deadline. See *supra* Section

(continued....)

Accordingly, we seek comment on the scope of third party IP distribution of video clips that were taken from video programming shown on television with captions, the relationship between such third parties and the video programming owner, and the costs and benefits of imposing the obligation to caption video clips on such entities, including small entities.

38. We seek comment on the third parties that distribute video clips of video programming shown on television with captions. What types of entities are included in this category, and how many such entities exist? We request information on the relationship between these third parties and video programming owners. Do the third parties receive video clips directly from the video programming owner, or do they receive video clips for IP distribution in a different manner? What licensing or other agreements exist between video programming owners and these third party video programming providers and distributors with regard to IP-delivered video clips? Do video programming owners sometimes lack knowledge that third parties are distributing their video clips via IP, and in what circumstances might that occur? Should any rules covering third party distributors be limited to those distributors that have a licensing or other formal agreement with the video programming owner?

39. How should we ensure that video clips taken from programming shown on television are successfully captioned by third party distributors on a timely basis? For example, the general IP closed captioning rules that apply to full-length programming require video programming owners to send program files to video programming distributors and providers with required captions, and they require video programming providers and distributors to enable the rendering or pass through of all required captions to the end user.¹⁶⁴ Should we impose this allocation of responsibility for IP-delivered video clips when the video programming provider or distributor did not also publish or exhibit the associated video programming on television? Should we impose the general IP closed captioning rules in this context, or should we impose any differing obligations? For example, the IP closed captioning rules require each video programming owner to agree “[w]ith each video programming distributor and provider that such owner licenses to distribute video programming directly to the end user through a distribution method that uses Internet protocol . . . upon a mechanism to inform such distributors and providers on an ongoing basis whether video programming is subject to the requirements of this section.”¹⁶⁵ How would this “mechanism” operate in the context of video clips covered by these rules when they are provided to third party IP distributors? How will third party video programming providers and distributors be informed that a video clip already in their library has been shown on television with captions?¹⁶⁶ Will the video programming owner always know that a video clip previously shown as part of television programming has been posted online and by whom? How should this impact enforcement, if at all?

40. If video clips are initially posted online by a third party distributor without captions and later amended to include captions, will links to the original posting of the video clip still work? What other technical, legal or other issues should we be aware of that may impact the ability of third party video programming distributors to comply with our IP closed captioning requirements, and how quickly can they be addressed? We seek comment on what would be an appropriate compliance period. We also

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III.C.1. References herein to “third party” distributors should be read to include all video programming providers and distributors not subject to the attached order as a result of this limitation.

¹⁶⁴ 47 C.F.R. § 79.4(c).

¹⁶⁵ 47 C.F.R. § 79.4(c)(1)(ii).

¹⁶⁶ See *IP Closed Captioning Order*, 27 FCC Rcd at 797, ¶ 14 (Section 202(b) of the CVAA “requires the Commission to ‘establish a mechanism to make available to video programming providers and distributors information on video programming subject to the Act on an ongoing basis.’ The purpose of the required ‘mechanism’ is to enable [video programming providers and distributors] to determine whether the video programming that they intend to make available via IP has been shown on television with captions after the effective date of the new rules.”) (citing 47 U.S.C. § 613(c)(2)(D)(v)).

seek comment on what obligations, if any, should be different when a third party distributor embeds instead of hosts the content on its website.¹⁶⁷

41. We seek comment on our statutory authority over video clips provided by third party distributors. As explained above, the CVAA requires that any IP-delivered video programming that was shown on television with captions, whether full-length or an excerpt, must also be captioned when delivered using IP.¹⁶⁸ What requirements do we need to impose in the context of third party distributors to ensure that we are fulfilling the requirements and goals of the CVAA, which directs the Commission to require “the provision of closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of such regulations”?¹⁶⁹ Do any statutory exemptions apply in this context? For example, should the Commission exempt any third party video programming distributors or categories of distributors from its video clips captioning obligations on the basis that it would be “economically burdensome” for these distributors to comply?¹⁷⁰ If so, parties should provide specific reasons for why the economic burden exemption should apply.¹⁷¹ If adopted, should such categorical exemption expire after a set period of time, subject to renewal if warranted?

B. Grace Period for Live and Near-Live Video Clips

42. As explained above, beginning July 1, 2017 we require the provision of closed captions on IP-delivered video clips of video programming previously shown live or near-live on television with captions within 12 hours and eight hours, respectively, after the associated video programming is published or exhibited on television in the United States with captions.¹⁷² Herein we seek comment on whether in the future we should decrease or eliminate this grace period for providing captions. We seek comment on the costs of imposing a shorter grace period on covered entities, including small entities, in comparison to the benefits to consumers of a reduced grace period.

43. We remain concerned about the impact that delayed access to IP-delivered video clips of live and near-live programming will have on people who are deaf and hard of hearing. For example, breaking news aired live on television and initially posted online without closed captions effectively excludes these individuals from having timely access to this information. We seek comment on the impact that these delays will have on people who are deaf and hard of hearing and whether continuing to allow these delays is consistent with Congress’s intent, as expressed in the CVAA, to improve access to video programming delivered via the Internet. We also expect that, at some time in the future, it will be appropriate to decrease or eliminate this grace period because we expect that technology will automate

¹⁶⁷ When a third party video programming distributor “embeds” a video clip, it is directing the consumer’s browser or video player to display a video that is currently hosted on another video programming distributor’s platform. When a third party video programming distributor “hosts” a video clip, it is both directing the consumer’s browser or video player to display the video and providing the video file itself.

¹⁶⁸ See *supra* Section III.A.

¹⁶⁹ 47 U.S.C. § 613(c)(2)(A).

¹⁷⁰ 47 U.S.C. § 613(c)(2)(D)(ii) (the regulations “may exempt any service, class of service, program, class of program, equipment, or class of equipment for which the Commission has determined that the application of such regulations would be economically burdensome for the provider of such service, program, or equipment”).

¹⁷¹ See *supra* n. 134; *1997 Closed Captioning Order*, 13 FCC Rcd at 3342, ¶¶ 143-145 (setting forth the Commission’s treatment of class exemptions); *Anglers Reversal Order*, 26 FCC Rcd at 14958-60, ¶¶ 33-36 (explaining the different application of the term “economically burdensome” to case-by-case exemptions than to rulemaking decisions to exempt certain categories of programming); *IP Closed Captioning Order*, 27 FCC Rcd at 828, ¶ 67 (also noting the distinction between the Commission’s treatment of these two types of captioning exemptions).

¹⁷² See *supra* Section III.C.3.

the process such that a grace period is no longer needed.¹⁷³ We invite comment on the timeframe within which we should decrease or eliminate the grace period applicable to video clips of live and near-live programming. For example, for video clips of live programming, should we provide a grace period of six hours beginning July 1, 2018, and three hours beginning July 1, 2019? What adjustments should we make to the grace period for video clips of near-live programming? We ask commenters to justify any differing treatment of video clips of live programming and video clips of near-live programming. We also ask industry to submit specific comment on the status of technological developments in this regard. What steps must industry currently take to prepare captioned video clips of live and near-live programming, and how and when might those steps be streamlined in the future? To the extent that these delays can be reduced, would it be appropriate to adopt a schedule of deadlines phasing in shorter grace periods, and if so, what should these deadlines be? Would a schedule phasing out these grace periods encourage greater technical innovation to automate these captioning processes, as well as provide the necessary time to achieve compliance?

C. Combinations of Video Clips and Content Not Televised with Captions (“Mash-Ups”)

44. We seek comment on the application of the IP closed captioning requirements to files that contain a combination of one or more video clips that have been shown on television with captions, and other content (such as online-only content) that has not been shown on television with captions. The industry refers to these files as “mash-ups.” We seek comment on the costs to covered entities, including small entities, and the benefits of applying the IP closed captioning requirements to mash-ups. We seek additional information on issues associated with the captioning of the portion of the clip that was shown on television with captions. We recognize that any part of the video clip that was not shown on television with captions, such as online-only content, would not be subject to the IP closed captioning requirements.

45. As explained above, the CVAA requires that any IP-delivered video programming that was shown on television with captions, whether full-length or an excerpt, must also be captioned when delivered using IP.¹⁷⁴ Is there any statutory basis on which we could exclude from the IP closed captioning requirements video clips embedded in mash-ups if the embedded clips were shown on television with captions? We seek comment on whether this type of clip is subject to any of the exemptions set forth in Section 202 of the CVAA. For example, if the clips that were shown on television with captions were very short or insignificant in comparison to the rest of the mash-up that contains online-only content,¹⁷⁵ would the lack of captions be considered a “de minimis” failure to comply under Section 202?¹⁷⁶ If so, how would the Commission be able to determine what is a “de minimis” situation versus one where lack of captions is considered a violation of our regulations? That is, what would constitute an insignificant or short enough clip sufficient to invoke the “de minimis” exemption? Alternatively, should the Commission exempt the class of “mash-ups” from its IP closed captioning rules

¹⁷³ See, e.g., Consumer Groups June 5 *Ex Parte* Letter at 4 (“We would also urge the Commission to solicit on an ongoing basis rigorous technical evidence of how long a grace period is actually necessary to facilitate the posting of captions – a period that is sure to decline and likely to disappear as technology improves over the coming months. To that end, we would encourage the Commission to build-in an automatic sunset for any grace period that could not be extended without rigorous evidence of its ongoing necessity.”).

¹⁷⁴ See *supra* Section III.A.

¹⁷⁵ For example, a documentary made for the Internet about the history of television might include snippets of material that previously aired on television with captions, although the documentary itself was not shown on television with captions. In this regard, we note that in the *Caption Quality Order*, the Commission addressed “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,” and clarified that such programs need not be captioned. *Caption Quality Order*, 29 FCC Rcd at 2289, ¶ 116.

¹⁷⁶ 47 U.S.C. § 613(c)(2)(D)(vii) (“de minimis failure to comply with such regulations by a video programming provider or owner shall not be treated as a violation of the regulations”).

on the basis that it would be “economically burdensome” for the provider of such clip to comply with our rules?¹⁷⁷ If adopted, should such categorical exemption expire after a set period of time, subject to renewal if warranted? Parties should provide specific comment on why the Commission’s economic burden test would apply in this situation and how the Commission should apply this test to this class exemption, if adopted.¹⁷⁸ Is there any other basis on which the Commission can exclude an otherwise covered video clip from the IP closed captioning rules, consistent with the CVAA’s direction that the Commission “require the provision of closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date”¹⁷⁹ For example, if an online program itself was not shown on television with captions, but rather only isolated clips embedded in the program were, does that render the program in its entirety (including integrated clips of televised captioned programming) outside the scope of the CVAA on the theory that the whole program is a new work that does not constitute “video programming . . . that was published or exhibited on television with captions”¹⁸⁰

46. We seek comment on the nature of these types of integrated clips. Industry should give us specific examples of such clips and describe how prevalent they are. If the Commission applies the IP closed captioning requirements to one or more video clips that have been shown on television with captions, regardless of whether these clips are integrated with other content (such as online-only content) that has not been shown on television with captions, how will industry comply with such a requirement? That is, we seek comment on the technical challenges associated with captioning such clips. Will industry need to caption the covered material anew, or will it be able to repurpose televised captions?¹⁸¹ What would be an appropriate compliance deadline for captioning of covered clips included in mash-ups? Would video programming providers and distributors need a grace period for captioning the covered clips in mash-ups following the airing of the associated video programming on television with captions and, if so, what grace period would be appropriate?

D. Advance Video Clips

47. As stated above, we find that further information on the technological challenges of captioning advance video clips would be useful before we proceed with requiring closed captioning for such clips.¹⁸² Accordingly, we invite comment on application of the IP closed captioning rules to advance video clips. “Advance” video clips are video clips that are added to the video programming distributor’s or provider’s library on or after January 1, 2016 for straight lift clips and January 1, 2017 for montages, when the associated video programming (including the advance video clips) is later shown on television with captions on or after the compliance deadline and the advance video clips remain online.¹⁸³ We defer

¹⁷⁷ 47 U.S.C. § 613(c)(2)(D)(ii) (the regulations “may exempt any service, class of service, program, class of program, equipment, or class of equipment for which the Commission has determined that the application of such regulations would be economically burdensome for the provider of such service, program, or equipment”).

¹⁷⁸ See *supra* n. 134.

¹⁷⁹ See 47 U.S.C. § 613(c)(2)(A).

¹⁸⁰ See *id.*; *Caption Quality Order*, 29 FCC Rcd at 2289, ¶ 116.

¹⁸¹ See, e.g., NCTA June 3 *Ex Parte* Letter at 3 (“Other types of short form video content, such as ‘mash-ups’ that integrate portions of television content with new content that has never been aired on television (and thus never been captioned) would need to be captioned from scratch.”); Consumer Groups June 5 *Ex Parte* Letter at 3 (“We believe that the portions of mashups that have been shown on television with captions are unequivocally covered by the CVAA and should be captioned – a process that should be made easier by the possibility of repurposing such captions.”).

¹⁸² See *supra* Section III.C.4.

application of the IP closed captioning requirements to advance video clips pending resolution of this issue. We seek comment on the costs to covered entities, including small entities, and the benefits of captioning advance video clips.

48. We understand that video programming distributors and providers sometimes add video clips to their libraries shortly before the associated video programming is shown on television with captions, and we think it is important that IP-delivered advance video clips be made accessible to consumers who are deaf or hard of hearing once the programming associated with such clips has been shown on television with captions. For example, if a broadcast television station places a clip filmed on location earlier in the day on its website shortly before the station's nightly news program, and then the clip is shown on television with captions as part of the program, we are concerned that consumers who are deaf or hard of hearing would not have access to the content of the clip if it remains uncaptioned online.¹⁸⁴ Accordingly, we ask whether we should provide a timeframe within which closed captions may be added to IP-delivered advance video clips, once the associated video programming is shown on television with captions. For example, would 24 hours be an appropriate timeframe for the grace period? If not, what timeframe would balance consumers' desire for prompt access to IP-delivered advance video clips and industry's need for time to identify and provide captions on IP-delivered advance video clips?¹⁸⁵ Should we adopt an initial timeframe for the grace period, and then decrease or eliminate it over time, in recognition of the expectation that technology will automate the process such that a grace period will no longer be needed?¹⁸⁶ What compliance deadline should we impose for advance clips? We note that in the *IP Closed Captioning Order*, the Commission gave entities a phased-in timeframe for compliance with respect to the captioning of full-length programming that is in the video programming provider or distributor's online library before it is shown on television with captions.¹⁸⁷ Should a similar approach be adopted here? What is the scope of the advance clips under consideration? For example, should the scope include all advance clips, or should it be limited to clips posted online within a certain timeframe, such as seven days, before the associated video programming is shown on television? How would any such limitation be consistent with the CVAA? For what time period should video programming owners, providers, and distributors be required to monitor the posting of the advance clip online and the associated

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¹⁸³ We clarify that, if a video programming distributor or provider posts an advance video clip online, and then reposts that video clip online after the programming is shown on television with captions on or after the compliance deadline, the reposted version of the clip would not be considered an advance clip since it was not posted before the programming was shown on television with captions.

¹⁸⁴ Accordingly, we disagree with NCTA that "[a]ny rule must exclude these 'advance' clips from a captioning obligation, and should leave to the reasonable judgment of the programmers whether the 'advance clip' retains value such that replacing it with a captioned version makes sense after the program airs on television with captions." NCTA June 3 *Ex Parte* Letter at 4; *see also* NAB June 9 *Ex Parte* Letter at 2.

¹⁸⁵ *See, e.g.*, Consumer Groups June 5 *Ex Parte* Letter at 4 ("We believe that a period on the order of hours and not days should suffice in all cases, and we would oppose any period longer than 24 hours."); NAB June 13 *Ex Parte* Letter at 1 ("A deadline of 24 hours will provide a reasonable amount of time to ensure that a large variety of clips are monitored, uploaded, and replaced, without forcing the licensee to limit which content it can publish online because it is unable to comply with an arbitrarily short timeframe."). *See also* Consumer Groups June 13 *Ex Parte* Letter at 4 ("If IP distributors instead determined in advance of posting a clip that it was likely to be shown on television with captions, they could simply ensure that the IP version was captioned from the outset, providing equal access to viewers who are deaf or hard of hearing *and* avoiding unnecessary transaction costs."); NCTA June 18 *Ex Parte* Letter at 1 (noting that advance clips "often must be captioned from scratch" and resources "would be required to track and delete (or replace) such clips").

¹⁸⁶ *See* NAB June 9 *Ex Parte* Letter at 2 ("In our discussion with Commission staff on the possibility of a waiver process, we noted the majority of local stations would need regulatory relief until an automated captioning video clip solution comes to market. Thus, the burden on both station and FCC resources makes a case-by-case waiver process impractical.").

¹⁸⁷ *IP Closed Captioning Order*, 27 FCC Rcd at 809-810, ¶ 34; 47 C.F.R. § 79.4(b)(4).

video programming on television? If a commenter proposes a period of time, we seek additional comment on the justification for such proposal, including the costs to industry and the benefits to consumers, including consumers who are deaf or hard of hearing.

49. What is the nature and extent of the difficulties associated with captioning advance clips after their associated video programming has been shown on television with captions? To what extent and for how long does the industry expect that these technological challenges will continue to hinder captioning this category of IP-delivered video clips? In the *IP Closed Captioning Order*, the Commission required closed captioning of full-length video programming that is in the provider's or distributor's library before it is shown on television with captions, but it extended the deadlines applicable to such programming in recognition of the need to develop processes for finding and adding captions to this category of programming.¹⁸⁸ How should the Commission justify any differing treatment of advance IP-delivered video clips?¹⁸⁹ Are any differences in treatment justified by Hulu's assertion that "clips have a shorter shelf life for viewership than long-form content,"¹⁹⁰ or are Consumer Groups correct that many video clips "are likely to live on the Internet indefinitely"?¹⁹¹ For purposes of quantifying the burden and difficulty in captioning such clips after they appear on television with captions after the applicable deadline, we seek comment on the likely volume of advance video clips in providers' online libraries. How would the "mechanism" referenced above apply in the context of such video clips, and how would third party video programming distributors and providers comply with a requirement to caption them?¹⁹² What is the likelihood that a requirement to caption advance video clips will result in the removal of these clips and should that factor into our analysis?¹⁹³

50. Even if advance clips are not excerpts of programs shown on television with captions at the time they are initially posted online, we invite comment on whether their status changes once the associated video programming is shown on television with captions thus triggering the captioning requirement.¹⁹⁴ Are there any statutory exemptions that would apply to these clips or to a subset of these clips?¹⁹⁵ How would the costs of compliance with such a captioning requirement for advance clips compare to the benefits to consumers? We ask video programming providers and distributors to provide information on their standard practices for removing video clips previously posted online. Do video clips tend to remain online indefinitely, and if so, why? What aspects of the practices now used to post and

¹⁸⁸ See *IP Closed Captioning Order*, 27 FCC Rcd at 809-10, ¶ 34. Additionally, instead of requiring captions immediately as is otherwise the case, the Commission adopted permissible timeframes between the posting of the program file and updating it to include closed captions. See *id.* at 810, ¶ 34.

¹⁸⁹ See Consumer Groups Reply at 11 (arguing that the Commission should cover advance video clips just as it covered full-length IP-delivered programming that is in the video programming provider or distributor's online library before it is shown on television with captions).

¹⁹⁰ See Hulu Apr. 1 *Ex Parte* Letter at 3.

¹⁹¹ See Consumer Groups Mar. 28 *Ex Parte* Letter at 6 ("Many clips are likely to live on the Internet indefinitely . . .").

¹⁹² See *supra* Section IV.A.

¹⁹³ See NAB Reply at 9.

¹⁹⁴ See *supra* ¶¶ 10-11; NCTA Apr. 25 *Ex Parte* Letter at 2 (claiming that "clips created and posted online before being televised" are "not excerpted from full-length TV programs aired with captions and therefore would not fall within the scope of the CVAA").

¹⁹⁵ For example, we note that the statute permits exemptions due to economic burden. See 47 U.S.C. § 613(c)(2)(D)(ii) (permitting the Commission's implementing regulations to "exempt any service, class of service, program, class of program, equipment, or class of equipment for which the Commission has determined that the application of such regulations would be economically burdensome for the provider of such service, program, or equipment").

maintain clips online would need to be changed to comply with the imposition of closed captioning requirements for advance video clips?

V. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

51. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),¹⁹⁶ the Commission has prepared a Final Regulatory Flexibility Analysis (“FRFA”) relating to the *Video Clips Order* in MB Docket No. 11-154. The FRFA is set forth in Appendix B.

52. *Initial Regulatory Flexibility Analysis.* As required by the RFA, the Commission has prepared an Initial Regulatory Flexibility Analysis (“IRFA”) relating to the *Further Notice*. The IRFA is attached to this Second Further Notice of Proposed Rulemaking as Appendix C.

B. Paperwork Reduction Act

53. The *Video Clips Order* does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

54. The *Further Notice* may result in new or revised information collection requirements. If the Commission adopts any new or revised information collection requirement, the Commission will publish a notice in the *Federal Register* inviting the public to comment on the requirement, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. §§ 3501-3520). In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), the Commission seeks specific comment on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

C. Congressional Review Act

55. The Commission will send a copy of the *Video Clips Order* in MB Docket No. 11-154 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

D. Ex Parte Rules

56. Permit-But-Disclose. This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.¹⁹⁷ 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

¹⁹⁶ *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (“CWAAA”).

¹⁹⁷ 47 C.F.R. §§ 1.1200 *et seq.*

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

E. Filing Requirements

57. Comments and Replies. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

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

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

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

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

59. People with Disabilities. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

F. Additional Information

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

VI. ORDERING CLAUSES

61. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in Sections 4(i), 4(j), 303, and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303, and

613, this *Second Order on Reconsideration and Second Further Notice of Proposed Rulemaking* IS **ADOPTED**, effective thirty (30) days after the date of publication in the *Federal Register*.

62. **IT IS ORDERED** that, pursuant to the authority found in Sections 4(i), 4(j), 303, and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303, and 613, the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix A.

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

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

65. **IT IS FURTHER ORDERED** that Consumer Groups' Petition for Reconsideration, filed April 27, 2012, is **GRANTED IN PART**, to the extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

The Federal Communications Commission amends 47 CFR part 79 as follows:

PART 79 – Accessibility of Video Programming

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

Authority: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 330, 544a, 613, 617.

2. Amend § 79.4 by renumbering paragraph (b) as paragraph (b)(1) and adding a new (b)(2) to read as follows:

§ 79.4 Closed captioning of video programming delivered using Internet protocol.

* * * * *

(b) Requirements for closed captioning of Internet protocol-delivered video programming.

(1) All nonexempt full-length video programming delivered using Internet protocol must be provided with closed captions if the programming is published or exhibited on television in the United States with captions on or after the following dates:

(i) September 30, 2012, for all prerecorded programming that is not edited for Internet distribution, unless it is subject to paragraph (b)(1)(iv) of this section.

(ii) March 30, 2013, for all live and near-live programming, unless it is subject to paragraph (b)(1)(iv) of this section.

(iii) September 30, 2013, for all prerecorded programming that is edited for Internet distribution, unless it is subject to paragraph (b)(1)(iv) of this section.

(iv) All programming that is already in the video programming distributor's or provider's library before it is shown on television with captions must be captioned within 45 days after the date it is shown on television with captions on or after March 30, 2014 and before March 30, 2015. Such programming must be captioned within 30 days after the date it is shown on television with captions on or after March 30, 2015 and before March 30, 2016. Such programming must be captioned within 15 days after the date it is shown on television with captions on or after March 30, 2016.

(2) All nonexempt video clips delivered using Internet protocol must be provided with closed captions if the video programming distributor or provider posts on its website or application a video clip of video programming that it published or exhibited on television in the United States with captions on or after the applicable compliance deadline. The requirements contained in this paragraph shall not apply to video clips added to the video programming distributor's or provider's library before the video programming distributor or provider published or exhibited the associated video programming on television in the United States with captions on or after the applicable compliance deadline.

(i) The requirements contained in paragraph (2) shall apply with the following compliance deadlines:

(A) January 1, 2016, where the video clip contains a single excerpt of a captioned television program with the same video and audio that was presented on television.

(B) January 1, 2017, where a single file contains multiple video clips that each contain a single excerpt of a captioned television program with the same video and audio that was presented on television.

(C) July 1, 2017, for video clips of live and near-live programming.

(ii) Closed captions must be provided for video clips of live programming within 12 hours after the conclusion of the associated video programming's publication or exhibition on television in the United States with captions. Closed captions must be provided for video clips of near-live programming within eight hours after the conclusion of the associated video programming's publication or exhibition on television in the United States with captions.

* * * * *

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),¹ an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated into the *Notice of Proposed Rulemaking* in this proceeding.² The Federal Communications Commission (“Commission”) sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. The Media Bureau issued a public notice seeking comment on the closed captioning of Internet protocol-delivered video clips, and that public notice also referenced the Initial Regulatory Flexibility Analysis included in the *NPRM* in this proceeding, which identified small entities that might be affected.³ The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis (“FRFA”) conforms to the RFA.⁴

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

2. One of the Commission’s priorities is to ensure that all individuals, especially individuals with disabilities, are able to enjoy the full benefits of broadband technology, including the services that broadband enables such as online video programming. Online viewing of video programming is becoming increasingly significant, and one aspect of this development is that more and more consumers are receiving news, sports, and entertainment programming in the form of online video clips.⁵ In the Second Order on Reconsideration (“*Video Clips Order*”), as part of our continued implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”),⁶ we conclude that clips of video programming covered by the statute must be captioned when delivered using Internet protocol (“IP”) and set out a schedule of deadlines.

3. When the Commission initially adopted IP closed captioning requirements pursuant to its responsibilities under the CVAA it applied the requirements to full-length video programming and not to

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (“CWAAA”).

² See *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Notice of Proposed Rulemaking, 26 FCC Rcd 13734 (2011) (“*NPRM*”).

³ *Media Bureau Seeks Comment on Application of the IP Closed Captioning Rules to Video Clips*, Public Notice, 28 FCC Rcd 16699 (MB, 2013) (“*Video Clips PN*”).

⁴ See 5 U.S.C. § 604.

⁵ See, e.g., CEA News Release, Change is in the Air: U.S. Households Viewing TV Programming only via the Internet are Poised to Surpass those Viewing only via Antenna, Finds New CEA Study, June 5, 2014, available at https://www.ce.org/News/News-Releases/Press-Releases/2014/OTA-Study_060514.aspx (last visited June 11, 2014) (citing the study’s finding that “viewership of video programming on connected devices continues to grow”); Global Web Index, Chart of the Day from March 14, 2014, available at https://www.globalwebindex.net/products/chart_of_the_day/14th-march-2014-77-percent-of-internet-users-watching-video-clips (last visited June 11, 2014) (“We track the rising popularity of watching video clips. By the end of 2013, 77% of [I]nternet users said they had done this in the last month – a figure which corresponds to more than 1.152 billion people (up from 711 million back in early 2011).”); Consumer Groups, Report on the State of Closed Captioning of Internet Protocol-Delivered Video Programming, MB Docket No. 11-154 and CG Docket No. 05-231 (May 16, 2013) (evaluating a variety of online video clips, including news clips and clips of entertainment programming, to determine the volume of captioned online video clips).

⁶ Pub. L. No. 111-260, 124 Stat. 2751 (2010). See also Amendment of the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA).

video clips.⁷ The Commission said that it might in the future extend the IP closed captioning requirements to video clips if it found that consumers who are deaf or hard of hearing are denied access to critical areas of programming, such as a news, because the programming is posted online as video clips.⁸ In response to a petition for reconsideration filed by consumer groups, and at the Commission's direction, the Media Bureau issued a Public Notice seeking updated information on the closed captioning of IP-delivered video clips, including the extent to which the industry has voluntarily captioned these clips.⁹ After reviewing the record compiled in this proceeding, we find that a significant percentage of video clips continue to remain inaccessible to consumers who are deaf or hard of hearing. In addition, we have reconsidered the Commission's earlier interpretation of the statute and conclude that Congress intended the IP closed captioning requirements to extend to all covered video programming including clips, but left to our discretion the timeline for compliance with this requirement. Accordingly, to implement the statute fully, and in furtherance of Congress's intent to ensure that individuals who are deaf or hard of hearing have better access to online video programming,¹⁰ the *Video Clips Order* reconsiders the Commission's earlier decision and revises the Commission's regulations to require the provision of closed captioning on video clips delivered using IP when the programming was published or exhibited on television with captions. As discussed in Section III of the *Video Clips Order*, it imposes closed captioning requirements on IP-delivered video clips by adopting rules that will:

- Extend the IP closed captioning requirements to IP-delivered video clips if the video programming distributor or provider¹¹ posts on its website or application (“app”) a video clip of video programming that it published or exhibited on television in the United States with captions, regardless of the content or length of the video clip.
- Pursuant to our authority to establish an appropriate schedule of deadlines for purposes of the IP closed captioning requirements,¹² adopt a compliance deadline of January 1, 2016 for “straight lift” clips, which contain a single excerpt of a captioned television program with the same video and audio that was presented on television, and January 1, 2017 for “montages,” which contain multiple straight lift clips.
- After the applicable deadlines, require IP-delivered video clips to be provided with closed captions at the time the clips are posted online, except as otherwise provided.
- For clips of video programming previously shown live or near-live on television with captions,¹³

⁷ *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787, 816-18, ¶¶ 44-48 (2012) (“*IP Closed Captioning Order*”).

⁸ *Id.* at 818, ¶ 48.

⁹ *Video Clips PN*.

¹⁰ See S. Rep. No. 111-386, 111th Cong., 2d Sess. at 1 (2010) (“Senate Committee Report”) (indicating that Congress sought to “update the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming”); H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 19 (2010) (“House Committee Report”) (same); 156 Cong. Rec. H6004 (daily ed. Jul. 26, 2010) (statement of then-Rep. Markey) (noting the “whole series of legislative initiatives aimed at broadening the disabled community’s access to technologies that can help them do things that most Americans take for granted”); *id.* at H6005 (statement of Rep. Stearns) (“[I]t’s important that people with disabilities are not left behind, have access and are afforded the opportunity to enjoy this wide variety of technology.”).

¹¹ When we use the term video programming distributor or provider herein, we invoke the definition of that term in the Commission’s IP closed captioning rules, which is “[a]ny 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).

¹² 47 U.S.C. § 613(c)(2)(B).

¹³ Industry refers to these video clips as “time-sensitive.”

require captions beginning July 1, 2017 and for the present time allow a grace period of 12 hours after the live programming is shown on television and eight hours after the near-live programming is shown on television before the clip must be captioned online.

- Find that compliance with the new requirements would be economically burdensome for video clips that are in the video programming distributor's or provider's online library before January 1, 2016 for straight lift clips, and January 1, 2017 for montages, and thus exempt this class of video clips from coverage; and
- Generally apply the IP closed captioning requirements to video clips in the same manner that they apply to full-length video programming, which among other things means that the quality requirements applicable to full-length IP-delivered video programming will apply to video clips.

In short, while we expect that some small entities will be impacted by these rules, we find that any economic impact of these rules on small entities will be mitigated by the availability of exemptions due to economic burden, and by the provision of the CVAA providing that a *de minimis* failure to comply with these rules will not be treated as a violation.

B. Summary of Significant Issues Raised By Public Comments in Response to the IRFA

4. No comments were filed in response to the IRFA. Some parties have made filings on the record that address the potential impact on small entities of rules requiring closed captioning of IP-delivered video clips. Specifically, one commenter asserted that small broadcasters that currently voluntarily caption certain televised programming might cease doing so, to avoid triggering a requirement for captioning of online clips of that programming.¹⁴ Another commenter argued that the technology is still developing and stated, "If broadcasters, perhaps particularly smaller ones, were immediately to face FCC complaint procedures and potential enforcement actions for failing to caption online video clips with the requisite quality, this would act as a disincentive to place video clips online, at least until clip captioning technology improves in both quality and reliability."¹⁵

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

5. The RFA directs agencies to provide a description of and an estimate of the number of small entities to which the rules will apply.¹⁶ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹⁷ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹⁸ A "small business concern" is one which: (1) is independently

¹⁴ Reply Comments of the Association of Public Television Stations and the Public Broadcasting Service at 2, 5-6. *But see* Consumer Groups Reply to Opposition of APTS/PBS, NAB, and NCTA at 5 (arguing that reductions in captioning costs no longer justify the television closed captioning exemption cited by APTS/PBS, in any event, and that the availability of exemptions due to economic burden should alleviate the concerns of APTS/PBS).

¹⁵ Reply Comments of the National Association of Broadcasters at 10. *See also id.* at 5, n. 8 ("Some small market stations report that they can only afford to caption clips online if owned and subsidized by a larger market station, given the cost of clip captioning and the lack of revenue from online video clips."); Letter from Susan L. Fox, Vice President, Government Relations, The Walt Disney Company, to Marlene H. Dortch, Secretary, FCC, at 2 (June 18, 2014) ("[T]he key aspect in crafting a *realistic* regime would be a long implementation period so that stations and programmers (both big and small) could budget for and undertake such a reconfiguration.") (emphasis in original).

¹⁶ 5 U.S.C. § 604(a)(4).

¹⁷ *Id.* § 601(6).

¹⁸ *Id.* § 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, (continued....)

owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (“SBA”).¹⁹ Below are descriptions of the small entities that may be affected by the rules adopted in the *Video Clips Order*, including, where feasible, an estimate of the number of such small entities.

6. *Small Businesses, Small Organizations, and Small Governmental Jurisdictions.* Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards.²⁰ First, according to the SBA Office of Advocacy, in 2010, there were 27.9 million small businesses in the United States.²¹ In addition, a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”²² Nationwide, as of 2007, there were approximately 1,621,315 small organizations.²³ Finally, the term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”²⁴ Census Bureau data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States.²⁵ We estimate that, of this total, a substantial majority may qualify as “small governmental jurisdictions.”²⁶ Thus, we estimate that most governmental jurisdictions are small.

7. *Wired Telecommunications Carriers.* The North American Industry Classification System (“NAICS”) defines “Wired Telecommunications Carriers” as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a

(Continued from previous page) _____

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.”

¹⁹ 15 U.S.C. § 632.

²⁰ See 5 U.S.C. §§ 601(3)-(6).

²¹ See SBA, Office of Advocacy, “Frequently Asked Questions,” (dated September 2012); available at http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf. The SBA Office of Advocacy defines a small business as an independent business having fewer than 500 employees. In 2010 there were 18,500 firms with 500 employees or more. *Id.*

²² 5 U.S.C. § 601(4).

²³ INDEPENDENT SECTOR, THE NEW NONPROFIT ALMANAC & DESK REFERENCE (2010).

²⁴ 5 U.S.C. § 601(5).

²⁵ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, Table 427 (2007).

²⁶ The 2007 U.S. Census data for small governmental organizations indicate that there were 89,476 local governments in 2007. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2011, Table 428. The criterion by which the size of such local governments is determined to be small is a population of fewer than 50,000. 5 U.S.C. § 601(5). However, since the Census Bureau, in compiling the cited data, does not state that it applies that criterion, it cannot be determined with precision how many such local governmental organizations are small. Nonetheless, the inference seems reasonable that a substantial number of these governmental organizations have a population of fewer than 50,000. To look at Table 428 in conjunction with a related set of data in Table 429 in the Census’s Statistical Abstract of the U.S., that inference is further supported by the fact that in both Tables, many sub-entities that may well be small are included in the 89,476 local governmental organizations, e.g. county, municipal, township and town, school district and special district entities. Measured by a criterion of a population of fewer than 50,000, many of the cited sub-entities in this category seem more likely than larger county-level governmental organizations to have small populations. Accordingly, of the 89,746 small governmental organizations identified in the 2007 Census, the Commission estimates that a substantial majority are small.

combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.²⁷ The SBA has developed a small business size standard for wireline firms for the broad economic census category of “Wired Telecommunications Carriers.” Under this category, a wireline business is small if it has 1,500 or fewer employees.²⁸ Census data for 2007 shows that there were 31,996 establishments that operated for the entire year.²⁹ Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.³⁰ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

8. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which category is defined above.³¹ The SBA has developed a small business size standard for this category, which is: All such businesses having 1,500 or fewer employees.³² Census data for 2007 shows that there were 31,996 establishments that operated for the entire year.³³ Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.³⁴ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

9. *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 rate regulation rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.³⁵ According to

²⁷ U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. Examples of this category are: broadband Internet service providers (e.g., cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television (“CCTV”) services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (“DTH”) services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (“MMDS”).

²⁸ 13 C.F.R. § 121.201; NAICS code 517110.

²⁹ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

³⁰ *Id.*

³¹ See also U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

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

³³ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

³⁴ *Id.*

³⁵ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, MM Docket No. 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

SNL Kagan, there are 1,258 cable operators.³⁶ Of this total, all but 10 incumbent cable companies are small under this size standard.³⁷ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.³⁸ Current Commission records show 4,584 cable systems nationwide.³⁹ Of this total, 4,012 cable systems have fewer than 20,000 subscribers, and 572 systems have 20,000 subscribers or more, based on the same records. Thus, under this standard, we estimate that most cable systems are small.

10. *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."⁴⁰ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.⁴¹ Based on available data, we find that all but 10 incumbent cable operators are small under this size standard.⁴² 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.⁴³ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable to estimate with greater precision the number of cable system operators that would qualify as small cable operators under this definition.

³⁶ Data provided by SNL Kagan to Commission Staff upon request on March 25, 2014. Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505-06, ¶ 24 (2013) ("15th Annual Competition Report").

³⁷ SNL Kagan, U.S. Multichannel Top Cable MSOs, <http://www.snl.com/interactivex/TopCableMSOs.aspx> (visited June 26, 2014). We note that when this size standard (*i.e.*, 400,000 or fewer subscribers) is applied to all MVPD operators, all but 14 MVPD operators would be considered small. *15th Annual Competition Report*, 28 FCC Rcd at 10507-08, ¶¶ 27-28 (subscriber data for DBS and Telephone MVPDs). 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).

³⁸ 47 C.F.R. § 76.901(c).

³⁹ The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on July 1, 2014. A cable system is a physical system integrated to a principal headend.

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

⁴¹ 47 C.F.R. § 76.901(f); see Public Notice, FCC Announces New Subscriber Count for the Definition of Small Cable Operator, 16 FCC Rcd 2225 (Cable Services Bureau, 2001) (establishing the threshold for determining whether a cable operator meets the definition of small cable operator at 677,000 subscribers and stating that this threshold will remain in effect for purposes of Section 76.901(f) until the Commission issues a superseding public notice). We note that current industry data indicates that there are approximately 54 million incumbent cable video subscribers in the United States today and that this updated number may be considered in developing size standards in a context different than Section 76.901(f). NCTA, Industry Data, Cable's Customer Base (June 2014), <https://www.ncta.com/industry-data> (visited June 25, 2014).

⁴² See SNL Kagan, U.S. Multichannel Top Cable MSOs, <http://www.snl.com/interactivex/TopCableMSOs.aspx> (visited June 26, 2014).

⁴³ 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).

11. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. DBS, by exception, is now included in the SBA’s broad economic census category, Wired Telecommunications Carriers,⁴⁴ which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.⁴⁵ Census data for 2007 shows that there were 31,996 establishments that operated for the entire year.⁴⁶ Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.⁴⁷ Therefore, under this size standard, the majority of such businesses can be considered small. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled “Cable and Other Program Distribution.” The definition of Cable and Other Program Distribution provided that a small entity is one with \$12.5 million or less in annual receipts.⁴⁸ Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.⁴⁹ Each currently offers subscription services. DIRECTV and DISH Network each reports 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.

12. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA’s broad economic census category, Wired Telecommunications Carriers,⁵⁰ which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.⁵¹ Census data for 2007 shows that there were 31,996 establishments that operated for the entire year.⁵² Of this total, 30,178

⁴⁴ This category of Wired Telecommunications Carriers is defined above (“By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”). U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁴⁵ 13 C.F.R. § 121.201; NAICS code 517110.

⁴⁶ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁴⁷ *Id.*

⁴⁸ 13 C.F.R. § 121.201; NAICS code 517510 (2002).

⁴⁹ See 15th Annual Competition Report, at ¶ 27. As of June 2012, DIRECTV is the largest DBS operator and the second largest MVPD in the United States, serving approximately 19.9 million subscribers. DISH Network is the second largest DBS operator and the third largest MVPD, serving approximately 14.1 million subscribers. *Id.* at ¶¶ 27, 110-11.

⁵⁰ This category of Wired Telecommunications Carriers is defined above (“By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”). U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁵¹ 13 C.F.R. § 121.201; NAICS code 517110.

⁵² U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007

(continued....)

establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.⁵³ Therefore, under this size standard, the majority of such businesses can be considered small.

13. *Home Satellite Dish (HSD) Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.⁵⁴ The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.⁵⁵ Census data for 2007 shows that there were 31,996 establishments that operated that year.⁵⁶ Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.⁵⁷ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

14. *Open Video Services.* The open video system (OVS) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.⁵⁸ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,⁵⁹ OVS falls within the SBA small business size standard covering cable services, which is Wired Telecommunications Carriers.⁶⁰ The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.⁶¹ Census data for 2007 shows that there were 31,996 establishments that operated that year.⁶² Of this total, 30,178 establishments had fewer than

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Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁵³ *Id.*

⁵⁴ This category of Wired Telecommunications Carriers is defined above ("By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."). U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁵⁵ 13 C.F.R. § 121.201; NAICS code 517110.

⁵⁶ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁵⁷ *Id.*

⁵⁸ 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").

⁵⁹ See 47 U.S.C. § 573.

⁶⁰ This category of Wired Telecommunications Carriers is defined above. See also U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁶¹ 13 C.F.R. § 121.201; NAICS code 517110.

⁶² U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

100 employees, and 1,818 establishments had 100 or more employees.⁶³ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities. In addition, we note that the Commission has certified some OVS operators, with some now providing service.⁶⁴ Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.⁶⁵ The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

15. *Wireless cable systems – Broadband Radio Service and Educational Broadband Service.* Wireless cable systems use the Broadband Radio Service (BRS)⁶⁶ and Educational Broadband Service (EBS)⁶⁷ 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.⁶⁸ 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.⁶⁹ 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.⁷⁰ 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.⁷¹

⁶³ *Id.*

⁶⁴ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsccer.html>.

⁶⁵ See *Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer businesses that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

⁶⁶ 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).

⁶⁷ EBS was previously referred to as the Instructional Television Fixed Service (ITFS). See *id.*

⁶⁸ 47 C.F.R. § 21.961(b)(1).

⁶⁹ 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.

⁷⁰ *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).

⁷¹ *Id.* at 8296.

Auction 86 concluded in 2009 with the sale of 61 licenses.⁷² 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. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers,⁷³ which was developed for small wireline businesses. The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.⁷⁴ Census data for 2007 shows that there were 31,996 establishments that operated that year.⁷⁵ Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.⁷⁶ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities. In addition to Census data, the Commission's internal records indicate that as of September 2012, there are 2,241 active EBS licenses.⁷⁷ The Commission estimates that of these 2,241 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.⁷⁸

⁷² *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).

⁷³ This category of Wired Telecommunications Carriers is defined above. *See also* U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁷⁴ 13 C.F.R. § 121.201; NAICS code 517110.

⁷⁵ U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁷⁶ *Id.*

⁷⁷ <http://wireless2.fcc.gov/UlsApp/UlsSearch/results.jsp>.

⁷⁸ 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 fewer than 50,000). 5 U.S.C. §§ 601(4)-(6).

17. *Incumbent Local Exchange Carriers (ILECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. ILECs are included in the SBA's economic census category, Wired Telecommunications Carriers.⁷⁹ Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.⁸⁰ Census data for 2007 shows that there were 31,996 establishments that operated that year.⁸¹ Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.⁸² Therefore, under this size standard, the majority of such businesses can be considered small.

18. *Small Incumbent Local Exchange Carriers.* We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."⁸³ The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.⁸⁴ We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

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. These entities are included in the SBA's economic census category, Wired Telecommunications Carriers.⁸⁵ Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.⁸⁶ Census data for 2007 shows that there were 31,996 establishments that operated that year.⁸⁷ Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.⁸⁸ Therefore, under this size standard, the majority of such businesses can be considered small.

⁷⁹ This category of Wired Telecommunications Carriers is defined above. *See also* U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁸⁰ 13 C.F.R. § 121.201; NAICS code 517110.

⁸¹ U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁸² *Id.*

⁸³ 15 U.S.C. § 632.

⁸⁴ 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).

⁸⁵ This category of Wired Telecommunications Carriers is defined above. *See also* U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁸⁶ 13 C.F.R. § 121.201; NAICS code 517110.

⁸⁷ U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁸⁸ *Id.*

20. *Television Broadcasting.* This economic census category “comprises establishments primarily engaged in broadcasting images together with sound.”⁸⁹ The SBA has created the following small business size standard for Television Broadcasting businesses: those having \$35.5 million or less in annual receipts.⁹⁰ Census data for 2007 shows that 2,076 establishments in this category operated for the entire year.⁹¹ Of this total, 1,515 establishments had annual receipts of \$10,000,000 or less, and 561 establishments had annual receipts of more than \$10,000,000.⁹² Because the Census has no additional classifications on the basis of which to identify the number of stations whose receipts exceeded \$35.5 million in that year, the majority of such establishments can be considered small under this size standard.

21. Apart from the U.S. Census, the Commission has estimated the number of licensed commercial television stations to be 1,388 stations.⁹³ Of this total, 1,221 stations (or about 88 percent) had revenues of \$35.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on July 2, 2014. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 395.⁹⁴ NCE stations are non-profit, and therefore considered to be small entities.⁹⁵ Therefore, we estimate that the majority of television broadcast stations are small entities.

22. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations⁹⁶ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

23. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis.... These establishments produce

⁸⁹ U.S. Census Bureau, 2012 NAICS Definitions, “515120 Television Broadcasting,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. 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.” Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

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

⁹¹ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series - Estab and Firm Size: Receipts Size of Establishments for the United States: 2007,” NAICS code 515120, Table EC0751SSSZ1; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁹² *Id.*

⁹³ See *Broadcast Station Totals as of March 31, 2014*, Press Release (MB rel. April 9, 2014) (*Broadcast Station Totals*) at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-326518A1.pdf.

⁹⁴ See *Broadcast Station Totals*, *supra*.

⁹⁵ See generally 5 U.S.C. §§ 601(4), (6).

⁹⁶ “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 21.103(a)(1).

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.⁹⁷ The SBA has developed a small business size standard for this category, which is: all such businesses having \$35.5 million or less in annual revenues.⁹⁸ Census data for 2007 shows that there were 659 establishments that operated for the entire year.⁹⁹ Of that number, 462 operated with annual revenues of fewer than \$10 million, and 197 operated with annual revenues of \$10 million or more.¹⁰⁰ Therefore, under this size standard, the majority of such businesses can be considered small.

24. *Motion Picture and Video Production.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials.”¹⁰¹ 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 programming for cable television. To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data currently available from the U.S. Census for the year 2007. The SBA has developed a small business size standard for this category, which is: those having \$30 million or less in annual receipts.¹⁰² Census data for 2007 shows that there were 9,095 firms in this category that operated for the entire year.¹⁰³ Of this total, 8,995 firms had annual receipts of fewer than \$25 million, and 43 firms had receipts of \$25 million to \$49,999,999.¹⁰⁴ Therefore, under this size standard, the majority of such businesses can be considered small.

25. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors.”¹⁰⁵ 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 distribute programming for cable television. To gauge small business prevalence in the Motion Picture and Video Distribution industries, the Commission relies on data currently available from the U.S. Census for the year 2007. The SBA has developed a small business size standard for this category, which is: those

⁹⁷ U.S. Census Bureau, 2012 NAICS Definitions, “515210 Cable and Other Subscription Programming” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁹⁸ 13 C.F.R. § 121.210; NAICS code 515210.

⁹⁹ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Receipts Size of Establishments for the United States: 2007 – 2007 Economic Census;” NAICS code 515210, Table EC0751SSSZ1; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

¹⁰⁰ *Id.*

¹⁰¹ U.S. Census Bureau, 2012 NAICS Definitions, “512110 Motion Picture and Video Production” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

¹⁰² 13 C.F.R. § 121.201, NAICS Code 512110.

¹⁰³ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Receipts Size of Firms for the United States: 2007 – 2007 Economic Census;” NAICS code 512110, Table EC0751SSSZ4; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

¹⁰⁴ *Id.*

¹⁰⁵ U.S. Census Bureau, 2012 NAICS Definitions, “512120 Motion Picture and Video Distribution” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

having \$29.5 million or less in annual receipts.¹⁰⁶ Census data for 2007 shows that there were 450 firms in this category that operated for the entire year.¹⁰⁷ Of this total, 434 firms had annual receipts of fewer than \$25 million, and 7 firms had receipts of \$25 million to \$49,999,999.¹⁰⁸ Therefore, under this size standard, the majority of such businesses can be considered small.

26. *Internet Publishing and Broadcasting and Web Search Portals.* The Census Bureau defines this category as follows: “This industry comprises 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.”¹⁰⁹ The SBA has developed a small business size standard for this category, which is: all such businesses having 500 or fewer employees.¹¹⁰ Census data for 2007 shows that there were 2,705 firms that operated for the entire year.¹¹¹ Of this total, 2,682 firms had fewer than 500 employees, and 13 firms had between 500 and 999 employees.¹¹² Therefore, under this size standard, the majority of such businesses can be considered small.

27. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.”¹¹³ The SBA has developed a small business size standard for this category, which is: all such businesses having 750 or fewer employees.¹¹⁴ Census data for 2007 shows that there were 939 establishments that operated for

¹⁰⁶ 13 C.F.R. § 121.201, NAICS Code 512120.

¹⁰⁷ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Receipts Size of Firms for the United States: 2007 – 2007 Economic Census;” NAICS code 512120, Table EC0751SSSZ4; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

¹⁰⁸ *Id.*

¹⁰⁹ U.S. Census Bureau, 2012 NAICS Definitions, “519130 Internet Publishing and Broadcasting and Web Search Portals” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. Examples of this category are: Internet book publishers, Internet sports sites, Internet entertainment sites, Internet video broadcast sites, Internet game sites, Internet news publishers, Internet periodical publishers, Internet radio stations, Internet search portals, Web search portals, and Internet search web sites.

¹¹⁰ 13 C.F.R. § 121.201; NAICS code 519130.

¹¹¹ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Firms for the United States: 2007 – 2007 Economic Census;” NAICS code 519130, Table EC0751SSSZ5; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

¹¹² *Id.*

¹¹³ U.S. Census Bureau, 2012 NAICS Definitions, “334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

¹¹⁴ 13 C.F.R. § 121.201; 2012 NAICS code 334220.

part or all of the entire year.¹¹⁵ Of this total, 912 establishments had fewer than 500 employees, and 10 establishments had between 500 and 999 employees.¹¹⁶ Therefore, under this size standard, the majority of such establishments can be considered small.

28. *Audio and Video Equipment Manufacturing.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing electronic audio and video equipment for home entertainment, motor vehicles, and public address and musical instrument amplification. Examples of products made by these establishments are video cassette recorders, televisions, stereo equipment, speaker systems, household-type video cameras, jukeboxes, and amplifiers for musical instruments and public address systems.”¹¹⁷ The SBA has developed a small business size standard for this category, which is: all such businesses having 750 or fewer employees.¹¹⁸ Census data for 2007 shows that 492 establishments in this category operated for part or all of the entire year.¹¹⁹ Of this total, 488 establishments had fewer than 500 employees, and three had between 500 and 999 employees.¹²⁰ Therefore, under this size standard, the majority of such establishments can be considered small.

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.”¹²¹ The SBA has developed a small business size standard for this category, which is: those having \$29.5 million or less in annual receipts.¹²² Census data for 2007 indicates that there were 1,605 firms that operated in this category for the entire year.¹²³ Of this total, 1,587 firms had annual receipts of fewer than \$25 million, and 9 firms had receipts of \$25 million to \$49,999,999.¹²⁴ Therefore, we estimate that the majority of firms in this category are small entities.

¹¹⁵ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Manufacturing: Summary Series: General Summary: Industry Statistics for Subsectors and Industries by Employment Size: 2007 – 2007 Economic Census,” NAICS code 334220, Table EC0731SG3; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

¹¹⁶ *Id.*

¹¹⁷ U.S. Census Bureau, 2012 NAICS Definitions, “334310 Audio and Video Equipment Manufacturing” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

¹¹⁸ 13 C.F.R. § 121.201; 2012 NAICS code 334310.

¹¹⁹ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Manufacturing: Summary Series: General Summary: Industry Statistics for Subsectors and Industries by Employment Size: 2007 – 2007 Economic Census,” NAICS code 334310, Table EC0731SG3; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

¹²⁰ *Id.*

¹²¹ U.S. Census Bureau, 2012 NAICS Definitions, “512191 Teleproduction and Other Postproduction Services” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

¹²² 13 C.F.R. § 121.201, NAICS Code 512191.

¹²³ U.S. Census Bureau, American FactFinder, “Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2007 U.S. Census Bureau, 2007 Economic Census,” NAICS code 512191, Table EC0751SSSZ4; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

¹²⁴ *Id.*

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.”¹²⁵ The SBA has developed a small business size standard for this category, which is: those having \$14 million or less in annual receipts.¹²⁶ Census data for 2007 indicates that there were 2,706 firms that operated in this category for the entire year.¹²⁷ Of this total, 2,687 had annual receipts of fewer than \$10 million, and 11 firms had receipts of \$10 million to \$24,999,999.¹²⁸ Therefore, we estimate that the majority of firms in this category are small entities.

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

32. The rules adopted in the *Video Clips Order* generally extend the IP closed captioning requirements, which previously applied only to full-length video programming, to video clips. The *Video Clips Order* does not adopt a new regulatory regime, but rather, applies the existing regime for full-length IP-delivered video programming to IP-delivered video clips, with certain modifications in recognition of the differences between video clips and full-length video programming. Accordingly, there are no new reporting or recordkeeping requirements. There will, however, be new compliance requirements for small entities. Specifically, the IP closed captioning requirements will extend to IP-delivered video clips if the video programming distributor or provider posts on its website or app a video clip of video programming that it published or exhibited on television in the United States with captions. The Commission adopts a compliance deadline of January 1, 2016 for “straight lift” clips, which contain a single excerpt of a captioned television program with the same video and audio that was presented on television, and January 1, 2017 for “montages,” which contain multiple straight lift clips. After the applicable deadlines, the new rules will require IP-delivered video clips to be provided with closed captions at the time the clips are posted online, except as otherwise provided. For clips of video programming previously shown live or near-live on television with captions, the rules will require captions beginning July 1, 2017, and for the present time will allow a grace period of 12 hours after the live programming is shown on television and eight hours after the near-live programming is shown on television before the clip must be captioned online. The Commission finds that compliance with the new requirements would be economically burdensome for video clips that are in the video programming distributor’s or provider’s online library before January 1, 2016 for straight lift clips and January 1, 2017 for montages, and thus the Commission exempts this class of video clips from coverage. In general, the Commission applies the IP closed captioning requirements to video clips in the same manner that they apply to full-length video programming, which among other things means that the quality requirements applicable to full-length IP-delivered video programming will apply to video clips.

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

33. The RFA requires an agency to describe the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the

¹²⁵ U.S. Census Bureau, 2012 NAICS Definitions, “561492 Court Reporting and Stenotype Services” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. Examples of this category are: Court reporting or stenotype recording services; Real-time (*i.e.*, simultaneous) closed captioning of live television performances, meetings, conferences; and Public stenography services.

¹²⁶ 13 C.F.R. § 121.201, NAICS Code 561492.

¹²⁷ U.S. Census Bureau, American FactFinder, “Administrative and Support and Waste Management and Remediation Services: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2007,” NAICS code 561492, Table EC0756SSSZ4; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

¹²⁸ *Id.*

final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.¹²⁹

34. As explained above, the *Video Clips Order* does not adopt a new regulatory regime, but rather, applies the existing regime for full-length IP-delivered video programming to IP-delivered video clips, with certain modifications in recognition of the differences between video clips and full-length video programming. Accordingly, similar to the rules promulgated in the *IP Closed Captioning Order*, the rules adopted in the *Video Clips Order* may have a significant economic impact in some cases and that impact may affect a substantial number of small entities.¹³⁰ Although the Commission has considered alternatives, where possible, to minimize economic impact on small entities, we note that our action is governed by the congressional mandate contained in the CVAA.¹³¹

35. Notably, the same aspects of the IP closed captioning rules applicable to full-length programming that ease compliance burdens on small entities also apply to small entities in the context of video clips. Specifically, in the *IP Closed Captioning Order*, the Commission adopted procedures enabling it to grant exemptions to the rules governing closed captioning of IP-delivered video programming pursuant to Section 202 of the CVAA, where a petitioner has shown that compliance would present an economic burden (*i.e.*, a significant difficulty or expense), and pursuant to Section 203 of the CVAA, where a petitioner has shown that compliance is not achievable (*i.e.*, cannot be accomplished with reasonable effort or expense) or not technically feasible.¹³² As was the case with regard to full-length programming, this exemption process will allow the Commission to address the impact of the extension of the rules to video clips on individual entities, including smaller entities, and to modify the application of the rules to accommodate individual circumstances.¹³³ Further, as with full-length IP-delivered video programming, a *de minimis* failure to comply with the requirements adopted pursuant to Section 202 of the CVAA with regard to IP-delivered video clips will not be treated as a violation, and parties may continue to use alternate means of compliance to the rules adopted pursuant to either Section 202 or Section 203 of the CVAA.¹³⁴ Individual entities, including smaller entities, may benefit from these provisions.

36. Overall, in crafting its new requirements, the Commission addressed the issues described in Section B above by providing reasonable timeframes within which entities may come into compliance, and by providing a grace period within which captions may be added to video clips of live or near-live programming.¹³⁵ All of these provisions should ease the burdens that small entities otherwise would face in complying with these requirements. Further, in recognition of the burdens that would be imposed on regulated entities, in particular smaller entities, if faced with a requirement to caption video clips that are in the video programming distributor's or provider's online library before January 1, 2016 for straight lift clips and January 1, 2017 for montages, the Commission finds that such a requirement would be economically burdensome and thus exempts this category of video clips from coverage.¹³⁶ We note,

¹²⁹ 5 U.S.C. § 604(a)(6).

¹³⁰ See *IP Closed Captioning Order*, 27 FCC Rcd at 891, ¶ 38.

¹³¹ See *id.*

¹³² See *id.*

¹³³ See *id.*

¹³⁴ See *id.* See also 47 U.S.C. § 613(c)(3) ("An entity may meet the requirements of this section through alternate means than those prescribed by regulations . . . if the requirements of this section are met, as determined by the Commission"); Section 203(e) of the CVAA ("An entity may meet the requirements of sections 303(u), 303(z), and 330(b) of the Communications Act of 1934 through alternate means than those prescribed by regulations . . . if the requirements of those sections are met, as determined by the Commission").

¹³⁵ See *Video Clips Order* Sections III.C.2-3.

¹³⁶ See *Video Clips Order* Section III.C.4.

additionally, that a Commission requirement for captioning IP-delivered video clips will ensure that the content, including critical news programming, will be accessible to individuals who are deaf or hard of hearing, thus significantly benefiting consumers and serving the stated public interest goal of the CVAA.¹³⁷

F. Report to Congress

37. The Commission will send a copy of the *Video Clips Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.¹³⁸ In addition, the Commission will send a copy of the *Video Clips Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Video Clips Order* and FRFA (or summaries thereof) will also be published in the Federal Register.¹³⁹

¹³⁷ See *Video Clips Order* Section III.B

¹³⁸ See 5 U.S.C. § 801(a)(1)(A).

¹³⁹ See *id.* § 604(b).

APPENDIX C

Initial Regulatory Flexibility Analysis

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

A. Need for, and Objectives of, the Second Further Notice of Proposed Rulemaking

2. In the Second Order on Reconsideration attached to the *Further Notice*, as part of the Commission’s continued implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”), the Commission imposes closed captioning requirements on excerpts of video programming, specifically online video clips. In the *Further Notice* attached to that order, the Commission explores the following four issues related to closed captioning of video clips delivered via Internet protocol (“IP”):

- Application of the IP closed captioning rules to the provision of video clips by third party video programming providers and distributors;
- Whether in the future we should decrease or eliminate the 12-hour timeframe within which IP-delivered video clips of video programming previously shown live on television must be captioned and the eight-hour timeframe within which IP-delivered video clips of video programming previously shown near-live on television must be captioned;
- Application of the IP closed captioning requirements to files that contain a combination of one or more video clips that have been shown on television with captions and online-only content that has not (“mash-ups”); and
- Application of the IP closed captioning rules to video clips that are added to the video programming distributor’s or provider’s library on or after January 1, 2016 for straight lift clips⁴ and January 1, 2017 for montages,⁵ but before the associated video programming is shown on television with captions (“advance” video clips).

B. Legal Basis

3. The proposed action is authorized pursuant to Sections 4(i), 4(j), 303, and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303, and 613.

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

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ “Straight lift” clips are those that contain a single excerpt of a captioned television program with the same video and audio that was presented on television.

⁵ “Montages” contain multiple straight lift clips.

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

4. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted in the *Video Clips Order*.⁶ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁷ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁸ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (“SBA”).⁹ Small entities that may be directly affected by the proposals in the *Further Notice* are those entities that distribute IP-delivered clips of video programming and the owners of such programming. Such small entities may include television broadcasters, multichannel video programming distributors (MVPDs), programmers, and other entities that own or distribute video programming. Below are descriptions of the small entities that may be affected by the rules proposed in the *Further Notice*, including, where feasible, an estimate of the number of such small entities. In addition, because the *Further Notice* considers application of the IP closed captioning rules to the provision of video clips by third party video programming providers and distributors, and because of the difficulty of identifying all such third party video programming providers and distributors, we seek specific comment on whether such small entities are covered by the categories listed below and, if not, on how to identify and estimate such small entities.

5. *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.¹⁰ First, according to the SBA Office of Advocacy, in 2010, there were 27.9 million small businesses in the United States.¹¹ In addition, a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”¹² Nationwide, as of 2007, there were approximately 1,621,315 small organizations.¹³ Finally, the term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”¹⁴ Census Bureau data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States.¹⁵ We estimate that, of this total, a substantial

⁶ 5 U.S.C. § 603(b)(3).

⁷ *Id.* § 601(6).

⁸ *Id.* § 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.”

⁹ 15 U.S.C. § 632.

¹⁰ *See* 5 U.S.C. §§ 601(3)-(6).

¹¹ *See* SBA, Office of Advocacy, “Frequently Asked Questions,” (dated September 2012); available at http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf. The SBA Office of Advocacy defines a small business as an independent business having fewer than 500 employees. In 2010 there were 18,500 firms with 500 employees or more. *Id.*

¹² 5 U.S.C. § 601(4).

¹³ INDEPENDENT SECTOR, THE NEW NONPROFIT ALMANAC & DESK REFERENCE (2010).

¹⁴ 5 U.S.C. § 601(5).

¹⁵ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, Table 427 (2007).

majority may qualify as “small governmental jurisdictions.”¹⁶ Thus, we estimate that most governmental jurisdictions are small.

6. *Wired Telecommunications Carriers.* The North American Industry Classification System (“NAICS”) defines “Wired Telecommunications Carriers” as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”¹⁷ The SBA has developed a small business size standard for wireline firms for the broad economic census category of “Wired Telecommunications Carriers.” Under this category, a wireline business is small if it has 1,500 or fewer employees.¹⁸ Census data for 2007 shows that there were 31,996 establishments that operated for the entire year.¹⁹ Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.²⁰ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

7. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which category is defined above.²¹ The SBA has developed a small business size standard for this category, which is: All

¹⁶ The 2007 U.S. Census data for small governmental organizations indicate that there were 89,476 local governments in 2007. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2011, Table 428. The criterion by which the size of such local governments is determined to be small is a population of fewer than 50,000. 5 U.S.C. § 601(5). However, since the Census Bureau, in compiling the cited data, does not state that it applies that criterion, it cannot be determined with precision how many such local governmental organizations are small. Nonetheless, the inference seems reasonable that a substantial number of these governmental organizations have a population of fewer than 50,000. To look at Table 428 in conjunction with a related set of data in Table 429 in the Census’s Statistical Abstract of the U.S., that inference is further supported by the fact that in both Tables, many sub-entities that may well be small are included in the 89,476 local governmental organizations, e.g. county, municipal, township and town, school district and special district entities. Measured by a criterion of a population of fewer than 50,000, many of the cited sub-entities in this category seem more likely than larger county-level governmental organizations to have small populations. Accordingly, of the 89,746 small governmental organizations identified in the 2007 Census, the Commission estimates that a substantial majority are small.

¹⁷ U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. Examples of this category are: broadband Internet service providers (e.g., cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television (“CCTV”) services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (“DTH”) services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (“MMDS”).

¹⁸ 13 C.F.R. § 121.201; NAICS code 517110.

¹⁹ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

²⁰ *Id.*

²¹ See also U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

such businesses having 1,500 or fewer employees.²² Census data for 2007 shows that there were 31,996 establishments that operated for the entire year.²³ Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.²⁴ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

8. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rate regulation rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.²⁵ According to SNL Kagan, there are 1,258 cable operators.²⁶ Of this total, all but 10 incumbent cable companies are small under this size standard.²⁷ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.²⁸ Current Commission records show 4,584 cable systems nationwide.²⁹ Of this total, 4,012 cable systems have fewer than 20,000 subscribers, and 572 systems have 20,000 subscribers or more, based on the same records. Thus, under this standard, we estimate that most cable systems are small.

9. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."³⁰ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual

²² 13 C.F.R. § 121.201; NAICS code 517110.

²³ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

²⁴ *Id.*

²⁵ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, MM Docket No. 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

²⁶ Data provided by SNL Kagan to Commission Staff upon request on March 25, 2014. Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505-06, ¶ 24 (2013) ("15th Annual Competition Report").

²⁷ SNL Kagan, U.S. Multichannel Top Cable MSOs, <http://www.snl.com/interactivex/TopCableMSOs.aspx> (visited June 26, 2014). We note that when this size standard (*i.e.*, 400,000 or fewer subscribers) is applied to all MVPD operators, all but 14 MVPD operators would be considered small. 15th Annual Competition Report, 28 FCC Rcd at 10507-08, ¶¶ 27-28 (subscriber data for DBS and Telephone MVPDs). 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).

²⁸ 47 C.F.R. § 76.901(c).

²⁹ The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on July 1, 2014. A cable system is a physical system integrated to a principal headend.

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

revenues of all its affiliates, do not exceed \$250 million in the aggregate.³¹ Based on available data, we find that all but 10 incumbent cable operators are small under this size standard.³² 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.³³ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable to estimate with greater precision the number of cable system operators that would qualify as small cable operators under this definition.

10. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. DBS, by exception, is now included in the SBA’s broad economic census category, Wired Telecommunications Carriers,³⁴ which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.³⁵ Census data for 2007 shows that there were 31,996 establishments that operated for the entire year.³⁶ Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.³⁷ Therefore, under this size standard, the majority of such businesses can be considered small. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled “Cable and Other Program Distribution.” The definition of Cable and Other Program Distribution provided that a small entity is one with \$12.5 million or less in annual receipts.³⁸ Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.³⁹ Each currently offers subscription services. DIRECTV and DISH

³¹ 47 C.F.R. § 76.901(f); see Public Notice, FCC Announces New Subscriber Count for the Definition of Small Cable Operator, 16 FCC Rcd 2225 (Cable Services Bureau, 2001) (establishing the threshold for determining whether a cable operator meets the definition of small cable operator at 677,000 subscribers and stating that this threshold will remain in effect for purposes of Section 76.901(f) until the Commission issues a superseding public notice). We note that current industry data indicates that there are approximately 54 million incumbent cable video subscribers in the United States today and that this updated number may be considered in developing size standards in a context different than Section 76.901(f). NCTA, Industry Data, Cable’s Customer Base (June 2014), <https://www.ncta.com/industry-data> (visited June 25, 2014).

³² See SNL Kagan, U.S. Multichannel Top Cable MSOs, <http://www.snl.com/interactivex/TopCableMSOs.aspx> (visited June 26, 2014).

³³ 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).

³⁴ This category of Wired Telecommunications Carriers is defined above (“By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”). U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

³⁵ 13 C.F.R. § 121.201; NAICS code 517110.

³⁶ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

³⁷ *Id.*

³⁸ 13 C.F.R. § 121.201; NAICS code 517510 (2002).

³⁹ See *15th Annual Competition Report*, at ¶ 27. As of June 2012, DIRECTV is the largest DBS operator and the second largest MVPD in the United States, serving approximately 19.9 million subscribers. DISH Network is the second largest DBS operator and the third largest MVPD, serving approximately 14.1 million subscribers. *Id.* at ¶¶ 27, 110-11.

Network each reports annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

11. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, Wired Telecommunications Carriers,⁴⁰ which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.⁴¹ Census data for 2007 shows that there were 31,996 establishments that operated for the entire year.⁴² Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.⁴³ Therefore, under this size standard, the majority of such businesses can be considered small.

12. *Home Satellite Dish (HSD) Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.⁴⁴ The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.⁴⁵ Census data for 2007 shows that there were 31,996 establishments that operated that year.⁴⁶ Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.⁴⁷ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

⁴⁰ This category of Wired Telecommunications Carriers is defined above ("By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."). U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁴¹ 13 C.F.R. § 121.201; NAICS code 517110.

⁴² U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁴³ *Id.*

⁴⁴ This category of Wired Telecommunications Carriers is defined above ("By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."). U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁴⁵ 13 C.F.R. § 121.201; NAICS code 517110.

⁴⁶ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁴⁷ *Id.*

13. *Open Video Services.* The open video system (OVS) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.⁴⁸ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,⁴⁹ OVS falls within the SBA small business size standard covering cable services, which is Wired Telecommunications Carriers.⁵⁰ The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.⁵¹ Census data for 2007 shows that there were 31,996 establishments that operated that year.⁵² Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.⁵³ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities. In addition, we note that the Commission has certified some OVS operators, with some now providing service.⁵⁴ Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.⁵⁵ The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

14. *Wireless cable systems – Broadband Radio Service and Educational Broadband Service.* Wireless cable systems use the Broadband Radio Service (BRS)⁵⁶ and Educational Broadband Service (EBS)⁵⁷ 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.⁵⁸ 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

⁴⁸ 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*”).

⁴⁹ See 47 U.S.C. § 573.

⁵⁰ This category of Wired Telecommunications Carriers is defined above. See also U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁵¹ 13 C.F.R. § 121.201; NAICS code 517110.

⁵² U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁵³ *Id.*

⁵⁴ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsccer.html>.

⁵⁵ See *Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer businesses that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

⁵⁶ 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).

⁵⁷ EBS was previously referred to as the Instructional Television Fixed Service (ITFS). See *id.*

⁵⁸ 47 C.F.R. § 21.961(b)(1).

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.⁵⁹ 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.⁶⁰ 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.⁶¹ Auction 86 concluded in 2009 with the sale of 61 licenses.⁶² 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.

15. 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. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers,⁶³ which was developed for small wireline businesses. The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.⁶⁴ Census data for 2007 shows that there were 31,996 establishments that operated that year.⁶⁵ Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.⁶⁶ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities. In addition to Census data, the Commission's internal records indicate that as of September 2012, there are 2,241 active EBS licenses.⁶⁷ The Commission estimates that of these

⁵⁹ 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.

⁶⁰ *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).

⁶¹ *Id.* at 8296.

⁶² *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).

⁶³ This category of Wired Telecommunications Carriers is defined above. *See also* U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁶⁴ 13 C.F.R. § 121.201; NAICS code 517110.

⁶⁵ U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁶⁶ *Id.*

⁶⁷ <http://wireless2.fcc.gov/UlsApp/UlsSearch/results.jsp>.

2,241 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.⁶⁸

16. *Incumbent Local Exchange Carriers (ILECs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. ILECs are included in the SBA's economic census category, Wired Telecommunications Carriers.⁶⁹ Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.⁷⁰ Census data for 2007 shows that there were 31,996 establishments that operated that year.⁷¹ Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.⁷² Therefore, under this size standard, the majority of such businesses can be considered small.

17. *Small Incumbent Local Exchange Carriers*. We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."⁷³ The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.⁷⁴ We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

18. *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. These entities are included in the SBA's economic census category, Wired Telecommunications Carriers.⁷⁵ Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.⁷⁶ Census data for 2007 shows that there were 31,996 establishments that operated that year.⁷⁷ Of this total, 30,178

⁶⁸ 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 fewer than 50,000). 5 U.S.C. §§ 601(4)-(6).

⁶⁹ This category of Wired Telecommunications Carriers is defined above. *See also* U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁷⁰ 13 C.F.R. § 121.201; NAICS code 517110.

⁷¹ U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁷² *Id.*

⁷³ 15 U.S.C. § 632.

⁷⁴ 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).

⁷⁵ This category of Wired Telecommunications Carriers is defined above. *See also* U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

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

⁷⁷ U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007

(continued....)

establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.⁷⁸ Therefore, under this size standard, the majority of such businesses can be considered small.

19. *Television Broadcasting.* This economic census category “comprises establishments primarily engaged in broadcasting images together with sound.”⁷⁹ The SBA has created the following small business size standard for Television Broadcasting businesses: those having \$35.5 million or less in annual receipts.⁸⁰ Census data for 2007 shows that 2,076 establishments in this category operated for the entire year.⁸¹ Of this total, 1,515 establishments had annual receipts of \$10,000,000 or less, and 561 establishments had annual receipts of more than \$10,000,000.⁸² Because the Census has no additional classifications on the basis of which to identify the number of stations whose receipts exceeded \$35.5 million in that year, the majority of such establishments can be considered small under this size standard.

20. Apart from the U.S. Census, the Commission has estimated the number of licensed commercial television stations to be 1,388 stations.⁸³ Of this total, 1,221 stations (or about 88 percent) had revenues of \$35.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on July 2, 2014. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 395.⁸⁴ NCE stations are non-profit, and therefore considered to be small entities.⁸⁵ Therefore, we estimate that the majority of television broadcast stations are small entities.

21. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations⁸⁶ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific

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Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁷⁸ *Id.*

⁷⁹ U.S. Census Bureau, 2012 NAICS Definitions, “515120 Television Broadcasting,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. 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.” Separate census categories pertain to businesses primarily engaged in producing programming. *See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

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

⁸¹ U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, “Information: Subject Series - Estab and Firm Size: Receipts Size of Establishments for the United States: 2007,” NAICS code 515120, Table EC0751SSSZ1; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁸² *Id.*

⁸³ *See Broadcast Station Totals as of March 31, 2014*, Press Release (MB rel. April 9, 2014) (*Broadcast Station Totals*) at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-326518A1.pdf.

⁸⁴ *See Broadcast Station Totals, supra.*

⁸⁵ *See generally* 5 U.S.C. §§ 601(4), (6).

⁸⁶ “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 21.103(a)(1).

television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

22. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis.... These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.”⁸⁷ The SBA has developed a small business size standard for this category, which is: all such businesses having \$35.5 million or less in annual revenues.⁸⁸ Census data for 2007 shows that there were 659 establishments that operated for the entire year.⁸⁹ Of that number, 462 operated with annual revenues of fewer than \$10 million, and 197 operated with annual revenues of \$10 million or more.⁹⁰ Therefore, under this size standard, the majority of such businesses can be considered small.

23. *Motion Picture and Video Production.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials.”⁹¹ 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 programming for cable television. To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data currently available from the U.S. Census for the year 2007. The SBA has developed a small business size standard for this category, which is: those having \$30 million or less in annual receipts.⁹² Census data for 2007 shows that there were 9,095 firms in this category that operated for the entire year.⁹³ Of this total, 8,995 firms had annual receipts of fewer than \$25 million, and 43 firms had receipts of \$25 million to \$49,999,999.⁹⁴ Therefore, under this size standard, the majority of such businesses can be considered small.

24. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and

⁸⁷ U.S. Census Bureau, 2012 NAICS Definitions, “515210 Cable and Other Subscription Programming” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁸⁸ 13 C.F.R. § 121.210; NAICS code 515210.

⁸⁹ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Receipts Size of Establishments for the United States: 2007 – 2007 Economic Census;” NAICS code 515210, Table EC0751SSSZ1; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁹⁰ *Id.*

⁹¹ U.S. Census Bureau, 2012 NAICS Definitions, “512110 Motion Picture and Video Production” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁹² 13 C.F.R. § 121.201, NAICS Code 512110.

⁹³ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Receipts Size of Firms for the United States: 2007 – 2007 Economic Census;” NAICS code 512110, Table EC0751SSSZ4; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁹⁴ *Id.*

exhibitors.”⁹⁵ 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 distribute programming for cable television. To gauge small business prevalence in the Motion Picture and Video Distribution industries, the Commission relies on data currently available from the U.S. Census for the year 2007. The SBA has developed a small business size standard for this category, which is: those having \$29.5 million or less in annual receipts.⁹⁶ Census data for 2007 shows that there were 450 firms in this category that operated for the entire year.⁹⁷ Of this total, 434 firms had annual receipts of fewer than \$25 million, and 7 firms had receipts of \$25 million to \$49,999,999.⁹⁸ Therefore, under this size standard, the majority of such businesses can be considered small.

25. *Internet Publishing and Broadcasting and Web Search Portals.* The Census Bureau defines this category as follows: “This industry comprises 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.”⁹⁹ The SBA has developed a small business size standard for this category, which is: all such businesses having 500 or fewer employees.¹⁰⁰ Census data for 2007 shows that there were 2,705 firms that operated for the entire year.¹⁰¹ Of this total, 2,682 firms had fewer than 500 employees, and 13 firms had between 500 and 999 employees.¹⁰² Therefore, under this size standard, the majority of such businesses can be considered small.

26. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile

⁹⁵ U.S. Census Bureau, 2012 NAICS Definitions, “512120 Motion Picture and Video Distribution” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁹⁶ 13 C.F.R. § 121.201, NAICS Code 512120.

⁹⁷ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Receipts Size of Firms for the United States: 2007 – 2007 Economic Census;” NAICS code 512120, Table EC0751SSSZ4; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁹⁸ *Id.*

⁹⁹ U.S. Census Bureau, 2012 NAICS Definitions, “519130 Internet Publishing and Broadcasting and Web Search Portals” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. Examples of this category are: Internet book publishers, Internet sports sites, Internet entertainment sites, Internet video broadcast sites, Internet game sites, Internet news publishers, Internet periodical publishers, Internet radio stations, Internet search portals, Web search portals, and Internet search web sites.

¹⁰⁰ 13 C.F.R. § 121.201; NAICS code 519130.

¹⁰¹ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Firms for the United States: 2007 – 2007 Economic Census;” NAICS code 519130, Table EC0751SSSZ5; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

¹⁰² *Id.*

communications equipment, and radio and television studio and broadcasting equipment.”¹⁰³ The SBA has developed a small business size standard for this category, which is: all such businesses having 750 or fewer employees.¹⁰⁴ Census data for 2007 shows that there were 939 establishments that operated for part or all of the entire year.¹⁰⁵ Of this total, 912 establishments had fewer than 500 employees, and 10 establishments had between 500 and 999 employees.¹⁰⁶ Therefore, under this size standard, the majority of such establishments can be considered small.

27. *Audio and Video Equipment Manufacturing.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing electronic audio and video equipment for home entertainment, motor vehicles, and public address and musical instrument amplification. Examples of products made by these establishments are video cassette recorders, televisions, stereo equipment, speaker systems, household-type video cameras, jukeboxes, and amplifiers for musical instruments and public address systems.”¹⁰⁷ The SBA has developed a small business size standard for this category, which is: all such businesses having 750 or fewer employees.¹⁰⁸ Census data for 2007 shows that 492 establishments in this category operated for part or all of the entire year.¹⁰⁹ Of this total, 488 establishments had fewer than 500 employees, and three had between 500 and 999 employees.¹¹⁰ Therefore, under this size standard, the majority of such establishments can be considered small.

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

29. The first category of *Teleproduction and Other Postproduction Services* “comprises establishments primarily engaged in providing specialized motion picture or video postproduction services, such as editing, film/tape transfers, subtitling, credits, closed captioning, and animation and special effects.”¹¹¹ The SBA has developed a small business size standard for this category, which is: those having \$29.5 million or less in annual receipts.¹¹² Census data for 2007 indicates that there were

¹⁰³ U.S. Census Bureau, 2012 NAICS Definitions, “334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

¹⁰⁴ 13 C.F.R. § 121.201; 2012 NAICS code 334220.

¹⁰⁵ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Manufacturing: Summary Series: General Summary: Industry Statistics for Subsectors and Industries by Employment Size: 2007 – 2007 Economic Census,” NAICS code 334220, Table EC0731SG3; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

¹⁰⁶ *Id.*

¹⁰⁷ U.S. Census Bureau, 2012 NAICS Definitions, “334310 Audio and Video Equipment Manufacturing” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

¹⁰⁸ 13 C.F.R. § 121.201; 2012 NAICS code 334310.

¹⁰⁹ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Manufacturing: Summary Series: General Summary: Industry Statistics for Subsectors and Industries by Employment Size: 2007 – 2007 Economic Census,” NAICS code 334310, Table EC0731SG3; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

¹¹⁰ *Id.*

¹¹¹ U.S. Census Bureau, 2012 NAICS Definitions, “512191 Teleproduction and Other Postproduction Services” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

¹¹² 13 C.F.R. § 121.201, NAICS Code 512191.

1,605 firms that operated in this category for the entire year.¹¹³ Of this total, 1,587 firms had annual receipts of fewer than \$25 million, and 9 firms had receipts of \$25 million to \$49,999,999.¹¹⁴ Therefore, we estimate that the majority of firms in this category are small entities.

30. The second category of *Court Reporting and Stenotype Services* “comprises establishments primarily engaged in providing verbatim reporting and stenotype recording of live legal proceedings and transcribing subsequent recorded materials.”¹¹⁵ The SBA has developed a small business size standard for this category, which is: those having \$14 million or less in annual receipts.¹¹⁶ Census data for 2007 indicates that there were 2,706 firms that operated in this category for the entire year.¹¹⁷ Of this total, 2,687 had annual receipts of fewer than \$10 million, and 11 firms had receipts of \$10 million to \$24,999,999.¹¹⁸ Therefore, we estimate that the majority of firms in this category are small entities.

31. *Newspaper Publishers.* The Census Bureau defines this category as follows: “This industry comprises establishments known as newspaper publishers. Establishments in this industry carry out operations necessary for producing and distributing newspapers, including gathering news; writing news columns, feature stories, and editorials; and selling and preparing advertisements.”¹¹⁹ The SBA has developed a small business size standard for this category, which is: those having 500 or fewer employees.¹²⁰ Census data for 2007 shows that there were 4,852 firms in this category that operated for the entire year.¹²¹ Of this total, 4,771 firms had fewer than 500 employees, and an additional 33 firms had between 500 and 999 employees.¹²² Therefore, we estimate that the majority of firms in this category are small entities.

32. *Periodical Publishers.* The Census Bureau defines this category as follows: “This industry comprises establishments known either as magazine publishers or periodical publishers. These establishments carry out the operations necessary for producing and distributing magazines and other periodicals, such as gathering, writing, and editing articles, and selling and preparing advertisements.”¹²³

¹¹³ U.S. Census Bureau, American FactFinder, “Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2007 U.S. Census Bureau, 2007 Economic Census,” NAICS code 512191, Table EC0751SSSZ4; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

¹¹⁴ *Id.*

¹¹⁵ U.S. Census Bureau, 2012 NAICS Definitions, “561492 Court Reporting and Stenotype Services” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. Examples of this category are: Court reporting or stenotype recording services; Real-time (*i.e.*, simultaneous) closed captioning of live television performances, meetings, conferences; and Public stenography services.

¹¹⁶ 13 C.F.R. § 121.201; NAICS Code 561492.

¹¹⁷ U.S. Census Bureau, American FactFinder, “Administrative and Support and Waste Management and Remediation Services: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2007,” NAICS code 561492, Table EC0756SSSZ4; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

¹¹⁸ *Id.*

¹¹⁹ U.S. Census Bureau, 2012 NAICS Definitions, “511110 Newspaper Publishers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. These establishments may publish newspapers in print or electronic form. *Id.*

¹²⁰ 13 C.F.R. § 121.201; NAICS Code 511110.

¹²¹ U.S. Census Bureau, American FactFinder, “Information: Subject Series - Estab and Firm Size: Employment Size of Firms for the United States: 2007,” NAICS code 511110, Table EC0751SSSZ5; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

¹²² *Id.*

¹²³ U.S. Census Bureau, 2012 NAICS Definitions, “511120 Periodical Publishers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. These establishments may publish magazines and other periodicals in print or electronic form. *Id.* Examples of this category are: Comic book publishers (except exclusive Internet publishing); Radio and

(continued....)

The SBA has developed a small business size standard for this category, which is: those having 500 or fewer employees.¹²⁴ Census data for 2007 shows that there were 5,479 firms in this category that operated for the entire year.¹²⁵ Of this total, 5,434 firms had fewer than 500 employees, and an additional 25 firms had between 500 and 999 employees.¹²⁶ Therefore, we estimate that the majority of firms in this category are small entities.

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

33. Certain proposals discussed in the *Further Notice* would affect reporting, recordkeeping, or other compliance requirements.

34. The *Further Notice* considers four issues related to the extension of the IP closed captioning requirements to video clips as discussed in the *Video Clips Order*. First, the *Further Notice* seeks comment on application of the IP closed captioning requirements to “third party” video programming providers and distributors, which are those not subject to the *Video Clips Order*.¹²⁷ Third party distributors include entities, such as news websites, that do not distribute full-length video programming but may sometimes make video clips available on their websites. Third party distributors also include entities, such as Hulu, that distribute full-length video programming online but do not also distribute such programming on television.¹²⁸ The *Further Notice* asks whether the Commission should impose the general IP closed captioning rules to such third parties, or whether any differing obligations should apply. For example, the IP closed captioning rules require each video programming owner, “[w]ith each video programming distributor and provider that such owner licenses to distribute video programming directly to the end user through a distribution method that uses Internet protocol, [to] agree upon a mechanism to inform such distributors and providers on an ongoing basis whether video programming is subject to the requirements of this section.”¹²⁹ The *Further Notice* asks how this “mechanism” would operate in the context of video clips covered by these rules when they are provided to third party IP distributors. Extension of the IP closed captioning requirements for video clips to third party distributors that are small entities will subject these entities to the video clips requirements. Second, the Commission seeks comment on decreasing or eliminating the grace period adopted in the *Video Clips Order* for providing closed captions on IP-delivered video clips of video programming previously shown live or near-live on television with captions.¹³⁰ Decreasing or eliminating this grace period would require all entities, including smaller entities, to make captions available more quickly for video clips of live and near-live programming. Third, the *Further Notice* asks about application of the Commission’s IP closed

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television guide publishers (except exclusive publishing); Magazine publishers (except exclusive Internet publishing); Scholarly journal publishers (except exclusive Internet publishing); Newsletter publishers (except exclusive Internet publishing); and Trade journal publishers (except exclusive Internet publishing).

¹²⁴ 13 C.F.R. § 121.201; NAICS Code 511120.

¹²⁵ U.S. Census Bureau, American FactFinder, “Information: Subject Series - Estab and Firm Size: Employment Size of Firms for the United States: 2007,” NAICS code 511120, Table EC0751SSSZ5; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

¹²⁶ *Id.*

¹²⁷ The *Video Clips Order* imposes closed captioning requirements for IP-delivered video clips, at the present time, to instances in which the video programming provider or distributor (as those terms are defined in the IP closed captioning rules) posts on its website or application a video clip of video programming that it published or exhibited on television in the United States with captions on or after the applicable compliance deadline. See *Video Clips Order* Section III.C.1.

¹²⁸ See *Further Notice* Section IV.A.

¹²⁹ 47 C.F.R. § 79.4(c)(1)(ii).

¹³⁰ See *Further Notice* Section IV.B.

captioning requirements to files that contain a combination of one or more video clips that have been shown on television with captions and other content (such as online-only content) that has not been shown on television with captions (“mash-ups”).¹³¹ Extension of the IP closed captioning requirements to mash-ups will require all entities, including small entities, to comply with the requirements for an additional type of video clip. Fourth, the Commission seeks comment on application of the IP closed captioning rules to “advance” video clips, which are those that are added to the video programming distributor’s or provider’s library on or after January 1, 2016 for straight lift clips and January 1, 2017 for montages, but before the associated video programming is shown on television with captions on or after the compliance deadline.¹³² Extension of the IP closed captioning requirements to advance video clips also will require all entities, including small entities, to comply with the requirements for an additional type of video clip.

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

35. 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.¹³³

36. Similar to the rules promulgated in the accompanying *Second Order on Reconsideration (“Video Clips Order”)*, the proposals contained in the *Further Notice*, if adopted, could have a significant economic impact on a substantial number of small entities. Although the Commission has considered (and will continue to consider) alternatives, where possible, to minimize economic impact on small entities, we note that our proposals in the *Further Notice* are governed by the congressional mandate contained in the CVAA. We note that in the *Further Notice*, the Commission seeks comment on the costs and benefits of the proposals on affected entities, including small entities.

37. As explained in the Final Regulatory Flexibility Analysis (FRFA) for the accompanying *Video Clips Order*, as well as the FRFA for the *IP Closed Captioning Order*, we note that the same aspects of the IP closed captioning rules applicable to full-length programming that ease compliance burdens on small entities also apply to small entities in the context of video clips.¹³⁴ Specifically, in the *IP Closed Captioning Order*, the Commission adopted procedures enabling it to grant exemptions to the rules governing closed captioning of IP-delivered video programming pursuant to Section 202 of the CVAA, where a petitioner has shown that compliance would present an economic burden (*i.e.*, a significant difficulty or expense), and pursuant to Section 203 of the CVAA, where a petitioner has shown that compliance is not achievable (*i.e.*, cannot be accomplished with reasonable effort or expense) or not technically feasible.¹³⁵ As was the case with regard to full-length programming, this exemption process will allow the Commission to address the impact of any rule revisions resulting from the *Further Notice* on individual entities, including smaller entities, and to modify the application of the rules to

¹³¹ See *id.* Section IV.C.

¹³² See *id.* Section IV.D.

¹³³ 5 U.S.C. § 603(c)(1)-(c)(4).

¹³⁴ See *Video Clips Order*, Appendix B (Final Regulatory Flexibility Analysis), Section E. See also *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787, 891, ¶ 38 (2012) (“*IP Closed Captioning Order*”).

¹³⁵ See *id.*

accommodate individual circumstances.¹³⁶ Further, as with full-length IP-delivered video programming, a *de minimis* failure to comply with the requirements adopted pursuant to Section 202 of the CVAA with regard to IP-delivered video clips will not be treated as a violation, and parties may continue to use alternate means of compliance to the rules adopted pursuant to either Section 202 or Section 203 of the CVAA.¹³⁷ Individual entities, including smaller entities, may benefit from these provisions.

38. The *Further Notice* itself also reflects our consideration of small entities and significant alternatives. First, the *Further Notice* seeks comment on what types of entities are included in the category of third parties that distribute video clips of programming shown on television with captions.¹³⁸ The Commission also asks if it should impose general IP closed captioning rules in the context of such third parties, or if it should impose different obligations.¹³⁹ These concerns will allow the Commission to look into the impact of the requirements on smaller entities and to explore alternatives. For example, the Commission will consider whether the closed captioning requirements for video clips should apply to all third party distributors, or whether comments demonstrate that the application to certain small third party distributors would be economically burdensome.

39. Second, the *Further Notice* seeks comment on decreasing or eliminating the grace period applicable to captions of IP-delivered video clips of live and near-live programming.¹⁴⁰ Specifically, beginning July 1, 2017, the Commission requires the provision of closed captions on IP-delivered video clips of video programming previously shown live or near-live on television with captions within 12 hours (for live) or eight hours (for near-live) after the associated video programming is published or exhibited on television in the United States with captions.¹⁴¹ The Commission expects that at some time in the future, technology will automate the process such that the grace period for captioning is no longer needed. The Commission seeks comment on the status of technological developments in this regard and the current process through which entities prepare video clips of live and near-live programming.¹⁴² This information will allow the Commission to consider the impact of decreasing or eliminating the grace period on all covered entities, including small entities. The Commission thus will determine whether it should decrease or eliminate the grace period, and it will consider comments submitted about the impact of doing so on small entities.

40. Third, the *Further Notice* seeks comment on applying the IP closed captioning requirements to files that contain a combination of one or more video clips that have been televised with captions and other content (such as online-only content) that has not been shown on television with captions (“mash-ups”).¹⁴³ The Commission asks how the industry would comply with such a requirement and whether it will need to caption the covered material anew or simply repurpose televised captions.¹⁴⁴ Thus, the Commission will continue to consider the impact of its rules on covered entities, including small entities, in adopting any rule revisions. A captioning requirement for mash-ups will require all entities, including smaller entities, to caption an additional category of video clips.

¹³⁶ *See id.*

¹³⁷ *See id.*

¹³⁸ *See Further Notice* Section IV.A.

¹³⁹ *See id.*

¹⁴⁰ *See Video Clips Order* Section III.C.3, *Further Notice* Section IV.B.

¹⁴¹ *See Video Clips Order* Section III.C.3.

¹⁴² *See Further Notice* Section IV.B.

¹⁴³ *See id.* Section IV.C.

¹⁴⁴ *See id.*

41. Fourth, the *Further Notice* seeks comment on applying the IP closed captioning rules to “advance” video clips, which are those that are added to the video programming distributor’s or provider’s library on or after January 1, 2016 for straight lift clips and January 1, 2017 for montages, but before the associated video programming is shown on television with captions on or after the compliance deadline.¹⁴⁵ The Commission seeks comment on the difficulties associated with a captioning requirement for this category of video clips, including whether any statutory exemptions might apply to these clips or to a subset of these clips. The information provided in response will facilitate the Commission’s consideration of the impact of application of the IP closed captioning rules to this category of video clips on covered entities, including small entities.

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

42. None.

¹⁴⁵ See *id.* Section IV.D.

**STATEMENT OF
CHAIRMAN TOM WHEELER**

Re: *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010; Closed Captioning of Internet Protocol-Delivered Video Clips*, MB Docket 11-154

The FCC is the representative of all Americans. I believe we have a special responsibility to fight for the interests of underserved communities, in particular Americans living with disabilities.

Americans living with intellectual and physical disabilities stand to benefit the most from broadband-enabled technologies, but are among the least connected segments of our society.

Our responsibility is two-fold: (1) to assure access for all to our communications networks, and (2) to open up the possibilities new technologies bring for dealing with various challenges facing the disability community.

Fulfilling these responsibilities has been one of the agency's highest priorities since I became Chairman, and I'm proud to say that this commitment is reflected in our actions.

On my very first day on the job at the FCC, I met with representatives of the disability community to talk about how we could attack these challenges together.

I met with a student from Gallaudet who told me the story of when her sister went into shock and she had to text her mother at work, pray her mom was watching her phone, so that her mom could call 911. In January, we proposed that all text messaging providers had to offer text-to-911 capabilities.

Last month, I joined some of the nation's leading innovators to recognize small businesses, large industries, app developers, government agencies, and public-private partnerships that are doing pioneering work in assistive technologies. At that same event, I announced the ASL Consumer Support Line at the FCC, a video service that will allow consumers to speak to the FCC using American Sign Language rather than filling out a form.

We've moved forward with a \$10 million trial program to support equipment to low-income individuals who are deaf-blind to access the phone network, advanced communications and the Internet so that they may gain new levels of independence, privacy and productivity.

And as today's item demonstrates, we've made significant progress on improving closed captioning.

Earlier this year, the Commission acted to enhance quality standards for closed captioning on TV that had been languishing at the FCC for over a decade.

As part of our implementation of the Communications and Video Accessibility Act, the Commission previously adopted closed captioning requirements for full-length video programming online. With today's item, we go further and require captioning for video clips that end up on the Internet.

Accessibility of programming must evolve with technology in order for us to maintain our commitment to universal access. When the number of U.S. households viewing TV programming exclusively on the Internet is poised to surpass the number viewing only via antenna, and 77% of Internet users regularly watch video clips online – often to get news, sports, and entertainment programming, it's time to update our closed captioning rules to reflect these changes.

Today's order does just that and will ensure millions of Americans who "hear with their eyes" have greater access to video information on the Internet.

Many members of the industry have already taken significant strides toward captioning online video clips, especially news clips, which I commend. I encourage these entities to continue captioning their IP-delivered video clips whenever possible, and to do so in a timely fashion so that individuals who are deaf or hard-of-hearing are able to access the same content available to the hearing population.

The Order we adopt today will ensure that this progress continues, and the reasonable compliance deadlines we impose will ensure that industry is able to meet the requirements.

I am also pleased that the Second Further Notice of Proposed Rulemaking seeks comment on additional issues for which future Commission action could provide additional benefit to this population.

In particular, it is my hope that the Commission will act quickly to address application of the IP closed captioning rules to video clips provided by third-party distributors, and to decrease or eliminate the grace period applicable to video clips of live programming. It is essential that people with disabilities not only get the same access as the rest of us, but that the access that they get is as timely and therefore as relevant, as what the rest of us get. Access delayed is often the same as access denied.

Therefore, until we resolve these issues, while the Further Notice is pending, I encourage members of the industry to caption IP-delivered video clips of live programming as quickly as possible, to best serve all consumers. I want to thank Commission staff of the Media Bureau and the Consumer and Governmental Affairs Bureau for their fine and thoughtful work on this item.

Never has there been a greater opportunity to harness the power of communications technology to improve the lives of Americans living with disabilities. Since I became Chairman, we have acted aggressively to seize these opportunities. Today, we acted again. And we will continue to act in the future.

**STATEMENT OF
COMMISSION MIGNON L. CLYBURN**

Re: *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010; Closed Captioning of Internet Protocol-Delivered Video Clips*, MB Docket 11-154

As Victor Hugo famously noted, there are few things more powerful than an idea whose time has come.

When Congress passed the Twenty-First Century Communications and Video Accessibility Act of 2010 — better known as CVAA, it marked a bold step in insuring that all individuals, particularly those with hearing disabilities, could enjoy the full benefits of modern communications technology.

Our action today represents yet another step towards full implementation of CVAA. In reconsidering the Commission's earlier interpretation of the statute, we concluded that Congress intended the IP closed captioning requirements to extend to all covered video programming beyond television, including video clips. Among other things, Congress left it to the discretion of the FCC to determine an appropriate timeline for compliance with this requirement.

The item accomplishes these objectives.

As a prelude to where we are today, we must acknowledge that considerable work has already gone into developing a compliance regimen on IP captioning. Industry has sought to work cooperatively with key stakeholders, and has achieved quite a respectable level of compliance in voluntarily captioning video clips. For these efforts, the industry should be commended and encouraged to keep moving forward.

However, even with that impressive level of progress, it became clear that those with hearing disabilities were still not experiencing the full benefits that every American expects today. That is what motivates me to support this item.

As our society moves ever steadily to an all-IP environment, we must be mindful not to create divides — even if they are unintended. After all, we will be remembered for our actions, not necessarily our good intentions. We should not, and do not want to, create a system where those with hearing disabilities are left to their own devices when it comes to their media engagement — even if that content appears in short video clips beyond the television platform. For instance, in emergency situations we need to ensure that every member of the community has access to vital information.

This item seeks to close that divide where it currently exists, and attempts to make sure that such a fissure does not grow in the video ecosystem. And while it is not perfect it will put us ever closer to where we want and need to be.

I know there has been a healthy discussion concerning the recommended time frame for implementing this order, especially as it relates to the burdens and costs on video programmers for captioning “montage” clips. I am sensitive to the concerns of industry when it points out a need for more time, for it is clear that the captioning process in the IP framework is much more complex than captioning on video.

But that alone should not be an impediment to full implementation. I am more than confident that industry's willingness to comply with this item is superseded only by its tremendous capacity to create and innovate. Therefore, I am hopeful that neither time nor technical issues will obstruct our march toward full participation and engagement by all Americans.

I would like to acknowledge the concerns raised by my colleague, Commissioner O'Rielly, with respect to potential hardships on small broadcasters — however we may define “small”. I share those concerns, and

am sure that there is no shortage of small broadcasters who are not as well-equipped to tackle this requirement, compared to their larger counterparts.

So I greatly appreciate the efforts by the Chairman to address these concerns because we all should remember that there is a bottom-line difference in the way small broadcasters and large broadcasters go about doing business. And we should remain mindful of imposing any additional burdens on those least able to shoulder them.

Finally Mr. Chairman, I want to acknowledge the patience, persistence and perseverance of the advocates from the deaf and hard of hearing community. In the best and finest tradition of our participative democracy, they have pressed their case for full inclusion. Their non-stop efforts to sensitize those of us with different abilities to the day-to-day issues they face have been nothing short of heroic. And until we completely close these gaps, Mr. Chairman, our work is not done.

And of course, I want to thank the Media Bureau, the Consumer and Governmental Affairs Bureau, the Office of General Counsel, my law clerks Sharon Lin and Laura Arcadipane and my advisor, Adonis Hoffman, for their work on this item.

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010; Closed Captioning of Internet Protocol-Delivered Video Clips*, MB Docket 11-154

The future of watching video does not look like the past. Bulky television sets encased in walnut cabinets are no more. But even slim models with flat-screens mounted on the wall are no longer the only game in town. Because we live in a world where screens surround us, multiplying opportunities for viewing—anytime, anywhere.

In short, television is changing fast. As the ways we watch expand, the Commission must update its policies under the law. Here we do just that. Specifically, we modernize our rules regarding the closed captioning of Internet Protocol-delivered programming, pursuant to the Twenty-First Century Communications and Video Accessibility Act. In particular, we update our policies regarding what are known as IP video clips.

This is a righteous nod to changes in how we watch. After all, the future of video involves a lot more than gathering around a television screen for programs of uniform 30- or 60-minute length. Those programs now get sliced and diced into abbreviated bits and pieces. The excerpts, or IP video clips, that emerge get posted online and widely viewed. It makes sense that closed captioning obligations follow. That means more video programming online will be accessible to more people who are deaf or hard of hearing. That includes the 36 million Americans who today 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. So our actions have my full support.

At the same time, I appreciate that compliance with our new rules will take work. The law, however, charges this Commission to be more than just a steward of the status quo. So I believe we can move forward, make progress, meet deadlines, and get this done.

Finally, a special thank you to Chairman Wheeler, who has made improving closed captioning a high priority. Moreover, he has carried through on a promise he made to me on this dais just a few months ago when he said would be the second vote for updating our captioning policies regarding video clips. I am grateful for his interest and the speed with which he has led the charge for change.

**CONCURRING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010; Closed Captioning of Internet Protocol-Delivered Video Clips*, MB Docket 11-154

Communications enables connection. That's especially the case for Americans with disabilities. Luckily, we live in a time when our society places a priority on technological inclusion. Today, accessibility is increasingly the norm, rather than the exception.

Credit for this remarkable development belongs in part to Congress and the FCC. In particular, the Commission has made great strides in implementing the Twenty-First Century Communications and Video Accessibility Act (CVAA), which aims to make modern communications services accessible to all Americans with disabilities. I am proud to have worked with my colleagues in a bipartisan manner to implement this important piece of legislation and remain committed to seeing its promise fulfilled.

Pursuant to the Commission's rules, for example, full-length video programming shown on the Internet now must be captioned if it is aired on TV with captions. I applaud video programmers and distributors for their efforts to fulfill this requirement by making their content accessible to deaf and hard-of-hearing Americans. I also thank all of the groups representing Americans with disabilities for their work on these important issues. Without your efforts, we would not be where we are today.

Credit for greater accessibility to communications services also belongs to the private sector. For instance, by all accounts, an ever-increasing number of video clips posted on the Internet are being captioned on a voluntary basis. According to a study entered into the record by consumer groups, the percentage of IP news clips that are captioned grew from just 23 percent in May 2013 to 57 percent in February 2014.¹ This means that the portion of news clips that are captioned has more than doubled in less than a year. That's substantial and meaningful progress. In particular, I applaud NBC, ABC, and Fox News, which have led the way and already caption the vast majority of their news clips.²

Things are improving—and fast. This begs the question whether now is the time for the FCC to impose a new, one-size-fits-all regulatory mandate addressing video clips, one that everyone acknowledges cannot currently be met.

One might answer “yes” on the basis of a detailed determination that the benefits outweigh the costs. But this item contains no cost-benefit analysis. How much will the Commission's new closed captioning rules cost? What impact will those costs have on consumers? And on the benefits side of the ledger, how many video clips will be captioned after the rules begin taking effect in 2016 that otherwise would not have been made accessible? The item makes no effort to answer any of these questions. I asked for a cost-benefit analysis, but it never arrived. High-level rhetoric and appealing slogans are nice, but an administrative agency's rulemaking process demands more.

I am particularly concerned by the item's potential impact on small entities. Rather than incur the costs of captioning video clips, they may stop uploading clips onto the Internet altogether or may limit the number of clips they post. This would reduce the availability of news programming online—an outcome that wouldn't serve anyone's interests. I therefore hope that the Commission will give serious consideration to any waiver petitions filed by small programmers who would find it economically burdensome to comply with our captioning requirements for video clips.

My most serious concerns, however, are not with the rules we adopt today. Rather, they are with

¹ See Comments of Telecommunications for the Deaf and Hard of Hearing, Inc., *et al.*, MB Docket No. 11-154; CG Docket No. 05-231 (Feb. 3, 2014), at 2, 9.

² *Id.* at 10.

the Second Further Notice of Proposed Rulemaking (FNPRM). For example, the item requires Internet video clips of live programming to be captioned within 12 hours of airtime and near-live programming to be captioned within 8 hours of airtime beginning July 1, 2017.³ But even though the Commission establishes this rule just today, it also asks in this same document whether we should decrease or eliminate those 12-hour and 8-hour timeframes.⁴ In other words, the Commission sets rules for live and near-live clips, and before they even go into effect, it asks whether those rules should be eliminated or modified.

This is . . . odd. It brings to mind a regulatory merry-go-round where regulated entities are trapped in a never-ending cycle of notice-and-comment rulemaking, with their legal obligations a constantly moving target. One would think that we would let newly adopted rules take effect and then assess their real-world impact before we decide whether to change them. This is particularly true here given the Commission's determination that a 12-hour grace period is "reasonable" and "appropriately balances" industry and consumer concerns with respect to time-sensitive clips.⁵ But unfortunately, my modest request to study the rules' effects before proposing to change them was rejected.

While I wish that this suggestion and others had been adopted, I do appreciate that some positive revisions have been made to this item since it was circulated. In particular, all tentative conclusions have been removed from the FNPRM at Commissioner O'Rielly's suggestion. Moreover, pursuant to my request, the item now includes an 8-hour grace period for video clips of near-live programming and postpones the captioning requirement for near-live programming until July 1, 2017. This is an important change because it will make it easier for programmers to make time-sensitive clips available promptly over the Internet. I thank my colleagues for incorporating this proposal into the item.

Ultimately, these and other revisions lead me to cast a concurring vote. Going forward, I hope that video programmers will continue making progress in captioning video clips during the rest of this year and 2015. These rules, which will not begin to take hold until 2016, should not supplant the industry's commendable, voluntary efforts in this area. I also hope that the Commission will be flexible in implementing the rules that we adopt today. If technology does not develop as quickly as we might like, we should adjust accordingly. After all, if it were possible today for programmers to comply with the standards we are adopting, our rules would not become effective in stages between eighteen months and three years from now.

Finally, I would like to thank Diana Sokolow, Michelle Carey, Mary Beth Murphy, Steven Broeckhart, Alison Neplokh, Evan Baranoff, Karen Peltz Strauss, Rosaline Crawford, Gregory Hlibok, Eliot Greenwald, and Suzy Rosen Singleton for their efforts on this item. Your efforts on this and other orders have brought to life the promise of the CVAA, and you have the satisfaction of knowing that your work matters to tens of millions of Americans. I also would like to make a special mention of my former advisor Jeff Neumann, who contributed to this item. I am glad that the Media Bureau is taking advantage of his many talents.

³ See *Order* at para. 30.

⁴ *Id.* at paras. 42-43.

⁵ *Id.* at para. 30.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY
APPROVING IN PART, CONCURRING IN PART**

Re: *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010; Closed Captioning of Internet Protocol-Delivered Video Clips*, MB Docket 11-154

Of our nation's 300 million citizens, it is estimated that between 35 million and 50 million have some type of hearing loss. The Commission recently has undertaken a number of steps to ensure that more communications services are available to the deaf and those hard of hearing. I applaud the intent of these efforts to increase accessibility for this community.

To begin, I question whether the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) provided the Commission with the legal authority to promulgate these closed captioning rules for Internet video clips. I do not see statutory language in the Act to impose such requirements, especially when the CVAA is read in combination with the Congressional committee reports that explicitly forbear from applying closed captioning to Internet video clips.¹ The FCC record also contains a significant amount of debate on this question, most of it arguing strenuously that the Commission is not authorized to do so. This, along with the fact that the Commission came to the same conclusion just a few short years ago, leads me to believe that the best course of action here would have been to ask Congress to clarify the issue directly. Instead, this order marks yet another 180 degree turn on its own statutory interpretation, diminishing the agency's credibility. I am also concerned by the process used to get us here today—going straight to order after a mere Public Notice sought comment on a reconsideration petition. Taken together, this strongly implies an ends-justify-the-means approach.

Nevertheless, I have a deep regard for the Senators and House Members who worked on this legislation and I recognize that it was written in a Democrat-controlled Congress. For instance, Senators Mark Pryor (D-AR) and Ed Markey (D-MA), who helped author the law, have formally stated that covering video clips corresponds with their intent.² As someone who expects congressional intent to be heeded, I am willing to provide a bit more deference than normal to these views. As such, I will concur in part, rather than dissent, and know that this issue will have to be ultimately resolved by the courts.

Moreover, I believe that the agency had an obligation to do a thorough cost-benefit analysis before regulating. This item should have established the quantitative effects on the deaf and hard of hearing community. It should have determined the actual costs, especially on American video programmers and distributors, of mandating the closed captioning of video clips at the same quality standards that we demand of television content. (Keep in mind, these quality standards are even harder to achieve when captioning Internet clips.) And, most importantly, it should have determined beyond a shadow of a doubt that these rules would not ultimately lead to a reduction of video clips on the Internet. If captioning expenses are too high, content providers will have no choice but to withhold or remove online clips. That isn't a good policy result for anyone—hearing impaired or not. But, in the haste to regulate, the Commission did none of this analysis.

I am also troubled that once again the Commission sets compliance deadlines that are aspirational and not based on realities of technological development and deployment. This item repeatedly

¹ H.R. REP. NO. 111-563, at 30 (2010) (“The Committee intends, at this time, for the regulations to apply to full-length programming and not to video clips or outtakes.”); S. REP. NO. 111-386 at 13-14 (2010) (“The Committee intends, at this time, for the regulations to apply to full-length programming and not to video clips or outtakes.”)

² Letter from Sen. Mark Pryor and Sen. Edward J. Markey, to Tom Wheeler, Chairman, FCC, filed in MB Docket No. 11-154 (Dec. 9, 2013).

acknowledges that captioning Internet clips is not easy and no one can estimate with any certainty when better technology will be readily available. This is a precarious way to regulate. The Commission must learn that technology doesn't develop faster simply because this agency wants it to. Fortunately, at my request, the item includes a simplified process to ensure that, if improved technology is not available as hoped, the compliance deadlines will be extended. It also reiterates that for those Internet video players and applications that find compliance too economically burdensome, they can seek immediate relief from the rules while the Commission considers appropriate waivers.

I am pleased that the Chairman also accommodated a number of my other edits to help mitigate any unintended consequences. For these reasons, I approve in part and concur in part, and I thank the Chairman and the staff who went above and beyond to try to address my concerns.