

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

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

SECOND REPORT AND ORDER

Adopted: February 18, 2016

Released: February 19, 2016

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

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I. INTRODUCTION AND BACKGROUND

1. In this Second Report and Order, the Federal Communications Commission (Commission) allocates the responsibilities of video programming distributors (VPDs) and video programmers with respect to the provision and quality of closed captions on television programming. These actions are intended to ensure that people who are deaf and hard of hearing have full access to such programming.

2. Closed captioning is a technology that provides visual access to the audio content of video programs by displaying this content as printed words on the television screen.¹ In 1997, the Commission, acting pursuant to Section 713 of the Communications Act (the Act),² adopted rules establishing implementation schedules for closed captioning based on whether the programming was analog or digital, Spanish or English, and new or “pre-rule.”³ Currently, all *new* English and Spanish language programming, both analog and digital, that is not exempt from the Commission’s rules must be closed captioned.⁴ In addition, 75% of all nonexempt *pre-rule* English and Spanish language programming must be closed captioned.⁵

3. In 2004, several advocacy groups representing individuals who are deaf and hard of hearing (Consumer Groups) filed a joint petition for rulemaking seeking amendments to the Commission’s closed captioning rules.⁶ Among other things, Consumer Groups asked the Commission to

¹ *Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc. Petition for Rulemaking*, CG Docket No. 05-231, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 2221, 2227, para. 6 (2014) (*Closed Captioning Quality Order and Further Notice of Proposed Rulemaking*). References are to the *Closed Captioning Quality Order* when discussing parts of the Report and Order, and to the *Closed Captioning Quality Further Notice* when discussing parts of the Further Notice of Proposed Rulemaking.

² 47 U.S.C. § 613(b) (directing the Commission to prescribe regulations to ensure that “video programming first published or exhibited after the effective date of such regulations is fully accessible through the provision of closed captions” and that “video programming providers or owners maximize the accessibility of video programming first published or exhibited prior to the effective date of such regulations through the provision of closed captions”).

³ *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, MM Docket No. 95-176, Report and Order, 13 FCC Rcd 3272, 3292-95, paras. 41-47 (1997) (*1997 Closed Captioning Report and Order*); 47 CFR § 79.1(b). Analog programming that first aired on or after January 1, 1998, and digital programming that first aired on or after July 1, 2002, is referred to as *new* programming. 47 CFR § 79.1(a)(5). Analog programming that first aired prior to January 1, 1998, and digital programming that first aired prior to July 1, 2002, is referred to as *pre-rule* programming. 47 CFR § 79.1(a)(8).

⁴ The compliance deadlines for all nonexempt, new programming to be captioned were January 1, 2006 for English language programming, 47 CFR § 79.1(b)(1)(iv), and January 1, 2010 for Spanish language programming. 47 CFR § 79.1(b)(3)(iv). Section 713(d) of the Act allows the Commission to grant two types of exemptions from its captioning mandates. 47 U.S.C. § 613(d). First, the Commission’s rules list thirteen categorical exemptions that are self-implementing. See 47 CFR § 79.1(d). In addition, a video programming provider, producer, or owner may petition the Commission for an individual exemption from the closed captioning obligations if it can show that providing captions would be economically burdensome. See 47 CFR § 79.1(f).

⁵ The compliance deadlines for 75% of nonexempt pre-rule programming to be captioned were January 1, 2008 for English language programming, 47 CFR § 79.1(b)(2)(ii), and January 1, 2012 for Spanish language programming. 47 CFR § 79.1(b)(4)(ii).

⁶ *Telecommunications for the Deaf Inc. et al. Petition for Rulemaking*, RM-11065 at 35-40 (July 23, 2004) (2004 Petition). Petitioners included Telecommunications for the Deaf, Inc. (TDI), the National Association of the Deaf (continued....)

adopt non-technical closed captioning quality standards, to revise the process for submitting closed captioning complaints, and to provide contact information for VPDs⁷ and video programming providers (VPPs)⁸ on the Commission's website.⁹ In 2005, the Commission released a Notice of Proposed Rulemaking seeking comment on the 2004 Petition and initiating a proceeding to examine the Commission's closed captioning rules.¹⁰ In 2008, the Commission addressed some of the matters raised in the Consumer Groups' 2004 Petition by adopting rules requiring VPDs to file contact information with the Commission for the purposes of receiving and handling captioning concerns and complaints.¹¹ The Commission has since created a database to collect and make public such contact information.¹²

4. On February 24, 2014, the Commission adopted the *Closed Captioning Quality Order*, in which, among other things, it defined four non-technical quality standards—accuracy, synchronicity, completeness, and placement—as the components necessary to ensure that closed captions provided by VPDs fully and effectively convey the content of pre-recorded, live, and near-live television

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(NAD), Self Help for Hard of Hearing People, Inc. (SHHH), the Association for Late Deafened Adults (ALDA), and the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN) (collectively, Consumer Groups). TDI has since changed its name to Telecommunications for the Deaf and Hard of Hearing, Inc., but still uses the acronym TDI, and SHHH has since changed its name to Hearing Loss Association of America (HLAA). Additional members of the Consumer Groups for the subsequent comments include Cerebral Palsy and Deaf Organization (CPADO), California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH), American Association of the Deaf-Blind (AADB), Speech Communication Assistance by Telephone (SCT) and Technology Access Program at Gallaudet University (TAP).

⁷ A VPD or video programming distributor is “[a]ny television broadcast station licensed by the Commission and any multichannel video programming distributor . . . and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission.” 47 CFR § 79.1(a)(11).

⁸ A VPP is “[a]ny video programming distributor and any other entity that provides video programming that is intended for distribution to residential households including, but not limited to broadcast or nonbroadcast television network and the owners of such programming.” 47 CFR § 79.1(a)(12). Video programmers are, by definition, a subset of VPPs.

⁹ 2004 Petition at 12-15, 21-22, 35-39.

¹⁰ See *Closed Captioning of Video Programming, Telecommunications for the Deaf, Inc., Petition for Rulemaking*, CG Docket No. 05-231, Notice of Proposed Rulemaking, 20 FCC Rcd 13211 (2005) (2005 *Closed Captioning NPRM*). Prior to this, the Consumer and Governmental Affairs Bureau (CGB) had notified the public about the petition in a Public Notice. See *Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemaking Filed*, Public Notice, Report No. 2670, Sept. 2, 2004.

¹¹ *Closed Captioning and Video Programming, Closed Captioning Requirements for Digital Television Receivers, Declaratory Ruling*, CG Docket No. 05-231, Order and Notice of Proposed Rulemaking, 23 FCC Rcd 16674, 16685-86, paras. 30-32 (2008) (2008 *Closed Captioning Decision*) (adopted rules requiring VPDs to file with the Commission, contact information (1) for the receipt and handling of immediate problems with captions that arise while viewing programs and (2) for addressing closed captioning complaints); see also 47 CFR § 79.1(i)(1); *Closed Captioning and Video Programming, Closed Captioning Requirements for Digital Television Receivers*, CG Docket No. 05-231, Erratum, 24 FCC Rcd 8262 (CGB 2009) (amending the language in the new rule section 79.1(i)(1) adopted in the 2008 *Closed Captioning Decision*). On February 16, 2010, the Bureau waived section 79.1(i) to the extent that it requires VPDs to place such contact information in local telephone directories in which the VPD does not itself directly advertise or otherwise place commercial listings, so long as the VPD makes the contact information available on its website and in billing statements, to the extent it has a website and issues billing statements. *Closed Captioning of Video Programming*, CG Docket No. 05-231, Order, 25 FCC Rcd 1370, 1372, para. 6, n.16 (CGB 2010).

¹² See *Closed Captioning of Video Programming*, CG Docket No. 05-231, Order, 24 FCC Rcd 14837 (2009) (*Captioning Contact Web Form Order*).

programming.¹³ The Commission placed responsibility for compliance with the closed captioning quality standards on VPDs while simultaneously releasing the *Closed Captioning Quality Further Notice* to seek comment on, among other issues, extending some of the responsibilities for complying with the closed captioning quality standards to other entities involved in the production and delivery of video programming.¹⁴ The Commission also sought comment on (1) whether to require that contact information submitted to the Commission pursuant to section 79.1(i)(3) of the rules be submitted directly to the VPD registry through use of a web form,¹⁵ and (2) how to resolve a conflict between statutory provisions protecting consumer privacy and a Commission rule adopted in the 2008 *Closed Captioning Decision* that directed VPDs to forward captioning complaints to other programming entities when such VPDs lacked control over the issues raised in such complaints.¹⁶

5. On December 15, 2014, the Commission released a Second Further Notice seeking to supplement the record in this proceeding in response to comments received on the *Closed Captioning Quality Further Notice*.¹⁷

II. EXECUTIVE SUMMARY

6. In this Second Report and Order, we address various issues raised by the *Closed Captioning Quality Further Notice* and the *Closed Captioning Quality Second Further Notice* by amending our rules to:

- Assign responsibility for the *quality* of closed captioning to VPDs and video programmers,¹⁸ with each entity responsible for closed captioning issues that are primarily within its control;
- Maintain current rules that place primary responsibility for the *provision* of closed captioning on television programming on VPDs, but also hold video programmers responsible for a lack of captions where they have failed to provide captions on non-exempt programs;
- Require each video programmer to file with the Commission a certification that: (a) the video programmer (i) is in compliance with the rules requiring the inclusion of closed captions, and (ii) either is in compliance with the captioning quality standards or has adopted and is following related Best Practices; or (b) is exempt from the captioning obligations; if

¹³ *Closed Captioning Quality Order*, 29 FCC Rcd at 2240-53, paras. 26-49; 47 CFR § 79.1(j)(2). Other matters addressed in that order included the use of Electronic Newsroom Technique (ENT) for live news programming, and requirements for VPDs to monitor and maintain their equipment and to perform technical equipment checks to ensure that captions are passed through to viewers intact. *Closed Captioning Quality Order*, 29 FCC Rcd at 2268-74, 2277, paras. 76-86, 94.

¹⁴ *Closed Captioning Quality Further Notice*, 29 FCC Rcd at 2291-96, paras. 122-130. Other issues raised in the *Further Notice* will be addressed in a subsequent order.

¹⁵ *Id.* at 2302-03, paras. 146-47.

¹⁶ See 47 CFR § 79.1(g)(3) (requiring the forwarding of complaints); 47 U.S.C. § 551(c)(1) (the statutory provision protecting consumer privacy, which prohibits, except under certain circumstances, a cable operator from disclosing “personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned”); 47 U.S.C. § 338(i)(4)(A) (creates the same prohibition for satellite carriers). See also *Closed Captioning Quality Further Notice*, 29 FCC Rcd at 2303-05, paras. 148-52 (seeking comment on how to amend 47 CFR § 79.1(g)(3)).

¹⁷ *Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc. Petition for Rulemaking*, CG Docket No. 05-231, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 105088 (2014) (*Closed Captioning Quality Second Further Notice*).

¹⁸ A video programmer is “[a]ny entity that provides video programming that is intended for distribution to residential households including, but not limited to, broadcast or nonbroadcast television networks and the owners of such programming,” 47 CFR § 79.1(a)(9).

the latter certification is submitted, the video programmer must specify the specific exemptions claimed;

- Allow each VPD to satisfy its obligations regarding the provision of closed captioning by ensuring that each video programmer whose programming it carries has certified its compliance with the Commission's closed captioning rules;
- Revise the procedures for receiving, serving, and addressing television closed captioning complaints in accordance with a burden-shifting compliance model;
- Establish a compliance ladder for the Commission's television closed captioning quality requirements that provides VPDs and video programmers with opportunities to take corrective action prior to enforcement action by the Commission;
- Require that each VPD use the Commission's web form when providing contact information to the VPD registry; and
- Require each video programmer to register with the Commission its contact information for the receipt and handling of written closed captioning complaints, and to use the Commission's web form for this purpose.

III. REPORT AND ORDER

A. Responsibilities of VPDs and Video Programmers

7. In the *1997 Closed Captioning Report and Order*, the Commission placed sole responsibility for compliance with its television closed captioning rules on VPDs.¹⁹ At that time, the Commission concluded that holding VPDs responsible would most expeditiously increase the availability of television programming with closed captions and promote efficiency in the Commission's monitoring and enforcement of its captioning rules.²⁰ At the same time, the Commission recognized the Commission's jurisdiction, under section 713 of the Act, over both video programming providers *and* owners to ensure the provision of closed captioning of video programming,²¹ and noted its expectation that both "owners and producers will be involved in the captioning process."²²

8. In the *Closed Captioning Quality Order*, the Commission similarly placed the responsibility for compliance with the closed captioning quality standards on VPDs.²³ However, recognizing that the creation and delivery of quality closed captioning is not solely within the control of VPDs and that video programmers play a "critical role" in providing closed captions to viewers,²⁴ the Commission stated that it would allow a VPD to satisfy its obligations with respect to the caption quality rules by obtaining or making best efforts to obtain certifications on captioning quality from its video programmers that such programmers are in compliance with the Commission's quality standards or related best practices.²⁵ At the same time, as noted above, the *Closed Captioning Further Notice* sought comment on whether the Commission should revise its rules to allocate responsibilities for compliance

¹⁹ *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286-87, paras. 27-29.

²⁰ *Id.* at 3286, para. 27.

²¹ *Id.* at 3286, para. 27.

²² *Id.* at 3286-87, para. 28.

²³ *Closed Captioning Quality Order*, 29 FCC Rcd at 2255, para. 53.

²⁴ *Id.* at 2254-55, paras. 52-53. The Commission defined video programmers as "entities that provide video programming that is intended for distribution to residential households including, but not limited to, broadcast or nonbroadcast television networks and the owners of such programming." *Id.*

²⁵ 47 CFR § 79.1(j)(1); *see also Closed Captioning Quality Order*, 29 FCC Rcd at 2255-56, para. 54.

with the television closed captioning obligations, including the obligation to provide quality captions, among various entities involved in the production and delivery of video programming.²⁶ To this end, among other things, the Commission also asked about imposing joint and several liability for these responsibilities,²⁷ and further sought comment on a specific proposal by Comcast Corporation and NBCUniversal (Comcast) for a “burden-shifting enforcement model” that would place the initial burden of addressing captioning matters on VPDs, but then extend some captioning responsibilities to video programming owners (VPOs).²⁸ Finally, the Commission sought input on what effect, if any, extending responsibility for compliance to entities other than VPDs would have on the Commission’s ability to efficiently monitor and enforce the closed captioning television rules.²⁹

9. For the reasons discussed below, we now conclude that the obligations associated with compliance with the Commission’s closed captioning quality rules shall be divided between VPDs and video programmers, making each entity responsible for closed captioning quality issues that are primarily within its control. We further conclude that the responsibilities associated with ensuring the *provision* of closed captions on television shall remain primarily with VPDs, but amend our rules to also hold video programmers responsible for ensuring the insertion of closed captions on all their nonexempt programming. We also conclude that the video programmer certifications that video programmers must now make widely available to VPDs should instead be filed with the Commission.

1. Definitions of Video Programmers and Video Programming Owners

10. As an initial matter, we consider the definitions of “video programmers” and “video programming owners” (VPOs). The *Closed Captioning Quality Order* defined a video programmer as “[a]ny entity that provides video programming that is intended for distribution to residential households including, but not limited to, broadcast or nonbroadcast television networks and the owners of such programming,”³⁰ noting that such programmers are a subset of VPPs.³¹ The *Closed Captioning Quality Further Notice* also noted that the Commission has defined VPOs for purposes of requiring captions on video programming delivered via Internet protocol, in part, as “any person or entity that ‘[l]icenses the video programming to a video programming distributor or provider that makes the video programming available directly to the end user through a distribution method that uses Internet protocol.’”³² The *Further Notice* sought comment on whether the definition of video programmer adopted in the *Closed Captioning Quality Order* is sufficiently broad in scope or whether the Commission should expand the definition to cover other categories of entities, and if so, which entities.³³ The Commission also sought comment on whether and how the Commission should define VPOs with respect to the television closed captioning rules.³⁴

11. We will continue to apply the definition of video programmer adopted in the *Closed Captioning Quality Order* without change.³⁵ Thus, we decline the suggestion by the Rehabilitation

²⁶ *Closed Captioning Quality Further Notice*, 29 FCC Rcd at 2292, 2294, paras. 123, 127.

²⁷ *Id.* at 2294, para. 127.

²⁸ *Id.* at 2293-94, paras. 125-26. See *infra* section III.A.1 for the definition of VPO.

²⁹ *Closed Captioning Quality Further Notice*, 29 FCC Rcd at 2294-95, para. 128.

³⁰ 47 CFR § 79.1(a)(9); see also *Closed Captioning Quality Order*, 29 FCC Rcd at 2254, para. 52.

³¹ *Closed Captioning Quality Further Notice*, 29 FCC Rcd at 2292, paras. 123. In the television captioning context, VPPs include VPDs as well as video programmers. *Id.* at 2292, n.470; see 47 CFR § 79.1(a)(12).

³² *Closed Captioning Quality Further Notice*, 29 FCC Rcd at 2293, para. 124 (quoting 47 CFR § 79.4(a)(4)).

³³ *Id.* at 2292-93, para. 123.

³⁴ *Id.* at 2293, para. 124.

³⁵ 47 CFR § 79.1(a)(9); see also *Closed Captioning Quality Order*, 29 FCC Rcd at 2254, para. 52.

Engineering Research Center for Wireless Technologies (Wireless RERC) to expand this definition to include entities that provide video programming intended for distribution “to all end users.” The Wireless RERC argues that the current definition, which references only the provision of video programming intended for distribution “to residential households,” may exclude consumers who receive television on tablets and other mobile devices that are not tied to their residences.³⁶ Although we recognize that newer methods of distribution to consumers may include distribution to devices that can be used outside the home, the current definition does not exclude entities that provide programming for distribution to locations other than the home; rather it merely makes the intent to distribute to residential households a criterion of the definition. In other words, if an entity intends for its programming to be distributed to residential households, the entity will meet the definition of a “video programmer” and will be covered by our captioning rules, even if the video programmer’s programming also reaches devices, such as tablets and other mobile devices that can be used outside the home.³⁷

12. We also decline to adopt a suggestion made by Comcast to define video programmers to only “cover any person or entity that licenses the video programming to a VPD that makes the programming available directly to the end user.”³⁸ We are concerned that this approach could exclude certain video programmers, including owners of such programming, who license their programming to third parties. Such VPOs, which may distribute programming themselves and possess a right to license the programming to third parties, are often the entities that enter into contracts for captioning services for their programming.³⁹ The consequence of omitting such entities from the definition of video programmers is that a key segment of those who primarily have control over the quality of closed captions might be excluded from the Commission’s requirements. Accordingly, for purposes of the Commission’s television closed captioning requirements, we conclude that the term video programmers includes all VPOs.

13. We further agree with AT&T Services, Inc. (AT&T) and Verizon that the definition of “VPO” in the context of the television closed captioning rules should be consistent with the definition of this term in the IP closed captioning rules.⁴⁰ This will provide clarity and consistency for those VPOs whose programs are distributed on both television and IP-delivered platforms.⁴¹ Accordingly, we define VPO, for purposes of television captioning, as any person or entity that either (i) licenses video programming to a video programming distributor or provider that is intended for distribution to

³⁶ See Rehabilitation Engineering Research Center for Wireless Technologies (Wireless RERC) 2014 Comments at 3-4 (noting that, for example, Tablet TV plans to beta test free over-the-air television to tablet computers in San Francisco in the summer of 2014).

³⁷ See *Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 12-107, Second Report and Order and Second Further Notice of Proposed Rulemaking, FCC 15-56, at para. 14 (rel. May 28, 2015) (*Emergency Information Second Report and Order*) (“Instead of applying our rules based on where the consumer is located when viewing the programming, we look instead to whether the programming is provided over the MVPD’s network, as opposed to over the Internet”).

³⁸ Comcast 2014 Comments at 2, n.5.

³⁹ See *infra* section III.A.3.

⁴⁰ See AT&T 2014 Comments at 4, n.7; Verizon 2014 Comments at 8-9; see also 47 CFR § 79.4(a)(4) (defining VPO as “[a]ny 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”).

⁴¹ See Verizon 2014 Comments at 8 (noting that “there will be overlap in video programming distributed over television networks and IP-delivered platforms”).

residential households; or (ii) acts as the video programming distributor or provider, and also possesses the right to license video programming to a video programming distributor or provider that is intended for distribution to residential households.⁴² As is the case with video programmers, an entity will be considered a VPO if it licenses or possesses the right to license programming that is intended for distribution to residential households, even if the programming is also distributed to devices that are not located in the home. Accordingly, our captioning rules will cover video programming that is provided by such VPOs to VPPs and VPDs and distributed over VPD systems, even if the VPO's programming reaches devices, such as tablets and other mobile devices that may or may not be located in the home.⁴³

2. Commission Authority under Section 713 of the Act

14. We reaffirm the Commission's determinations, made in the *1997 Closed Captioning Report and Order* and the *Closed Captioning Quality Order*, that the Commission has authority under section 713 of the Act to impose obligations for compliance with the Commission's closed captioning rules on both VPDs and video programmers.⁴⁴ Section 713 of the Act authorizes the Commission to ensure the provision of closed captioning of video programming by providers and *owners* of video programming.⁴⁵ In this regard, as commenters note,⁴⁶ section 713(b)(2) of the Act directs the Commission to prescribe regulations that "shall ensure" that "video programming providers or *owners* maximize the accessibility of video programming first published or exhibited prior to the effective date of such regulations through the provision of closed captions."⁴⁷ Additionally, various subsections of section 713(d) authorize exemptions for both video programming providers and program owners.⁴⁸ For example, section 713(d)(1) allows the Commission to exempt "programs, classes of programs, or services for which the Commission has determined that the provision of closed captioning would be economically burdensome to the provider or *owner* of such programming."⁴⁹ Similarly, section 713(d)(2) states that "a provider of video programming or *the owner of any program* carried by the provider shall not be obligated to supply closed captions if such action would be inconsistent with contracts in effect on the date of enactment of the Telecommunications Act of 1996"⁵⁰

⁴² See *id.* at 8-9. The definition proposed by Verizon for a VPO has been edited to add the phrase "that is intended" in order to conform to the existing definition for video programmer. See 47 CFR §§ 79.1(a)(9).

⁴³ See *Emergency Information Second Report and Order* at para. 14.

⁴⁴ See *Closed Captioning Quality Order*, 29 FCC Rcd at 2254, para. 51; *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286, para. 27, n.62 (citing sections 713(b)(2), (d)(2) and (d)(3) of the Act, 47 U.S.C. § 613(b)(2), (d)(2) and (d)(3)). Parties who commented on the Commission's jurisdiction uniformly agree that the Commission has such authority. See, e.g., American Cable Association (ACA) 2014 Comments at 3-4; Verizon 2014 Comments at 3-4; DIRECTV 2014 Comments at 1; DIRECTV 2015 Comments at 2; Consumer Groups 2014 Reply Comments at 7; Comcast 2014 Comments at 1-2 (stating that its burden-shifting proposal "is well grounded in the Commission's captioning authority under the Communications Act"); Comcast 2015 Comments at 2 (same). In fact, no commenters argue that the Commission lacks such authority under the Act.

⁴⁵ 47 U.S.C. § 613(b)(2) (emphasis added).

⁴⁶ ACA 2014 Comments at 3; Charter Communications, Inc. (Charter), Cablevision Systems Corporation, Mediacom Communications Corporation, Cequel Communications, LLC d/b/a Suddenlink Communications, and Time Warner Cable Inc. (collectively, Operators) 2014 Comments at 13; DIRECTV 2014 Comments at 1; DIRECTV 2015 Comments at 2.

⁴⁷ 47 U.S.C. § 613(b)(2) (emphasis added).

⁴⁸ See 47 U.S.C. § 613(d).

⁴⁹ 47 U.S.C. § 613(d)(1) (emphasis added).

⁵⁰ 47 U.S.C. § 613(d)(2) (emphasis added). The date of enactment of the Telecommunications Act of 1996 was February 8, 1996. Pub. L. 104-104, 110 Stat. 56 (1996 Act). Additionally, section 713(d)(3) states that "a provider of video programming or *program owner* may petition the Commission for an exemption from the requirements of (continued....)

15. The legislative history of section 713 of the Act further reflects Congress's intent to extend the Commission's authority over captioning of video programming to various entities involved in the production and delivery of video programming.⁵¹ Specifically, the House Report accompanying 1996 amendments to the Act states that section 713(b) of the Act directs the Commission to establish a schedule for the implementation of closed captioning, and that "such schedules should not be economically burdensome on program providers, distributors or the owners of such programs."⁵² This Congressional report also recognizes that "[i]t is clearly more efficient and economical to caption programming at the time of production and to distribute it with captions than to have each delivery system or local broadcaster caption the program."⁵³

16. The Commission has long recognized its jurisdiction under section 713 of the Act to impose closed captioning obligations on both VPDs and video programmers.⁵⁴ The Commission referenced its authority in the *1997 Closed Captioning Report and Order*⁵⁵ and the *Closed Captioning Quality Order*,⁵⁶ and extended certain captioning responsibilities to VPOs in the *IP Captioning Report and Order*, which created requirements for captioned television programs to be displayed with captions when delivered via Internet protocol.⁵⁷ There, the Commission concluded that imposing responsibility on VPOs as well as VPDs⁵⁸ was necessary to further the statutory purpose of helping to "ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming,"⁵⁹ and that placing obligations on VPOs would ensure that the Commission could hold a responsible party accountable for violations of the Twenty-First Century Communications and Video Accessibility Act (CVAA).⁶⁰ Similarly, changes made to the Commission's requirements for the presentation of accessible emergency information on television⁶¹ added video programming providers, which includes program owners, as parties responsible (along with VPDs) for making such information

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this section, and the Commission may grant such petition upon a showing that the requirements contained in this section would be economically burdensome"). 47 U.S.C. § 613(d)(3) (emphasis added); *see also* Operators April 28, 2014 Comments at 13.

⁵¹ *See* H.R. Rep. No. 104-204, 104th Cong., 1st Sess. (1995) at 114 (House Report); *see also* *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286, para. 27; *Closed Captioning Quality Further Notice*, 29 FCC Rcd at 2294, para. 126, n.475.

⁵² House Report at 114 (emphasis added).

⁵³ *Id.* at 114; *see also* *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286-87, para. 28.

⁵⁴ *See* Operators 2014 Comments at 13-14; Operators 2014 Reply Comment at 6; Verizon 2014 Comments at 3-4.

⁵⁵ *See* *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286, para. 27, n.62 (citing sections 713(b)(2), (d)(2) and (d)(3) of the Act, 47 U.S.C. § 613(b)(2), (d)(2) and (d)(3)).

⁵⁶ *Closed Captioning Quality Order*, 29 FCC Rcd at 2254 para. 51.

⁵⁷ *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154, Report and Order, 27 FCC Rcd 787, 798, para. 15 (2012) (*IP Captioning Report and Order*). Under the rules adopted therein, VPOs must send program files used for the delivery of programming over Internet protocol to VPDs with all required captions. 47 CFR § 79.4(c).

⁵⁸ In the context of the *IP Captioning Report and Order*, the VPDs distribute IP-based programming. *IP Captioning Report and Order*, 27 FCC Rcd at 793-97 paras. 8-13; 47 CFR § 79.4(a)(3).

⁵⁹ *IP Captioning Report and Order*, 27 FCC Rcd at 798, para. 16.

⁶⁰ Pub. L. No. 11-260, 124 Stat. 2751 (2010), *technical corrections*, Pub. L. No. 111-265, 124 Stat. 2795 (2010); *IP Captioning Report and Order*, 27 FCC Rcd at 799, para. 18.

⁶¹ 47 CFR § 79.2.

accessible to individuals who are blind or visually impaired.⁶² There the Commission ruled that the entity that creates the visual emergency information content and adds it to the programming stream is responsible for providing an aural representation of the information on a secondary audio stream, whether that entity is the VPD or VPP.⁶³ Here, we reaffirm that section 713 of the Act gives the Commission jurisdiction to ensure the provision of closed captioning of video programming by both VPDs *and* video programmers.⁶⁴

3. Responsibilities for Ensuring Captioning Quality

17. In this section we address the allocation of responsibility with regard to the Commission's rules governing captioning quality.⁶⁵ We conclude that it is appropriate to allocate responsibility for compliance with the closed captioning quality rules between VPDs and video programmers by placing responsibility on each entity for those aspects of closed captioning quality over which they primarily have control. We reach this conclusion because video programmers exert the most direct control over the creation of closed captions, and thus, as compared to VPDs, can exercise greater control over the non-technical quality components of closed captioning.⁶⁶ At the same time, VPDs primarily have control over the technical aspects of captioning quality related to the pass-through and distribution of programming to end users. Below, we explain the allocation of these responsibilities.

18. As we noted in the *Closed Captioning Quality Order*, there are a number of tasks associated with the provision of quality closed captions performed by video programmers. Specifically, the Commission explained that these entities "enter into contracts with captioning vendors, control when programming is delivered to captioning vendors to be captioned, and incorporate captioning with programming for delivery to VPDs."⁶⁷ Several parties commenting in this proceeding confirm that video programmers typically have greater control than VPDs over the quality of closed captioning. For example, according to DIRECTV, LLC (DIRECTV), "[i]t is the VPOs . . . that actually arrange for captioning of their video programming, either by inserting captioning themselves or by hiring third parties to do so according to their specifications."⁶⁸ Similarly, a coalition of cable operators (Operators) explains that video programmers control programming content and are thus in a better position to ensure the

⁶² *In the Matter of Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 4871, 4898-4900, paras. 34-36 (2013) (*2013 Emergency Information Order*) (amending 47 CFR §79.2).

⁶³ *Id.* at 4899-4900, para. 36.

⁶⁴ Although the in the *1997 Closed Captioning Report and Order*, the Commission placed exclusive responsibility for compliance with the closed captioning requirements on VPDs, *see 1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286, para. 27, as noted above, the Commission did so only because at that time it believed that placing responsibility solely on VPDs would help it best accomplish its goal of increasing the availability of video programming with closed captioning. *Id.* We agree with commenters that the 1997 decision does not mean that the Commission is restricted from placing responsibility for compliance with our closed captioning rules on video programmers. *See, e.g.,* Verizon April 28, 2014 Comments at 4 (stating that the Commission's previous decision to impose responsibility for the provision of closed captioning on VPDs "[does] not now in any way require that the Commission impose responsibility for meeting closed captioning quality standards on video programming distributors beyond the obligation to pass through captioning in a manner that does not itself undermine the quality of captions").

⁶⁵ The next section addresses the allocation of responsibility for the provision of closed captions.

⁶⁶ *See* section I, *supra*, for a description of the non-technical quality components.

⁶⁷ *Closed Captioning Quality Order*, 29 FCC Rcd at 2254-55, para. 52.

⁶⁸ DIRECTV 2014 Comments at 5; *see also* DIRECTV 2015 Comments at 2 (stating that "[i]t is VPOs . . . that have control over the process of actually captioning video programming").

provisioning and quality of closed captioning; the coalition concludes that VPDs “have limited ability to control the captioning process.”⁶⁹ Comcast agrees that as compared to VPDs, video programmers “have a more direct relationship with the entities that provide captioning services and are more likely to have the rights to modify the content and to correct captions.”⁷⁰

19. The critical role that video programmers play in creating quality captioning justifies changing the allocation of responsibility for compliance with the caption quality requirements.⁷¹ We thus affirm the finding made in the *Closed Captioning Quality Order* that “video programmers typically are the entities with the most direct control over the quality of closed captioning of their program.”⁷² It is for this reason that we believe that assigning some responsibility for the quality of closed captioning directly to video programmers will more efficiently and effectively achieve compliance with the Commission’s closed captioning quality requirements.⁷³

20. We are therefore not persuaded by statements made by the Video Programmer Coalition that the “overwhelming majority” of closed captioning problems are within the control of VPDs, including errors of timing, placement, and other quality issues.⁷⁴ VPDs receive programs with the embedded captions supplied by video programmers, and while VPDs have an obligation to ensure that their technical equipment is capable of passing through program signals with captions in a manner that does not adversely affect the non-technical quality components (accuracy, synchronicity, completeness

⁶⁹ Operators 2014 Comments at 3-4; Operators 2015 Comments at 2 (noting that “[c]aptioning is typically added to programs during production, before VPDs receive the content to distribute to viewers. . . . [V]ideo programmers control programming content during the stage of the captioning process when captions are added”); *see also* AT&T 2014 Comments at 1, 3 (stating that video programmers “have direct control over the quality of closed captioning in their programming” and “create the closed captioning before the VPD receives the programming,” while VPDs “have no involvement in the process of creating closed captioning”); Verizon 2014 Comments at 1, 4 (stating that “the creation and delivery of good quality closed captioning is not within the control of [VPDs] . . . but is more directly controlled by video programmers”).

⁷⁰ Comcast 2014 Comments at 3.

⁷¹ *See* Operators 2014 Reply Comments at 10-11; Comcast 2014 Reply Comments at 7; Verizon 2014 Reply Comments at 5; DIRECTV 2014 Reply Comments at 3.

⁷² *Closed Captioning Quality Order*, 29 FCC Rcd at 2255, para. 52.

⁷³ Contrary to the arguments of some commenters, the record provides a sufficient basis for reversing the Commission’s previous decision in the 1997 *Closed Captioning Report and Order* to hold only VPDs responsible for compliance with these requirements, and so we now place some of the captioning responsibilities on video programmers. *See* CBS Corporation, 21st Century Fox, Inc., Time Warner Inc., Viacom Inc., The Walt Disney Company, and Scripps Networks Interactive, Inc. (collectively, Video Programmer Coalition) 2014 Comments at 5-9 (referencing 1997 *Closed Captioning Report and Order*, 13 FCC Rcd at 3286-87, paras. 27-28); *see also* Starz Entertainment, LLC, Hemisphere Media Group, Inc., UP Entertainment, LLC, Aspire Channel, LLC, Shorts International Ltd., PixL Entertainment, LLC and BFTV, LLC (Starz et al.) 2015 Reply Comments at 4 (arguing that “[i]mposing a compliance certification requirement on programmers effectively would reverse the compliance burden which VPDs have borne for nearly 20 years”); *cf.* Consumer Groups 2014 Comments at 4 (urging the Commission to hold only VPDs responsible for compliance with its closed captioning quality requirements).

⁷⁴ *See* Video Programmer Coalition 2014 Comments at 3 and attached declarations (stating that “[i]n the experience of the undersigned companies, and as documented in the attached declarations, the overwhelming majority of captioning complaints raise issues that require the involvement of MVPDs for resolution”); Video Programmer Coalition Jan. 21, 2016 *Ex Parte* at 1. *But see* Comcast 2014 Reply Comments at 6 (reporting the results of an internal survey of 426 customer complaints in 2013 that required engineering follow-up, which found that “closed captioning problems were outside the control of the VPD in over 40% of cases”); Comcast 2015 Reply Comments at 2-3; DIRECTV 2014 Reply Comments at 3-4 (noting that in its experience, consumer captioning issues that escalate to a complaint before the Commission “relate predominantly to issues with the VPO”); AT&T 2014 Comments at 5 (stating that “[o]ver the last three years, problems originating with programmers have comprised approximately 50% of the closed captioning complaints received by AT&T”); AT&T 2015 Reply Comments at 3 (same).

and placement),⁷⁵ the record shows that video programmers are responsible in the first instance for making sure that captions meet these quality components – *i.e.*, at the time when programmers initially arrange for the inclusion and insertion of such captions on their programs.⁷⁶ Video programmers thus have primary control over ensuring that the non-technical quality standards are met.⁷⁷

21. In addition, we agree with commenters who assert that allocating captioning quality responsibilities between VPDs and video programmers will be more efficient and effective than attempting to reach video programmers indirectly through their contracts with VPDs.⁷⁸ In the *1997 Closed Captioning Report and Order*, the Commission predicted that “the realities of the marketplace will result in shared responsibility for the closed captioning of video programming,”⁷⁹ and that VPDs would use contractual arrangements to pass on closed captioning obligations to their video programming producers and owners.⁸⁰ It further predicted that such producers and owners would cooperate with VPDs to ensure compliance with the Commission’s rules.⁸¹ For the reasons discussed below, however, we conclude that the responsibilities imposed by the contractual arrangements between these entities will not be as effective or efficient as direct responsibility on the part of video programmers to achieve compliance with the Commission’s new closed captioning quality obligations.

22. First, the record shows that contractual arrangements between VPDs and video programmers may not be fully effective to ensure that video programmers will provide quality closed captions.⁸² For example, ACA claims that “[e]specially for smaller VPDs, contractual representations do

⁷⁵ See 47 CFR § 79.1(c)(1).

⁷⁶ See ACA 2014 Comments at 4 (stating that “cable operators simply pass through the programming signal, including closed captioning data, as received from the program network or broadcaster (*i.e.*, the ‘video programmer’)” and that MVPDs and cable operators “play no role in generating or embedding the closed captioning, except where they produce original programming (subject to certain exemptions)”; AT&T 2014 Comments at 3 (stating that “VPD equipment merely receives the programming with embedded captions supplied by the video programmer and passes through to users that programming with included captions”; see also Consumer Groups 2014 Comments at 6 (agreeing that “VPDs are in the best position to address equipment-related problems,” while “programmers are better positioned in practice to ensure the quality of their programs’ captions”); Operators 2014 Reply Comments at 8 (arguing that “the data regarding the source of captioning problems presented by [the Video Programmer Coalition] is anecdotal at best and Operators do not concede that a majority of captioning problems are the fault of VPDs”); Verizon 2014 Reply Comments at 4 (stating that “in Verizon’s experience, captioning quality issues generally do not arise from the actions of distributors”).

⁷⁷ See AT&T 2014 Comments at 3 (arguing that “video programmers are in the best position to address closed captioning quality issues at [the] earliest stages of production”); Comcast 2014 Comments at 2-3 (arguing that video programmers “are in a better position to ensure that . . . the captions meet quality standards” because video programmers “have a more direct relationship with the entities that provide captioning services and are more likely to have the rights to modify the content and to correct captions”); Comcast 2015 Comments at 2 (arguing that responsibilities should be divided according to “which party in the distribution chain is *best positioned* to address the relevant captioning issue”).

⁷⁸ See AT&T 2014 Comments at 1 (stating that “attempting to indirectly improve closed captioning quality through private contractual arrangements between video programmer[s] and VPDs is inefficient”); AT&T 2015 Reply Comments at 1 (same); see also ACA Jan. 11, 2016 *Ex Parte* at 4; ACA Jan. 21, 2016 *Ex Parte* at 4.

⁷⁹ *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3288, para. 30.

⁸⁰ *Id.* at 3286, para. 28.

⁸¹ *Id.* at 3287, para. 30.

⁸² See AT&T April 28, 2014 Comments at 4 (“VPDs have little leverage to force programmers to improve the quality of closed captioning.”); Operators January 20, 2015 Comments at 2 (stating that “VPDs lack both control and leverage over the programmers”).

not induce programmers to comply with the closed captioning rules.”⁸³ Moreover, DIRECTV points out that “VPDs do not have the opportunity to review and ensure that programming is captioned before transmitting it to viewers. Nor do they have the opportunity to review the extent and quality of such captioning. At best, they can only attempt to negotiate contractual provisions that require VPOs to provide captioned programming as required under the Commission’s rules and/or produced in adherence to the Best Practices recently adopted.”⁸⁴ Similarly, Operators note that enforcement via contract would require VPDs to monitor hundreds of agreements,⁸⁵ putting into question the efficiency of that approach as a means to achieve quality captions. Consumer Groups argue that “holding video programmers legally responsible for ensuring quality indirectly through contract and indemnification is undoubtedly less efficient than holding them directly responsible for compliance.”⁸⁶

23. We further agree that financial constraints and lack of influence may impede a VPD’s ability to enforce agreements where violations of the captioning quality standards occur.⁸⁷ For example, AT&T and others question, short of refusing to carry a programmer’s content, the extent to which VPDs will have available options to force closed captioning quality.⁸⁸ AT&T suggests that even the threat of not carrying programming will have “minimal impact,” and that if forced to bear full responsibility for the captioning quality compliance, VPDs would be “put in the untenable position of passing through the captioned programming as receive[d],” or fearing being one of few VPDs to not carry the programming, potentially “placing the VPD at a competitive disadvantage vis-a-vis other VPDs.”⁸⁹ Further, as noted by Comcast, even in those instances in which a VPD is able to enforce its contractual agreement, the video programmer may decide to simply indemnify the VPD rather than correct the captioning quality problem.⁹⁰

24. Some parties suggest that imposing responsibilities for captioning quality on video programmers will complicate the Commission’s complaint process and enforcement efforts, and thereby thwart the overall goals of ensuring quality captions.⁹¹ Along these lines, the Video Programmer

⁸³ ACA 2014 Comments at 5; *see also* ACA Jan.11, 2016 *Ex Parte* at 4; ACA Jan. 21, 2016 *Ex Parte* at 4.

⁸⁴ DIRECTV 2014 Comments at 5.

⁸⁵ Operators 2014 Comments at 9.

⁸⁶ Consumer Groups 2014 Comments at 6.

⁸⁷ *See* ACA 2014 Reply Comments at 4 (explaining that “under the Commission’s current closed captioning regime, the large video programmers, who own or control the majority of the most popular programming viewed by consumers, do not have strong incentive to proactively address closed captioning complaints involving smaller VPDs because they have little reason to worry that a smaller VPD will seek legal recourse if the programmer breaches its contractual obligation to provide proper captioning”); ACA 2014 Comments at 5 (“In most cases, it is likely that the smaller VPD’s financial and administrative costs to pursue legal action to obtain reimbursement will far outweigh the benefits gained by holding the programmer liable for this breach.”); Verizon 2014 Reply Comments at 6 (arguing that “[i]t is unrealistic to suggest that [VPDs] have the leverage necessary to enforce captioning quality standards”).

⁸⁸ AT&T 2014 Comments at 4; Verizon 2014 Reply Comments at 6.

⁸⁹ AT&T 2014 Comments at 4.

⁹⁰ *See* Comcast 2014 Comments at 4.

⁹¹ Video Programmer Coalition 2014 Comments at 4-5 (arguing that “[m]aintaining the current allocation of compliance responsibility promotes the public interest by ensuring that consumers receive the benefit of this history [of MVPDs resolving complaints] and existing infrastructure, which MVPDs can leverage to ensure that consumers’ captioning quality complaints are resolved promptly and efficiently”); Consumer Groups 2014 Comments at 5-7 (arguing that “dividing responsibility between multiple parties adds complexity to the complaint resolution and enforcement process” and raising concerns about “finger-pointing and subterfuge” and the ability of consumers and the Commission to “easily identify the party legally responsible for caption problems”); Aberdeen Captioning, Inc.

(continued....)

Coalition argues that as the last link in the programming distribution chain, VPDs are better able to address quality issues because they have a direct relationship with consumers and a history of resolving captioning complaints.⁹² To the contrary, we conclude that having VPDs and video programmers share captioning quality responsibilities is likely to improve the efficacy of the complaint process because it will assign responsibility to the entity most able to effectively resolve the complaint. In addition, by allowing the Commission to take enforcement action against video programmers as well as VPDs, it will create incentives for both entities to take actions within their control to resolve quality problems swiftly and to the satisfaction of consumers.⁹³ The record in this proceeding reveals that captioning quality problems can stem from the actions or inactions of either VPDs or video programmers.⁹⁴ As discussed more fully below, the new procedures adopted in this order for resolving captioning quality complaints consider this fact, and utilize the established relationship between VPDs and programmers, as well as VPDs and consumers, to simplify the resolution of complaints for consumers.⁹⁵ In this regard, as noted by Operators and DIRECTV, to the extent that a VPD is responsible for captioning problems, under a regulatory scheme of divided responsibility, the VPD will remain responsible for rectifying those problems.⁹⁶ Likewise, video programmers will remain responsible for addressing captioning problems primarily within their control.

25. We also disagree with the Video Programmer Coalition's suggestion that assigning video programmers responsibility for compliance with the captioning quality rules will discourage cooperation between VPDs and video programmers to resolve captioning complaints because "each party's focus shifts toward risk minimization," rather than collaboration.⁹⁷ We believe it is in the interest of all entities responsible for the production and delivery of video programming with quality captions to work together to achieve compliance with the Commission's captioning rules. In an effort to foster such cooperation, in this order we adopt a compliance ladder to address violations of the captioning rules, which we hope will

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(Aberdeen) 2015 Comments at 1 (arguing that "it is often difficult to determine where potential closed caption errors are introduced" which will "leave room for finger pointing and waiving of responsibility").

⁹² Video Programmer Coalition 2014 Comments at 4; Video Programmer Coalition Jan. 21, 2016 *Ex Parte* at 1.

⁹³ For these reasons, we disagree with Consumer Groups, who raise the concern that "assigning responsibility for the quality standards to video programmers rather than to VPDs may water down the complaint and enforcement processes to the point that a divided responsibility model provides video programmers with *worse* incentives to provide high-quality captions than a VPD-centric model." Consumer Groups 2014 Comments at 7 (emphasis in original).

⁹⁴ See, e.g., AT&T 2014 Comments at 5 (stating that "[o]ver the last three years, problems originating with programmers have comprised approximately 50% of the closed captioning complaints received by AT&T"); AT&T 2015 Reply Comments at 3 (same); Comcast 2014 Reply Comments at 6 (reporting the results of an internal survey of 426 customer complaints in 2013 that required engineering follow-up, which found that "closed captioning problems were outside the control of the VPD in over 40% of cases"); Comcast 2015 Reply Comments at 2-3 (same); DIRECTV 2014 Reply Comments at 3-4 (noting that in its experience, consumer captioning issues that escalate to a complaint before the Commission "relate predominantly to issues with the VPO").

⁹⁵ See *infra* Section III.B.

⁹⁶ DIRECTV 2014 Reply Comments at 4; Operators 2014 Reply Comments at 8-9. As a result, even assuming the accuracy of the Video Programmer Coalition's claim that the "overwhelming majority" of complaints require VPD action for resolution, see Video Programmer Coalition 2014 Comments at 3 and attached declarations, under the complaint procedures we adopt herein, the initial responsibility for addressing a complaint will reside with the VPD, and the video programmer will not be required to address the complaint until after the VPD determines that the cause of the problem is outside the VPD's primary control. See *infra* Section III.B.

⁹⁷ Video Programmer Coalition 2014 Comments at 11; see also Video Programmer Coalition Aug. 18, 2014 *Ex Parte* at 1-2 (stating that reallocating liability to video programmers "will make everyone – front-line MVPD staff and front-line cable network staff – more conscious of enforcement and liability risk, and therefore more litigation-minded and less willing to cooperate"); Video Programmer Coalition Jan. 21, 2016 *Ex Parte* at 1-2.

provide incentives to reduce possible conflicts between the responsible entities.⁹⁸ As discussed in more detail below, the compliance ladder will afford VPDs and video programmers opportunities to correct closed captioning problems and thereby reduce the risk of enforcement action for small, isolated problems. Additionally, because consumer complaints filed with the Commission will be served on VPDs and video programmers simultaneously, and because we will require VPDs to stay involved throughout the complaint resolution process to help video programmers troubleshoot issues,⁹⁹ the amended complaint processes will offer multiple opportunities for collaboration between the responsible parties. In this manner, new incentives, rather than disincentives, will be created to achieve cooperation between VPDs and video programmers to facilitate resolution of closed captioning complaints for consumers.

26. Accordingly, we amend our rules to require video programmers to ensure that closed captioning data provided to VPDs complies with the Commission's closed captioning quality standards. We also continue to require VPDs to pass through programming with the original closed captioning data intact, in a format that can be recovered and displayed by consumers. Thus, under the rules we adopt, video programmers will be responsible for closed captioning quality problems that stem from producing the captions, as well as transmission of the captions by the video programmers to the VPDs up to when the programming is handed off to the VPDs.¹⁰⁰ VPDs will be responsible for closed captioning quality problems that are the result of faulty equipment or the failure to pass through closed captioning data intact.¹⁰¹ As a result, a VPD will be held responsible for a violation of the caption quality rules when the circumstances underlying the violation are primarily within the control of the VPD,¹⁰² and a video programmer will be held responsible for a violation of the caption quality rules when the circumstances underlying the violation are primarily within its control.¹⁰³ Assigning liability in this manner will allow VPDs and video programmers to focus their resources on the captioning transmission processes over

⁹⁸ See *infra* Section III.C.

⁹⁹ See *infra* Section III.B., for a discussion of the revised complaint procedures.

¹⁰⁰ For example, transmission problems could result in garbled or missing words.

¹⁰¹ In other words, although video programmers bear primary responsibility for ensuring the non-technical quality of closed captioning, VPDs will continue to be responsible for ensuring that quality closed captions reach viewers, and thus can be held accountable to the extent that a caption quality problem results from an error in passing through such captions to end users. See DIRECTV 2015 Comments at 2 (stating that VPDs "should be held accountable if their systems do not" pass through closed captioning intact); AT&T 2015 Reply Comments at 2 (stating that "VPDs pass through captions to viewers and should ensure that their equipment does not block or impede the delivery of captions embedded in the programming stream").

¹⁰² A VPD also will be held responsible if it carries non-exempt programming without captions from a video programmer that has provided a certification that the VPD knew or had reason to know was false, even if the lack of captions was not due to the VPD's failure to pass through closed captions intact. In such case, both the VPD and the video programmer will be held responsible. See *infra* section III.A.6.

¹⁰³ A VPD and the video programmer may be jointly responsible for a violation of the caption quality rules that is within the control of both parties. However, because we believe it would be more efficient and effective to make VPDs and video programmers responsible for violations of the Commission's closed captioning quality requirements over which they each have control, we reject Consumer Groups' suggestion that the Commission should impose joint and several liability among the covered entities for compliance with the caption quality rules over a trial period of one year. See Consumer Groups 2014 Comments at 4, 7-8; Consumer Groups 2014 Reply Comments at 7; *Closed Captioning Quality Further Notice*, 29 FCC Rcd at 2294, para. 127 (seeking comment on imposition of joint and several liability). We agree with commenters that regulatory certainty and stability militate against adopting such an approach, Comcast 2014 Reply Comments at 9, and that under a joint and several liability regime, "the VPD or programmer could be held responsible for a captioning problem over which it has no control." Comcast 2014 Reply Comments at 9; see also ACA 2014 Comments at 11-12; Operators 2014 Reply Comments at 2; Comcast 2014 Reply Comments at 9-10; Verizon 2014 Comments at 9.

which they have the most control, thereby increasing their individual incentives to provide quality closed captions.¹⁰⁴

4. Responsibilities for the Provision of Captioning

27. The section above discusses the allocation of responsibilities for ensuring captioning quality. We now turn to the extent to which the obligation to ensure the *provision* of closed captions should be allocated between video programmers and VPDs. Section 79.1(b) currently places on VPDs the responsibility for ensuring the provision of closed captions on non-exempt television programs.¹⁰⁵ The *Closed Captioning Quality Further Notice* sought comment on whether the Commission should revise this rule to allocate some of this responsibility to other programming entities, such as video programmers.¹⁰⁶

28. Based on comments in the record, we conclude that the better approach for ensuring the provision of closed captions on television is to continue to hold VPDs primarily responsible for this obligation on the programming they carry,¹⁰⁷ but to also hold video programmers responsible where they fail to provide captions on non-exempt programming. We reach this conclusion because we believe that our prior policy of placing sole responsibility on VPDs for the provision of closed captions on television programs failed to consider fully the role that video programmers play in the provision of captions on their video programming. As discussed above, we agree with commenters that video programmers play a significant role in securing captioning services.¹⁰⁸ Given that video programmers have control over the provision of closed captioning on programs they make available to VPDs for distribution to viewers, we believe that it would be more effective and efficient to hold video programmers accountable for ensuring the insertion of closed captions on all of their programming that is not exempt, and we amend section 79.1(b) of our rules¹⁰⁹ to include the responsibilities of video programmers.

29. At the same time, we agree with Consumer Groups that VPDs have an important role in the distribution of captioned programming, and that VPDs should remain “fully engaged” to ensure the provision of captions on nonexempt programming delivered to the public.¹¹⁰ Thus, we will maintain our current rules requiring VPDs to remain primarily responsible for ensuring the provision of closed captions on their programming, including the obligation to pass through programming with the original closed

¹⁰⁴ See ACA 2014 Comments at 6 (“By holding the programmer directly responsible when the captioning problem is due to its own error, the programmer will have the appropriate direct exposure to any enforcement actions when closed captioning issues arise, as well as being subject to public scrutiny when it fails to provide appropriate captioning”); Operators 2014 Comments at 9 (“Under a regulatory model that assigns liability according to actual responsibility, each participant involved in the creation and delivery of captioned programming would be incented to focus entirely on fulfilling its specific regulatory charge”); Operators 2014 Reply Comments at 3.

¹⁰⁵ 47 CFR § 79.1(b).

¹⁰⁶ *Closed Captioning Quality Further Notice*, 29 FCC Rcd at 2294, para. 127.

¹⁰⁷ 47 CFR § 79.1(b). As discussed in the *1997 Closed Captioning Report and Order*, we anticipate that VPDs typically will continue to accomplish this through contractual arrangements with their programming suppliers. See *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286-87, para. 28.

¹⁰⁸ See *infra* Section III.A.3; see also Operators 2014 Reply Comments at 10-11; Operators 2015 Comments at 2; Comcast 2014 Reply Comments at 2-3, 7; Verizon 2014 Reply Comments at 4-5; DIRECTV 2014 Reply Comments at 3; AT&T 2014 Comments at 3-4; AT&T 2015 Reply Comments at 2; ACA 2014 Comments at 4.

¹⁰⁹ 47 CFR § 79.1(b).

¹¹⁰ Consumer Groups 2015 Comments at 4-5; Consumer Groups 2015 Reply Comments at 6 (noting that VPDs “are not merely passive conduits for programming” but “make active decisions about which programming to distribute to their customers and should retain responsibility for ensuring the programming is available to all their customers, including customers who are deaf or hard of hearing, on equal terms”).

captioning data intact, in a format that can be recovered and displayed by consumers.¹¹¹ As with our closed captioning quality rules, we believe that allocating responsibilities for the provision of closed captioning in this manner will incentivize entities with the greatest control over each aspect of the closed captioning carriage, transmission and delivery processes to provide closed captions. We also believe that the approach adopted herein will maintain the current incentives for VPDs to ensure that the programming they carry is in compliance with the Commission's rules, while allowing the Commission to reach video programmers in instances where such entities have been non-compliant.

30. We further conclude that this approach will respond to requests by commenters to eliminate a potential "liability gap" in our captioning rules, that they claim has arisen by permitting VPDs to rely on certifications from programming suppliers to demonstrate compliance with our rules.¹¹² Under the current rules, a VPD may rely on a certification from the programming supplier, even when "a programming source falsely certifies that the programming delivered to the distributor meets our captioning requirements if the distributor is unaware that the certification is false."¹¹³ Moreover, because the current rules do not assign responsibility to video programmers, they are not held accountable even where a video programmer either fails to provide a certification, provides a false certification, or simply fails to provide the required captioning. Our decision to hold VPDs primarily responsible for the provision of closed captioning while allocating some responsibility to video programmers will ensure that the responsible entities are held accountable when closed captioning is not provided and will better enable the Commission to fulfill Congress's intent to ensure the accessibility of video programming.¹¹⁴

31. Our approach for the allocation of responsibility for the provision of captioning is consistent with the Commission's actions to assign some captioning responsibilities to VPOs in the *IP Captioning Report and Order*.¹¹⁵ As noted above,¹¹⁶ there, as here, the Commission found that imposing

¹¹¹ Below, we explain that if a VPD carries programming without captions, the VPD will be able to demonstrate compliance with the captioning rules by relying on a programmer's certification that such program was exempt from the Commission's rules, so long as the lack of captions did not arise as a result of the VPD's failure to pass through the closed captions intact to viewers and the VPD did not know or did not have reason to know that the certification was false. However, if a VPD carries non-exempt programming without captions and the programmer's certification does not exist or the VPD knew or should have known that the certification was false, the VPD will remain liable for failing to have provided closed captions on such programming. *See infra* Section III.A.6; *supra* note 102. In the latter case, both the VPD and the video programmer would be held liable because the programmer will have submitted a false certification and will have violated its obligation with respect to the provision of captions.

¹¹² *See, e.g.*, Comcast 2014 Comments at 5 (arguing that a uniform approach for all of the Commission's closed captioning rules "will help eliminate any potential 'liability gap' in the Commission's existing compliance regime for TV captions"); Comcast 2015 Comments at 2 (same); ACA 2014 Reply Comments at 16 (arguing that applying a uniform approach for all of the Commission's closed captioning rules would make Commission enforcement more efficient and eliminate any potential "liability gap"). While the approach that we now adopt for the provision of captions differs slightly from the approach for allocating responsibility for the captioning quality rules discussed above we believe that the outcome will be the same – making sure that the responsibility for ensuring the provision of captions is assigned to VPDs and video programmers based on their role in provisioning captions.

¹¹³ 47 CFR § 79.1(g)(6).

¹¹⁴ *See* 47 U.S.C. § 613(b). We thus reject the claims of some commenters that the record does not support a change from the Commission's prior approach of holding only VPDs responsible for the Commission's closed captioning requirements. *See* Video Programmer Coalition 2014 Reply Comments at 3 ("For more than sixteen years, MVPDs have been responsible for compliance with the television caption rules, and no evidence has been introduced that would justify a departure from this longstanding approach."); Video Programmer Coalition Jan. 21, 2016 *Ex Parte* at 2; *see also* Starz et al. 2015 Reply Comments at 4 (arguing that "[i]mposing a compliance certification requirement on programmers effectively would reverse the compliance burden which VPDs have borne for nearly 20 years").

¹¹⁵ *See IP Captioning Report and Order*, 27 FCC Rcd at 798, para. 15 (extended to VPOs some of the responsibilities to require captioned television programs to be displayed with captions when delivered via Internet (continued....))

responsibility on VPOs as well as VPDs was necessary to further the statutory purpose of ensuring that individuals with disabilities are able to access video programming,¹¹⁷ and that placing obligations on VPOs would ensure that the Commission could hold a responsible party accountable for violations of the CVAA's IP closed captioning requirements.¹¹⁸ Similarly, this approach is consistent with recently adopted rules to include VPDs and all other video programming providers, including program owners, as parties responsible for making emergency information on television accessible to individuals who are blind or visually impaired.¹¹⁹ There too, the Commission decided that the entity that creates the visual emergency information content and adds it to the programming stream must be responsible for providing an aural representation of the information on a secondary audio stream, accompanied by an aural tone.¹²⁰ By contrast, video programming distributors are responsible for ensuring that the aural representation of the emergency information gets passed through to consumers.¹²¹ The Commission also decided that both VPDs and VPPs "are responsible for ensuring that emergency information supersedes any other programming on a secondary audio channel, with each entity responsible only for its own actions or omissions in this regard."¹²² For reasons similar to those identified in the instant proceeding, the Commission concluded that this approach would allow it "to take enforcement action not only against a non-compliant video programming distributor, but also against a program provider or owner that does not comply with its obligation to make visual emergency information accessible to consumers who are blind or visually impaired."¹²³

5. Video Programmer Certification

32. We next turn to whether we should modify the Commission's rules governing video programmers' certifications of compliance with respect to the provision and quality of closed captions. As a result of our decision to allocate responsibility between video programmers and VPDs for the quality and provision of closed captioning, we conclude that our rules governing these certifications should be amended to (1) make such certifications mandatory and (2) require video programmers to file these certifications with the Commission.

33. At present, the Commission's rules provide for two separate types of video programmer certifications in the closed captioning context. Section 79.1(g)(6) of the Commission's rules provides that VPDs may rely upon certifications from programming suppliers, including programming producers, programming owners, network syndicators and other distributors, to demonstrate a program's compliance

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protocol (IP), by requiring VPOs to send program files for the delivery of IP programming to VPDs (as defined in 47 CFR §79.4(a)(3)) with all required captions); *see also* Comcast 2015 Comments at 2 (stating that division of responsibility for the provision and quality of closed captions "builds on the shared-responsibility models adopted for online captioning and accessible emergency information").

¹¹⁶ *See supra* section III.A.3.

¹¹⁷ *IP Captioning Report and Order*, 27 FCC Rcd at 798, para. 16.

¹¹⁸ *Id.* at 799-800, para. 18. Under the approach adopted in the *IP Captioning Report and Order*, the Commission concluded that VPDs were responsible only for rendering or passing through closed captions and exercising good faith efforts to identify programming subject to the IP captioning rules, and would be protected from liability so long as those two requirements were met. *Id.* at 798, para. 16.

¹¹⁹ *2013 Emergency Information Order*, 28 FCC Rcd at 4898-4900, paras. 34-36 (2013) (*2013 Emergency Information Order*) (amending 47 CFR §79.2); *see also* Comcast 2015 Comments at 2.

¹²⁰ *2013 Emergency Information Order*, 28 FCC Rcd at 4899-4900, para. 36; *see also* 47 CFR § 79.2(b)(2)(ii).

¹²¹ *See id.*

¹²² *2013 Emergency Information Order*, 28 FCC Rcd at 4900, para. 36.

¹²³ *Id.* at 4900, para. 36.

with the captioning provision rules.¹²⁴ As noted earlier, this section goes on to state that VPDs will “not be held responsible for situations where a program source falsely certifies that programming delivered to the distributor meets our captioning requirements if the distributor is unaware that the certification is false.”¹²⁵ Under our current rules, there is no affirmative obligation on the part of VPDs to obtain such certifications or on programming suppliers to provide them. Additionally, our rules simply permit a VPD to rely on these certifications to prove that there was no underlying obligation to caption the programming received. This is the case even if the certification received is false (unless the VPD was aware of such falsehood).

34. The second type of programmer certification, which VPDs must make best efforts to obtain, was adopted by the Commission in the *Closed Captioning Quality Order*, and is contained in section 79.1(j)(1) of the Commission’s rules.¹²⁶ Under this rule, a VPD must exercise best efforts to obtain one of the following certifications from each video programmer with respect to the programming supplied to the VPD: (i) that the video programmer’s programming satisfies the caption quality standards;¹²⁷ (ii) that in the ordinary course of business, the video programmer has adopted and follows the Best Practices for video programmers with respect to captioning quality;¹²⁸ or (iii) that the video programmer is exempt from the closed captioning rules, under one or more properly attained exemptions.¹²⁹ If a video programmer claims an exemption from the captioning rules, it must also specify the exact exemption.¹³⁰ In addition, section 79.1(k)(1)(iv) requires a video programmer that adopts Best Practices to adhere to option (ii) above, that is, it must certify to its VPDs that it has adopted and is following Best Practices for video programmers with respect to quality.¹³¹ Both 79.1(j)(1) and (k)(1)(iv) require that the video programmer make this certification widely available, with (j)(1) requiring that the video programmer do so within 30 days after receiving a written request to do so from a VPD.¹³²

35. In the *Closed Captioning Quality Second Further Notice* the Commission sought comment on the need to alter its video programmer certification requirements if it extends some responsibilities for compliance with its closed captioning rules to video programmers.¹³³ Specifically, the Commission asked whether it should amend section 79.1(j)(1) of its rules to require video programmers to file their certifications on caption quality with the Commission (rather than making such certifications widely available through other means) and whether it should amend section 79.1(k)(1)(iv) to make the filing of certifications with the Commission part of video programmers’ Best Practices.¹³⁴ The Commission also sought comment on whether it should amend section 79.1(g)(6) to *require* video

¹²⁴ 47 CFR §79.1(g)(6).

¹²⁵ 47 CFR § 79.1(g)(6); *see also supra* section III.A.4.

¹²⁶ 47 CFR § 79.1(j)(1).

¹²⁷ *See* 47 CFR §79.1(j)(2) (stating the requirements with regard to the captioning quality standards).

¹²⁸ *See* 47 CFR §79.1(k)(1) (stating the specific requirements with regard to Best Practices); *see also* 47 CFR § 79.1(k)(1)(iv) (stating the requirement for programmers who adopt the Best Practices to provide certifications to VPDs that they adhere to Best Practices).

¹²⁹ 47 CFR §79.1(j)(1); *Closed Captioning Quality Order*, 29 FCC Rcd at 2254-56, paras. 51-57.

¹³⁰ 47 CFR § 79.1(j)(1); *Closed Captioning Quality Order*, 29 FCC Rcd at 2255, para. 54.

¹³¹ 47 CFR § 79.1(k)(1)(iv).

¹³² 47 CFR §§ 79.1(j)(1) and (k)(1)(4); *Closed Captioning Quality Order*, 29 FCC Rcd at 2255-56, 2259, paras. 54, 60. A video programmer that does not make its certification widely available within 30 days after receiving a written request to do so from a VPD will be placed in a publicly available database identifying non-certifying video programmers. 47 CFR § 79.1(j)(1)(iii).

¹³³ *Closed Captioning Quality Second Further Notice*, 29 FCC Rcd at 15091, para. 6.

¹³⁴ *Id.* at 15091-92, para. 7.

programmers to file certifications with the Commission that they are in compliance with the Commission's rules for the provision of closed captioning.¹³⁵

36. We agree with commenters that changing our certification processes to require video programmers to provide certifications to the Commission of their compliance with the Commission's rules regarding the provision and quality of closed captions is necessary to effectively implement the new apportionment of the closed captioning obligations.¹³⁶ To better ensure compliance with our rules and simplify the certification process, we therefore revise our certification processes to collapse the certification requirements contained at Sections 79.1(g)(6), (j)(1), and (k)(1)(iv)¹³⁷ into a single rule that, with respect to non-exempt programming, makes mandatory the obligation for each video programmer¹³⁸ to submit to the Commission a certification that its programming (1) is in compliance with the obligation to provide closed captioning *and* (2) either complies with the captioning quality standards¹³⁹ or adheres to the Best Practices for video programmers with respect to captioning quality.¹⁴⁰ In the event that some or all of the programming in question is exempt under one or more of the exemptions set forth in the Commission's rules, in lieu of the above certification, the video programmer must submit a certification attesting to such exemption and specifying each category of exemption that is claimed.¹⁴¹ We require

¹³⁵ *Id.* at 15092-93, para. 9.

¹³⁶ See Aberdeen 2015 Comments at 1 (supports requiring video programmers to provide certification to the Commission); ACA 2015 Comments at 1 ("Requiring video programmers to file . . . certifications of captioning compliance with the Commission will better facilitate compliance with the Commission's closed captioning rules and ensure that individuals who are deaf and hard of hearing receive accurate and complete captions."), 2-3, 6-9; ACA Jan. 11, 2016 *Ex Parte* at 4; ACA Jan. 21, 2016 *Ex Parte* at 4; Consumer Groups 2015 Comments at 2-3; cf. Operators 2015 Comments at 5 (stating that the certification process should be retained and "be made more robust," "if the Commission opts not to place direct and *sole* responsibility on programmers and to continue to hold VPDs responsible for the provision and quality of captions") (emphasis added).

¹³⁷ 47 CFR §§ 79.1(g)(6), (j)(1), and (k)(1)(iv).

¹³⁸ As currently written, section 79.1(g)(6) discusses certifications from "programming suppliers, including programming producers, programming owners, networks, syndicators and other distributors." 47 CFR § 79.1(g)(6). In the *Closed Captioning Quality Second Further Notice*, the Commission sought comment on replacing the term "programming supplier" with the term "video programmer" in sections 79.1(e)(6) and 79.1(g)(6). 47 CFR §§ 79.1(e)(6) and (g)(6). *Closed Captioning Quality Second Further Notice*, 29 FCC Rcd at 15092, para. 8. Consumer Groups, which were the only entities to comment on this issue, support amending sections 79.1(e)(6) and 79.1(g)(6) in this manner if "the Commission shifts responsibility from VPDs to video programmers" to "clarify that VPDs may only rely upon certifications provided by the entity actually responsible for the underlying program's compliance with the rules and not another VPD who is not responsible for compliance." Consumer Groups 2015 Comments at 2, n.4. Accordingly, we will use the term "video programmer" in the new certification requirement that replaces section 79.1(g)(6). We also amend section 79.1(e)(6) to replace the term "programming supplier" with the term "video programmer."

¹³⁹ See 47 CFR § 79.1(j)(2) (containing the captioning quality standards).

¹⁴⁰ See 47 CFR § 79.1(k)(1) (containing the Best Practices).

¹⁴¹ See *Closed Captioning Quality Order*, 29 FCC Rcd at 2255, para. 54. See also Consumer Groups 2015 Comments at 4 (stating that certifications that programming is exempt should specify the exemption claimed because of the "extensive record" showing that VPDs and video programmers have, in the past, erroneously asserted eligibility for various self-implementing exemptions). Operators argue that it is "not practical" for video programmers to specify the exemption claimed for programming that is "exempt as a matter of course, such as interstitials, advertising, and late night programming" and urge the Commission to clarify that certifications "need only identify the applicable exemption that would justify a lack of captioning on all or nearly all of the programming on a particular channel." Operators 2015 Comments at 5-6. To address Operators' concerns, we require video programmers to specify only the categories of exemptions that are claimed and do not require that specific details, such as the names of each affected show and timeslots that apply to such show, be listed. For example, a video programmer may specify that some of its programming is subject to one or more of the following exemptions

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video programmers to file their certifications with the Commission when they first launch and on an annual basis, on or before July 1 of each year, and, as discussed below, to use the Commission's web form filing system for such submissions.¹⁴²

37. By amending our rules to make certification as to the provision and quality of closed captions by video programmers mandatory, we will hold video programmers accountable for their certifications, *e.g.*, where a submitted certification is false or a programmer fails to provide the requisite certifications.¹⁴³ We agree with commenters who point out that requiring video programmers to file their certifications with the Commission,¹⁴⁴ rather than with VPDs (as currently required), also will create greater efficiencies because it will create a single repository for all video programmer certifications, providing greater transparency and ease of reference for video programmers, consumers and VPDs.¹⁴⁵ Moreover, this approach eliminates the need to rely on VPDs to obtain certifications from video programmers, and for VPDs to undertake the task of locating and collecting such certifications.¹⁴⁶

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contained in the Commission's rules: 47 C.F.R. § 79.1(d)(5) (late night hours), 47 C.F.R. § 79.1(d)(6) (interstitials), or 47 C.F.R. § 79.1(d)(10) (non-vocal music). We caution video programmers to list in their certifications only those exemptions that are applicable to their programming because certifications that include lists of inapplicable exemptions will not satisfy this requirement. Moreover, in response to a complaint or Commission inquiry, video programmers will be required to provide specific information about the exemptions claimed for the programs and timeslots that are the subject of the complaint. Lastly, the Commission will revisit this issue should the Commission find that the goal of assisting consumers in understanding which programs are exempt and the basis for such claimed exemptions is not being met by this requirement.

¹⁴² We direct CGB to issue a Public Notice establishing procedures for filing these certifications and to establish the deadline for the first filing of such certifications once the rules go into effect and the Commission's website is ready to receive such certifications. *See infra* section III.D.2. So long as a video programmer provides the applicable certification when it launches and annually thereafter on or before July 1st, it need not provide supplemental certifications mid-year, each time it delivers new programs to the VPD. However, we require each annual filing to be updated, as needed, to identify any applicable exemptions that were not specified in the previously-filed certification.

¹⁴³ In other words, a video programmer's failure to submit a certification or submission of a false certification will be deemed a violation of the Commission's rules that is separate from any violations related to the failure to provide quality captions. In contrast, section 79.1(g)(6), as currently written, creates neither an obligation nor any incentive for video programmers to provide certifications regarding the provision of closed captions, and sections 79.1(j)(1) and (k)(1)(iv) presently create no obligation and only minimal incentive for video programmers to provide certifications as to the quality of their closed captioning. *See* 47 CFR §§ 79.1(g)(6), (j)(1) and (k)(1)(iv). The only consequence for video programmers that fail to provide certifications pursuant to section 79.1(j)(1) is the chance that they will be placed in a publicly available database of non-certifying video programmers. *See* 47 CFR § 79.1(j)(1).

¹⁴⁴ Such certifications must be filed using the Commission's web form filing system and will be searchable in the Commission's database. *See infra* section III.D.2.

¹⁴⁵ *See* ACA 2015 Comments at 8-9 (stating that filing certifications with the Commission will allow consumers to review a programmer's certification and determine whether it qualifies for an exemption from the Commission's closed captioning rules, as well reduce video programmers' transaction costs and benefit MVPDs); Verizon 2015 Comments at 4 (stating that filing certifications with the Commission in a "central database" will "make the certifications easier for the Commission, distributors, and . . . consumers [who are deaf and hard of hearing] to locate, and thereby facilitate response to and resolution of complaints"); AT&T 2015 Reply Comments at 4-6; CenturyLink, Inc. (CenturyLink) 2015 Reply Comments at 2-3 ("It is more efficient to have video programmers provide the certification directly to the Commission . . ."); Consumer Groups 2015 Comments at 3; Consumer Groups Jan. 14, 2016 *Ex Parte* at 3; Consumer Groups Jan. 27, 2016 *Ex Parte* at 2.

¹⁴⁶ *See* DIRECTV Aug. 11, 2014 *Ex Parte* at 2; Comcast 2014 Comments at 6, n.15; *see also* Verizon 2014 Comments at 10-11; Verizon Aug. 21, 2014 *Ex Parte* at 1-2.

38. We reject the argument, made by some commenters, that certifications are unnecessary if some of the captioning responsibilities are directly assigned to video programmers.¹⁴⁷ For the most part, these commenters suggest that once such direct responsibility is placed on video programmers, there is no need for VPDs to continue relying on such certifications.¹⁴⁸ We disagree. First, even under our new rules, VPDs will remain primarily responsible for the provision of closed captioning on the non-exempt programming that they carry.¹⁴⁹ Certifications from video programmers will be necessary to inform VPDs of the extent to which the programming that they carry contained closed captions upon receipt. As discussed in the next section, VPDs can then rely on these certifications to prove compliance, so long as they do not know or do not have reason to know a certification is false and so long as the VPDs pass through such captions intact to viewers.¹⁵⁰ We agree with commenters that requiring video programmers to provide certifications regarding their compliance with the closed captioning quality standards or Best Practices will help bring to their attention their new responsibilities, and thereby help to ensure quality closed captions.¹⁵¹ Specifically, we believe that the process of having to prepare and provide the certification will help alert video programmers of the need to comply with the captioning quality standards or Best Practices.

39. We also believe that, compared to the prior certification procedures, the new certification regime (which imposes direct responsibilities on video programmers as well as VPDs) will enhance our ability to enforce the captioning rules against video programmers and VPDs, and thus ensure the needs of consumers are better served. We disagree with the assertion of the National Association of Broadcasters (NAB) that it is unnecessary for the Commission's rules to require video programmers to provide certifications on the grounds that VPDs can easily negotiate closed captioning certifications from video

¹⁴⁷ See DIRECTV 2015 Comments at 3 (suggesting that the Commission “eliminate[e] VPO certifications altogether” because “[o]nce VPOs bear direct responsibility for their captioning activities . . . there is no longer any reason to require VPOs to provide certification”); Comcast 2015 Comments at 3 (stating that “if the Commission adopts the burden-shifting proposal, there no longer will be a need for VPDs to obtain and rely on such certifications” because “programmers would be directly responsible and liable for captioning issues within their control under the burden-shifting approach”); Comcast Dec. 22, 2015 *Ex Parte* at 2 (same); AT&T 2015 Reply Comments at 4 (“If the Commission modifies its rules to make video programmers responsible for closed captioning functions within their control, VPDs will no longer need to use certifications from programmers to demonstrate VPD compliance with the closed captioning rules”); NAB 2015 Comments at 5 (stating that video programmer certification requirements are “unnecessary”); National Cable & Telecommunications Association (NCTA) 2015 Comments at 2 (stating that “[i]f the Commission were to impose compliance responsibility on programmers (in whole or in part) and relieve MVPDs of responsibility for programmers’ compliance, there would be no need for programmers to provide certifications”); Public Broadcasting Service (PBS) 2015 Reply Comments at 1-2.

¹⁴⁸ See, e.g., DIRECTV 2015 Comments at 3; Comcast 2015 Comments at 3.

¹⁴⁹ See *supra* Section III.A.4; Operators 2015 Comments at 3-5 (arguing that video programmer certifications are unnecessary if video programmers are made “solely responsible” for compliance with the captioning rules, but that if the Commission continues to hold VPDs responsible for the provision and quality of captions, “the certification process should be retained”); Verizon 2015 Comments at 4.

¹⁵⁰ See *infra* Section III.A.6.

¹⁵¹ Verizon 2015 Comments at 4-5 (stating that requiring video programmers to file certifications regarding caption quality would be “a useful means to ensure video programmers are aware of the standards and the need to comply with those standards”); Consumer Groups 2015 Comments at 2-3 (stating that requiring video programmers to certify compliance with the caption provision and quality rules “would require programmers to understand and assert that they are responsible for compliance”); Consumer Groups 2015 Reply Comments at 4 (stating that requiring certifications would “force programmers to be proactive in ensuring their compliance with the rules”). We reject NCTA’s additional argument that the Commission should not require video programmer certifications because it is not mandated by the CVAA. See NCTA 2015 Comments at 3. As Consumer Groups note, the Commission’s television closed captioning rules are promulgated under the Telecommunications Act of 1996, not the CVAA. Consumer Groups 2015 Reply Comments at 5.

programmers as part of programming negotiations.¹⁵² First, as noted above, because video programmers were not obligated to provide certifications under our prior rules (*i.e.*, sections 79.1(g)(6), (j)(1), and (k)(1)(iv)),¹⁵³ the Commission had limited enforcement ability against noncompliant video programmers. Second, we agree with commenters that some VPDs may be unable to negotiate contractual arrangements obligating video programmers to provide such certifications, due to disparities in negotiating power.¹⁵⁴

40. Finally, we disagree with NAB's claim that requiring video programmers to file certifications regarding the provision and quality of closed captions with the Commission will result in "a significant cost and time burden" on video programmers.¹⁵⁵ Because many video programmers already provide certifications to VPDs under sections 79.1(g)(6) and (j)(1), combining these certifications into a single certification to be filed with the Commission should not result in any significant additional burden.¹⁵⁶ Moreover, even if this requirement were to create an added burden on video programmers who are not already providing certifications under our current rules, the rules we now adopt minimize such burden by only requiring these certifications to be filed annually, on or before July 1 of each year, rather than "for every programming shift."¹⁵⁷ In addition, any such burden will be outweighed by the benefits of requiring video programmers to provide certifications, as described in the preceding paragraphs.¹⁵⁸

¹⁵² NAB 2015 Comments at 5.

¹⁵³ 47 CFR §§ 79.1(g)(6), (j)(1), and (k)(1)(iv).

¹⁵⁴ See Cincinnati Bell Extended Territories, LLC (Cincinnati Bell) Aug. 11, 2014 *Ex Parte* at 3 (stating that the disparity in negotiating power "means that smaller VPDs likely would not be able to negotiate representations and warranties relating to the programmer's close[d] captioning obligations"); see also AT&T 2014 Comments at 4 (stating that "short of refusing to carry a programmer's content, VPDs have few options to force closed captioning improvements, and even that threat has minimal impact" because "[v]ideo programmers have multiple outlets for distributing content"); ACA Sept. 4, 2014 *Ex Parte* at 2 (stating that contractual commitments are ineffective because "video programming providers have little incentive to comply with their obligations with respect to smaller MVPDs, as these smaller providers are less likely to seek legal recourse in the event of a closed captioning problem due to the costs involved in doing so").

¹⁵⁵ NAB 2015 Comments at 7. We also do not agree with NAB's related claim that requiring video programmer certifications will result in a significant burden on VPDs or the Commission. See *id.* at 7-8. As discussed below, see *infra* Section III.A.6, we are reducing the burden on VPDs because first, all video programmer certifications and contact information will now be housed in one easy to find location, eliminating the need for VPDs to search for this information on websites spread across the Internet, and because VPDs will no longer be required to inform video programmers of the video programmers' obligation to provide certifications. In addition, under the new certification rules, VPDs will no longer have to alert the Commission when certifications are not provided by video programmers. While the Commission will maintain a website for the receipt of such certifications, any additional burden that this creates for the Commission will be offset by eliminating the need to maintain a public list of non-compliant video programmers and by the regulatory efficiencies (both in terms of compliance and enforcement) in having video programmers deal directly with the Commission, as opposed to having the Commission rely on VPDs to monitor video programmers' compliance.

¹⁵⁶ See ACA 2015 Comments at 7-9; Consumer Groups 2015 Reply Comments at 5.

¹⁵⁷ See NAB 2015 Comments at 7 ("Forcing VPPs to file certifications with the FCC for every programming shift would be extremely resource intensive and burdensome . . . [and] would result in almost weekly amendments to certifications").

¹⁵⁸ NCTA argues that requiring video programmers to file certifications "would serve no purpose at all yet would impose paperwork burdens on hundreds of program networks, large and small, contrary to the mandates of the Paperwork Reduction Act." NCTA 2015 Comments at 2-3; see also NAB 2015 Reply Comments at 5-6 (agreeing with NCTA's argument). We have explained above the need for such certifications, as well as how we have minimized the burden imposed on video programmers, including small entities. We therefore reject NCTA's and NAB's argument that this requirement is contrary to the Paperwork Reduction Act.

6. VPD Obligations With Respect to Video Programmer Certifications

41. We next turn to the obligations of VPDs with respect to video programmer certifications. The *Closed Captioning Quality Second Further Notice* sought comment on VPDs' obligations pertaining to such certifications, and, specifically, whether to require each VPD to alert its video programmers of the requirement to provide certifications to the Commission, to verify video programmers' compliance with the certification requirement, and to thereafter report to the Commission any failure by a video programmer to comply.¹⁵⁹

42. Because the rules now adopted by the Commission will hold video programmers directly liable for their failure to provide the required certifications, we agree with commenters that it is not necessary to make VPDs responsible for informing video programmers about the need to provide certifications, or to require that VPDs check on and report noncompliant video programmers to the Commission.¹⁶⁰ At the same time, we agree with Verizon that VPDs should be allowed to rely upon the certifications from video programmers to fulfill their obligation to ensure the provision of closed captions on the programming they carry.¹⁶¹ Accordingly, we will allow a VPD to demonstrate compliance with its captioning obligations where it relies on a programmer's certification as to the presence of captions on such programming or that such programming is exempt from the captioning requirements, so long as (1) the VPD passes through the closed captions intact to viewers; and (2) the VPD did not know or did not have reason to know that such certification was false.¹⁶² However, if a VPD carries non-exempt programming without captions from a video programmer that has *not* provided certification to the Commission, or from a video programmer that has provided a certification that the VPD knew or had reason to know was false, the VPD will be liable for failing to have provided closed captions on such programming, even if the lack of captions was not due to the VPD's failure to pass through closed captions intact.¹⁶³ This will discourage the VPD from ignoring information that should warrant checking

¹⁵⁹ *Closed Captioning Quality Second Further Notice*, 29 FCC Rcd at 15093, para. 10.

¹⁶⁰ See Operators 2015 Comment at 6 (arguing that VPDs should not be required to "notify programmers of their captioning responsibilities or to keep track of whether programmers are meeting their own obligations," as doing so would "exacerbate the problem of indirect regulation" and require the unnecessary expenditure of VPD resources); Verizon 2015 Comments at 5 (stating that VPDs should not be required to "police whether video programmers are certifying to compliance or filing the certifications" because VPDs "do not have the means to comprehensively 'monitor' compliance with the Commission's rules" and VPDs cannot control whether or not a video programmer files a certification); AT&T 2015 Reply Comments at 5; CenturyLink 2015 Reply Comments at 3 ("It is more efficient to have video programmers provide the certification directly to the Commission rather than to have all VPDs track video programmer certifications, reach out to video programmers for missing certifications, and then report back to the Commission on missing video programmer certifications."); see also ACA 2015 Comments at 8 (stating that the filing of video programmer certifications with the Commission "would . . . alleviate the need for the Commission to rely on VPDs to report back to the Commission that a particular video programmer has not provided a certification"); NAB 2015 Comments at 7-8 (detailing the inefficiency created by a system in which VPDs must "track down and monitor thousands of [video programmers] to ensure they file their certifications").

¹⁶¹ Verizon 2015 Comments at 4 (stating that "if distributors remain responsible for compliance with the quality standards, or other closed captioning rules, then, in the context of responding to complaints . . . they should be allowed to demonstrate compliance by relying on certifications from video programmers").

¹⁶² The VPD, in this instance, can point to the existence of such certification to demonstrate its compliance with the Commission's rules in response to a complaint or Commission inquiry. If a VPD has verified that a video programmer has provided the applicable certification, the VPD need not re-check for certification each time the video programmer provides new programming to the VPD in the middle of the certification year (July 1-June 30). Only new video programmers that have not previously provided video programming shown on television must submit certifications mid-year for video programming that they provide on television for the first time in the middle of the year, and have those certifications verified by VPDs mid-year. See also *supra* section III.A.5.

¹⁶³ In this case, if the certification was false, both the video programmer and the VPD will be held accountable for noncompliance with the captioning rules. Thus, we reject Operators' request to allow a VPD to rely upon a

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into the veracity of the certification, such as the VPD finding the absence of captioning on programming, and hold the VPD accountable for the failure to provide closed captioning on programming that it knows or has reason to know is not exempt from the Commission's rules.¹⁶⁴

43. We believe that these new rules will reduce burdens resulting from compliance with our captioning quality rules on VPDs. At present, VPDs must search video programmer websites and other locations to find the video programmers' "widely available" certifications. CGB's recent experience in verifying the availability of some of these certifications suggest that in some cases these searches have been difficult and have not yielded certifications that video programmers had placed on their websites. The new rules will enable VPDs to be able to easily find these certifications on the Commission's website.

B. Complaint Handling

44. Our decision in this order to allocate captioning responsibilities between VPDs and video programmers¹⁶⁵ necessitates the establishment of an orderly process for the handling of complaints by each covered entity in order to prevent duplication of efforts, avoid potential confusion about responsibilities, and achieve overall efficiency to ensure the timely resolution of captioning complaints. In this regard, the *Closed Captioning Quality Further Notice* sought comment on a "burden-shifting" model proposed by Comcast to address the handling of captioning complaints.¹⁶⁶ For the reasons set forth below, we conclude that a burden-shifting approach similar to the Comcast proposal is appropriate for the handling of these complaints.

45. Under the Comcast proposal, upon receiving a complaint about the quality of captions, a VPD would have the initial burden of conducting an investigation into the source of the problem.¹⁶⁷ The VPD would address the complaint if able to do so, but the burden of addressing the complaint would shift to the video programmer if the VPD learned, after its initial investigation, that the problems raised were not within its control.¹⁶⁸ Considerable support for this and similar burden-shifting approaches exists in the record. For example, ACA applauds this model's ability to "allow[] the VPD to assist in identifying the other entities that may be responsible for the captioning errors, ultimately leading to a more efficient means of affixing responsibility on the right party."¹⁶⁹ AT&T points out that "the framework proposed by Comcast . . . would recognize the shared responsibility for delivering high quality closed captioning to users and the significant role that video programmers play in resolving closed captioning problems."¹⁷⁰ DIRECTV adds that a burden-shifting approach "would represent an appropriate allocation of responsibilities for failure to comply with any of the Commission's television captioning rules,"¹⁷¹ and

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certification from a video programmer regarding the provision of closed captions, even if the certification is false, if the VPD knows or has reason to know that the certification is false. See Operators 2015 Comments at 6.

¹⁶⁴ See Consumer Groups 2015 Reply Comments at 6.

¹⁶⁵ See *supra* sections III.A and B.

¹⁶⁶ *Closed Captioning Quality Further Notice*, 29 FCC Rcd at 2293-94, para. 125-27. Although Comcast provided this model to apply to complaints about captioning quality, the Commission's *Further Notice* asked about its application to all captioning complaints.

¹⁶⁷ See Comcast 2014 Comments at 6-8 (describing the Comcast burden-shifting proposal); *Closed Captioning Quality Further Notice*, 29 FCC Rcd at 2293-94, paras. 125-26.

¹⁶⁸ See Comcast 2014 Comments at 7-8; see also *Closed Captioning Quality Further Notice*, 29 FCC Rcd at 2293-94, paras. 125-26.

¹⁶⁹ ACA 2014 Comments at 7-8 (citing *Closed Captioning Quality Order*, 29 FCC Rcd at 2254, para. 51).

¹⁷⁰ AT&T 2014 Comments at 5.

¹⁷¹ DIRECTV 2014 Comments at 8.

Operators submit that “it would provide added incentives for responsible parties to act promptly and with care.”¹⁷²

46. We agree with these commenters that there are numerous advantages to a burden-shifting model and therefore adopt this approach for the handling of all closed captioning complaints brought to either the Commission or the VPD. We believe that this approach appropriately “builds on existing programmer and VPD practices,” by which VPDs investigate complaints, determine whether their equipment is causing the problem, and confer with video programmers to identify and resolve closed captioning problems under the video programmers’ control.¹⁷³ This model can also “ensure that the entity most able to remedy the captioning issue will have the responsibility to fix the problem.”¹⁷⁴ For these various reasons, we expect that this approach will expedite complaint resolution and result in more effective results for viewers who rely on captions to follow a program’s content.¹⁷⁵

47. We further conclude that it is best to apply the same burden-shifting approach to all types of captioning complaints – rather than apply this approach only to complaints on captioning quality. Employing different processes in the handling of different types of complaints would require the Commission and covered entities to try to predict the source of each complaint’s underlying issues before directing the complaint through the appropriate process.¹⁷⁶ This would be difficult given that some complaints may raise both non-technical and technical problems, and ascertaining the underlying causes for such problems often becomes possible only after an investigation into those causes.¹⁷⁷ As a result, attempts to predict the underlying problem at the outset might result in the complaint being referred to the wrong entity and thereby delay its resolution. Accordingly, we agree with Verizon that “[a] uniform complaint and enforcement model for all closed captioning issues on television programming will . . . streamline the rules and clarify all parties’ obligations.”¹⁷⁸ Under this approach, as discussed in more detail below, the video programmer and the VPD will each be responsible for resolving complaints that are the result of problems within each entity’s respective control.

48. At present, the Commission’s television closed captioning rules allow consumers to file captioning complaints with either the Commission or with the VPD responsible for the delivery and exhibition of video programming at issue, within sixty days after the consumer experiences a captioning problem.¹⁷⁹ We agree with commenters who support maintaining this approach. Because of the existing relationship that VPDs have with their subscribers,¹⁸⁰ the approach provides a single point of contact for

¹⁷² Operators 2014 Comments at 11.

¹⁷³ AT&T 2014 Comments at 5; AT&T 2015 Reply Comments at 3; *see also* Operators 2014 Comments at 11-12.

¹⁷⁴ *See, e.g.*, ACA 2014 Comments at 2. Accordingly, we reject the Video Programmer Coalition’s argument that the burden-shifting approach will fail to take advantage of VPDs’ direct relationships with consumers and “extensive complaint-resolution infrastructure.” Video Programmer Coalition 2014 Comments at 4.

¹⁷⁵ *See* Comcast 2015 Comments at 2 (arguing that the burden shifting approach will make VPDs and video programmers “highly motivated to resolve caption issues” for which they are responsible).

¹⁷⁶ *See* ACA 2014 Comments at 9.

¹⁷⁷ For example, a consumer may file a complaint because the captions on a particular program were garbled. This could be the result of poor captioner performance (a non-technical captioning quality problem under the control of the programmer) or faulty transmission equipment (a technical equipment problem under the control of the VPD). Or it could be the result of both deficiencies. The appropriate complaint process to be followed would not be clear in this instance, if different processes were to be employed in the handling of captioning complaints.

¹⁷⁸ Verizon 2014 Reply Comments at 9-10; *see also* ACA 2014 Comments at 9; DIRECTV 2014 Comments at 8.

¹⁷⁹ 47 CFR § 79.1(g)(1). The Commission has similar rules for the handling of complaints about closed captions delivered via Internet protocol. *See* 47 CFR § 79.4(e).

¹⁸⁰ *See* Video Programmer Coalition Aug. 18, 2014 *Ex Parte* at 1 (stating that MVPDs have “an ongoing billing and customer care relationship with the consumer”); DIRECTV Aug. 11, 2012 *Ex Parte* at 1 (stating that “because they
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consumers¹⁸¹ and allows utilization of the existing VPD infrastructure for receiving, processing, and resolving closed captioning complaints.¹⁸² Allowing consumers to file complaints with either the VPD or the Commission eliminates the need for consumers to identify the video programmer with whom consumers generally have no direct relationship.¹⁸³ It also eliminates the need for consumers to figure out the party responsible for the problem they are experiencing – for example, whether it was a pass through problem caused by the VPD or a non-technical quality problem caused by the video programmer.

49. Accordingly, the captioning complaint process that we adopt today will continue to allow consumers to file closed captioning complaints either with the Commission or with the VPD.¹⁸⁴ If the complainant chooses to file with the VPD, but fails to receive a timely response or is not satisfied with that response, the consumer may subsequently file his or her complaint with the Commission. Below, we set forth the procedures for such complaint handling.

1. Complaints Filed with the Commission

a. Complaint Content

50. In the *Closed Captioning Quality Order*, the Commission adopted a rule requiring the following information to be provided in an informal complaint regarding captioning quality as a prerequisite to the Commission forwarding such complaint to a VPD: (1) the channel number; (2) the channel name, network, or call sign; (3) the name of the multichannel video programming distributor (MVPD), if applicable; (4) the date and time that the captioning problem occurred; (5) the name of the program involved; and (6) a detailed description of the problem.¹⁸⁵ The Commission explained that this information is necessary to enable a programming entity to investigate and resolve the complaint. Because the same rationale applies to all closed captioning complaints, whether or not related to closed captioning quality, we now extend the requirement to provide this information to all television closed

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have ongoing relationships with their subscribers,” NBCUniversal, Comcast, Time Warner Cable, Charter, AT&T, Mediacom, and DIRECTV “are willing to serve as the initial point of contact for customer complaints”); Comcast 2015 Comments at 2 (stating that its burden-shifting proposal is “consumer friendly, establishing an initial point of responsibility with the VPD with which the customer has a preexisting relationship”).

¹⁸¹ See Consumer Groups Aug. 4, 2014 *Ex Parte* at 2 (stating that Consumer Groups would tentatively support a burden-shifting approach if “VPDs remain the primary point of contact for captioning complaints”); Consumer Groups Jan. 14, 2016 *Ex Parte* at 3; Consumer Groups Jan. 27, 2016 *Ex Parte* at 3; DIRECTV 2014 Comments at 6 (supporting the use of “a single point of contact for processing captioning complaints”).

¹⁸² See Video Programmer Coalition 2014 Comments at 4 (noting that MVPDs’ direct consumer relationships, small numbers relative to programmers, and extensive complaint-resolution infrastructure “make MVPDs a natural fit for receiving captioning complaints through existing customer care centers”); ACA 2014 Comments at 7 (stating that the process of allowing consumers to file complaints directly with a VPD or the Commission “works well for consumers and the Commission . . . because . . . VPDs are well positioned to provide an initial response to subscriber complaints about captioning issues”).

¹⁸³ See ACA 2014 Comments at 7 (stating that the process of allowing consumers to file complaints directly with a VPD or the Commission “works well for consumers and the Commission . . . because consumers can easily identify their VPD”); Verizon 2014 Reply Comments at 7 (arguing that whatever complaint process the Commission adopts should allow consumers to “address complaints regarding quality standards directly to the [MVPDs] with whom they have a relationship”); AT&T 2015 Reply Comments at 3 (stating that “[i]mposing on VPDs the *initial* obligation to investigate closed captioning problems would avoid the need for viewers to track the parties that are potentially responsible for resolving captioning problems”) (emphasis in original).

¹⁸⁴ An individual may bring a complaint to a video programmer as well, but such complaints will not be governed by the Commission’s complaint processes.

¹⁸⁵ See 47 CFR § 79.1(j)(4); *Closed Captioning Quality Order*, 29 FCC Rcd at 2263, para. 66.

captioning complaints.¹⁸⁶ We direct CGB to provide assistance to consumers who may experience difficulties gathering any of this required information.¹⁸⁷ We further clarify that all complaints should contain the consumer's identifying information, including the consumer's name, postal address, and other contact information, if available, such as telephone number or e-mail address, along with the consumer's preferred format or method of response to the complaint (such as letter, facsimile transmission, telephone (voice/TRS/TTY), e-mail, or some other method that would best accommodate the consumer).

b. Complaint Procedures

51. Under the burden-shifting approach that we adopt, when the Commission receives a closed captioning complaint, it will serve the complaint on the named VPD and the appropriate video programmer simultaneously. If the Commission cannot determine the appropriate video programmer to serve, the Commission will forward the complaint to the VPD and will inform the VPD that the Commission has been unable to determine the appropriate video programmer. Within ten days after the date of such notification, the VPD must respond to the Commission with the name and contact information for the appropriate video programmer, after which the Commission will forward the complaint to the video programmer as well.

52. After being served with a consumer complaint, the VPD must conduct an initial investigation to determine whether the matters raised in the complaint are within its control.¹⁸⁸ Concurrently, the video programmer may voluntarily begin its own inquiry into the source of the captioning problem, but the video programmer is not required to take any action at that time. We agree with the broad array of commenters who suggest that forwarding the complaint to both the VPD and video programmer at the outset will help facilitate the swift resolution of complaints because it will allow the video programmer, if it so chooses, to take its own steps toward a resolution while the VPD investigates matters under its control.¹⁸⁹

53. Commenters generally recommend that VPDs be given flexibility in conducting their initial investigations, in order to allow for differences in equipment and processes among VPDs.¹⁹⁰ We

¹⁸⁶ See Comcast 2014 Comments at 6, n.17 (suggesting that the Commission forward to VPDs only those complaints that include the information necessary to investigate the complaint).

¹⁸⁷ In the *Closed Captioning Quality Order*, the Commission similarly indicated that Commission assistance would be provided, as needed, to assist consumers in acquiring the information necessary to complete their complaints on captioning quality. See *Closed Captioning Quality Order*, 29 FCC Rcd at 2263, para. 66.

¹⁸⁸ See Comcast 2014 Comments at 7.

¹⁸⁹ See Operators 2014 Comments at 10 (noting that because section 79.1(j)(4) of the Commission's rules, 47 CFR § 79.1(j)(4), now requires complaints to include specific information before the Commission can forward them, "both the VPD and programmer could be provided with copies of the complaint" and "the programmer, having received the complaint, could simultaneously undertake its own investigation or could wait to receive notice from the VPD that the compliance burden had shifted"); Comcast 2014 Comments at 6 (suggesting that the Commission forward a complaint to the VPD and "also send a copy of the complaint to the cited programmer"); Comcast Dec. 22, 2015 *Ex Parte* at 2; DIRECTV Aug. 11, 2014 *Ex Parte* at 1 (expressing support for the Commission sending complaints to "both the VPO and VPD involved so that both relevant parties can begin working on the issues without delay"); ACA Jan. 11, 2016 *Ex Parte* at 4; ACA Jan. 21, 2016 *Ex Parte* at 5.

¹⁹⁰ See Comcast 2014 Comments at 7 (stating that VPDs should have "flexibility in how they handle these investigations given the variations in network architectures and other differences among VPDs"); AT&T 2014 Comments at 5 (supporting the framework proposed by Comcast); ACA 2014 Reply Comments at 17-18 (stating that it agrees with Comcast "that the Commission must afford VPDs the flexibility in how to fully investigate a consumer's captioning complaint" and arguing that given the variations in size, staffing, and network architecture among VPDs, "it is imperative that the Commission refrain from requiring VPDs to follow set procedures to shift compliance responsibility to video programmers"); ACA Jan. 11, 2016 *Ex Parte* at 4-5; ACA Jan. 21, 2016 *Ex Parte* at 5-6.

agree, but caution that VPDs will be required to exercise due diligence in their efforts to identify the source of the issue and resolve all matters within their control before shifting responsibility for addressing these matters to their video programmers.¹⁹¹ To meet this standard and to ensure a thorough investigation into closed captioning problems raised in complaints, we require VPDs, at a minimum, to take the following actions as part of their investigations: (1) *Program Stream Check*: Capture program streams¹⁹² of the programming network identified in the complaint and check the streams for any caption-related impairments that may have caused the reported problem and to prevent ongoing problems;¹⁹³ (2) *Processing Equipment Check*: If there is an issue with the program stream, and there is not prior knowledge as to where the problem originated, check post-processing equipment at the relevant headend or other video distribution facility to determine whether the issue was introduced at the VPD level or was present in the stream when received by the VPD from the video programmer; (3) *Consumer Premises Check*: If the VPD's investigation indicates that the problem may lie with the consumer's customer premises equipment, including the set-top box, check the end user equipment, either remotely, or, if necessary, at the consumer's premises, to ensure there are no issues that might interfere with the pass through, rendering or display of closed captioning.¹⁹⁴ We will defer to the VPD's good faith judgment about whether there is an indication that the problem might lie with the customer's customer premises equipment and whether it is necessary to go to the customer's premises to check the equipment. However, in the event of a dispute or an enforcement proceeding, the VPD will have the burden of proving that it conducted a thorough investigation into the closed captioning problems raised in the complaint. Requiring VPDs to take these steps will ensure that a full and effective investigation occurs prior to shifting the complaint handling responsibilities to video programmers. This also is more likely to result in a speedier and efficient resolution of the problems raised in complaints, thereby helping to fulfill Congress's goal to make television programming fully accessible to people who are deaf and hard of hearing.¹⁹⁵

54. If the VPD's investigation reveals that the closed captioning problem is within the control of the VPD, the VPD must correct the problem and provide a written response to the Commission, the video programmer and the consumer acknowledging such responsibility and describing the steps taken to correct the problem. A complaint must be resolved, and a written response sent, within 30 days after the date the Commission forwards the complaint to the VPD.¹⁹⁶ As required by the Commission's current rules, the VPD's response must provide the Commission with sufficient evidence, including records and

¹⁹¹ See Video Programmer Coalition 2014 Reply Comments at 7 (arguing that, to give practical effect to the requirement that VPDs engage in necessary and appropriate due diligence to identify the source of captioning quality issues and resolve the aspects within their control, "the Commission also would need to prescribe procedures for MVPDs to follow in evaluating and responding to consumer complaints").

¹⁹² A program stream or transport stream is the combination of digitally encoded elementary streams such as video, audio, closed captioning, timing, and other data necessary for a viewer to receive a complete television viewing experience. See Walter Ciciora, *Modern Cable Television Technology*, 112-114 (Morgan Kaufman 2004) (1999).

¹⁹³ By capturing the complete program stream, VPDs will be able to analyze, among other things, whether the programming stream contains missing, incomplete, or inaccurate captions; missing, incomplete, or inaccurate timing data; and other video, audio, or data issues. See, e.g., Comcast Dec. 22, 2015 *Ex Parte* at 1-2.

¹⁹⁴ See Comcast 2014 Comments at 7 (explaining that Comcast would undertake the first two steps when investigating a complaint); Cincinnati Bell Reply 2014 Comments at 4 (proposing a check of the consumer's premises if the first two steps do not resolve the issue); Cincinnati Bell Aug. 11, 2014 *Ex Parte* at 2 (clarifying that the check of the consumer premises equipment should be optional) ().

¹⁹⁵ See 47 U.S.C. § 613.

¹⁹⁶ Cincinnati Bell argues that smaller VPDs should report their findings to the Commission, and the Commission should forward the findings to the video programmer and the consumer. Cincinnati Bell 2014 Reply Comments at 6. We believe that requiring the VPD to respond directly to the Commission, the consumer, and the video programmer at the same time will be more efficient and will expedite a response to the consumer.

documentation, to demonstrate that the VPD is in compliance with the Commission's closed captioning rules.¹⁹⁷ In this case, no burden-shifting to the video programmer will occur, and the VPD will retain liability for the problem.¹⁹⁸

55. If the VPD's investigation reveals that the closed captioning problems raised in the complaint are not within the VPD's control and appear to have been present in the program stream when received by the VPD, the burden for addressing the complaint will shift to the video programmer.¹⁹⁹ To shift the burden, the VPD must certify to the Commission, the video programmer, and the consumer that it has exercised due diligence to identify and resolve the source of the captioning problem by conducting an investigation on the closed captioning complaint in accordance with the Commission's rules, and that the problems raised in the complaint are not within its control.²⁰⁰ In addition, if at any time during the complaint resolution process, the VPD's investigation reveals that the closed captioning problems raised in the complaint were the result of causes not within the VPD's control and also do not appear to be within the video programmer's control, such as a faulty third-party DVR, television, or other third-party device, the VPD must certify to the Commission, the video programmer, and the consumer that it has exercised due diligence to identify and resolve the source of the captioning problem by conducting an investigation on the closed captioning complaint in accordance with the Commission's rules, and that the problems raised in the complaint were caused by a third party device or other causes that appear not to be within the control of either the VPD or the video programmer.²⁰¹ The applicable certification may be provided at any time during the VPD's investigation, but no later than 30 days after the date the Commission forwarded the complaint. The requirement for such certification generally has significant support in the record,²⁰² and is intended to alleviate concerns that VPDs might perform cursory investigations or inappropriately shift the burden of resolving complaints to video programmers in order

¹⁹⁷ See 47 CFR § 79.1(g)(5).

¹⁹⁸ See Comcast 2014 Comments at 7 ("If the investigation reveals that the issue is caused by the VPD's set-top box, processing equipment, or is otherwise within the VPD's control, the VPD will be responsible for fixing the problem pursuant to its pass-through obligations under the rules."); DIRECTV 2014 Comments at 6 ("If the problem is found to arise from the pass-through of captions by the VPD's equipment, the VPD would be responsible for finding a solution and would bear the potential liability arising from an associated enforcement action. No burden-shifting would occur.").

¹⁹⁹ Various parties support this approach. See, e.g., Comcast 2014 Comments at 7; DIRECTV 2014 Comments at 8; ACA 2014 Comments at 7 (stating that "if the VPD's investigation reveals that the captioning issue is not within its control, the compliance burden shifts to the video programmer"); AT&T 2014 Comments at 5 (supporting the Comcast proposal that allows VPDs "to shift the compliance burden to the video programmer if the closed captioning problem is within the programmer's control"); see also Operators 2014 Comments at 10.

²⁰⁰ See Video Programmer Coalition 2014 Comments at 12 (proposing such certification).

²⁰¹ For example, a captioning problem not within the control of either a VPD or video programmer might be caused by (1) a faulty DVR, television set or other device that was acquired by the consumer from a third party or (2) the improper use of such device by the consumer.

²⁰² Video Programmer Coalition 2014 Comments at 11-12 (suggesting that the Commission require MVPDs "to certify to the Commission that they have engaged in necessary and appropriate due diligence to identify the source of the captioning quality issue and resolve aspects of the issue within their control *before* ascribing any responsibility to programmers"); DIRECTV 2014 Comments at 8 ("If the Commission is concerned that VPDs may shift responsibility to VPOs inappropriately, it could require VPDs to describe to the Commission the nature and findings of their investigations that justify such a shift . . ."); Operators 2014 Reply Comments at 14 (stating that Operators do not oppose the DIRECTV proposal to require VPDs to describe to the Commission the nature and findings of their investigations that justify a burden-shift from a VPD to a programmer); Comcast 2014 Reply Comments at 9 (supporting the Video Programmer Coalition's certification proposal); Comcast 2015 Reply Comments at 2 (same).

to avoid fulfilling their captioning obligations.²⁰³ It also enhances the transparency of the complaint resolution process, a key concern of Consumer Groups.²⁰⁴ A VPD that fails to provide a certification or provides an untruthful certification may be subject to immediate enforcement action without first being subject to the compliance ladder.²⁰⁵ In addition, any video programmer may report to the Commission when, after receiving a certification from a VPD, the video programmer determines that the VPD did not follow all of the steps required by the Commission's rules for investigating a complaint or that the problem described in a complaint is in fact within the VPD's control.

56. After the responsibility for resolving the complaint shifts to the video programmer, the video programmer must investigate and attempt to resolve the closed captioning problem to the extent that doing so is in the video programmer's control. We remind video programmers that after the responsibility for resolving the complaint shifts to the video programmer, the video programmer will have the burden of proving that the video programmer conducted a thorough investigation into the closed captioning problems raised in the complaint. In addition, while, at this point in the complaint resolution process, the video programmer will take on the primary responsibility for resolving the closed captioning problem, we require the VPD to continue to assist the video programmer with resolving the complaint, as needed. We agree with various commenters who see the benefits of such continued involvement of the VPD. For example, Comcast notes that even after the burden is shifted, the VPD "should help troubleshoot the issue."²⁰⁶ Requiring the VPD to remain involved throughout the complaint process will foster collaboration between VPDs and video programmers,²⁰⁷ and increase the likelihood that the complaint will be swiftly resolved to the satisfaction of the consumer and the Commission.²⁰⁸

²⁰³ See Video Programmer Coalition 2014 Reply Comments at 6 (arguing that the Comcast burden-shifting approach "would create harmful incentives for an MVPD to engage in only cursory investigations of difficult issues, as the MVPD's unilateral decision to shift the burden of compliance onto a programmer would 'relieve[it] of any liabilities associated with captioning problems'"). We are not persuaded by ACA's suggestion that the Commission should bypass the VPD and send complaints directly to the video programmer when evidence suggests that the problem originated with the programmer, such as when numerous complaints from multiple locations are filed about the same program against different VPDs. See ACA 2014 Comments at 8-9; ACA Jan. 11, 2016 *Ex Parte* at 5; ACA Jan. 21, 2016 *Ex Parte* at 5. Rather, we believe that under the procedures described above, if there is evidence in the complaint to suggest that the programmer was the source of the problem, the VPD will be able to use such evidence to swiftly determine its own lack of responsibility and concurrently allow the video programmer to initiate action to resolve the problem. Further, as noted above, the VPD will be required to certify to the Commission, the video programmer, and the consumer that the VPD is not in control of the problem, and may bring such evidence to the Commission's attention in the burden-shifting certification.

²⁰⁴ See Consumer Groups Aug. 4, 2014 *Ex Parte* at 2-3 (urging the Commission to ensure that a burden-shifting approach is accompanied by additional transparency measures to ensure that consumers understand what is happening after they file a complaint).

²⁰⁵ See *infra* section III.C.

²⁰⁶ Comcast 2014 Comments at 8; see also ACA 2014 Reply Comments at 19 (stating that after the burden for resolving the complaint shifts to the video programmer, "a video programmer can rely on a VPD if the VPD's assistance is necessary to find where the video programmer's captioning issue originated, or to help confirm that a captioning issue has been resolved"); Consumer Groups Second Cycle Reply Comments at 6 (opposing arguments that "forwarding a complaint should absolve a VPD of any future responsibility").

²⁰⁷ See Comcast 2014 Comments at 8; ACA 2014 Reply Comments at 19.

²⁰⁸ We therefore disagree with the Video Programmer Coalition's assertion that the burden shifting model would "discourage collaboration and harm the public interest by prioritizing blame-shifting over solving a consumer's captioning problem." Video Programmer Coalition 2014 Comments at 10. See also Video Programmer Coalition Jan. 21, 2016 *Ex Parte* at 1-2. Additionally, we are not persuaded by DIRECTV's suggestion that after the VPD certifies its lack of responsibility, "there is no reason the VPD should continue to be involved in the investigation." DIRECTV 2014 Comments at 2.

57. Within 30 days after the date of certification from the VPD, the video programmer must provide a written response to the complaint that either describes the steps taken to rectify the problem or certifies that its investigation revealed that it has exercised due diligence to identify and resolve the source of the captioning problem by conducting an investigation on the closed captioning complaint in accordance with the Commission's rules, and that the problems raised in the complaint are not within its control. For example, this would occur if the closed captioning in the program stream was fully functioning at the time the program stream was handed off to the VPD. Such response must be submitted to the Commission, the VPD, and the consumer, and must provide the Commission with sufficient records and documentation to demonstrate that the video programmer is in compliance with the Commission's rules.²⁰⁹ We agree with Cincinnati Bell that requiring video programmers to respond within 30 days will ensure that video programmers promptly investigate complaints.²¹⁰ If the video programmer reports that it has rectified the problem, this will enable the VPD to conduct additional checks of the program stream if needed to confirm the complaint's resolution,²¹¹ and keep the VPD, the Commission, and the consumer informed so the VPD can know when to close the complaint file.

58. If the video programmer certifies that the program stream contained fully functioning captioning at the time the program stream was handed off to the VPD, and the VPD has not determined that the problem resulted from a third party source, the VPD and the video programmer must then work together to determine the source of the captioning problem. Once the source of the problem is determined, the VPD and video programmer shall each be required to correct those aspects of the problem within its control. We then require the VPD, after consultation with the video programmer, to report to the Commission and the complainant the steps taken to fix the captioning problem. The VPD must submit such information in writing within 30 days after the date that the video programmer certified that the cause of the problem was not within the video programmer's control.²¹² Further, the Commission may, during its review of a complaint or the pendency of an enforcement proceeding, request the VPD and the video programmer to provide sufficient documentation to demonstrate compliance with the Commission's rules.

59. For this reason, we reject the suggestion, made by the Video Programmer Coalition, that a burden-shifting approach will unfairly place liability on video programmers.²¹³ The Coalition maintains that requiring video programmers to always participate in the complaint process will make complaint resolution wasteful and inefficient because "the vast majority of complaints are either directly attributable to MVPDs or require the involvement of MVPDs for resolution."²¹⁴ Even assuming that a large portion of closed captioning problems are attributable to VPDs,²¹⁵ this line of reasoning fails to recognize that

²⁰⁹ 47 CFR § 79.1(g)(5); *see also* Comcast 2014 Comments at 8 (suggesting that the video programmer advise the consumer and the Commission that the video programmer has resolved the issue).

²¹⁰ *See* Cincinnati Bell Aug. 11, 2014 *Ex Parte* at 2 (recommending that to "ensure meaningful resolution of closed captioning complaints," video programmers should "have 30 days, commencing with receipt of the VPD report of no identifiable pass-through issues, to respond").

²¹¹ *See* Comcast 2014 Comments at 8 (suggesting that the VPD will conduct additional checks of the program stream to confirm the complaint's resolution).

²¹² Rather than shift the burden back to the VPD, as proposed by NAB, *see* NAB 2015 Comments at 9, we believe that requiring the VPD and the video programmer to work together to resolve the source of the problem will prevent "finger-pointing" between the video programmer and the VPD, because both covered entities will be under an obligation to find solutions to the captioning problem until it is resolved. *See* Comcast 2015 Reply Comments at 2.

²¹³ *See* Video Programmer Coalition 2014 Comments at 7-9; Video Programmer Coalition Jan. 21, 2016 *Ex Parte* at 1-2.

²¹⁴ Video Programmer Coalition 2014 Comments at 4.

²¹⁵ As we have previously noted, there is conflicting evidence in the record regarding the extent to which closed captioning problems are attributable to VPDs as opposed to video programmers. *See supra* section III.A.3.

under the burden-shifting approach VPDs will remain responsible for resolving problems that are within their control, which will help prevent the wasteful duplication of efforts to resolve complaints.²¹⁶

2. Complaints Filed with the VPD

60. As noted above, consumers have long had the option of filing their captioning complaints directly with their VPDs.²¹⁷ We now preserve such option. When a VPD receives a complaint from a consumer, we expect the VPD will investigate the complaint with the same due diligence and in the same manner as required for complaints initially filed with the Commission and later served on VPDs, with a goal of initially determining whether the matter raised in the complaint is within the control of the VPD.²¹⁸ If, after conducting its initial investigation, the VPD determines that the issue raised in the complaint is within its control, it shall take the necessary measures to resolve it, and notify the consumer of such resolution within 30 days after the date of the complaint. If (1) the consumer does not receive a response to the complaint within the 30-day period, or (2) the consumer is not satisfied with the VPD's response, the consumer may file the complaint with the Commission within sixty days after the time allotted for the VPD to respond to the consumer.²¹⁹ We believe that VPDs will have sufficient incentives to thoroughly investigate and promptly resolve the complaints that they receive directly from consumers, to reduce the need for such consumers to re-file their complaints with the Commission.²²⁰

61. In the event that the VPD determines that the issues raised in the complaint are not within its responsibilities, section 79.1(g)(3) of the Commission's rules as currently written requires the VPD to forward the complaint to the responsible programming entity.²²¹ We now address a conflict between section 79.1(g)(3) and statutory provisions prohibiting the VPD from disclosing a consumer's personally identifiable information (PII) without the consumer's consent.²²² The *Closed Captioning Quality Further*

²¹⁶ See Operators 2014 Reply Comments at 8-9; see also ACA 2014 Reply Comments at 12 (arguing that the burden-shifting approach would not remove VPDs from the complaint process). Additionally, even though the Commission will serve the complaint on both the VPD and the video programmer, and the video programmer has the option of investigating the complaint prior to the VPD completing its investigation, there is no requirement for the video programmer to begin its investigation of the complaint during the pendency of the VPD's investigation.

²¹⁷ See 47 CFR § 79.1(g)(1) and (4).

²¹⁸ See *supra* Section III.B.1. Unlike complaints brought to the Commission, however, when a VPD receives a complaint directly from a consumer, the VPD is not required to so inform the Commission, to provide documentation to the Commission demonstrating the VPD's compliance with the Commission's rules, or, in the event that the investigation reveals that the problem is not within the VPD's control, to so certify. See ACA 2014 Comments at 10-11 (advocating that the Commission maintain its existing process, and require the VPD to report investigation results to the Commission only when the Commission forwards the complaint to the VPD).

²¹⁹ For example, if a consumer files a complaint on June 1st, the VPD must respond within 30 days, or by July 1st. If the consumer does not receive a response by that date, he or she may proceed with filing a complaint with the Commission any time after that, but no later than August 30th, which is 60 days after the VPD's response was due to the consumer. Similarly, if the VPD does respond by July 1st, but the consumer is not satisfied with the response, the consumer also has until August 30th to bring his or her complaint to the Commission.

²²⁰ See ACA 2014 Comments at 10.

²²¹ 47 CFR § 79.1(g)(3). See *Closed Captioning Quality Further Notice*, 29 FCC Rcd at 2303-05, paras. 148-52 (seeking comment on how to amend 47 CFR § 79.1(g)(3), which requires such referrals). For example, the responsible programming entity could be a video programmer or another VPD.

²²² See 47 U.S.C. § 551(c)(1) ("Except as provided in paragraph (2), a cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator."); 47 U.S.C. § 338(i)(4)(A) ("A satellite carrier shall not disclose personally identifiable information concerning any subscriber without prior written or electronic consent of the subscriber concerned."). The Act does not define the term "personally identifiable information," but does note that this term "does not include any record of aggregate data which does not identify particular persons." 47 U.S.C. § (continued....)

Notice proposed requiring VPDs that receive complaints regarding captioning issues over which they do not exercise control to give complainants the option of either asking the VPD to forward the complaint to the appropriate entity, or having the complainant submit the complaint directly to the appropriate party on his or her own. Where a complainant chooses not to ask the VPD to forward the complaint, the Commission proposed that the VPD would have no further responsibility.²²³

62. We reject the approach proposed in the *Closed Captioning Quality Further Notice* because we agree with Consumer Groups that the process of obtaining such consent would burden consumers, likely result in a delay in the complaint's resolution, and may even result in some complaints never being resolved – *i.e.*, if the consumer fails to respond to the VPD's request for consent.²²⁴ Instead, we resolve the existing regulatory conflict by requiring that if a VPD determines that an issue raised in the complaint is not within the VPD's control, the VPD, within 30 days after the date of the complaint, must either forward the complaint to the video programmer or other responsible entity, such as another VPD, with the consumer's PII – including the consumer's name, contact information, and other identifying information – redacted, or provide the video programmer or other responsible entity with information contained in the complaint sufficient to achieve its investigation and resolution.²²⁵ Such information should include the same type of information necessary for a complaint to be forwarded to a VPD when it is submitted to the Commission – *i.e.*, (1) the channel number; (2) the channel name, network, or call sign; (3) the name of the multichannel video programming distributor (MVPD), if applicable; (4) the date and time that the captioning problem occurred; (5) the name of the program involved; and (6) a detailed description of the problem – to the extent the VPD is in possession of such information. In addition, the VPD must provide the video programmer or other responsible entity with an explanation of why the cause of the captioning problem is not within the control of the VPD.²²⁶ We expect that requiring a VPD to forward the complaint with the consumer's PII redacted or to forward a description of the complaint's material details will not only resolve the outstanding regulatory conflict; it also is likely to eliminate the need for “back-and-forth communications” between the VPD and the consumer that otherwise might have been needed for resolution of the complaint.²²⁷

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551(a)(2). In 2009, the Commission stayed the effective date for section 79.1(g)(3), pending resolution of this conflict. *Closed Captioning of Video Programming*, CG Docket No. 05-231, Order Suspending Effective Date, 24 FCC Rcd 14777 (2009) (2009 Suspension Order).

²²³ *Closed Captioning Quality Further Notice*, 29 FCC Rcd at 2305, para. 152. The Commission also proposed that the VPD inform the Commission that it notified the complainant by providing the Commission with copies of all written or electronic correspondence or a written description of all communications that were not either in electronic or written form. Additionally, the Commission requested commenters to submit any alternative proposals for amending section 79.1(g)(3) to avoid breaching the consumer protections contained in sections 631(c)(1) and 338(i)(4) of the Act. *Id.*

²²⁴ See Consumer Groups Second Cycle Comments at 12 (arguing that requiring a consumer to either ask the VPD to forward the complaint or to submit the complaint directly to the appropriate party on his or her own would “dramatically compound[] the already significant burden of filing a complaint, increasing the likelihood of further delays and errors in processing the complaint, and decreasing the likelihood that the complaint will ultimately be resolved”); Consumer Groups Aug. 4, 2014 *Ex Parte* at 3 (urging the Commission to ensure that statutory restrictions designed to protect consumer privacy do not pose a barrier to the resolution of captioning problems).

²²⁵ See DIRECTV Aug. 26, 2014 *Ex Parte* at 1 (explaining that many VPDs follow this practice, “which generally works more quickly than the alternative of forwarding actual complaints, which requires us to redact . . . information before sending”). See also Comcast Dec. 22, 2015 *Ex Parte* at 2.

²²⁶ See Comcast 2014 Comments at 7 (“The VPD will promptly notify the programmer about the results of the VPD's investigation”).

²²⁷ See NCTA Second Cycle Comments at 11-12 (opposing the Commission's proposal to require VPDs to seek consent of consumers to forward their complaints in part because “the back-and-forth communications with consumers could cause confusion and delays in resolving complaints”).

63. When forwarding the complaint or a description of the complaint, the VPD must also assign a unique identifying number (“complaint ID number”) to the complaint, and transmit that number to the video programmer or other responsible entity along with the complaint or a description of the complaint. We further require the VPD to inform the consumer that the complaint has been forwarded, along with the complaint ID number and the name and contact information of the video programmer or other responsible entity to whom the complaint was forwarded, at the same time that the complaint is forwarded to the video programmer or other responsible entity. As noted earlier,²²⁸ providing information to consumers about the status of their complaints will enhance the transparency of the complaint resolution process,²²⁹ and avoid the situation raised by Consumer Groups, in which a VPD responds to a complaint by shifting blame for a captioning problem to another entity while refusing to identify such entity publicly.²³⁰ Additionally, providing consumers with both the complaint ID number and the video programmer’s or other responsible entity’s contact information will enable the consumer to contact a video programmer or other responsible entity directly and inquire about the status of his or her complaint if so desired.²³¹

64. Once a video programmer or other responsible entity receives a complaint and notification from a VPD that the issue described in the complaint is outside the VPD’s control, the burden will shift to the video programmer or other responsible entity to investigate and resolve the complaint. However, as for complaints initially filed with the Commission, we require the VPD to continue to assist the video programmer or other responsible entity in resolving the complaint as needed and to conduct additional checks of the program stream to confirm resolution of the problem, upon notification from the video programmer or other responsible entity that the problem has been resolved.²³²

65. The video programmer or other responsible entity must respond in writing to the VPD within 30 days after the forwarding date of the complaint from the VPD, in a form that can be forwarded to the consumer. The VPD must then forward this response to the consumer within ten days after the date of the video programmer’s or other responsible entity’s response. If the video programmer or other responsible entity fails to respond to the VPD within 30 days after the forwarding date of the complaint from the VPD, the VPD must inform the consumer of the video programmer’s or other responsible entity’s failure to respond within 40 days after that forwarding date.²³³

66. If the video programmer or other responsible entity fails to respond to the VPD within the time allotted, or if the VPD fails to forward the video programmer’s or other responsible entity’s response to the consumer, or if the consumer is not satisfied with that response, the consumer may file the

²²⁸ See *supra* section III.B.1.b.

²²⁹ See Consumer Groups Aug. 4, 2014 *Ex Parte* at 3 (urging the Commission to ensure that consumers understand what is happening after they file a complaint).

²³⁰ See Consumer Groups 2014 Comments at 5 (describing a situation that arose in the context of the Commission’s IP closed captioning rules where a VPD responded to the complaint of several consumer groups “with finger-pointing and subterfuge, blaming VPOs for many of the problems with captioning but refusing to identify them publicly”).

²³¹ The VPD must also explain to the consumer that if the consumer wishes to follow up with the video programmer, the consumer will need to provide the video programmer with the name of the VPD as well as the complaint identification number.

²³² See *supra* section III.B.1.b.

²³³ For example, if a consumer files a complaint on June 1st, and the VPD forwards the complaint to one of its video programmers or other responsible entity for resolution, it must do so by July 1st, which will then become “the forwarding date.” The video programmer or other responsible entity will then have 30 days, or until July 31st, to resolve that complaint and respond to the VPD. If the video programmer or other responsible entity fails to respond to the VPD within this time period, the VPD must so notify the consumer by August 10th—*i.e.*, within 10 days of the video programmer’s or other responsible entity’s deadline, or 40 days from the forwarding date.

complaint with the Commission within sixty days after the time allotted for the VPD to either forward the video programmer's or other responsible entity's response to the consumer or inform the consumer of the video programmer's or other responsible entity's failure to respond.²³⁴ Upon receipt of the complaint from the consumer, the Commission will forward such complaints to the appropriate VPD and video programmer, and the VPD and video programmer shall handle such complaints, as governed by the rules applicable to complaints filed with the Commission.

67. Some VPDs argue against requiring VPDs to act as "intermediaries" in the resolution of complaints that are not within the VPDs' control, claiming, among other things, that this may delay the process,²³⁵ and that having the programmer convey the resolution directly to the consumer and the Commission is simpler and more efficient than requiring this of the VPD.²³⁶ We are not persuaded by these assertions for several reasons. First and foremost, we agree with Consumer Groups that as the entity with which a complainant has a direct commercial relationship, the VPD should remain the primary point of contact for the complainant even when the complaint is forwarded to the video programmer.²³⁷ As many commenters acknowledge, unlike video programmers, VPDs are the last link in the distribution chain and either receive direct payment from consumers for services rendered or provide programming over the public airwaves.²³⁸ Having VPDs forward responses from video programmers or other responsible entities to consumers will create a seamless process for consumers, allowing them to receive a response from the business entity with which they are familiar, and with which they initially filed their complaint. Second, this approach utilizes "an extensive complaint-resolution infrastructure, including response procedures and customer-care teams"²³⁹ that VPDs have developed over their many years of handling closed captioning complaints. Third, as a practical matter, because we require the VPD to redact the consumer's PII, including the consumer's name and address, when forwarding a complaint to a video programmer or other responsible entity, the video programmer or other responsible entity will not have the necessary contact information to respond directly to the consumer. Finally, in response to a concern that this approach might delay notification to the consumer regarding the outcome of the complaint,²⁴⁰ as

²³⁴ In the above example, the consumer would have the right to file a complaint with the Commission during a time window beginning 40 days after the forwarding date and ending 60 days thereafter.

²³⁵ DIRECTV Aug. 11, 2014 *Ex Parte* at 1 (arguing that "[r]equiring VPDs to act as intermediaries will not facilitate resolution of captioning issues over which VPDs have no control, and may well delay that process").

²³⁶ See Comcast 2014 Comments at 8; see also NCTA Second Cycle Comments at 11-12 (arguing that cable operators should be permitted "to return any misdirected captioning complaints directly to consumers, providing the name and address of the correct party to whom the complaint should be sent"); Verizon Second Cycle Comments at 10 (arguing that "there is no reason for the initially-contacted distributor to remain in the middle between the responsible distributor or programmer and the consumer").

²³⁷ See Consumer Groups Second Cycle Comments at 12; Consumer Groups Second Cycle Reply Comments at 6 (opposing NCTA's proposal to allow a VPD to return "misdirected" complaints to consumers and arguing that because the complainant is the VPD's customer, the VPD should "remain the primary point of contact throughout the complaint resolution process"); Consumer Groups August 4, 2014 *Ex Parte* at 2.

²³⁸ See Consumer Groups Aug. 4, 2014 *Ex Parte* at 2 ("Consumers receive access to video programming from VPDs in exchange for substantial fees for cable and satellite programming and the use of the public airwaves for broadcast programming"); ACA 2014 Comments at 7 (stating that "consumers can easily identify their VPD"); Video Programmer Coalition 2014 Comments at 4 (stating that "MVPDs' position as the last link in the distribution chain places them in direct relationship with the consumers affected by captioning issues"); Video Programmer Coalition Aug. 18, 2014 *Ex Parte* at 1; Video Programmer Coalition Jan. 21, 2016 *Ex Parte* at 1; CBS May 22, 2014 *Ex Parte* at 3; DIRECTV Aug. 11, 2014 *Ex Parte* at 1 (stating that because VPDs "have ongoing relationships with their subscribers," they "are willing to serve as the initial point of contact for consumer complaints"); see also Verizon 2014 Reply Comments at 7.

²³⁹ Video Programmer Coalition 2014 Comments at 4.

²⁴⁰ See DIRECTV Aug. 11, 2014 *Ex Parte* at 1.

discussed above, we impose timelines on (1) the forwarding of complaints by VPDs, (2) the response by the video programmer or other responsible entity to the VPD, and (3) the forwarding of the response by the VPD to the consumer. We therefore conclude that assigning to the VPD the responsibility of reporting the resolution to the consumer should not delay the provision of such notification.

68. In the event that the video programmer, other responsible entity, or VPD fails to meet any deadlines for responses to the consumer's complaint²⁴¹ or if such responses do not satisfy the consumer, the consumer may file the complaint with the Commission within 60 days after the time allotted either for the VPD to respond to the consumer or for the VPD to forward the video programmer's or other responsible entity's response to the consumer, whichever is applicable. If a consumer re-files the complaint with the Commission after initially filing the complaint with the VPD, the Commission will forward the complaint to the appropriate VPD and the video programmer, and each such entity must follow the complaint handling processes as outlined in the prior section of this Report and Order.²⁴²

C. Compliance Ladder

69. In the *Closed Captioning Quality Order*, the Commission adopted a "compliance ladder" that allows broadcast stations to take corrective actions to demonstrate compliance with new enhanced electronic newsroom technique (ENT) procedures prior to being subject to enforcement action.²⁴³ The Commission reasoned that this approach would provide these entities with "ample opportunities to improve their captioning, especially if their current practices are deficient."²⁴⁴ In the *Closed Captioning Quality Further Notice*, the Commission sought comment on whether to similarly allow VPDs and video programmers to assert a safe harbor to demonstrate compliance through corrective actions prior to being subject to enforcement action, in the event certain obligations for compliance with the captioning quality standards are placed on each of these entities.²⁴⁵

70. For the reasons discussed below, we adopt a compliance ladder for the captioning quality rules, including rules addressing quality issues related to the pass-through of captions, which is similar to the ladder adopted for the enhanced ENT rules. We will not apply this compliance ladder to other captioning requirements, including the provision of captioning, equipment monitoring and maintenance, registration and certification. Rather, we conclude that the Commission's current practice of addressing the latter types of concerns through the informal complaint process, while retaining the option to refer such matters for enforcement action as appropriate, has been effective in achieving resolution of these concerns. However, for the reasons discussed below, we find that a compliance ladder will be the most effective vehicle for the Commission to achieve its goal of helping video programmers and VPDs improve the quality of captioning.

71. Various commenters to this proceeding urge the Commission to provide an opportunity for covered entities to respond to violations with their own corrective actions prior to being subject to an

²⁴¹ These include a failure of the VPD to respond to the consumer within 30 days of the date of the complaint, a failure of the video programmer or other responsible entity to respond to the VPD within 30 days of the date when the complaint was forwarded by the VPD, or a failure of the VPD to forward the video programmer's or other responsible entity's response to the consumer within ten days of the date of the response from the video programmer or other responsible entity.

²⁴² See *supra* section III.B.1.

²⁴³ *Closed Captioning Quality Order*, 29 FCC Rcd at 2273-74, paras. 84-86. ENT is a technique that can convert the dialogue included on a teleprompter script into captions. *Id.* at 2266, para. 71. The enhanced ENT requirements adopted in the *Closed Captioning Quality Order* are intended to ensure that most news programming, including sports, weather, and most late-breaking news is scripted for the teleprompter and therefore captioned. *Id.* at 2270-71, paras. 78-79.

²⁴⁴ *Id.* at 2274, para. 86.

²⁴⁵ *Closed Captioning Quality Further Notice*, 29 FCC Rcd at 2295, para. 129.

enforcement action.”²⁴⁶ For example, ACA states that “it would be unjust to hold VPDs responsible for unexpected breakdowns in equipment when the VPD is taking appropriate preventative steps to minimize such occurrences.”²⁴⁷ We acknowledge this concern, and, as the Commission has previously noted, it may not be possible, using current technology, to avoid errors entirely in captioning live programming.²⁴⁸ For this reason, prior to turning to the compliance ladder, the Commission will continue to entertain individual informal complaints of noncompliance with the Commission’s closed captioning quality rules in accordance with the complaint procedures outlined in this order.²⁴⁹ We believe that utilizing this informal complaint process as an initial step for resolving these complaints will effectively and swiftly address isolated incidents of poor captioning quality, such as technical glitches or unexpected breakdowns. As the Commission explained in the *Closed Captioning Quality Order*, “the informal complaint process has been an effective tool in identifying problems that need to be addressed. . . . Our goal is to ensure accessible television programming for people who are deaf and hard of hearing, and we believe the informal complaint process will help to achieve this goal by enabling VPDs to correct problems early on, before they become a pattern or trend.”²⁵⁰

72. However, for captioning quality complaints received by the Commission that indicate a pattern or trend of noncompliance with our captioning quality rules, we adopt a compliance ladder that is similar to that used for addressing noncompliance with our rules governing the enhanced ENT procedures.²⁵¹ By focusing on patterns or trends rather than individual reports of closed captioning quality problems, use of this compliance mechanism will afford VPDs and video programmers opportunities to correct such problems without Commission enforcement action.²⁵² In this manner, a compliance ladder will “enable parties to more quickly address and remedy problems without worrying that in so doing they may be subject to fines or forfeitures.”²⁵³

73. This approach has considerable support in the record.²⁵⁴ We agree with NCTA that, because a compliance ladder is “a system focused on fixing problems rather than trying to affix blame,”²⁵⁵

²⁴⁶ See DIRECTV 2014 Comments at 8-9 (arguing that if a VPD can demonstrate that it has monitored and maintained its equipment “in a diligent manner designed to ensure proper pass-through of closed captioning,” the Commission should allow the VPD “an opportunity to take corrective action to come back into compliance prior to being subject to an enforcement action”); ACA 2014 Comments at 13 (urging the Commission to allow VPDs to “take corrective actions to demonstrate compliance prior to being subject to enforcement action”); see also ACA 2014 Reply Comments at 16-17; DIRECTV Aug. 11, 2014 *Ex Parte* at 2.

²⁴⁷ ACA 2014 Comments at 12-13; see also ACA 2014 Reply Comments at 16; Operators 2014 Reply Comments at 16 (arguing that “the safe harbor proposal would promote fairness and efficiency in the captioning process”).

²⁴⁸ See *Closed Captioning Quality Order*, 29 FCC Rcd at 2250-52, paras. 42-46; see also NCTA 2014 Comments at 1 (arguing that “[l]ive captioning by its very nature cannot be error-free”).

²⁴⁹ See *supra* section III.B.1.

²⁵⁰ *Closed Captioning Quality Order*, 29 FCC Rcd at 2263, para. 66. Similarly, we will continue to rely on informal complaints to bring to our attention all other problems related to captioning noncompliance, including problems pertaining to the absence of captions, as well as technical problems pertaining to the pass-through of captions.

²⁵¹ *Id.* at 2273, para. 84; 47 CFR § 79.1(e)(11)(iv).

²⁵² See *Closed Captioning Quality Order*, 29 FCC Rcd at 2274, para. 85; NCTA 2014 Comments at 3.

²⁵³ NCTA 2014 Comments at 3; see also Operators 2014 Reply Comments at 14 (arguing that the compliance ladder will “allow[] both VPDs and programmers to resolve captioning issues quickly without simultaneously grappling with enforcement concerns”).

²⁵⁴ See e.g., NCTA 2014 Comments at 2-3 (supporting a compliance ladder approach similar to that adopted for ENT); DIRECTV 2014 Comments at 8 (supporting “a safe harbor” for VPDs who demonstrate that they have monitored and maintained their equipment to ensure proper pass-through of closed captioning that would give them “an opportunity to take corrective action to come back into compliance prior to being subject to an enforcement action”); NCTA 2014 Comments at 2-3; Operators 2014 Reply Comments at 13-14; ACA 2014 Reply Comments at (continued....)

it will foster “an atmosphere of cooperation rather than contention” between VPDs and video programmers.²⁵⁶ We expect that the compliance ladder will promote the swift and efficient resolution of complaints on captioning quality, which will be to the benefit of consumers.²⁵⁷ This approach also will help to alleviate the concerns of some commenters that VPDs and video programmers will not work cooperatively with one another to resolve complaints because they will be too focused on minimizing their individual liability.²⁵⁸

74. Accordingly, we adopt the following compliance ladder to be applied when consumer complaints received by the Commission indicate a pattern or trend of noncompliance with the Commission’s rules governing the quality of television closed captioning on the part of either the VPD or the video programmer. We will apply a broad definition of “pattern or trend” when determining whether the compliance ladder is triggered. For example, a “pattern or trend” may be found when a particular entity is subject to a series of complaints over time about caption quality problems or failures or where a particular entity is subject to a large volume of complaints that suggests widespread quality problems or failures, even if they occur over a relatively short span of time. A pattern or trend of consumer complaints, even if about different programs or different types of captioning failures by the same entity, may reflect a system breakdown in that entity’s processes sufficient to trigger this approach. In other words, the Commission may discern a pattern or trend in a series of complaints about the same or similar problems or in a multiplicity of complaints about unrelated problems.

- If the Commission notifies a VPD or video programmer that the Commission has identified a pattern or trend of possible noncompliance with the Commission’s rules governing the quality of closed captioning by the VPD or video programmer, the VPD or video programmer shall respond to the Commission within 30 days after the date of such notice regarding such possible noncompliance, describing corrective measures taken, including those measures the VPD or video programmer may have undertaken in response to informal complaints and inquiries from viewers.²⁵⁹ However, we do not consider multiple complaints about a single incident to be a pattern or trend.
- If, after the date for a VPD or video programmer to respond to the above notification, the Commission subsequently notifies the VPD or video programmer that there is further evidence indicating a pattern or trend of noncompliance with the Commission’s rules

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16-17; DIRECTV Aug. 11, 2014 *Ex Parte* at 1-2; ACA Sept. 4, 2014 *Ex Parte* at 3 (supporting a compliance ladder because “certain types of real-time technical problems” are not preventable); ACA Jan. 11, 2016 *Ex Parte* at 4; ACA Jan. 21, 2016 *Ex Parte* at 4.

²⁵⁵ NCTA 2014 Comments at 3.

²⁵⁶ *Id.* at 3.

²⁵⁷ *Cf.* ACA 2014 Comments at 12-13 (suggesting that a safe harbor would allow VPDs to take corrective actions prior to initiating enforcement action against VPDs).

²⁵⁸ *See* Video Programmer Coalition 2014 Comments at 11 (claiming that a burden-shifting approach “would have a chilling effect on collaboration”); Video Programmer Coalition Aug. 18, 2014 *Ex Parte* at 1-2 (stating that reallocating liability to video programmers “will make everyone – front-line MVPD staff and front-line cable network staff – more conscious of enforcement and liability risk, and therefore more litigation-minded and less willing to cooperate”); Video Programmer Coalition Jan. 21, 2016 *Ex Parte* at 1-2.

²⁵⁹ For example, a corrective measure involves the initial steps a VPD or video programmer takes to address the problem or failure causing the pattern or trend of possible noncompliance and could include modification in the instructions given to the captioning provider with respect to captioning a particular program or programs in the future, the repair or adjustment of equipment that caused the captioning quality errors, or other measures that will correct the specific problem resulting in the pattern or trend of complaints. We expect such measures to be specific, measurable, and implemented as promptly as possible.

governing the quality of closed captioning, the VPD or video programmer shall submit to the Commission, within 30 days after the date of such subsequent notification, a written action plan describing additional measures it will take to bring the VPD's or video programmer's closed captioning performance into compliance with the Commission's regulations. For example, action plans involve the identification and implementation of longer term measures and may include, but are not limited to, a commitment to train the VPD's or video programmer's personnel, the use of improved equipment, more frequent equipment checks, improved monitoring efforts, and changes in closed captioning vendors or closed captioning procedures. In addition, the VPD or video programmer shall be required to conduct spot checks of its closed captioning performance and report to CGB on the results of such action plan and spot checks 180 days after submission of such action plan.²⁶⁰

- If, after the date for submission of the report on the results of an action plan, the Commission finds continued evidence of a pattern or trend of noncompliance with the Commission's rules governing the quality of closed captioning, the Commission will then consider, through its Enforcement Bureau, appropriate enforcement action, including admonishments, forfeitures, and other corrective actions as necessary.

75. We note that Consumer Groups support a two-step, rather than a three-step compliance ladder.²⁶¹ They argue that once the Commission identifies a pattern or trend of non-compliance, it should require VPDs and video programmers to submit an action plan as the initial step, rather than first allow implementation of corrective measures, and that enforcement action should follow that action plan if it does not resolve the problem.²⁶² We reject this approach because we believe that the first step of the compliance ladder, once a pattern or trend of noncompliance is identified, should afford an opportunity for VPDs and video programmers to rectify captioning quality violations on their own and quickly, without the regulatory involvement that would be associated with the second's step's required action plan or the third step's enforcement action.²⁶³ If the Consumer Groups' proposal were adopted, we are concerned that VPDs or video programmers would instead be focused on the more time-consuming process of developing an action plan, which could delay the resolution of the closed captioning problem. We further believe that the three-step ladder will provide VPDs and video programmers with the necessary incentives to take corrective action on their own, in order to avoid progressing to the second and third steps. However, if we find that this approach is not effective in ensuring widespread compliance with our television closed captioning quality rules or fulfilling our goal of ensuring full access to television programming as required by section 713(b) of the Act,²⁶⁴ we may revisit this issue to the extent necessary.

76. Consumer Groups' further contend that the three-step compliance ladder will "unnecessarily depress incentives for high-quality captioning by affording what amounts to a 'get out of jail free' card for an initial violation of the rules."²⁶⁵ We emphasize that the compliance ladder will not

²⁶⁰ The action plan required by this second rung must be documented in writing and include the specific steps that the distributor or programmer will take to remedy its infractions going forward. This must be submitted to the Commission, and unlike the corrective measures that are required by the first rung, the action plan will be subject to ongoing oversight until the problems and underlying causes are fully corrected.

²⁶¹ See Consumer Groups Aug. 4, 2014 *Ex Parte* at 3-4.

²⁶² *Id.* at 4.

²⁶³ See DIRECTV 2014 Comments at 8 (supporting "a safe harbor" for VPDs who demonstrate that they have monitored and maintained their equipment to ensure proper pass-through of closed captioning that would give them "an opportunity to take corrective action to come back into compliance prior to being subject to an enforcement action").

²⁶⁴ 47 U.S.C. § 613(b).

²⁶⁵ Consumer Groups Aug. 4, 2014 *Ex Parte* at 4.

relieve VPDs or video programmers of any of their obligations under the television closed captioning rules. However, to address this concern, we adopt an additional rule allowing CGB to refer a captioning quality rule violation directly to the Enforcement Bureau for enforcement action, or for the Enforcement Bureau to pursue an enforcement action on its own, without first going through the compliance ladder, for a systemic closed captioning quality problem or an intentional and deliberate violation of the Commission's closed captioning quality standards. In making such a determination, CGB or the Enforcement Bureau shall take into consideration all relevant information regarding the nature of the violation or violations and the VPD or video programmer's efforts to correct them.

D. Registration

1. Submission of VPD Registration Information

77. In the *2008 Closed Captioning Decision*, the Commission amended its rules to add section 79.1(i)(3), which requires VPDs to submit contact information for the receipt and handling of both immediate requests to resolve captioning concerns by consumers while they are watching television and closed captioning complaints that consumers file after experiencing closed captioning issues.²⁶⁶ The 2008 Order explained that VPDs could satisfy this requirement by either filing the information with the Chief of the Disability Rights Office, CGB, or by sending an email to CLOSEDCAPTIONING_POC@fcc.gov.²⁶⁷ In 2009, the Commission added an option to allow VPDs to file their contact information directly online via a web form located on the Commission's website, in a database called the "VPD Registry."²⁶⁸ At the time, the Commission noted several benefits of having VPDs enter this information directly into the VPD Registry, namely: (1) VPDs would be more likely to provide all the necessary information requested if they enter it themselves on the web form; (2) having VPDs directly submit such information would reduce human error that might otherwise occur in transcribing VPD information received through other means; and (3) information submitted through the web form would be available for public searches on the Commission's website almost immediately.²⁶⁹ Recognizing in the *Closed Captioning Quality Further Notice* that such electronic filings into the VPD Registry would offer "the most efficient and accurate means of collecting the requisite information,"²⁷⁰ the Commission sought comment on a proposal to require all contact information required by sections 79.1(i)(1) and (2) to be submitted directly to the VPD Registry through the web form method.²⁷¹ The Commission also sought comment on how the costs of transitioning to a mandatory web form method of filing would compare with the ease and accuracy of filing and benefits derived from such a mandatory system.²⁷²

78. Several commenters support the proposal to mandate the use of the web form for filing contact information,²⁷³ and no commenters oppose the proposal. AT&T recognizes that such a

²⁶⁶ 2008 *Closed Captioning Decision*, 23 FCC Rcd at 16686-87, para. 34 (adding 47 CFR § 79.1(i)(3) to the Commission's rules); see also 47 CFR § 79.1(i)(1) (requiring contact information for immediate captioning concerns); 47 CFR § 79.1(i)(2) (requiring contact information for captioning complaints).

²⁶⁷ 2008 *Closed Captioning Decision*, 23 FCC Rcd at 16687 para. 34. In the *Closed Captioning Quality Order*, the Commission corrected the e-mail address specified in 47 CFR § 79.1(i)(3). See *Closed Captioning Quality Order*, 29 FCC Rcd at 2288, para. 114.

²⁶⁸ See *Captioning Contact Web Form Order*, 24 FCC Rcd at 14838, paras. 3-4.

²⁶⁹ *Id.* at 14838, para. 4.

²⁷⁰ See *Closed Captioning Quality Further Notice*, 29 FCC Rcd at 2302, para. 147.

²⁷¹ See *Id.* at 2303, para. 147.

²⁷² See *Id.* at 2303, para. 147.

²⁷³ See Verizon Second Cycle Comments at 8 ("Verizon supports the proposal to require that video programming distributors submit contact information directly to the VPD registry."); AT&T Second Cycle Comments at 2; Consumer Groups Second Cycle Comments at 11.

mechanism would “facilitate the efficient and timely provision of information.”²⁷⁴ Consumer Groups state that “this common-sense approach would ensure that all required information is available to consumers who need to contact a VPD and would minimize burdens on the collection and coding of information by the Commission without imposing any significant burden on VPDs.”²⁷⁵ Requiring VPDs to submit their contact information into the VPD Registry through the web form would also be consistent with the *2011 Electronic Filing Report and Order*, which adopted a policy to require the use of electronic filing whenever technically feasible.²⁷⁶ In light of such technical feasibility, as well as the accuracy and efficiency of this electronic filing method, the Commission amends section 79.1(i)(3) to require VPDs to submit their contact information required under sections 79.1(i)(1) and (2) directly into the Commission’s database through the web form method and to remove as options the alternate methods of submitting this information to the Commission.

2. Video Programmer Registration

79. In the *Closed Captioning Quality Second Further Notice*, the Commission sought comment on whether video programmers similarly should submit contact information to the Commission and, if so, whether such contact information should be entered into the Commission’s database through a web form.²⁷⁷ The Commission also asked whether it should require video programmers to submit the same or additional contact information as compared to what is now required of VPDs. Lastly, the Commission sought comment on whether it should also require video programmers to make a programmer’s contact information available to the public in other ways, such as on websites.²⁷⁸ For the reasons discussed below, we require video programmers to file their contact information through a web form located on the Commission’s web site for the handling of written closed captioning complaints by the Commission and by VPDs, and as required for VPDs, to update such information within ten business days of any changes.²⁷⁹ We also direct video programmers to submit their required compliance certifications through a web form located on the Commission’s web site, so that such certifications will be readily available to consumers, VPDs, and the Commission.²⁸⁰

80. This order places direct obligations on video programmers with respect to the provision and quality of captions on their programs, with accompanying responsibilities to address complaints relating thereto.²⁸¹ Given this greater accountability, we conclude that it is important for video

²⁷⁴ See AT&T Second Cycle Comments at 2.

²⁷⁵ Consumer Groups Second Cycle Comments at 11; Consumer Groups Jan. 14, 2016 *Ex Parte* at 2; Consumer Groups Jan. 22, 2016 *Ex Parte* at 2.

²⁷⁶ *Amendment of Certain of the Commission’s Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, GC Docket No. 10-44, Report and Order, 26 FCC Rcd 1594, 1599-1600, paras. 14-15 (2011) (*2011 Electronic Filing Report and Order*).

²⁷⁷ *Closed Captioning Quality Second Further Notice*, 29 FCC Rcd at 15090-91, para. 5.

²⁷⁸ *Id.* at 15901, para. 5.

²⁷⁹ See 47 CFR § 79.1(i)(3). The video programmer contact information shall include the name of the person with primary responsibility for captioning issues and who can ensure compliance with the captioning rules, and the person’s title or office, telephone number, fax number (if there is one), postal mailing address, and e-mail address. See 47 CFR § 79.1(i)(2) (requiring this information for VPDs); see also Verizon January 20, 2015 Comments at 3. We direct CGB to implement the development of one or more web forms (or to expand the existing VPD Registry) for the filing of video programmer contact information and certifications and to provide guidance to programming entities and the general public on the appropriate use of video programmer contact information found on the Commission’s web site. CGB shall issue a Public Notice to provide such guidance as well as procedures and deadlines for video programmers to file contact information and certifications once the rules go into effect and the Commission’s web site is ready to receive such contact information and certifications. See *supra* section III.A.5.

²⁸⁰ See *supra* section III.A.5, for a discussion of the video programmer certification requirements.

²⁸¹ See *supra* sections III.A and B.

programmers' contact information to be readily available to the Commission and to VPDs for the expedient and effective handling and resolution of complaints. Several commenters agree that requiring video programmers to register their contact information with the Commission will facilitate the complaint resolution process.²⁸² In particular, for complaints filed directly with a VPD, under the new complaint handling rules, the VPD must forward the complaint information to the correct video programmer when the VPD ascertains that the source of problem raised in a complaint originated with that programmer.²⁸³ To effectively achieve this in a timely fashion, VPDs must have ready access to video programmer contact information. We agree with Cincinnati Bell and ACA that if this information is not available to VPDs, and especially smaller VPDs, such entities may encounter challenges and delays in their efforts to resolve complaints.²⁸⁴ The filing of video programmer contact information will eliminate such challenges by enabling VPDs to obtain current contact information from a centralized location.²⁸⁵

81. We also agree with those commenters who argue that requiring video programmers to file their contact information with the Commission will help to expedite the resolution of complaints filed directly with the Commission.²⁸⁶ As discussed above, the complaint handling rules that we adopt in this Order require the Commission to forward written complaints to both VPDs and their video programmers.²⁸⁷ In order to forward such complaints, the Commission needs access to video programmer contact information. Finally, we agree with Consumer Groups that the public availability of video programmers' contact information will increase transparency, aid the complaint process, and thereby facilitate high-quality captioning.²⁸⁸ For example, the complaint handling rules we adopt require each

²⁸² See Comcast 2014 Comments at 6, n.18; Comcast 2015 Comments at 3; DIRECTV 2015 Comments at 2; Consumer Groups 2015 Comments at 3; AT&T 2015 Reply Comments at 6-7; CenturyLink 2015 Reply Comments at 2; Consumer Groups 2015 Reply Comments at 3; DIRECTV Aug. 11, 2014 *Ex Parte* at 1 (attested that all parties at an *ex parte* meeting agreed that the resolution of closed captioning issues would be facilitated by having VPO contact information added to the existing VPD captioning contact registry); Verizon Second Cycle Comments at 8; Verizon Aug. 21, 2014 *Ex Parte* at 2 (proposing the Commission requires collection of contact information from video programmers and owners to allow consumers and the Commission to contact video programmers and owners with complaints); Verizon 2015 Comments at 2-3 (same); ACA 2015 Comments at 2 (noting that "a number of commenters have raised concerns regarding the ability of VPDs to locate the correct video programmer point of contact for resolution of closed captioning complaints" and that requiring video programmers to file contact information "is a low cost solution to this problem"); ACA Jan. 11, 2016 *Ex Parte* at 4; ACA Jan. 21, 2016 *Ex Parte* at 4; see also Cincinnati Bell Aug. 11, 2014 *Ex Parte* at 3 ("[T]he lack of such clearly identified contact persons serves to delay the process."). As discussed below, we also agree with Consumer Groups that the availability of video programmer contact information will ensure the complaint process remains transparent. Consumer Groups Aug. 4, 2014 *Ex Parte* at 3.

²⁸³ See *supra* section III.B.2.

²⁸⁴ Cincinnati Bell Aug. 11, 2014 *Ex Parte* at 3; ACA Sept. 4, 2014 *Ex Parte* at 3; ACA 2015 Comments at 4-5 (arguing that the availability of video programmer contact information is "particularly important for smaller MVPDs . . . who primarily purchase their national video programming through the National Cable Television Cooperative ('NCTC') and therefore have little or no direct interaction with national programmers" and that "[w]hile it may be possible for smaller MVPDs to eventually obtain the necessary video programmer contact information through the NCTC or another buying group, the time it takes to track down the relevant contact information in this indirect manner" will delay the resolution of captioning complaints).

²⁸⁵ ACA Sept. 4, 2014 *Ex Parte* at 3 (suggesting that the filing of video programmer contact information with the Commission will be "enormously helpful" in this regard). Given these and the other comments discussed above, we thus reject NAB's claim that "[a]ll VPDs have contact information" for the video programmers whose programming they carry. See NAB 2015 Comments at 6.

²⁸⁶ See ACA 2015 Comments at 2, 4; Consumer Groups 2015 Reply Comments at 3.

²⁸⁷ See *supra* section III.B.1.

²⁸⁸ See Consumer Groups Aug. 4, 2014 *Ex Parte* at 2; Consumer Groups 2015 Reply Comments at 3-4; Consumer Groups Jan. 14, 2016 *Ex Parte* at 3; Consumer Groups Jan. 22, 2016 *Ex Parte* at 3.

VPD to inform a consumer when it has forwarded his or her complaint to a video programmer for resolution.²⁸⁹ If the consumer wishes to contact the video programmer directly regarding his or her complaint after it has been forwarded by the VPD, the Commission's web site will provide the consumer with the necessary video programmer's contact information to do so.²⁹⁰

82. Some parties claim that the easy availability of video programmer contact information may prompt some consumers to initially contact video programmers, rather than VPDs, for the resolution of their captioning issues.²⁹¹ While some consumers may prefer to contact video programmers directly, we emphasize that our actions today are not intended to remove VPDs from the process of resolving consumer complaints. We agree with Consumer Groups and other parties that VPDs may be in the best position to take primary responsibility for complaint resolution,²⁹² given the more direct relationship they have with viewers and subscribers, the opportunity for consumers to utilize existing VPD processes for receiving, processing, and resolving closed captioning complaints, and the ability of VPDs to provide a single point of contact for consumers.²⁹³ We reiterate that our new requirement for video programmers to file contact information with the Commission is intended primarily for use by VPDs and Commission staff for complaint resolution and enforcement purposes, and to facilitate transparency for the public when VPDs forward complaints to programmers for resolution.²⁹⁴ We encourage consumers to continue filing complaints about captioning with the Commission or VPDs in the interest of achieving faster resolution of their captioning concerns.²⁹⁵

83. Based on our experience with the registration of VPDs, we agree with commenters that the burden placed on video programmers by the online registration process will be minimal and outweighed by its benefits.²⁹⁶ DIRECTV and others acknowledge that they have not found existing

²⁸⁹ See *supra* section III.B.2.

²⁹⁰ See DIRECTV 2015 Comments at 2 (stating that making video programmer contact information available to the public "would facilitate the resolution of closed captioning issues by giving consumers another option through which to seek redress"). The rules that we are now adopting also require the VPD to inform the consumer of the video programmer's contact information. See *supra* section III.B.2.

²⁹¹ QVC, Inc. (QVC) 2015 Comments at 1-2 (arguing that requiring video programmers to file contact information will confuse consumers and lead them to contact video programmers directly for closed captioning issues, resulting in "additional and potentially unresolvable issues for consumers" because "video programmers possess inadequate information to resolve such issues"); NAB 2015 Comments at 3-5 (arguing that requiring video programmers to file contact information will confuse consumers, who will be unable to differentiate between a video programmer and a VPD and encourage consumers to contact video programmers to resolve captioning complaints, when consumers should instead first contact the VPD); NAB 2015 Reply Comments at 3; PBS 2015 Reply Comments at 2-3 (agreeing with QVC and NAB); Consumer Groups 2015 Reply Comments at 3 (stating that it shares NAB's and QVC's concerns about consumer frustration).

²⁹² See Consumer Groups 2015 Comments at 3, n.7 (urging the Commission to make clear that VPDs must retain responsibility for resolving consumer complaints and may not simply pass consumers off to a video programmer website, if video programmers are required to make contact information for the resolution of closed captioning issues widely available).

²⁹³ See *supra* section III.B.

²⁹⁴ See Consumer Groups 2015 Reply Comments at 3-4.

²⁹⁵ The Commission directs CGB to publicize on the Commission's website and through the use of consumer guides and other effective methods of dissemination, messaging that encourages consumers to file complaints either with the Commission or the VPD for faster complaint resolution.

²⁹⁶ See ACA 2015 Comments at 5 (stating that the filing of contact information "would simply require the video programmer to electronically complete a straightforward form" with the contact information of the person responsible for handling closed captioning information); Consumer Groups 2015 Reply Comments at 3.

contact information filing requirements to be burdensome.²⁹⁷ For this reason, we conclude that any costs associated with requiring video programmers to provide their contact information in the manner described above are outweighed by the benefits of this requirement.²⁹⁸

84. Finally, we do not think it is necessary, at this time, to require video programmers to make their contact information available on their websites or through other means in addition to filing this information in the Commission's database. We find that our requirement for video programmers to file contact information with the Commission is sufficient to serve our regulatory purposes of making such information available for use primarily by VPDs and Commission staff for complaint resolution and enforcement purposes, and to facilitate transparency for the public when VPDs forward complaints to programmers for resolution.²⁹⁹ Additionally, we agree with the Consumer Groups that providing such "contact information for the purpose of direct consumer contact and complaint resolution would frustrate consumers and complicate the complaint process for all involved."³⁰⁰ If we find that our objectives are not effectively achieved by the publication of this information in the Commission's database, we may revisit this decision.

E. Nonsubstantive Rule Amendments

85. More than 18 years have passed since the Commission adopted its regulations governing the closed captioning obligations. For purposes of clarity, we make two nonsubstantive editorial changes to our rules, which include eliminating certain outdated rule sections and updating the rule nomenclature. First, given that all benchmarks for the phase-in of the closed captioning requirements have passed, we amend section 79.1 (b)(1)-(4) of our rules to eliminate these outdated benchmarks, so that only the fully phased-in captioning requirements remain in the rule.³⁰¹ Second, we amend section 79.1(e)(9) to reflect the terminology used in this proceeding by making the nonsubstantive nomenclature change that VPDs "ensure the provision of closed captioning" rather than "provide closed captioning."³⁰²

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility

86. *Final Regulatory Flexibility Analysis.* With respect to this Second Report and Order, a Final Regulatory Flexibility Analysis (FRFA) is contained in Appendix C. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an FRFA of the expected impact on small entities of the requirements adopted in this Second Report and Order. The Commission will send a copy

²⁹⁷ DIRECTV 2015 Comments at 2; AT&T 2015 Reply Comments at 7.

²⁹⁸ NAB suggests that entities that have dual roles as both VPDs and video programmers generally should not be required to file duplicative information. NAB 2015 Comments at 2. The Commission is considering the practical implications of whether to create a combined registry or two separate registries for VPD and video programmer contact information. While we understand the interest in not having to file duplicative information, we need to make sure as well that that parties viewing the contact information can easily access the information they need. Accordingly, we instruct CGB to explore efforts to reduce the need for duplicative filings to the extent practical and to the extent this can be achieved while still fulfilling the underlying purpose of facilitating access to this contact information.

²⁹⁹ See Consumer Groups 2015 Reply Comments at 3-4. We therefore do not agree with DIRECTV 2015 Comments at 2 (suggesting that video programmers be required to post contact information to their websites, if they have websites).

³⁰⁰ Consumer Groups 2015 Reply Comments at 3; see also NAB 2015 Comments at 3-4; QVC 2015 Comments at 1-2.

³⁰¹ See 47 CFR § 79.1(b)(1)-(4).

³⁰² See 47 CFR § 79.1(e)(9); see also *supra* section III.A.4.

of the Second Report and Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

B. Paperwork Reduction Act

87. *Paperwork Reduction Act of 1995 Analysis.* The Second Report and Order adopts new and modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.³⁰³ It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA.³⁰⁴ OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198,³⁰⁵ we previously sought comment on how the Commission might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”³⁰⁶

C. Congressional Review Act

88. The Commission will send a copy of this Second Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.³⁰⁷

D. Materials in Accessible Formats

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

V. ORDERING CLAUSES

90. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 303(r) and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 613, this Second Report and Order IS ADOPTED and the Commission’s Rules ARE HEREBY AMENDED as set forth in Appendix A.

91. IT IS FURTHER ORDERED that the *Second Report and Order adopted herein* SHALL BE EFFECTIVE 30 days after publication in the *Federal Register* unless otherwise noted.

³⁰³ The PRA is codified at 44 U.S.C. §§ 3501-3520.

³⁰⁴ 44 U.S.C. § 3507(d).

³⁰⁵ 44 U.S.C. § 3506(c)(4).

³⁰⁶ See *Closed Captioning Quality Order*, 29 FCC Rcd at 2314, para. 175.

³⁰⁷ 5 U.S.C. § 801(a)(1)(A).

92. IT IS FURTHER ORDERED that the rule amendments contained in 47 CFR 79.1(g)(1) through (9), (i)(1) through (3), (j)(1) and (4), (k)(1)(iv), and (m) SHALL BE EFFECTIVE upon publication in the *Federal Register* of a notice announcing the approval by the Office of Management and Budget of the modified information collection requirements under the Paperwork Reduction Act of 1995³⁰⁸ and an effective date of the rule amendment.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁰⁸ Pub. L. No. 104-13, 109 Stat. 163 (May 22, 1995), *codified at* 44 U.S.C. §§ 3501 *et seq.*

APPENDIX A
List of Commenters

Comments on the *Closed Captioning Quality Further Notice*, due April 28, 2014 (2014 Comments)

American Cable Association (ACA)

AT&T Services, Inc. (AT&T)

Comcast Corporation and NBCUniversal (Comcast)

Consumer Groups

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), National Association of the Deaf (NAD), Hearing Loss Association of America (HLAA), Association of Late-Deafened Adults (ALDA), Cerebral Palsy and Deaf Organization (CPADO), Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH), American Association of the Deaf-Blind (AADB), Speech Communication Assistance by Telephone (SCT), and Technology Access Program at Gallaudet University (TAP)

DIRECTV, LLC (DIRECTV)

National Cable & Telecommunications Association (NCTA)

Operators

Charter Communications, Inc. (Charter), Cablevision Systems Corporation, Mediacom Communications Corporation, Cequel Communications, LLC d/b/a Suddenlink Communications, and Time Warner Cable Inc.

Rehabilitation Engineering Research Center for Wireless Technologies (Wireless RERC)

Verizon

Video Programmer Coalition

CBS Corporation, 21st Century Fox, Inc., Time Warner Inc., Viacom Inc., The Walt Disney Company, and Scripps Networks Interactive, Inc.

Reply Comments on the *Closed Captioning Quality Further Notice*, due May 27, 2014 (2014 Reply Comments)

ACA

Cincinnati Bell Extended Territories, LLC (Cincinnati Bell)

Comcast

Consumer Groups

DIRECTV

Operators

Verizon

Video Programmer Coalition

Comments on the *Closed Captioning Quality Second Further Notice*, due January 20, 2015 (2015 Comments)

Aberdeen Captioning, Inc. (Aberdeen)

ACA

Comcast

Consumer Groups

DIRECTV

National Association of Broadcasters (NAB)

NCTA
Operators
QVC, Inc. (QVC)
Verizon

**Reply Comments on the *Closed Captioning Quality Second Further Notice*, due January 30, 2015
(2015 Reply Comments)**

AT&T
CenturyLink, Inc. (CenturyLink)
Comcast
Consumer Groups
NAB
Public Broadcasting Service (PBS)
Starz et al.

Starz Entertainment, LLC, Hemisphere Media Group, Inc., UP Entertainment, LLC, Aspire
Channel, LLC, Shorts International Ltd., PixL Entertainment, LLC and BFTV, LLC

Note:

The Commission also received numerous comments from concerned individuals and ex parte filings in this proceeding. These filings are available through the Commission's electronic comment filing system.

Additionally, comments and reply comments submitted for the second comment cycle for other issues raised in the *Further Notice* will be listed in a subsequent order (and if cited in this order, will be noted as Second Cycle comments and reply comments). The Second Cycle comments were due by July 9, 2014, and the Second Cycle reply comments were due by August 8, 2014.

APPENDIX B**Final Rules**

The Federal Communications Commission amends part 79 of Title 47 of the Code of Federal Regulations (CFR) as follows:

PART 79 – Closed Captioning and Video Description of Video Programming

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

AUTHORITY: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 330, 554a, 613, 617.

2. Amend section 79.1 by revising paragraphs (a)(12), (a)(13), (b)(1), and (b)(2), removing paragraphs (b)(3) and (b)(4), renumbering paragraph (b)(5) as (b)(3), revising paragraphs (c)(1), (e)(5), (e)(6), (e)(9), (g), and (i), removing and reserving paragraph (j)(1), revising paragraph (j)(3), removing paragraph (j)(4), revising paragraph (k)(1)(iv), reserving paragraph (l), and adding paragraph (m) to read as follows:

§ 79.1 Closed captioning of televised video programming.

(a) * * *

(12) Video programming owner. Any person or entity that either:

(i) Licenses video programming to a video programming distributor or provider that is intended for distribution to residential households; or

(ii) Acts as the video programming distributor or provider and also possesses the right to license linear video programming to a video programming distributor or provider that is intended for distribution to residential households.

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

(b) Requirements for closed captioning of video programming

(1) Requirements for new programming.

(i) Video programming distributors must ensure that 100% of new, nonexempt English language and Spanish language video programming that is being distributed and exhibited on each channel during each calendar quarter is closed captioned.

(ii) Video programmers must provide closed captioning for 100% of new, nonexempt English language and Spanish language video programming that is being distributed and exhibited on each channel during each calendar quarter.

(2) Requirements for pre-rule programming.

(i) Video programming distributors must ensure that 75% of pre-rule, nonexempt English language and Spanish language video programming that is being distributed and exhibited on each channel during each calendar quarter is closed captioned.

(ii) Video programmers must provide closed captioning for 75% of pre-rule, nonexempt English language and Spanish video programming that is being distributed and exhibited on each channel during each calendar quarter.

* * * * *

(c) Obligation to pass through captions of already captioned programs; obligation to maintain equipment and monitor for captions.

(1) All video programming distributors shall deliver all programming received from the video programmer containing closed captioning to receiving television households with the original closed captioning data intact in a format that can be recovered and displayed by decoders meeting the standards of this part unless such programming is recaptioned or the captions are reformatted by the programming distributor.

* * * * *

(e) * * *

(5) Video programming that is exempt pursuant to paragraph (d) of this section that contains captions, except that video programming exempt pursuant to paragraph (d)(5) of this section (late night hours exemption), can count towards compliance with the requirements for pre-rule programming.

(6) For purposes of paragraph (d)(11) of this section, captioning expenses include direct expenditures for captioning as well as allowable costs specifically allocated by a video programmer through the price of the video programming to that video programming provider. To be an allowable allocated cost, a video programmer may not allocate more than 100 percent of the costs of captioning to individual video programming providers. A video programmer may allocate the captioning costs only once and may use any commercially reasonable allocation method;

* * * * *

(9) Video programming distributors shall not be required to ensure the provision of closed captioning for video programming that is by law not subject to their editorial control, including but not limited to the signals of television broadcast stations distributed pursuant to sections 614 and 615 of the Communications Act or pursuant to the compulsory copyright licensing provisions of sections 111 and 119 of the Copyright Act (Title 17 U.S.C. 111 and 119); programming involving candidates for public office covered by sections 315 and 312 of the Communications Act and associated policies; commercial leased access, public access, governmental and educational access programming carried pursuant to sections 611 and 612 of the Communications Act; video programming distributed by direct broadcast satellite (DBS) services in compliance with the noncommercial programming requirement pursuant to section 335(b)(3) of the Communications Act to the extent such video programming is exempt from the editorial control of the video programming provider; and video programming distributed by a common carrier or that is distributed on an open video system pursuant to section 653 of the Communications Act by an entity other than the open video system operator. To the extent such video programming is not otherwise exempt from captioning, the entity that contracts for its distribution shall be required to comply with the closed captioning requirements of this section.

* * * * *

(g) * * *

(1) Filing closed captioning complaints. Complaints concerning an alleged violation of the closed captioning requirements of this section shall be filed with the Commission or with the video programming distributor responsible for delivery and exhibition of the video programming within sixty (60) days after the problem with captioning.

(2) Complaints filed with the Commission. A complaint filed with the Commission must be in writing, must state with specificity the alleged Commission rule violated, and must include:

(A) The consumer's name, postal address, and other contact information, if available, such as telephone number or e-mail address, along with the consumer's preferred format or method of response to the

complaint (such as letter, facsimile transmission, telephone (voice/TRS/TTY), e-mail, or some other method that would best accommodate the consumer.

(B) The channel number; channel name, network, or call sign; the name of the multichannel video program distributor, if applicable; the date and time when the captioning problem occurred; the name of the program with the captioning problem; and a detailed description of the captioning problem, including specific information about the frequency and type of problem.

(3) Process for forwarding complaints. The Commission will forward complaints filed first with the Commission to the appropriate video programming distributor and video programmer. If the Commission cannot determine the appropriate video programmer, the Commission will forward the complaint to the video programming distributor and notify the video programming distributor of the Commission's inability to determine the appropriate video programmer. The video programming distributor must respond in writing to the Commission with the name and contact information for the appropriate video programmer within ten (10) days after the date of such notification. The Commission will then forward the complaint to the appropriate video programmer.

(4) Video programming distributor and video programmer responsibilities with respect to complaints forwarded by the Commission.

(i) In response to a complaint, the video programming distributor must conduct an investigation to identify the source of the captioning problem and resolve all aspects of the captioning problem that are within its control. At a minimum, a video programming distributor must perform the following actions as part of its investigation:

(A) Program stream check. The video programming distributor must capture program streams, defined as digitally encoded elementary streams such as video, audio, closed captioning, timing, and other data necessary for a viewer to receive a complete television viewing experience, of the programming network identified in the complaint and check the program streams for any caption-related impairments;

(B) Processing equipment check. If the video programming distributor's investigation indicates a problem with the program stream, and there is not prior knowledge as to where the problem originated, the video programming distributor must check post-processing equipment at the relevant headend or other video distribution facility to see if the issue was introduced by the video programming distributor or was present in the program stream when received by the video programming distributor from the video programmer; and

(C) Consumer premises check. If the video programming distributor's investigation indicates that the problem may lie with the consumer's customer premises equipment, including the set-top box, the video programming distributor must check the end user equipment, either remotely or, if necessary, at the consumer's premises, to ensure there are no issues that might interfere with the pass through, rendering, or display of closed captioning.

(ii) After conducting its investigation, the video programming distributor shall provide a response to the complaint in writing to the Commission, the appropriate video programmer, and the complainant within thirty (30) days after the date the Commission forwarded the complaint. The video programming distributor's response must:

(A) Acknowledge responsibility for the closed captioning problem and describe the steps taken to resolve the problem; or

(B) Certify that the video programming distributor has conducted an investigation into the closed captioning problems in accordance with paragraph (g)(4)(i) of this section and that the closed captioning problem is not within the video programming distributor's control and appears to have been present in the program stream when received by the video programming distributor; or

(C) Certify that the video programming distributor has conducted an investigation into the closed captioning problems in accordance with paragraph (g)(4)(i) of this section and that the closed captioning problem appears to have been caused by a third party DVR, television, or other third party device not within the video programming distributor's control.

(iii) If the video programming distributor provides a certification in accordance with paragraph (g)(4)(ii)(B) of this section, the video programmer to whom the complaint was referred must conduct an investigation to identify the source of the captioning problem and resolve all aspects of the captioning problem that are within its control.

(A) The video programmer may call upon the video programming distributor for assistance as needed, and the video programming distributor must provide assistance to the video programmer in resolving the complaint, as needed.

(B) After conducting its investigation, the video programmer must provide a response to the complaint in writing to the Commission, the appropriate video programming distributor, and the complainant within thirty (30) days after the date of the video programming distributor's certification. Such response either must describe the steps taken by the video programmer to correct the captioning problem or certify that the video programmer has conducted an investigation into the closed captioning problems in accordance with paragraph (g)(4)(iii) of this section and that the captioning problem was not within its control, for example, because the program stream was not subject to the closed captioning problem at the time the program stream was handed off to the video programming distributor.

(C) If the video programmer certifies pursuant paragraph (g)(4)(iii)(B) of this section that the captioning problem was not within its control, and it has not been determined by either the video programmer or the video programming distributor that the problem was caused by a third party device or other causes that appear not to be within the control of either the video programming distributor or the video programmer, the video programming distributor and video programmer shall work together to determine the source of the captioning problem. Once the source of the captioning problem is determined, the video programming distributor and video programmer shall each correct those aspects of the captioning problem that are within its respective control. Within thirty (30) days after the date of the video programmer's certification provided pursuant to paragraph (g)(4)(iii)(B) of this section, the video programming distributor, after consulting with the video programmer, shall report in writing to the Commission and the complainant on the steps taken to correct the captioning problem.

(5) Complaints filed with video programming distributors.

(i) If a complaint is first filed with the video programming distributor, the video programming distributor must respond in writing to the complainant with thirty (30) days after the date of the complaint. The video programming distributor's response must either:

(A) Acknowledge responsibility for the closed captioning problem and describe to the complainant the steps taken to resolve the problem; or

(B) Inform the complainant that it has referred the complaint to the appropriate video programmer or other responsible entity and provide the name and contact information of the video programmer or other responsible entity and the unique complaint identification number assigned to the complaint pursuant to paragraph (g)(5)(ii)(B) of this section; or

(C) Inform the complainant that the closed captioning problem appears to have been caused by a third party DVR, television, or other third party device not within the video programming distributor's control.

(ii) If the video programming distributor determines that the issue raised in the complaint was not within the video programming distributor's control and was not caused by a third party device, the video programming distributor must forward the complaint and the results of its investigation of the complaint

to the appropriate video programmer or other responsible entity within thirty (30) days after the date of the complaint.

(A) The video programming distributor must either forward the complaint with the complainant's name, contact information and other identifying information redacted or provide the video programmer or other responsible entity with sufficient information contained in the complaint to achieve the complainant's investigation and resolution.

(B) The video programming distributor must assign a unique complaint identification number to the complaint and transmit that number to the video programmer with the complaint.

(iii) (A) If a video programming distributor forwards a complaint to a video programmer or other responsible entity pursuant to paragraph (g)(5)(ii) of this section, the video programmer or other responsible entity must respond to the video programming distributor in writing in a form that can be forwarded to the complainant within thirty (30) days after the forwarding date of the complaint.

(B) The video programming distributor must forward the video programmer's or other responsible entity's response to the complainant within ten (10) days after the date of the response.

(C) If the video programmer or other responsible entity does not respond to the video programming distributor within thirty (30) days after the forwarding date of the complaint, the video programming distributor must inform the complainant of the video programmer's or other responsible entity's failure to respond within forty (40) days after the forwarding date of the complaint.

(iv) If a video programming distributor fails to respond to the complainant as required by paragraphs (g)(5)(i) of this section, or if the response received by the complainant does not satisfy the complainant, the complainant may file the complaint with the Commission within sixty (60) days after the time allotted for the video programming distributor to respond to the complainant. The Commission will forward such complaint to the video programming distributor and video programmer, and the video programming distributor and video programmer shall address such complaint as specified in paragraph (g)(4) of this section.

(v) If a video programmer or other responsible entity fails to respond to the video programming distributor as required by paragraph (g)(5)(iii)(A) of this section, or if a video programming distributor fails to respond to the complainant as required by paragraphs (g)(5)(iii)(B) or (C) of this section, or if the response from the video programmer or other responsible entity forwarded by the video programming distributor to the complainant does not satisfy the complainant, the complainant may file the complaint with the Commission within sixty (60) days after the time allotted for the video programming distributor to respond to the complainant pursuant to paragraphs (g)(5)(iii)(B) or (C) of this section. The Commission will forward such complaints to the appropriate video programming distributor and video programmer, and the video programming distributor and video programmer shall handle such complaints as specified in paragraph (g)(4) of this section.

(6) In response to a complaint, a video programming distributor or video programmer is obligated to provide the Commission with sufficient records and documentation to demonstrate that it is in compliance with the Commission's rules.

(7) Video programming distributors may rely on certifications from video programmers made in accordance with paragraph (m) of this section to demonstrate compliance with paragraphs (b)(1)(i) and (b)(2)(i) of this section. Video programming distributors shall not be held responsible for situations where a video programmer falsely certifies under paragraph (m) of this section unless the video programming distributor knows or should have known that the certification is false.

(8) The Commission will review complaints filed with the Commission, including all supporting evidence, and determine whether a violation has occurred. The Commission will, as needed, request additional information from the video programming distributor or video programmer.

(9) Compliance.

(i) Initial response to a pattern or trend of noncompliance. If the Commission notifies a video programming distributor or video programmer of a pattern or trend of possible noncompliance with the Commission's rules for the quality of closed captioning by the video programming distributor or video programmer, the video programming distributor or video programmer shall respond to the Commission within thirty (30) days after the Commission's notice of such possible noncompliance, describing corrective measures taken, including those measures the video programming distributor or video programmer may have undertaken in response to informal complaints and inquiries from viewers.

(ii) Corrective action plan. If, after the date for a video programming distributor or video programmer to respond to a notification under paragraph (g)(8)(i) of this section, the Commission subsequently notifies the video programming distributor or video programmer that there is further evidence indicating a pattern or trend of noncompliance with the Commission's rules for quality of closed captioning, the video programming distributor or video programmer shall submit to the Commission, within thirty (30) days after the date of such subsequent notification, a written action plan describing specific measures it will take to bring the video programming distributor's or video programmer's closed captioning performance into compliance with the Commission's closed captioning quality rules. In addition, the video programming distributor or video programmer shall conduct spot checks of its closed captioning quality performance and report to the Commission on the results of such action plan and spot checks 180 days after the submission of such action plan.

(iii) Continued evidence of a pattern or trend of noncompliance. If, after the date for submission of a report on the results of an action plan and spot checks pursuant to paragraph (g)(8)(ii) of this section, the Commission finds continued evidence of a pattern or trend of noncompliance, additional enforcement actions may be taken, which may include admonishments, forfeitures, and other corrective actions.

(iv) The Commission may take enforcement action, which may include admonishments, forfeitures, and other corrective actions, without providing a video programming distributor or video programmer the opportunity for an initial response to a pattern or trend of noncompliance or a corrective action plan, or both, under paragraphs (g)(8)(i) and (g)(8)(ii) of this section, for a systemic closed captioning quality problem or an intentional and deliberate violation of the Commission's rules for the quality of closed captioning.

* * * * *

(i) Contact information.

(1) Video programming distributors shall make publicly available contact information for the receipt and handling of immediate closed captioning concerns raised by consumers while they are watching a program. Video programming distributors must designate a telephone number, fax number (if the video programming distributor has a fax number), and e-mail address for purposes of receiving and responding immediately to any closed captioning concerns. Video programming distributors shall include this information on their Web sites (if they have a Web site), in telephone directories, and in billing statements (to the extent the distributor issues billing statements). Video programming distributors shall keep this information current and update it to reflect any changes within ten (10) business days for Web sites, by the next billing cycle for billing statements, and by the next publication of directories. Video programming distributors shall ensure that any staff reachable through this contact information has the capability to immediately respond to and address consumers' concerns. To the extent that a distributor has personnel available, either on site or remotely, to address any technical problems that may arise, consumers using this dedicated contact information must be able to reach someone, either directly or indirectly, who can address the consumer's captioning concerns. This provision does not require that distributors alter their hours of operation or the hours during which they have staffing available; at the same time, however, where staff is available to address technical issues that may arise during the course

of transmitting programming, they also must be knowledgeable about and be able to address closed captioning concerns. In situations where a video programming distributor is not immediately available, any calls or inquiries received, using this dedicated contact information, should be returned or otherwise addressed within 24 hours. In those situations where the captioning problem does not reside with the video programming distributor, the staff person receiving the inquiry shall refer the matter appropriately for resolution.

(2) Video programming distributors shall make contact information publicly available for the receipt and handling of written closed captioning complaints that do not raise the type of immediate issues that are addressed in paragraph (i)(1) of this section. The contact information required for written complaints shall include the name of a person with primary responsibility for captioning issues and who can ensure compliance with the Commission's rules. In addition, this contact information shall include the person's title or office, telephone number, fax number (if the video programming distributor has a fax number), postal mailing address, and e-mail address. Video programming distributors shall include this information on their Web sites (if they have a Web site), in telephone directories, and in billing statements (to the extent the distributor issues billing statements). Video programming distributors shall keep this information current and update it within ten (10) business days for Web sites, by the next billing cycle for billing statements, and by the next publication of directories.

(3) Providing contact information to the Commission. Video programming distributors and video programmers shall file contact information with the Commission through a web form located on the Commission's web site. Such contact information shall include the name of a person with primary responsibility for captioning issues and ensuring compliance with the Commission's rules. In addition, such contact information shall include the person's title or office, telephone number, fax number (if the video programming distributor or video programmer has a fax number), postal mailing address, and e-mail address. Contact information shall be available to consumers on the Commission's web site or by telephone inquiry to the Commission's Consumer Center. Video programming distributors and video programmers shall notify the Commission each time there is a change in any of this required information within ten (10) business days.

(j) Captioning quality obligation; standards.

(1) [Removed and Reserved]

* * * * *

(3) Application of captioning quality standards. Video Programmers shall ensure that captioning meet the standards of paragraph (j)(2) of this section for accuracy, synchronicity, completeness and placement, except for de minimis captioning errors. In determining whether a captioning error is de minimis, the Commission will consider the particular circumstances presented, including the type of failure, the reason for the failure, whether the failure was one-time or continuing, the degree to which the program was understandable despite the errors, and the time frame within which corrective action was taken to prevent such failures from recurring. When applying such standards to live and near-live programming, the Commission will also take into account, on a case-by-case basis, the following factors:

* * * * *

(4) [Removed]

* * * * *

(k) * * *

(1) * * *

(iv) Certification procedures for video programmers. Video programmers adopting Best Practices will certify to the Commission that they adhere to Best Practices for video programmers, in accordance with paragraph (m) of this section.

* * * * *

(l) [Reserved]

(m) Video programmer certification.

(1) Upon the effective date of this paragraph or prior to the first time a video programmer that has not previously provided video programming shown on television provides video programming for television for the first time, whichever is later, and on or before July 1 of each year thereafter, each video programmer shall submit a certification to the Commission through a web form located on the Commission's website stating that:

(i) The video programmer provides closed captioning for its programs in compliance with the Commission's rules; and

(ii) The video programmers' programs either satisfy the caption quality standards of paragraph (j)(2) of this section; or in the ordinary course of business, the video programmer has adopted and follows the Best Practices set forth in paragraph (k)(1) of this section.

(2) (i) If all of video programmer's programs are exempt from the closed captioning rules under one or more of the exemptions set forth in this section, in lieu of the certification required by paragraph (m)(1) of this section, the video programmer shall submit a certification to the Commission through a web form located on the Commission's website stating that all of its programs are exempt from the closed captioning rules and specify each category of exemption claimed by the video programmer.

(ii) If some of a video programmer's programs are exempt from the closed captioning rules under one or more of the exemptions set forth in this section, as part of the certification required by paragraph (m)(1) of this section, the video programmer shall include a certification stating that some of its programs are exempt from the closed captioning rules and specify each category of exemption claimed by the video programmer.

(3) A television broadcast station licensed pursuant to part 73 of this chapter or a low power television broadcast station licensed pursuant to part 74 subpart G of this chapter, or the owner of either such station, is not required to provide a certification for video programming that is broadcast by the television broadcast station.

APPENDIX C

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ Initial Regulatory Flexibility Analyses (IRFAs) were incorporated in the FNPRMs contained in the *Closed Captioning Quality Order and Further Notice*² and the *Closed Captioning Quality Second Further Notice*.³ The Commission sought written public comment on the proposals in the two *Further Notices*, including comment on the two IRFAs. No comments were received on the IRFAs incorporated in the two *Further Notices*. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.⁴ The Second Report and Order and FRFA (or summaries thereof) will be published in the Federal Register.⁵

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

2. The purpose of this proceeding is to apportion the responsibilities of VPDs and video programmers with respect to the provision and quality of closed captions⁶ on television programming to ensure that people who are deaf and hard of hearing have full access to such programming. The Second Report and Order follows the Commission's adoption in 2014 of captioning quality standards for programming shown on television⁷ and makes certain modifications to the closed captioning rules after consideration of the comments and reply comments received in response to the *Closed Captioning Quality Further Notice* and the *Closed Captioning Quality Second Further Notice*.

3. In the *Closed Captioning Quality Order* the Commission adopted, among other things, non-technical captioning quality standards pertaining to the accuracy, synchronicity, program completeness and placement of captions. The Commission also adopted a set of "best practices" for video programmers, captioning vendors and captioners. The rules adopted in this order required VPDs to make best efforts to obtain certifications from the video programmers from which they receive programming attesting that the video programmers (1) comply with the captioning quality standards, (2) adhere to the video programmer Best Practices, or (3) are exempt from the closed captioning rules under one or more properly attained and specified exemptions.

4. In the *Closed Captioning Quality Further Notice* the Commission sought comment on, among other things, (1) whether the Commission should impose some responsibilities for compliance with the Commission's closed captioning quality rules on video programmers and other entities; (2) whether to require that all contact information already required to be submitted by VPDs to the Commission for the VPD registry be submitted using the Commission's web form system only; and (3)

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

² *Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc. Petition for Rulemaking*, CG Docket No. 05-231, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 2221 (2014) (*Closed Captioning Quality Order and Further Notice*). References are to the *Closed Captioning Quality Order* when discussing parts of the Report and Order, and to the *Closed Captioning Quality Further Notice* when discussing parts of the Further Notice of Proposed Rulemaking.

³ *Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc. Petition for Rulemaking*, CG Docket No. 05-231, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 105088 (2014) (*Closed Captioning Quality Second Further Notice*).

⁴ See 5 U.S.C. § 604.

⁵ See 5 U.S.C. § 604(b).

⁶ 47 CFR § 79.1.

⁷ See *supra* *Closed Captioning Quality Order*.

how to amend the Commission's rules regarding the forwarding of consumer complaints to ensure subscriber privacy when the VPD receiving an informal complaint is not the responsible party. In the *Second Closed Captioning Quality Further Notice*, the Commission sought comment on whether to require video programmers to file contact information and certifications of captioning compliance with the Commission, and whether any other means would make video programmer contact information and certifications more widely available to consumers, VPDs, and other interested parties.

5. In this Second Report and Order, the Commission addresses various issues raised in the *Closed Captioning Quality Further Notice* by amending its rules to assign responsibility for the *quality* of closed captioning to VPDs and video programmers,⁸ with each entity responsible for closed captioning issues that are primarily within its control. Additionally, the Commission maintains current rules that place primary responsibility for the *provision* of closed captioning on television programming on VPDs, but amends them to hold video programmers responsible for a lack of captions where they have failed to provide captions on non-exempt programs. Also, the Commission adopts rules to: (1) require each video programmer to file with the Commission a certification that (a) the video programmer (i) is in compliance with the rules requiring the inclusion of closed captions, and (ii) either is in compliance with the captioning quality standards or has adopted and is following related Best Practices; or (b) is exempt from the captioning obligations; if the latter certification is submitted, the video programmer must specify the specific exemptions claimed; (2) allow each VPD to satisfy its obligations regarding the provision of closed captioning by ensuring that each video programmer whose programming it carries has certified its compliance with the Commission's closed captioning rules; (3) revise the procedures for receiving, serving, and addressing television closed captioning complaints in accordance with a burden-shifting compliance model;⁹ (4) establish a compliance ladder for the Commission's television closed captioning requirements that provides VPDs and video programmers with opportunities to take corrective action prior to enforcement action by the Commission; (5) require that each VPD use the Commission's web form when providing contact information to the VPD registry; and (6) require each video programmer to register with the Commission its contact information for the receipt and handling of written closed captioning complaints, and to use the Commission's web form for this purpose.

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

6. No comments were filed in response to the two IRFAs.

C. Description and Estimate of the Number of Small Entities Impacted

7. The SBA requires 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.¹⁰ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹¹ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹² A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.¹³

8. *Small Businesses, Small Organizations, and Small Governmental Jurisdictions.* Our

⁸ A video programmer is "[a]ny entity that provides video programming that is intended for distribution to residential households including, but not limited to, broadcast or nonbroadcast television networks and the owners of such programming," 47 CFR § 79.1(a)(9).

⁹ See Second Report and Order, section II.B.

¹⁰ See also 5 U.S.C. § 604(a)(4).

¹¹ 5 U.S.C. § 601(6).

¹² See 5 U.S.C. § 601(3); 15 U.S.C. § 632.

¹³ 5 U.S.C. § 632.

action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards that encompass entities that could be directly affected by the proposals under consideration.¹⁴ As of 2009, small businesses represented 99.9% of the 27.5 million businesses in the United States, according to the SBA.¹⁵ Additionally, a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”¹⁶ Nationwide, as of 2007, there were approximately 1,621,315 small organizations.¹⁷ Finally, the term “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”¹⁸ Census Bureau data for 2007 indicate that there were 89,527 governmental jurisdictions in the United States.¹⁹ We estimate that, of this total, as many as 88,761 entities may qualify as “small governmental jurisdictions.”²⁰ Thus, we estimate that most governmental jurisdictions are small.

9. *Cable Television Distribution Services.* These services have been included within the broad economic census category of Wired Telecommunications Carriers, which is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired 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 services. By exception, establishments providing satellite television distribution services on facilities and infrastructure that they operate are included in this industry.”²¹ The SBA has developed a small business size standard for this category, which is all such firms having 1,500 or fewer employees.²² To gauge

¹⁴ See 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

¹⁵ See SBA, Office of Advocacy, “Frequently Asked Questions,” available at <https://www.sba.gov/advocacy/frequently-asked-questions-about-small-business>.

¹⁶ 5 U.S.C. § 601(4).

¹⁷ INDEPENDENT SECTOR, THE NEW NONPROFIT ALMANAC & DESK REFERENCE (2010).

¹⁸ 5 U.S.C. § 601(5).

¹⁹ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, Table 427 (2007).

²⁰ The 2007 U.S. Census data for small governmental organizations are not presented based on the size of the population in each organization. There were 89,476 local governmental organizations in 2007. If we assume that county, municipal, township and school district organizations are more likely than larger governmental organizations to have populations of 50,000 or less, the total of these organizations is 52,095. If we make the same assumption about special districts, specifically that they are likely to have a population of 50,000 or less, and also assume that special districts are different from county, municipal, township, and school districts, there were 37,381 special districts. As a basis of estimating how many of the 87,476 local government organizations were small, in 2011, we note that there were a total of 715 cities and towns (incorporated places and minor civil divisions) with populations over 50,000. CITY AND TOWNS TOTALS: VINTAGE 2011 U.S. Census Bureau, *available at* <http://www.census.gov/popest/data/cities/totals/2011/index.html>. If we subtract the 715 cities and towns that exceed the 50,000 population threshold, we conclude that approximately 88,761 are small. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, Table 427 (2007).

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

²² See 13 CFR § 121.201, NAICS code 517110 (2014).

small business prevalence for the Cable Television and Distribution service, the Commission relies on data from the U.S. Census Bureau for the year 2007, the most recent year currently available. According to that source, there were 3,188 Wired Telecommunications Carrier firms that operated for the entire year in 2007.²³ Of these, 3,144 operated with less than 1,000 employees.²⁴ Thus, under this category and the associated Wired Telecommunications Carriers small business size standard, the majority of firms can be considered small.

10. *Cable Companies and Systems (Rate Regulation)*. The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.²⁵ Industry data indicate that there are currently 4,600 active cable systems in the United States.²⁶ Of this total, all but nine cable operators nationwide are small under the 400,000-subscriber size standard.²⁷ In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers.²⁸ Current Commission records show 4,600 cable systems nationwide. Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records.²⁹ Thus, under this standard as well, we estimate that most cable systems are small entities.

11. *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 There are approximately 52,403,705 cable video subscribers in the United States.³¹ Accordingly, an operator serving fewer than 524,037 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. Based on available data, we find that all but nine incumbent cable

²³ The Census Bureau conducts the Economic Census, an official five-year measure of American business and economy, for years ending in '2' and '7.' <http://factfinder.census.gov/faces/nav/jsf/pages/programs.xhtml?program=econ> (last visited October 16, 2015). In December 2013, the Census Bureau began publishing the Advance Report of the 2012 Economic Census, which provides the preliminary totals for all economic sectors, and the U.S. Census Bureau will publish additional results from the 2012 Economic Census over the next few years. See U.S. Census Bureau, Data Release Schedule – 2012 Economic Census, <http://www.census.gov/econ/census/schedule/> (last visited October 16, 2015). Currently, the American FactFinder, which provides comprehensive data from Census Bureau censuses and surveys, contains all data from the 2007 Economic Census, but not the 2012 Economic Census. U.S. Census Bureau, Data Release Schedule – 2007 Economic Census, <http://www.census.gov/econ/census/schedule/>.

²⁴ See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

²⁵ 47 C.F.R. § 76.901(e).

²⁶ August 15, 2015 Report from the Media Bureau based on data contained in the Commission's Cable Operations and Licensing System (COALS). See www.fcc.gov/coals.

²⁷ See SNL KAGAN at <https://snl.com/interactiveX/topCableMSOs.aspx?period=2015Q1&sortcol=subscribersbasic&sortorder=desc>.

²⁸ 47 C.F.R. § 76.901(c).

²⁹ See *supra* note 27 (SNL KAGAN).

³⁰ 47 U.S.C. § 543(m)(2); see also 47 CFR § 901(f) and nn.1-3.

³¹ See SNL KAGAN at www.snl.com/Interactivex/TopCableMSOs.aspx.

operators are small entities 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 at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act. Accordingly, an operator serving fewer than 524,037 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.³⁴ Based on available data, we find that all but nine incumbent operators are small.

12. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. DBS, by exception, is now included in the SBA’s broad economic census category of Wired Telecommunications Carriers, which was developed for small wireline firms.³⁵ Under this category, the SBA deems a Wired Telecommunications Carrier to be small if it has 1,500 or fewer employees.³⁶ Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.³⁷ Each currently offers subscription services. DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

13. *Wireless Cable Systems – Broadband Radio Service and Educational Broadband Service.* Wireless cable systems use the Broadband Radio Service (BRS)³⁸ and Educational Broadband Service

³² *Id.*

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 CFR § 76.901(f).

³⁴ *See* 47 CFR § 901(f) and nn.1-3.

³⁵ *See* 13 CFR § 121.201, NAICS code 517110 (2012). The 2012 NAICS definition of the category of “Wired Telecommunications Carriers” is discussed under Cable Television Distribution Service, *supra* para. 9; *see also* SNL KAGAN at <https://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx>.

³⁶ For the complete definition of this category and current data on the number of firms operating in this category, *see supra* para. 9 (the discussion under “Cable Television Distribution Services”).

³⁷ *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10507, para. 27 (2013) (*15th Annual Competition Report*). As of June 2012, DIRECTV was the largest DBS operator and the second largest MVPD in the United States, serving approximately 19.9 million subscribers. On July 24, 2015, the Commission granted, subject to conditions, the applications of AT&T Inc., and DIRECTV for Commission consent to the transfer of control of various Commission licenses and other authorizations from DIRECTV to AT&T pursuant to Section 310(d) of the Communications Act of 1934, as amended. *See Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Memorandum Opinion and Order, 30 FCC Rcd 9131 (2015). DISH Network was the second largest DBS operator and the third largest MVPD, serving approximately 14.1 million subscribers. *15th Annual Competition Report*, 28 FCC Rcd at 10507, para. 27, 10546, paras. 110-11.

³⁸ 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, para. 7 (1995) (*1995 BRS Filing Procedures Order*).

(EBS)³⁹ 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.⁴⁰ 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.⁴¹ 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 BTA areas.⁴² 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.⁴³ Auction 86 concluded in 2009 with the sale of 61 licenses. 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.⁴⁴

14. 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 (EBS). However, EBS programming is exempt from the Commission's captioning requirements pursuant to section 79.1(d)(7) of the Commission's rules.⁴⁵

15. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.⁴⁶ The OVS framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.⁴⁷ The OVS framework

³⁹ EBS was previously referred to as the Instructional Television Fixed Service (ITFS). *See id.*

⁴⁰ *See Id.* at 9668-9669, paras. 191-92.

⁴¹ 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 for Wired Telecommunications Carriers. *See* 13 CFR § 121.201, NAICS code 517110 (2014). For the complete definition of this category and current data on the number of firms operating in this category, *see supra* para. 9 (discussion under "Cable Television Distribution Services").

⁴² *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).

⁴³ *Id.* at 3296.

⁴⁴ *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).

⁴⁵ 47 CFR § 79.1(d)(7).

⁴⁶ *See* 47 U.S.C. § 573.

⁴⁷ 47 U.S.C. § 571(a)(3)-(4). *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, 24 FCC Rcd 542, 606, para. 135 (2009) (13th Annual Competition Report).

provides opportunities for the distribution of video programming other than through cable systems. Although some entities have filed for certifications to operate OVS systems, the Commission believes that most OVS subscribers are included in cable MVPD subscriber data, and the Commission does not have a way to count them separately.⁴⁸ 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 firms having 1,500 or fewer employees.⁵¹ To gauge small business prevalence for the OVS service, the Commission relies on data from the U.S. Census for the year 2007, the most recent year currently available. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees.⁵² Based on this data, the majority of OVS firms can be considered small.

16. *Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than \$38.5 million in annual receipts.⁵³ Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound. These establishments operate 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 stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources.”⁵⁴ The Commission has estimated the number of licensed full power commercial television stations to be 1,785.⁵⁵ To gauge the number of broadcast stations that are owned by small businesses, the Commission relies on data from the U.S. Census for the year 2007, the most recent year currently available. According to that source, there were 2,110 television broadcasting establishments in 2007. Of these, 857 establishments had annual receipts of \$25 million or less.⁵⁶ Based on this data, approximately 41% of television stations can be considered small. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business control affiliations must be included.⁵⁷ Because many of these stations may be held by large group owners, and the revenue figures on which our

⁴⁸ *15th Annual Competition Report*, 28 FCC Rcd at 10509, para. 32.

⁴⁹ See 47 U.S.C. § 573.

⁵⁰ U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁵¹ 13 CFR § 121.201, NAICS code 517110 (2014).

⁵² See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

⁵³ See 13 CFR § 121.201, NAICS Code 515120 (2014).

⁵⁴ U.S. Census Bureau, 2012 NAICS Definitions “515120 Television Broadcasting,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁵⁵ See *Broadcast Station Totals as of June 30, 2015*, News Release, July 8, 2015 (*Broadcast Station Totals*), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-334266A1.pdf.

⁵⁶ See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Receipts Size of Establishments for the United States: 2007, NAICS code 51512, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ1&prodType=table. We recognize that this total differs from that contained in *Broadcast Station Totals*; however, we are using the U.S. Census Bureau estimate for purposes of this revenue comparison.

⁵⁷ “[Business concerns] are affiliates of each other when one controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 CFR § 121.103(a)(1).

estimate is based does not include or aggregate revenues from control affiliates, our estimate likely overstates the number of small entities that might be affected by our action.

17. The Commission has estimated the number of licensed noncommercial educational (NCE) full power television stations to be 394.⁵⁸ The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities. There are also 422 Class A television stations and 1,920 low power television stations (LPTV).⁵⁹ Given the nature of these services, the Commission will presume that all Class A television and LPTV licensees qualify as small entities under the SBA definition, even though a number of these stations may be owned by entities that do not qualify as small entities.

18. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation.⁶⁰ The Commission is unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and is therefore over-inclusive to that extent. Also as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated.⁶¹ The Commission notes that it is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

19. *Incumbent Local Exchange Carriers (ILECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for ILECs. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees⁶² and “is not dominant in its field of operation.”⁶³ The SBA’s Office of Advocacy contends that, for RFA purposes, small ILECs are not dominant in their field of operation because any such dominance is not “national” in scope.⁶⁴ The Commission has therefore included small ILECs in this RFA analysis, although the Commission emphasizes that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

20. Census Bureau data for 2007, the most recent year currently available, show that there were 3,188 firms in the Wired Telecommunications Carriers category that operated for the entire year. Of this total, 3,144 had employment of fewer than 1,000 employees.⁶⁵ According to Commission data, 1,307

⁵⁸ See *supra* note 55 (*Broadcast Station Totals*).

⁵⁹ See *id.*

⁶⁰ 5 U.S.C. § 632.

⁶¹ *Id.*

⁶² 13 CFR § 121.201, NAICS Code 517110 (2014). For the complete definition of this category and current data on the number of firms operating in this category, see *supra* para. 9 (discussion under “*Cable Television Distribution Services*”).

⁶³ 15 U.S.C. § 632.

⁶⁴ 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 CFR § 121.102(b).

⁶⁵ See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

carriers have reported that they are engaged in the provision of ILEC services.⁶⁶ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees.⁶⁷ Consequently, the Commission estimates that most providers of ILEC service are small entities. The Commission estimates that three large ILECs, each of which employ more than 1,500 people, currently provide video programming.⁶⁸

21. *Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees⁶⁹ and “is not dominant in its field of operation.”⁷⁰ Census Bureau data for 2007, the most recent year currently available, show that there were 3,188 firms in the Wired Telecommunications Carriers category that operated for the entire year. Of this total, 3,144 had employment of fewer than 1,000 employees.⁷¹ According to Commission data, 1,442 carriers reported that they were engaged in the provision of either CLEC services or CAP services. Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.⁷² In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees. Seventy-two carriers have reported that they are Other Local Service Providers, and of the 72, 70 have 1,500 or fewer employees and 2 have more than 1,500 employees.⁷³ Consequently, most CLECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers can be considered small entities.

22. *Electric Power Distribution Companies.* These entities can provide video services over power lines (BPL).⁷⁴ The Census Bureau defines Electric Power Distribution companies as “electric power establishments primarily engaged in either (1) operating electric power distribution systems (*i.e.*, consisting of lines, poles, meters, and wiring) or (2) operating as electric power brokers or agents that arrange the sale of electricity via power distribution systems operated by others.”⁷⁵ These types of MVPDs serve few subscribers and their subscriber base is declining.⁷⁶ To gauge small business

⁶⁶ See *id.*

⁶⁷ See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf.

⁶⁸ See 15th Annual Competition Report, 28 FCC Rcd at 10549-10551, paras. 118-124; *Trends in Telephone Service* at Table 5.3.

⁶⁹ 13 CFR § 121.201, NAICS Code 517110 (2014). For the complete definition of this category and current data on the number of firms operating in this category, see the discussion under “*Cable Television Distribution Services*,” *supra*.

⁷⁰ 15 U.S.C. § 632.

⁷¹ See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

⁷² See *Trends in Telephone Service* at Table 5.3.

⁷³ See *id.*

⁷⁴ See *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems; Carrier Current Systems, Including Broadband Over Power Line Systems*, 19 FCC Rcd 21265 (2004); *Trends in Telephone Service* at Table 5.3.

⁷⁵ U.S. Census Bureau, 2007 NAICS Definitions, 221122 Electric Power Distribution, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁷⁶ See 15th Annual Competition Report, 28 FCC Rcd at 10508-09, para. 31.

prevalence in the Electric Power Distribution category, the Commission relies on data from the U.S. Census Bureau for the year 2007, the most recent year currently available. The SBA has developed a small business size standard for this category, which is all such firms having 1,000 or fewer employees.⁷⁷ Census Bureau data for 2007 show that there were 1,174 firms that operated for the entire year in this category. Of these firms, 1,124 had fewer than 1,000 employees.⁷⁸ Accordingly, a majority of these firms can be considered small.

23. *Cable and Other Subscription Programming.* According to The U.S. Census, “[T]his 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.”⁷⁹ To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data from the Census Bureau for the year 2007, the most recent year currently available. The size standard established by the SBA for this business category is that annual receipts of \$38.5 million or less determine that a business is small.⁸⁰ According to 2007 Census Bureau data there were 396 firms that were engaged in production of Cable and Other Subscription Programming. Of these, 349 had annual receipts below \$25 million.⁸¹ Thus in this category, and under the applicable size standard, the majority of firms 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.”⁸² 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 or distribute programming for VPDs. To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data from the Census Bureau for the year 2007, the most recent year currently available. The size standard established by the SBA for this business category is that annual receipts of \$32.5 million or less determine that a business is small.⁸³ According to 2007 Census Bureau data, there were 9,095 firms that were engaged in Motion Picture and Video Production. Of these, 8,995 had annual receipts of less than \$25 million.⁸⁴ Thus, under this category and associated small business size standard, the majority of firm.

⁷⁷ 13 CFR § 121.201, NAICS Code 221122 (2014).

⁷⁸ http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_22SSSZ5&prodType=table.

⁷⁹ U.S. Census Bureau, 2012 NAICS Definitions, 515210 Cable and Other Subscription Programming, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515210&search=2012>.

⁸⁰ 13 C.F.R. § 121.201, NAICS Code 515210 (2014).

⁸¹ See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2007, NAICS code 515210, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table.

⁸² U.S. Census Bureau, 2012 NAICS Definitions, NAICS Code 512110, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁸³ 13 C.F.R. § 121.201, NAICS Code 512110 (2014).

⁸⁴ See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2007, NAICS code 515210, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table.

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

26. *Teleproduction and Other Postproduction Services.* According to the U.S. Census, this industry “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.”⁸⁵ The relevant size standard for small businesses in these services is annual revenue of less than \$32.0 million.⁸⁶ For this category, Census Bureau data for 2007, the most recent year currently available, indicate that there were 1,605 firms that operated in this category for the entire year. Of that number, 1,537 had annual receipts totaling less than \$25 million.⁸⁷ Consequently, we estimate that the majority of Teleproduction and Other Postproduction Services firms are small entities.

27. *Court Reporting and Stenotype Services.* According to the U.S. Census, this industry “comprises establishments primarily engaged in providing verbatim reporting and stenotype recording of live legal proceedings and transcribing subsequent recorded materials.”⁸⁸ The size standard for small businesses in these services is annual revenue of less than \$15 million.⁸⁹ For this category, Census Bureau data for 2007 show that there were 2,868 firms that operated for the entire year. Of this total, 2,947 had annual receipts of under \$10 million.⁹⁰ Consequently, we estimate that the majority of Court Reporting and Stenotype Services firms are small entities.

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

28. Certain rule changes adopted in the Second Report and Order modify rules or add requirements governing reporting, recordkeeping and other compliance obligations. In the Second Report and Order, the Commission takes the following actions to improve the quality of closed captions:

- Adopts rules to require each video programmer to file with the Commission a certification that: (a) the video programmer is in compliance with the rules requiring the inclusion of closed captions, and either is in compliance with the captioning quality standards or has adopted and is following related Best Practices; or (b) is exempt from the captioning obligations; if the latter certification is submitted, the video programmer must specify the specific exemptions claimed;
- Revises the procedures for receiving, serving, and addressing television closed captioning complaints in accordance with a burden-shifting compliance model;
- Establishes a compliance ladder for certain of the Commission’s television closed captioning

⁸⁵ U.S. Census Bureau, 2007 NAICS Definitions, “512191 Teleproduction and Other Postproduction Services,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?>

⁸⁶ 13 CFR § 121.201, NAICS Code 512191 (2014).

⁸⁷ See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Receipts Size of Firms for the United States: 2007, NAICS code 512191, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table.

⁸⁸ U.S. Census, 2007 NAICS definitions, NAICS Code 561492, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁸⁹ 13 CFR § 121.201, NAICS Code 561492 (2014).

⁹⁰ http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ1&prodType=table.

requirements that provides VPDs and video programmers with opportunities to take corrective action prior to enforcement action by the Commission;

- Requires that each VPD use the Commission's web form when providing contact information to the VPD registry; and
- Requires each video programmer to register with the Commission its contact information for the receipt and handling of written closed captioning complaints, and to use the Commission's web form for this purpose.

29. The Second Report and Order amends the Commission's rules to require video programmers to ensure that closed captioning data provided to VPDs complies with the Commission's closed captioning quality standards while maintaining requirements for VPDs to pass through programming with that data intact. As a practical matter, video programmers have generally been the parties to prepare the captions of programming delivered to VPDs. This action will, by Commission rule, make video programmers responsible for captioning quality problems that stem from captioning production as well as transmission of the caption files to the VPDs and will leave VPDs responsible for closed captioning quality problems resulting from the VPDs' faulty equipment or the failure to pass through captioning data intact. These rule changes will allow both VPDs and video programmers to focus their resources on that part of the process that are primarily within their respective control. Although the Second Report and Order modifies reporting and recordkeeping requirements with respect to video programmer certifications, it will impose no new or additional requirements in this regard because the new rules will require video programmers to file certifications with the Commission rather than making them widely available as required under the current rules. With regard to compliance obligations, this action assigns compliance requirements more equitably between VPDs and video programmers.

30. The Second Report and Order modifies the complaint process by adopting a burden-shifting compliance model, which is consistent with the newly adopted assignment of responsibilities to VPDs and video programmers. The Commission concluded that this model ensures that the party most able to remedy the captioning issue will have the responsibility to fix the problem. This will expedite complaint resolution and result in more effective results.

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

31. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."⁹¹

32. In amending our closed captioning rules, we believe that we have minimized the effect on small entities while making television programming more accessible to persons who are deaf and hard of hearing. The Commission does not establish different compliance or reporting requirements or timetables with respect to small entities, because, as discussed herein, the importance of ensuring that video programming is accessible to people who are deaf and hard of hearing outweighs the small burdens associated with the new or different regulatory requirements adopted in the Second Report and Order. Nevertheless, the Commission already has in place twelve categorical exemptions from its closed captioning requirements, including exemptions intended to benefit small entities,⁹² and any entity,

⁹¹ 5 U.S.C. §§ 603(c)(1)-(4).

⁹² See 47 CFR § 79.1(d). In particular, there is an exemption for channels or streams producing revenues under \$3 million, 47 CFR § 79.1(d)(12), and no video programming provider is required to expend any money to caption

(continued....)

including a small entity, may file a request for exemption based upon economic burden.⁹³ In addition, the Commission's captioning rules generally use performance rather than design standards, and the Commission will publish a compliance guide to explain the new rules to small businesses. The approach taken herein is consistent with the Congressional goal of increasing the availability of captioned programming while preserving the diversity of available programming.

33. The new rules assign responsibilities between VPDs and video programmers in a fair and equitable manner. Specifically, in regard to the *quality* of closed captioning on television, VPDs and video programmers are each responsible for closed captioning issues that are primarily within their respective control. The Second Report and Order maintains current rules that place primary responsibility for the *provision* of closed captioning on television programming on VPDs, but also holds video programmers responsible for a lack of captions where they have failed to provide captions on non-exempt programs. Although assigning some direct responsibility for the provision and quality of closed captioning to video programmers imposes some new regulatory requirements on small entities that are video programmers, it will relieve burdens on small entities that are VPDs, because the Commission will be able to take direct compliance and enforcement action against video programmers rather than indirect action through VPDs.

34. The requirement for video programmers to file certifications with the Commission regarding compliance with the Commission's rules on the provisioning and quality of closed captioning imposes different reporting and recordkeeping obligations than currently required of video programmers, including small entities. However, the new rules do not impose additional burdens, because video programmers are required under the existing rules to provide certifications to VPDs and to make such certifications widely available under the Commission's rules.⁹⁴ The new rules may ease the burden on video programmers, because video programmers will know to go directly to the Commission's website to provide certification and will not need to determine how to make such certification widely available. In addition, the new rules will ease the burden on VPDs, including small entities, and consumers by having all certifications in one easy to find place.

35. The revised procedures for receiving, serving, and addressing closed captioning complaints in accordance with a burden-shifting compliance model imposes different procedural requirements on VPDs, including small entities, and new procedural requirements on video programmers, including small entities. Because the burden-shifting model calls for VPDs and video programmers to each be responsible for closed captioning issues that are within their respective control instead of placing all responsibility on VPDs, the model will ease the burden on VPDs, including small entities, who will be able to shift the burden to video programmers when, after investigation, the VPD determines that the cause of the captioning problem was within the control of the video programmer. This approach will also allow the Commission to more directly and more easily address consumer complaints, thereby benefitting consumers.

36. The establishment of a compliance ladder for the Commission's closed captioning quality requirements, a process that provides VPDs and video programmers, including small entities, with opportunities to take corrective action prior to enforcement action by the Commission for certain captioning violations, will ease the burden on VPDs and video programmers, including small entities, because use of the compliance ladder will be more informal and less time-consuming than a formal enforcement proceeding.

37. The requirement that all contact information submitted by VPDs to the Commission for

(Continued from previous page) _____
video programming in excess of two percent of its gross revenues received from the channel during the prior calendar year. 47 CFR § 79.1(d)(11).

⁹³ See 47 CFR § 79.1(f).

⁹⁴ See 47 CFR § 79.1(j)(1) and (k)(1)(iv); see also *id.* § 79.1(g)(6).

the VPD registry⁹⁵ must be submitted using the Commission's web form system does not subject VPDs, including small entities, to additional reporting and recordkeeping requirements, because VPDs are already required to submit their contact information to the Commission. However, VPDs, including small entities, may be required to alter their reporting and recordkeeping associated with such submissions in order to comply with the rule. The Commission considers the cost for VPDs to transition to a mandatory web form method of filing to be minimal as compared with the ease and accuracy of filing and the benefits to the public derived from a mandatory web form system.

38. The requirement for video programmers to register and file contact information with the Commission imposes new reporting and recordkeeping obligations on video programmers, including small entities. However, the new requirement takes into consideration the impact on small entities. The filing of contact information is a simple task that should take no more than a few minutes. In addition, such requirements may benefit other entities, such as VPDs, including small entities, and consumers, who will be able to search the registration information for contact information.

F. Federal Rules Which Duplicate, Overlap, or Conflict With, the Commission's Proposals

39. None

⁹⁵ See 47 CFR § 79.1(i)(3).

**STATEMENT OF
CHAIRMAN TOM WHEELER**

Re: Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc. Petition for Rulemaking, CG Docket No. 05-231.

Closed captioning is crucial for ensuring that our televised media are fully accessible to people who are deaf and hard of hearing.

The provision of closed captioning depends upon the coordination of both video programmers and video programming distributors (VPDs) to both generate and deliver high quality caption content to viewers. To date, however, only VPDs have been directly subject to the Commission's closed captioning rules, leaving half of the responsible parties unaccountable for the quality of their captioning.

The action we take today ensures that the legal responsibilities imposed by our rules reflect the real world responsibilities of the parties involved in bringing television to viewers' homes. Video programmers exert the most direct control over the creation of closed captions, and thus, as compared to VPDs, can exercise greater control over the non-technical quality components of closed captioning. At the same time, VPDs primarily have control over the technical aspects of captioning quality related to the pass-through and distribution of programming to end users.

The critical role that video programmers play in creating quality captioning justifies creating a new allocation of responsibility for compliance with the caption quality requirements. The shift in responsibility we adopt here, however, does not absolve VPDs of their responsibility to ensure accessible programming. This Order maintains current rules that place primary responsibility for the provision of closed captioning on television programming on VPDs, and VPDs continue to serve as principal points of contact for consumer captioning complaints.

Furthermore, upon receiving a complaint, the VPD must initially investigate it to determine the source of the problem and whether matters raised in the complaint are within its control. Only after the VPD has investigated the problem at its end, determines that the problem is not within its control, and certifies that it has exercised its due diligence will the burden shift from the VPD to the video programmer to resolve the complaint.

We believe that this new approach of shared responsibilities under our rules will greatly improve the quality of closed captions for millions of Americans who rely on this feature to understand television programming.

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc. Petition for Rulemaking, CG Docket No. 05-231.

Just over nineteen years ago the Commission adopted its first set of closed captioning rules. This decision marked a major first step in granting full access to video programming for deaf and hearing impaired citizens.

Much has changed since 1997, and today it is most fitting for us to update these rules, reflecting the insights gained from the experiences by industry, advocates and the FCC.

First, this item will place the responsibility for closed captioning quality on video programming distributors as well as video programmers. Each will be held accountable, both for the provisioning and the quality of closed captioning issues that are primarily within their control -- a common-sense update, to be sure. Video programming distributors will continue to be responsible for the provisioning of closed captioning, but now video programmers will be held responsible for the absence of captions, if they fail to provide them.

This item also enhances the transparency of compliance certifications and updates complaint procedures, whether those complaints are received by the Commission or the video programming distributor. It is my hope that these updates will not only help in compliance with our closed captioning rules but will assist in streamlining the resolution of closed captioning complaints or problems going forward.

Many thanks for this item are due to the Consumer and Governmental Affairs Bureau, most notably Karen Peltz Strauss and Eliot Greenwald.

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

Re: *Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc, Petition for Rulemaking*, CG Docket No. 05-231.

Video programmers and distributors each play an important role with respect to the provision and quality of closed captions. And today's *Order*, at its core, embraces a common-sense approach to allocating responsibility for complying with the Commission's closed captioning quality rules. A distributor will be responsible for those aspects of closed captioning quality over which it has primary control, and a programmer will be responsible for those aspects of closed captioning quality over which it has primary control.

Of course, the devil is in the details. For example, this *Order* establishes a compliance ladder for our closed-captioning quality rules, which is designed to encourage parties to quickly address and remedy problems without involving the agency's Enforcement Bureau. I had concerns about language originally in the *Order* that would have delegated to the Consumer and Governmental Affairs Bureau vast discretion to avoid the compliance ladder and refer matters directly to the Enforcement Bureau. This would have defeated the entire purpose of the compliance ladder.

Through some tough negotiations, we were able to significantly limit the possibility of evading the ladder. The compromise language may not be ideal, but it is good enough to merit my concurrence. Accordingly, I am voting to approve in part and concur in part.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY
APPROVING IN PART AND DISSENTING IN PART**

Re: Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc. Petition for Rulemaking, CG Docket No. 05-231.

A main focus of this item is to shift the burden involving the quality of closed captions from the programming distributors to the programmers themselves. While I can generally agree with the concept, I suspect it will be much messier – and therefore punitive – than what is suggested in the text. I also worry that the item doesn't make a similar shift for the burden to provide closed captions. The same logical argument for the quality shift should apply to provisioning. In any event, I will support these portions notwithstanding.

Disappointingly, the item seeps into troubling areas in at least two key places. First, the item creates an extremely convoluted mechanism by which a consumer closed captioning quality complaint could be forwarded from a video distributor to the programmer and then back again. Under this structure, the personal consumer information would be redacted before the forwarding could occur. But during consideration of an item last month, it was alleged that it was too difficult to redact the personal information for broadcasters' correspondence files, so the Chairman graciously agreed to move a separate item to eliminate the correspondence file in its entirety. How can it be that redacting personal information and the creation of a unique identifier is easy for video distributors but not for broadcasters? Doesn't anyone check these items for consistency?

Second, the item creates a three-tiered compliance ladder for the electronic newsroom technique procedures and then subsequently rejects it by establishing a special "rule allowing CGB to refer a captioning quality rule violation directly to the Enforcement Bureau for enforcement action, or for the Enforcement Bureau to pursue an enforcement action on its own, without first going through the compliance ladder..." for certain violations. Thanks to Commissioner Pai we now have a tighter standard of "intentional and deliberate" violations. Anyone want to guess how that is going to be applied by the Bureaus? Why wouldn't the compliance ladder capture such a violation? No justification is given. Instead, the item creates a fake compliance ladder that the CGB or Enforcement Bureau or both will climb over anytime they want. In essence, this creates an illusion of a thoughtful and judicious regulator, but it preserves the right to throw that out the window without any questions asked whenever the Bureaus feel like it. No thank you.