

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

In the Matter of)
)
Video Description: Implementation of the) MB Docket No. 11-43
Twenty-First Century Communications and)
Video Accessibility Act of 2010)

NOTICE OF PROPOSED RULEMAKING

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

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I. INTRODUCTION

1. Since the video description rules were reinstated, they have provided substantial benefits to persons who are blind or visually impaired by making television programming more accessible. Through video description, individuals who are blind or visually impaired can independently enjoy and follow popular television programs and be more fully included in the shared cultural experience that television offers. The Federal Communications Commission (“FCC” or “the Commission”) is now proposing revisions to our rules that would expand the availability of, and support consumer access to, video described programming. In 2011, the Commission took the initial step in expanding access to

video description, by reinstating the 2000 rules as directed by Section 202 of the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”).¹ The CVAA gives the Commission authority, subject to certain limitations, to issue additional regulations, if the benefits of doing so outweigh the costs.² As discussed in greater detail below, we tentatively conclude that the substantial benefits for individuals who are blind or visually impaired outweigh the likely minimal costs of the proposals we make in this *Notice of Proposed Rulemaking*.³

2. Specifically, we propose the following revisions to our video description rules:
 - An increase in the amount of described programming on each included network⁴ carried by a covered broadcast station or multichannel video programming distributor (“MVPD”), from 50 hours per calendar quarter to 87.5;
 - An increase in the number of included networks carried by covered distributors, from four broadcast and five nonbroadcast networks to five broadcast and ten nonbroadcast networks;
 - Adoption of a no-backsliding rule, which would ensure that once a network is designated an “included network” required to provide description, it would remain an “included network” even if it falls out of the top five or top ten ranking;
 - Removal of the threshold requirement that nonbroadcast networks reach 50 percent of pay-TV (or MVPD) households in order to be subject to inclusion;
 - A requirement that covered distributors provide dedicated customer service contacts who can answer questions about video description; and
 - A requirement that petitions for exemptions from the video description requirements, together with comments on or objections to such petitions, be filed with the Commission electronically.⁵

We seek comment on our tentative conclusion regarding the costs and benefits of these proposed rules, on the proposed rules themselves, on appropriate timelines for the proposed rules, and on other possible changes to the rules to ensure that blind and visually impaired consumers have access to television programming.

II. BACKGROUND

3. The CVAA was enacted on October 8, 2010 for the purpose of ensuring that individuals with disabilities are able to fully utilize modern communications services and equipment and to better access video programming.⁶ As part of this legislation, Congress mandated that the Commission reinstate its previously adopted video description rules for television programming, required periodic reports on issues related to video description, and granted the Commission continuing authority to adopt additional

¹ *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 26 FCC Rcd 11847, 11849, para. 3 (2011) (“2011 Order”). See also *infra* Section II.

² Pub. L. No. 111-260, 124 Stat. 2751, § 202 (2010). See 47 U.S.C. § 613(f)(4).

³ See *infra* Section III.

⁴ An “included network” is a network carried on a programming stream or channel on which a broadcaster or MVPD is required to provide video description.

⁵ See *infra* Sections IV and V, and Appendix A.

⁶ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010). See H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 19 (2010); S. Rep. No. 111-386, 111th Cong., 2d Sess. at 1 (2010).

regulations so long as the benefits of those new regulations outweigh their costs.⁷ Video description makes video programming⁸ accessible to individuals who are blind or visually impaired through “[t]he insertion of audio narrated descriptions of a television program’s key visual elements into natural pauses between the program’s dialogue,”⁹ and is typically provided through the use of a secondary audio stream, which allows the consumer to choose whether to hear the narration by switching from the main program audio.

4. In August 2011, the Commission reinstated the video description regulations that previously had been adopted in 2000, requiring certain television broadcast stations and MVPDs to provide video description for a portion of the video programming that they offer to consumers on television.¹⁰ These covered broadcasters and MVPDs are required to provide video described programming only on certain networks, as defined by our rules. The Commission’s rules play a key role in affording better access to television programs for individuals who are blind or visually impaired, “enabling millions more Americans to enjoy the benefits of television service and participate more fully in the cultural and civic life of the nation.”¹¹

5. The Commission’s video description rules require commercial television broadcast stations that are affiliated with ABC, CBS, Fox, or NBC and are located in the top 60 television markets to provide 50 hours per calendar quarter of video described prime time or children’s programming.¹² In addition, MVPD systems that serve 50,000 or more subscribers must provide 50 hours of video description per calendar quarter during prime time or children’s programming on each of the top five national nonbroadcast networks that they carry on those systems.¹³ The nonbroadcast networks currently

⁷ Pub. L. No. 111-260, § 202(a); 47 U.S.C. § 613(f). The CVAA also mandated that the Chairman of the Commission establish an advisory committee known as the Video Programming Accessibility Advisory Committee (“VPAAC”), comprised of representatives from industry and consumer groups, which was directed to develop a report identifying performance objectives and technical capabilities and procedures for the provision of video description. Pub. L. No. 111-260, § 201(e)(2). The VPAAC submitted its report on video description to the Commission on April 9, 2012. See Second Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010, available at <http://vpaac.wikispaces.com>. The portion of the report that addresses video description is available at <http://vpaac.wikispaces.com/file/view/120409+VPAAC+Video+Description+REPORT+AS+SUBMITTED+4-9-2012.pdf> (“VPAAC Report: Video Description”).

⁸ “Video programming” refers to programming provided by, or generally considered comparable to programming provided by, a television broadcast station, but not including consumer-generated media. 47 U.S.C. § 613(h)(2); 47 CFR § 79.3(a)(4).

⁹ 47 CFR § 79.3(a)(3). Video description is sometimes referred to as “audio description.” See *infra* para. 39 (seeking comment on terminology).

¹⁰ 47 CFR § 79.3. See generally *2011 Order*. See also *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Notice of Proposed Rulemaking, 26 FCC Rcd 2975 (2011) (“*Reinstatement NPRM*”). Video description rules were initially adopted in 2000, but were struck down due to lack of authority. *Implementation of Video Description of Video Programming*, MM Docket No. 99-339, Report and Order, 15 FCC Rcd 15230 (2000) (“*2000 Order*”), recon. granted in part and denied in part, *Implementation of Video Description of Video Programming*, MM Docket No. 99-339, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1251 (2001), *vacated sub nom*, *Motion Picture Ass’n of Am., Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

¹¹ *2011 Order*, 26 FCC Rcd at 11848, para. 1.

¹² 47 CFR § 79.3(b)(1)-(2). See also *2011 Order*, 26 FCC Rcd at 11849, 11855-56, paras. 4, 16. Although the reinstated rules originally applied to the top 25 television markets, as of July 1, 2015, the rules were extended to the top four broadcasters in the top 60 television markets. 47 CFR § 79.3(b)(2).

¹³ 47 CFR § 79.3(b)(4). See also *2011 Order*, 26 FCC Rcd at 11849-50, para. 4. For purposes of the rules, the top five national nonbroadcast networks are defined by an average of the national audience share during prime time of nonbroadcast networks that reach 50 percent or more of MVPD households and have at least 50 hours per quarter of
(continued....)

subject to these video description requirements are USA, TNT, TBS, History, and Disney Channel.¹⁴ Any programming initially aired with video description must include video description if it is re-aired on the same station or MVPD channel, unless the station or MVPD is using the technology for another program-related purpose.¹⁵

6. The rules also impose video description “pass through” obligations on all network-affiliated broadcast stations regardless of market size, and on all MVPDs regardless of the number of subscribers. Specifically, any broadcast station affiliated or otherwise associated with a television network must pass through video description when it is provided by the network, if the station has the technical capability necessary to do so¹⁶ and if that technology is not being used for another purpose related to the programming.¹⁷ Similarly, MVPD systems of any size must pass through video description provided by a broadcast station or nonbroadcast network, if the channel on which the MVPD distributes the station or programming has the technical capability necessary to do so and if that technology is not being used for another purpose related to the programming.¹⁸ Broadcasters and MVPDs were required to be in compliance with the video description requirements beginning on July 1, 2012.¹⁹ The rules permit covered entities to seek a full or partial exemption based on economic burden; we have received no such exemption requests to date.²⁰

7. Pursuant to the direction of the CVAA, not more than two years after the completion of the phase-in of the reinstated video description rules, the Commission submitted a report to Congress with findings relating to the costs and benefits of video description “in television programming” and “in video programming distributed on the Internet.”²¹ With regard to the video description rules that are currently in place, the report concluded that “[t]he availability of video description on television programming has provided substantial benefits for individuals who are blind or visually impaired.”²² Notably, the report found that video description greatly enhances the experience of viewing video programming because viewers who are blind or visually impaired no longer miss critical visual elements of television

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prime time programming that is not live or near-live or otherwise exempt under the video description rules. 47 CFR § 79.3(b)(4). See also *2011 Order*, 26 FCC Rcd at 11854-55, paras. 12-15.

¹⁴ *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Order and Public Notice, 30 FCC Rcd 2071, 2071, para. 1 (2015) (“*Update Order*”). The list of the top five networks is updated every three years in response to any changes in ratings. 47 CFR § 79.3(b)(4). The *Update Order* was the first of these periodic updates. Absent any revision to our rules, the next update will be in effect on July 1, 2018 based on the ratings for the time period from October 2016 to September 2017, and will be announced earlier in 2018.

¹⁵ 47 CFR § 79.3(c)(3), 79.3(c)(4)(i)-(ii).

¹⁶ A station or MVPD system is technically capable of passing through video description if it has virtually all necessary equipment and infrastructure to do so, except for items that would be of minimal cost. *2011 Order*, 26 FCC Rcd at 11861, para. 27. See also *2000 Order*, 15 FCC Rcd at 15243, para. 30. We expect that all stations and MVPDs now have this capability, because of the requirement to provide audible emergency information to persons who are blind or visually impaired, which is also accomplished by means of a secondary audio stream. See *infra* note 43 and accompanying text.

¹⁷ 47 CFR § 79.3(b)(3). See also *2011 Order*, 26 FCC Rcd at 11850, 11858-59, paras. 4, 20.

¹⁸ 47 CFR § 79.3(b)(5)(i)-(ii). See also *2011 Order*, 26 FCC Rcd at 11850, 11858-59, paras. 4, 20.

¹⁹ *2011 Order*, 26 FCC Rcd at 11864, para. 34.

²⁰ 47 CFR § 79.3(d). See also *2011 Order*, 26 FCC Rcd at 11868, para. 43. See also *infra* note 44 and accompanying text.

²¹ *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report to Congress, 29 FCC Rcd 8011 (2014) (“*2014 Report*”). See 47 U.S.C. § 613(f)(3).

²² *2014 Report*, 29 FCC Rcd at 8011, para. 1.

programming and, therefore, can fully understand and enjoy the program without having to rely on their sighted family members and friends to narrate these visual elements.²³ Commenters expressed that this ability to watch video programming independently is an incredibly important benefit of video description.²⁴ In addition, the report found that “industry appears to have largely complied with their responsibilities under the Commission’s 2011 rules,”²⁵ and that the rules have been implemented without exceptional or unexpected costs.²⁶ It also found, however, that “consumers report the need for increased availability of and easier access to video-described programming.”²⁷ With respect to video programming distributed on the Internet, the report found that there would be substantial benefits to wider availability, but that there were potential technical challenges and insufficient information to analyze costs.²⁸ In February of 2016, the Video Description Working Group of the Video Programming Subcommittee of the FCC’s Disability Advisory Committee released a list of recommended issues for our consideration; those issues are addressed throughout the item.²⁹

III. AUTHORITY

8. *Additional Regulations and Cost/Benefit Analysis.* As discussed in more detail below, we tentatively conclude that the statutory requirement for the Commission to issue additional video description regulations is satisfied because “the need for and benefits of” providing video described programming as proposed here would be “greater than the technical and economic costs” if the rules are adopted. The statute grants the Commission “continuing authority” to regulate the provision of video described programming.³⁰ Our continuing authority, however, is contingent on a finding that the benefits of additional video described programming outweigh the costs. Specifically, we may issue “additional regulations” if we determine that “the need for and benefits of” any video described programming required by the new rules “are greater than the technical and economic costs.”³¹ Furthermore, Congress directed us not to make such a determination until at least two years after release of the *2014 Report*.³² We therefore will take full consideration of the Report’s findings, as well as the comments in this proceeding, when determining the relative costs and benefits of adopting additional requirements.

9. The *2014 Report* found that “[v]ideo description provides significant benefits to individuals who are blind or visually impaired” by allowing “them greater independence and the ability to follow and understand television programs.”³³ One commenter to the proceeding expressed that she enjoys video description immensely when it is available because “[m]ost television shows are pointless to me unless I have description.”³⁴ Commenters who provided input for the Report described how video description allows them to directly follow the visual elements of television programming, including

²³ *Id.* at 8017-18, paras. 14-15.

²⁴ *Id.* at 8018, para. 15.

²⁵ *Id.* at 8011, para. 1.

²⁶ *Id.* at 8013, para. 3.

²⁷ *Id.* at 8011, para. 1.

²⁸ *Id.* at 8013-14, para. 3.

²⁹ *Recommendation of the FCC Disability Advisory Committee, Video Description Working Group of the Video Programming Subcommittee*, MB Docket 11-43 (Feb. 23, 2016) (“DAC Letter”).

³⁰ 47 U.S.C. § 613(f)(4). *See also 2011 Order*, 26 FCC Rcd at 11858, n.88 (observing that the Commission has “the authority to expand these rules, but only after the passage of time and a review of their impact”).

³¹ 47 U.S.C. § 613(f)(4)(A).

³² *Id.* As a result, the earliest the Commission can issue additional regulations is June 30, 2016.

³³ *2014 Report*, 29 FCC Rcd at 8012-13, para. 3.

³⁴ *Id.* at 8018, n.40 (citing Reply Comments of Rhonda Hornbacher to the 2014 Report Proceeding at 1).

“expressions, scene changes, visual jokes, and even things like visual clues in a murder mystery.”³⁵ For example, one commenter noted that without video description “I’d just hear exciting music and have to guess what was happening, but now I can hear how the good guys caught the bad guys, or about the significant looks exchanged by two characters, or how the good guy escaped from some impossible situation. It’s great!”³⁶ Commenters explained that this information is essential for providing access to the storytelling in what is a fundamentally visual medium, including for viewers who are not blind but who still can have difficulty with small visual details.³⁷ Of arguably even more significance is the way this direct access to video programming provides greater independence to persons who are blind or visually impaired. Commenters made clear the immense value of not having to rely on spouses, family members, or friends to keep them “up to speed” on television programming. They talked about the value of being able to enjoy a program without waiting for someone else to want to watch the same thing, and “interrupt their own viewing pleasure to try to tell [them] what was going on.”³⁸ As Mr. Rodgers’ comment makes clear, the benefits of this independence accrue not just to viewers who are blind or visually impaired, but to the members of their households as well. We seek comment on whether there are any other studies or data points about the use and benefits of video description that should inform our deliberations.³⁹

10. While the benefits of video description are extensive, video description itself remains in relatively limited supply, and can be difficult to access even where it exists. The *2014 Report* noted that consumers “[o]verwhelmingly . . . desire an increased amount of video description in television programming”; have “concerns regarding the availability of information about which television programs are video-described”; and “express frustration with the quality of customer support service for video description.”⁴⁰

11. The *2014 Report* also found that there were “no significant issues with regard to the technical or creative aspects”⁴¹ of providing video description, and that

[t]he costs of video description are consistent with the expectations of industry at the time of rule adoption, and covered entities do not indicate that the costs of video description have impeded their ability to comply with the video description rules.⁴²

At the time of the *2014 Report*, these costs included the “start-up” costs of developing the technical capability to provide video description, but, as explained in the Report, every distributor should now have that technical capacity.⁴³ The costs also include the actual description of video programming. According to the National Association of Broadcasters (“NAB”), the one-time cost to have an hour of programming

³⁵ *Id.* at 8017-18, para. 14 (citing Reply Comments of Adrienne Roy to the 2014 Report Proceeding at 1).

³⁶ *Id.* at 8018, n.39 (citing Reply Comments of Tracy Carcione to the 2014 Report Proceeding at 1).

³⁷ *Id.* at 8018, para. 14.

³⁸ *Id.* at 8018, para. 15 (citing Reply Comments of Ken Rodgers to the 2014 Report Proceeding at 1).

³⁹ *DAC Letter* at 1.

⁴⁰ *2014 Report*, 29 FCC Rcd at 8013, para. 3.

⁴¹ *Id.*

⁴² *Id.*

⁴³ As of May 26, 2015, covered broadcasters and MVPDs are required to have the necessary equipment and infrastructure to deliver a secondary audio stream in order to provide timely, audible emergency information to consumers who are blind or visually impaired, which is required by our rules without exception for technical capability. Since video description is also provided via the secondary audio stream, compliance with the emergency information requirement will give covered broadcasters and MVPDs the technical capability to comply with the video description requirements. 47 CFR § 79.2(b)(2)(ii) (implementing 47 U.S.C. § 613(g)). See also *2014 Report*, 29 FCC Rcd at 8028-29, para. 37.

video described can range from \$2,500 to \$4,100.⁴⁴ The *2014 Report* also observed that there had been no petitions for exemption based on economic burden,⁴⁵ and that has continued to be the case even after the requirements were extended to broadcasters in smaller television markets.⁴⁶ Since the initial rules were adopted, some distributors have provided video description in live and other marquee events.⁴⁷ In the *2014 Report*, industry commenters noted that some included networks provide more hours than are required,⁴⁸ and anticipate that the amount of described programming by some networks would grow even in the absence of additional regulation.⁴⁹

12. When the Commission reinstated the video description rules in 2011, it anticipated that the reinstated rules would “enabl[e] millions more Americans to enjoy the benefits of television service and participate more fully in the cultural and civic life of the nation,”⁵⁰ and considered it “unlikely that the modest requirement of 50 hours per quarter will be economically burdensome.”⁵¹ Our experience to date has confirmed the soundness of those predictions.⁵² As discussed below, we are proposing to increase the amount of described programming and make it more accessible. Given the extensive benefits to consumers of the existing requirements, we believe that they will benefit further from the proposed new requirements. We also have no evidence that the total cost of the additional description requirements or our other proposals will impose substantial economic burdens.⁵³ Given the information currently in the record in this proceeding, we tentatively conclude that “the need for and benefits of” the increased availability and accessibility of video described programming would be “greater than the technical and economic costs” if the rules we propose are adopted. We seek comment on this tentative conclusion and the analysis set forth above. To the extent possible, commenters should provide specific data and information, such as actual or estimated dollar figures for each specific cost or benefit addressed, including a description of how the data or information was calculated or obtained, and any supporting documentation or other evidentiary support.

⁴⁴ *2014 Report*, 29 FCC Rcd at 8032, para. 47 (citing NAB Report Comments at 4).

⁴⁵ *Id.* at 8032, para. 49.

⁴⁶ The extension to smaller broadcast markets occurred on July 1, 2015, by operation of the reinstated rules. 47 CFR § 79.3(b)(2). *See also Update Order*, 30 FCC Rcd at 2074, para. 11.

⁴⁷ For example, people who are blind or visually impaired were able to join “millions of Americans enjoying [the December 3, 2015] live broadcast of *The Wiz* on NBC, thanks to video description of the production.” Alix Hackett, *Perkins Students Enjoy Accessible Broadcast of ‘The Wiz Live!’*, Dec. 4, 2015, <http://www.perkins.org/stories/news/perkins-students-enjoy-accessible-broadcast-of-the-wiz-live>. Carl Augusto, CEO of the American Foundation for the Blind, called the live description of *The Wiz* a “godsend to people with vision loss.” *Comcast, NBC Add Video Descriptions to ‘The Wiz Live!’*, Multichannel News, Dec. 2, 2015, at <http://www.multichannel.com/news/content/comcast-nbc-add-video-descriptions-wiz-live/395671> (“This nationally described television broadcast will not only be a godsend to people with vision loss, but also to those who describe action to people with vision loss, and the general public, who will learn about the importance of audio description.”). CBS broadcast a two-hour special called “Stevie Wonder: Songs in the Key of Life – An All-Star Grammy Salute” with video description. *See CBS’ Stevie Wonder Special to Air with Video Description for Visually Impaired*, Feb. 11, 2015 at <http://www.broadwayworld.com/bwwtv/article/CBS-Stevie-Wonder-Special-to-Air-with-Video-Description-for-Visually-Impaired-20150211>.

⁴⁸ *2014 Report*, 29 FCC Rcd at 8019, para. 17 (citing Comments of the National Association of Broadcasters to the 2014 Report Proceeding at 2-3) (“NAB Report Comments”).

⁴⁹ *Id.* at 8019, para. 18 (citing Comments of the National Cable & Telecommunications Association to the 2014 Report Proceeding at 3) (“NCTA Report Comments”).

⁵⁰ *Reinstatement NPRM*, 26 FCC Rcd at 2975-76, para. 1.

⁵¹ *Id.* at 2987, para. 25.

⁵² *See infra* para. 17.

⁵³ *Id.*

13. *Limitation.* If the Commission decides to issue additional regulations, the CVAA places a restriction on any increase in the number of hours required to be video described. Paragraph (4)(B), entitled “Limitation,” reads:

If the Commission makes the determination under subparagraph (A) and issues additional regulations, the Commission may not increase, in total, the hour requirement for additional described programming by more than 75 percent of the requirement in the regulations reinstated under paragraph (1).⁵⁴

The requirement in the reinstated regulations is the same for all included networks – 50 hours of video description, per calendar quarter.⁵⁵ 75 percent of those 50 hours is 37.5 hours. We therefore read this provision to grant the Commission continuing authority to increase the per-network requirement by 37.5 hours (*i.e.*, up to 87.5 hours per quarter), but no more than this amount.

14. We find unpersuasive an alternative reading that suggests this provision caps the number of hours of video description a distributor must provide across all covered networks it carries. First, the CVAA’s “Limitation” provision says nothing about any increase in the hour requirement being constrained by the number of included networks. The CVAA and reinstated rules imposed the “hour requirement” on MVPDs on a per-channel basis, and on broadcasters on a per-programming stream basis. Thus, we believe that the continuing authority limitation is best interpreted as applying on a per-channel and per-programming stream basis; the alternative reading would import an aggregate calculation that is simply foreign to the statute and regulations. Second, the Commission cannot control the aggregate number of hours of described programming carried by a given distributor, because that depends on the networks they choose to carry. For example, one MVPD might choose to carry a large number of covered networks, while another might carry few of them, making an aggregate limitation apply differently to different MVPDs. For this reason, we believe an approach that focuses on the hours required for individual included networks, rather than on a theoretical aggregate number of hours that a distributor may or may not carry, better effectuates Congress’s goals. We read the phrase “in total” in the statute to mean that if the Commission increases the required hours per-network of video-described programming in increments, the total increase cannot exceed 75 percent. Finally, we think that if Congress intended to restrict the Commission from increasing the number of included entities, it would have done so explicitly, just as it did by specifying the maximum number of covered DMAs that the rule could be revised to reach over time.⁵⁶ We seek comment on our analysis of the statute’s hourly limitation.

15. *Additional Designated Market Areas.* In addition, the CVAA lays out a clear timeline for phasing in the video description regulations in designated market areas (“DMAs⁵⁷”) beyond the 25 included in the initial reinstated rules.⁵⁸ The expansion to the top 60 DMAs occurred in 2015, pursuant to the existing rules.⁵⁹ We may not expand beyond these 60 television markets, however, until 2020 at the

⁵⁴ 47 U.S.C. § 613(f)(4)(B).

⁵⁵ 47 CFR § 79.3(b)(1)-(2), (4). The rules as reinstated require distributors – broadcast stations and covered MVPDs – to provide video description. As a practical matter, however, the included networks themselves, rather than the broadcast stations and MVPDs, generally bear the efforts of preparing and providing video description, which the distributors pass through. *2011 Order*, 26 FCC Rcd at 11851-52, para. 8.

⁵⁶ *See infra* para. 15.

⁵⁷ A DMA is a Nielsen-defined television market consisting of a unique group of counties. The United States is divided into 210 DMA markets. Nielsen identifies television markets by placing each U.S. county (except for certain counties in Alaska) in a market based on measured viewing patterns and by MVPD distribution. *See, e.g.*, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 14-16, Sixteenth Report, 30 FCC Rcd 3253, 3274, para. 45, n.122 (2015).

⁵⁸ 47 U.S.C. § 613(f)(4)(C).

⁵⁹ 47 CFR § 79.3(b)(2).

earliest, and then only after completion of an additional study and report to Congress.⁶⁰ The explicit timeline established by the CVAA does not contemplate any alternative approach to expanding the number of covered DMAs. As a result, it limits the Commission's authority to issue video description rules, at this time, to the top 60 television markets currently covered. We seek comment on this understanding of the scope of our authority.

16. *Television Programming.* Finally, we limit our proposals to programming "transmitted for display on television."⁶¹ The *2014 Report* did consider the issues, costs, and benefits of "[v]ideo description in video programming distributed on the Internet," per the directive of the CVAA.⁶² The report discussed a range of comments supportive and skeptical of our authority to impose video description requirements on programming distributed on the Internet.⁶³ We do not propose taking any action at this time with regard to video description on Internet programming.

IV. INCREASED AVAILABILITY OF VIDEO DESCRIBED PROGRAMMING

17. We propose to increase the quarterly requirement for video described programming to 87.5 hours and to require six additional networks to provide such programming. The existing requirements have proven to be highly beneficial to persons who are blind or visually impaired,⁶⁴ and we believe that these proposals will yield similar benefits.⁶⁵ At the same time, we do not anticipate that the marginal cost of additional described programming would be higher than it is under the current rules or that the total cost of the requirements would be economically burdensome. As discussed above, in the *2014 Report* we noted that the one-time cost to have an hour of programming video described can range from \$2,500 to \$4,100.⁶⁶ This would constitute roughly 0.08-0.20 percent of the budget of an episode of an hour-long television drama, which regularly costs between \$2.0 and \$3.0 million.⁶⁷ We seek comment on whether there will be any other costs associated with the proposed increase.⁶⁸ Accordingly, as noted above, we tentatively conclude that the benefits of our proposal will outweigh the costs, and we seek input on this tentative conclusion.

A. Hours Per Included Network

18. As discussed above, the CVAA gives us authority to increase the number of hours of described programming required to be aired on each included broadcast and nonbroadcast network carried by an entity subject to the rules, from 50 per quarter to no more than 87.5.⁶⁹ Given the extensive benefits and reasonable costs of video described programming,⁷⁰ we propose to revise our rules to require the full 87.5 hours per quarter, per included network. Consumers have supported an increase in available video described programming.⁷¹ Although we propose to increase the total number of hours to the maximum extent permissible under the CVAA, the total amount of hours required per covered network will remain

⁶⁰ 47 U.S.C. § 613(f)(4)(C)(iii)-(iv).

⁶¹ 47 U.S.C. § 613(f)(2)(A), (f)(4)(A).

⁶² *2014 Report*, 29 FCC Rcd at 8033-39, paras. 50-69. *See also* 47 U.S.C. § 613(f)(3)(B).

⁶³ *2014 Report*, 29 FCC Rcd at 8033-39, paras. 51-68.

⁶⁴ *See supra* paras. 7, 9.

⁶⁵ *See supra* paras. 4, 7, 9, 12.

⁶⁶ *See supra* para. 11.

⁶⁷ *See* Bill Carter, *Cable TV, the Home of High Drama*, N.Y. Times, Apr. 5, 2010, at B1.

⁶⁸ *See DAC Letter* at 1.

⁶⁹ *See supra* para. 13.

⁷⁰ *See supra* paras. 7, 9.

⁷¹ *2014 Report*, 29 FCC Rcd at 8020-22, paras. 21-23.

relatively small (*i.e.*, 87.5 hours per quarter amounts to approximately 6 hours and 45 minutes per week in a 13 week calendar quarter). As discussed above in paragraph 11, we have no evidence of compliance difficulties for covered distributors or the currently-included networks, and we do not believe any would arise if a limited amount of additional programming were required. Comments filed in the *2014 Report* proceeding indicate that at least some networks are already offering as much described programming as would be required under the proposed revision to the rules.⁷² As discussed above, we anticipate that “the need for and benefits of” the increased availability of video described programming would be “greater than the technical and economic costs” of providing this additional video described programming. We seek comment on this proposal.

19. Commenters in this docket previously have expressed concern about having sufficient eligible prime time and children’s programming to meet the requirement.⁷³ In the *2011 Order*, the Commission “note[d] and acknowledge[d] NCTA’s point that due to special circumstances, a covered network could theoretically have fewer than 50 hours of scheduled prime-time or children’s programming that can count toward the requirement in a given quarter.”⁷⁴ However, the Commission “anticipate[d] that these instances [would] be exceedingly rare” because included networks “air many, many hours of prime-time and children’s programming each quarter.”⁷⁵ The Commission suggested that, if such a situation arose, a programming distributor or provider could seek a waiver for the relevant quarter under the Commission’s general waiver authority.⁷⁶ No such waivers have been requested under the existing rules. However, given the proposed increase in described hours, we seek comment on whether we should make any other changes to the rules to provide more flexibility. For instance, should we allow some amount of non-prime time, non-children’s described programming to count toward the increased requirement?⁷⁷ If we do, should we continue to require that at least 50 hours per quarter be provided in either prime time or children’s programming? Should we require that any described programming that is counted toward the requirement run between 6 A.M. and Midnight local time? We seek comment on these questions.

B. Covered Networks

20. We propose to extend the requirement to provide video description to additional networks. It currently applies when a covered broadcast station carries one of four named commercial broadcast networks (ABC, CBS, Fox, and NBC) or when a covered MVPD carries one of five popular nonbroadcast networks. We propose to increase these to five broadcast, and ten nonbroadcast, networks. The benefits of video described programming are abundant, and experience to date has borne out predictions regarding the reasonable costs of adding description to programming.⁷⁸

21. Given the obvious parallels to closed captioning, which is required on virtually all television programming, it is not surprising that commenters have called for expanding the requirement for video description, with some going so far as to suggest that we echo the closed captioning requirement to extend the rules to virtually all programming.⁷⁹ In the CVAA, however, Congress directed us to

⁷² *Id.* at 8019, para. 17 (“[C]overed broadcasters on average are exceeding the required 50 hour threshold for the amount of video-described programming per calendar quarter in many cases, ‘with the actual amount of video-described programming ranging from the high 50s to 88 hours per quarter.’”) (quoting NAB Report Comments at 2-3).

⁷³ *See, e.g., 2011 Order*, 26 FCC Rcd at 11869, para. 46 (citing NCTA Comments at 17).

⁷⁴ *Id.*

⁷⁵ *Id.* at 11870, para. 46.

⁷⁶ *Id.*

⁷⁷ *See DAC Letter* at 1-2.

⁷⁸ *2014 Report*, 29 FCC Rcd at 8012-13, para. 3.

⁷⁹ *Id.* at 8021, para. 22.

expand the video description rules in a measured fashion. Any proposed expansion must satisfy the statutory test that asks whether “the need for and benefits of” the additional video described programming would be “greater than the technical and economic costs” of providing it.⁸⁰ In recognition of this directive for a measured approach, we propose a limited increase in the number of included broadcast and nonbroadcast networks on which covered broadcasters and MVPDs must provide video description. We believe that this approach will have a significant benefit to viewers who are blind or visually impaired, given the popularity of the additional programming networks. We seek comment below on whether we should add more or fewer networks at this time, and what the grounds would be for choosing any specific number of networks.⁸¹

22. First, we propose to revise our rules to require any commercial television broadcast station that (i) is affiliated with ABC, CBS, Fox, and NBC or with any other of the top five commercial television broadcast networks, and (ii) is located in the top 60 television markets, to provide 87.5 hours per calendar quarter of video described prime time or children’s programming on each programming stream on which they carry these networks. The original video description rules that Congress directed the Commission to reinstate specifically identified ABC, CBS, Fox, and NBC as subject to the description requirement.⁸² We propose to revise our rules to include those four networks, as well as any others in the top five nationally, determined triennially.⁸³ Barring any significant changes to the marketplace, we anticipate this rule change would result in one additional broadcast network being aired with 87.5 hours per quarter (or approximately 6 hours and 45 minutes per week in a 13 week calendar quarter) of video described programming.

23. In addition, we propose to revise our rules to require any MVPD system that serves 50,000 or more subscribers to provide 87.5 hours of video description per calendar quarter during prime time or children’s programming on each channel on which they carry one of the top ten national nonbroadcast networks.⁸⁴ In adopting the current video description rules, the Commission recognized that the popularity of programming networks shifts over time, and therefore adopted a requirement that we review network ratings every three years to determine the top five. We propose to continue the existing review process, but to expand the number of included networks from five to ten. Because the number of nonbroadcast networks is much larger than the number of broadcast networks,⁸⁵ we believe it

⁸⁰ 47 U.S.C. § 613(f)(4)(A).

⁸¹ See *infra* para. 24.

⁸² 2000 Order, 15 FCC Rcd at 15238, para. 20.

⁸³ The “top five” commercial broadcast networks will be determined in the same fashion as the nonbroadcast networks under the existing and proposed rules. Thus, every three years they will be the top five as determined by an average of the national audience share during prime time of broadcast networks, as calculated by Nielsen for the preceding ratings year, and that has at least 50 hours per quarter of prime time programming that is not live or near-live or otherwise exempt under the video description rules. As discussed above, the “top five” will include ABC, CBS, Fox, and NBC, regardless of their relative rankings. In the event that one or more of those named networks suffers a sustained drop below fifth place in relative broadcast network rankings, the “top five” broadcast networks for the purposes of these rules could consist of more than five networks.

⁸⁴ As under the current rules, these “top ten” would be determined by an average of the national audience share during prime time of nonbroadcast networks, as calculated by Nielsen for the preceding ratings year, and that has at least 50 hours per quarter of prime time programming that is not live or near-live or otherwise exempt under the video description rules.

⁸⁵ MVPD subscribers to the most popular tiers of service have access to more than six times as many nonbroadcast networks as broadcast networks. *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices, 29 FCC Rcd 14895, 14905-06, Tbls. 4, 5 (MB 2014) (showing an average of 250.8 total available channels on the most subscribed tiers of service, of which an average of 31.6 are local broadcast channels; these include standard definition and high definition streams as well
(continued....)

is appropriate to include a larger increase in covered nonbroadcast networks. If adopted, once the new rules are in effect, a covered MVPD would be required to provide 87.5 hours per quarter of video described programming on each of the top ten nonbroadcast networks that it carries. Below, we discuss the timing for implementation of these proposed revisions.⁸⁶

24. With this proposal, we seek to ensure that consumers are able to realize the benefits of video description, keeping in mind our Congressional directive to proceed judiciously with any expansion of the requirements. Should we include more, or fewer, additional networks at this time? Commenters should provide justifications for any specific change in the number of included networks. Would an alternative approach to determining included networks, such as a rule that included networks based on a minimum average viewership level, or gross network revenues, be preferable to one based on relative prime time broadcast rankings? We seek comment on the proposed approach and any alternatives.

C. Other Changes

25. *No Backsliding.* We propose to adopt a “no-backsliding” requirement. Such a rule would state that once a network is designated an “included network” required to provide description, it would remain an “included network” even if it falls out of the top five or top ten ranking. Under the current rules, the covered nonbroadcast networks are those in the top five,⁸⁷ recalculated triennially, and when a network drops from the top five during the applicable ratings period,⁸⁸ as Nickelodeon did between 2012 and 2015,⁸⁹ MVPDs are no longer required to provide video description on that network once the triennial period has ended.⁹⁰ In 2011, the Commission declined to adopt a “no backsliding” rule, noting that it did not have authority at that time to go beyond the scope of the reinstated rules except to the extent provided by the CVAA.⁹¹ The Commission also noted, however, that it would have authority to adopt such a rule “after the passage of time and a review of [the rules’] impact.”⁹²

26. Given the passage of time and the continuing authority granted to the Commission in the CVAA to adopt additional video description regulations, we believe that we now have authority to adopt a “no-backsliding” rule.⁹³ In addition, we believe that there are substantial policy benefits to ensuring that video described programming continues to be offered on networks currently subject to the rules. Once a broadcaster or MVPD begins to carry video described programming on a given network, it creates an expectation in consumers that they will be able to rely on that channel for described programming in the future. A “no-backsliding” rule would ensure that such consumer expectations are fulfilled, and would also result in an increased amount of video described programming for individuals who are blind or

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as secondary programming streams). *But see infra* note 100 (noting the “average” subscriber as determined by Nielsen actually receives around 180 channels; assuming the same number of broadcast channels in those average lineups, this would reflect roughly five times as many nonbroadcast as broadcast networks).

⁸⁶ *See infra* Section IV.D (“Timing and Coverage”).

⁸⁷ Excluding those networks airing large amounts of exempt programming. 47 CFR § 79.3(b)(4).

⁸⁸ *See id.*

⁸⁹ *Update Order*, 30 FCC Rcd at 2073-74, para. 10 & n.22. Although Nickelodeon is no longer in the top five nonbroadcast networks currently subject to the video description rules, it appears that Nickelodeon has continued to provide video description voluntarily on some of its children’s programming. *See* American Council of the Blind, The Audio Description Project, Video Described Shows by Network (updated 3/6/16), *available at* <http://www.acb.org/adp/tv.html#shows>.

⁹⁰ However, MVPDs must always pass through description on any channel if the network or broadcaster provides description, if they are not using that capacity for another program-related purpose. 47 CFR § 79.3(b)(5).

⁹¹ *2011 Order*, 26 FCC Rcd at 11857-58, para. 19.

⁹² *Id.* at 11858, n.88.

⁹³ *See supra* Section III (“Authority”).

visually impaired, as the popularity of networks shifts over time and new networks become subject to the rule. Further, we believe that the burden of continued compliance by formerly covered networks would be limited to the actual costs of describing specific programs, which as discussed above are low relative to the overall costs of television production.⁹⁴ Since any included network would be broadcast or carried with video description for at least three years, the processes for including video description in that networks' programming will have been well established by the next time the Commission reviews rankings.⁹⁵

27. For these reasons, along with the extensive benefits and reasonable costs of video describing programming discussed above, we propose to adopt a "no-backsliding" requirement. We note that networks are not directly covered by the rules. As a practical matter, however, the included networks themselves, rather than the broadcast stations and MVPDs, generally prepare and provide video description, which the distributors pass through.⁹⁶ Thus, under the current rules, a network that finds inclusion economically burdensome may petition, as a video programming provider, for exemption from the effect of the rules.⁹⁷ We seek comment on whether there should also be an express exemption from the proposed no-backsliding rule for networks that drop significantly in relative rankings or overall viewership. We seek comment on this proposal.

28. *50 Percent Threshold Elimination.* The rules, as reinstated, exempt nonbroadcast networks from being included networks if they are not available in 50 percent or more of MVPD homes.⁹⁸ Thus, for example, even if a network were one of the most popular in prime time, MVPDs would not be required to provide video description of any of that network's programming if it reaches only 40 percent of MVPD households. This exemption was initially adopted in 2001 at the request of HBO, and effectively exempts premium networks from the video description requirements.⁹⁹

29. We propose to eliminate the exemption for nonbroadcast networks that do not reach 50 percent or more of MVPD households. Given the increasing number of networks and fragmentation of the viewing public,¹⁰⁰ it is no longer clear that carriage into a given number of homes, even 50 percent, is sufficiently more important than prime time ratings for the purpose of establishing a threshold for determining which nonbroadcast networks should be covered by the video description requirements. Some premium networks offer very popular programming, including some of the "must-watch" shows that are very highly rated and have made an impact on popular culture. The proposed rule change would

⁹⁴ See *supra* para. 17.

⁹⁵ 2011 Order, 26 FCC Rcd at 11858, n.89 ("We nonetheless encourage parties to voluntarily continue providing video description service once it has begun, because of the benefits it provides to the community and the lower costs of continuing, as opposed to beginning, the provision of video description.").

⁹⁶ See *supra* note 554.

⁹⁷ 47 CFR § 79.3(d).

⁹⁸ *Id.* § 79.3(b)(4).

⁹⁹ See *Implementation of Video Description of Video Programming*, MM Docket No. 99-339, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1251, para. 10 (2001). See also *id.* para. 12 ("Accordingly, we amend Section 79.3(b)(3) to clarify that the 50-hour requirement applies to the top five national nonbroadcast networks, based on Nielsen national prime time audience share, that reach 50 percent or more of MVPD households. . . . The programming of each of the several nonbroadcast, non-premium networks with the highest ratings is available to more than 75 million subscribers. By contrast, while HBO is among the nonbroadcast networks with the highest ratings during prime time, only 27 million subscribers subscribe to its service.") (footnotes omitted).

¹⁰⁰ The number of cable channels received by the average subscriber has tripled since the original video description rules were adopted, from around 60 to more than 180. Sam Ro, *Americans Are Paying For a Lot of Channels They Don't Watch*, Business Insider, Oct. 25, 2015, <http://www.businessinsider.com/number-of-cable-channels-received-vs-viewed-2015-10>. See also *supra* note 85 (noting that as many as 251 channels are widely available, even if not all are received by Nielsen's "average" 180 channel subscriber).

ensure that if any premium networks are among the ten most popular they will be covered. We seek comment on this proposal.

D. Timing and Coverage

30. We seek comment on the appropriate effective date of the 87.5 hours/quarter requirement and the other proposed rules changes. When we reinstated the rules in 2011, the time from their release to the full compliance date was approximately ten months. If we adopt these proposals, should we allow a similar amount of time for distributors to come into compliance? Under the current rules, July 1, 2018 is the date on which the new list of included nonbroadcast networks will go into effect, after having been determined by the ratings for the time period October 2016 to September 2017. If the proposed rules go into effect earlier than July 1, 2018, what ratings period should be used to determine the included networks? Should the effective date of these rules establish the beginning of a new three-year network-list update cycle, or should the existing cycle be retained even if the implementation of these rules requires a mid-cycle addition of some networks? In the alternative, what are the benefits and costs of delaying the effective date of the proposed revisions to the rules until July 1, 2018, and expanding the number of broadcast and nonbroadcast networks that will be determined in reference to the 2016-2017 ratings year? We propose that, as in 2015, in each cycle the Media Bureau will issue a Public Notice and undertake a process to formally establish the updated list of included networks.¹⁰¹ We seek comment on these questions and this proposal.

V. IMPROVING CONSUMER ACCESS TO VIDEO DESCRIPTION

31. The *2014 Report* found significant consumer dissatisfaction with the availability of information about which programming is video described.¹⁰² This was contrary to the Commission's expectation that even without any requirements, such information would be made available "in an accessible manner, including on [distributor] websites and to companies that publish television listings information."¹⁰³ The *2014 Report* also found that consumers are frustrated with MVPD customer service when they seek information about accessing video description.¹⁰⁴ In both cases, we urged industry to take voluntary action to resolve these concerns.¹⁰⁵ Therefore, we seek comment on the state of industry efforts, and propose requiring covered distributors to provide dedicated customer service contacts to assist viewers in accessing their video described programming. We tentatively conclude that the benefits of this

¹⁰¹ See *Media Bureau Announces National Nonbroadcast Network Rankings for Purposes of July 1, 2015 Update to Video Description Requirements*, Public Notice, 30 FCC Rcd 76 (2015) and the *Update Order*, 30 FCC Rcd 2071. In determining the top five nonbroadcast networks subject to the rules in previous years, the Commission relied on Nielsen's "live +7 day" ratings, which include incremental viewing that takes place during the seven days following a telecast. Consistent with this approach, we will rely on Nielsen's "live + 7 day" ratings going forward.

¹⁰² *2014 Report*, 29 FCC Rcd at 8023-24, para. 27.

¹⁰³ *2011 Order*, 26 FCC Rcd at 11872, para. 51.

¹⁰⁴ *2014 Report*, 29 FCC Rcd at 8024-25, para. 29.

¹⁰⁵ *Id.* at 8024, 8026, paras. 28, 31. In their comments to this proceeding, consumers again raised significant concerns about the technical challenges they faced when attempting to access video description. *Id.* at 8026, para. 32. Similarly, concerns about the difficulties of accessing video described programming were voiced during the Commission's Video Description Roundtable event held on June 22, 2015. As discussed in the *2014 Report*, we recently adopted rules in another proceeding which should "alleviate the issues identified by consumer commenters by making it easier for individuals who are blind or visually impaired to access the secondary audio stream for video description." *Id.* at 8027, para. 33 (referencing *Accessibility of User Interfaces, and Video Programming Guides and Menus; Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket Nos. 12-108, 12-107, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 17330 (2013)).

proposal would exceed its costs, but seek comment on that tentative conclusion.¹⁰⁶ We also seek comment on a requirement that covered distributors notify publishers of programming guides when a program will be video described.

32. *Programming Guide Information.* Although fragmented lists of some video described programming are available online,¹⁰⁷ some consumers report difficulty in finding information in programming guides, which for many remain the primary source of information about their viewing options.¹⁰⁸ Industry commenters state that at least some information is provided to guide services by some included networks, but even they acknowledge that the information does not always actually appear in the guides.¹⁰⁹ We seek comment on whether this situation has improved. Do networks provide information about video description to program guide services, and if not, why not? If they do provide such information, do program guide services choose to include that information in the guides, and if not, why not? Would a requirement that distributors consistently provide notice when a program is going to be described make guide services more likely to include that information in guides? In the children's programming context, our rules require commercial television broadcast licensees to provide to publishers of program guides information identifying programming specifically designed to educate and inform children.¹¹⁰ Has this requirement been effective in informing consumers about the availability of educational and informational children's programming, and if not, why not? Instead of, or in addition to the programming guide information, should distributors create an easily accessible list of described video programming? What are the benefits and drawbacks of requiring a centralized listing of all described video programming? Would the creation of such a listing assist in ensuring the accuracy and comprehensiveness of information available to the public? Would it be useful toward promoting best practices for identifying video described programming? We seek comment on the costs and benefits of a requirement that distributors provide information identifying video described programming to program guides, and whether we should adopt such a rule, or any other rule to improve consumer access to information about the availability of video described programming.

33. *Dedicated Customer Service Contacts.* A number of consumers have expressed significant frustration with inadequate MVPD customer support for video description services.¹¹¹ The *2014 Report* details instances where consumers would call their provider for help with video description and, after spending "many hours on the phone with ill-informed customer services representatives"¹¹² ultimately discover that "not one person knew what [the consumer] was talking about."¹¹³ They would be promised return or follow-up calls that never came, or directed to email addresses that proved

¹⁰⁶ See *supra* para. 12.

¹⁰⁷ Some covered networks provide information on their websites that identifies programming with video description, see *2014 Report*, 29 FCC Rcd at 8023, para. 26, and where possible, the Commission has provided links to these network websites at <https://www.fcc.gov/encyclopedia/video-description>. However, consumers assert that information about video described programming available online is not always comprehensive or kept up to date. See *2014 Report*, 29 FCC Rcd at 8023-24, para. 27.

¹⁰⁸ *2014 Report*, 29 FCC Rcd at 8023-24, para. 27. Concerns about not being able to easily locate information on video described programs also were raised by participants at the Commission's Video Description Roundtable Event held on June 22, 2015.

¹⁰⁹ *Id.* at 8023, para. 26 (Although NAB claims that broadcast networks provide video description information to program guides, they acknowledge that "this information appears not to be published regularly.") (citing NAB Report Comments at 3-4).

¹¹⁰ 47 CFR § 73.673.

¹¹¹ *2014 Report*, 29 FCC Rcd at 8024-26, paras. 29-31.

¹¹² *Id.* at 8025, n.95 (citing Reply Comments of Ken Rodgers to the 2014 Report Proceeding at 1).

¹¹³ *Id.* (citing Reply Comments of Terry Knox to the 2014 Report Proceeding at 1).

unhelpful.¹¹⁴ In some cases it appears that customer support has been so poor that it has essentially denied some consumers the opportunity to access described programming at all.¹¹⁵ Recognizing this, the *2014 Report* encouraged covered distributors to provide proper customer service training and a dedicated point of contact so that consumers could get video-description-specific customer service from knowledgeable representatives.¹¹⁶ We seek comment on whether customer service has improved since adoption of the *2014 Report*. In light of previous shortcomings in customer support, we also propose to require that covered entities provide contact information for a person or office with primary responsibility for accessibility compliance issues to consumers who have questions about the availability of and access to video description services, or who request technical support. The point of contact must be able to address consumers' concerns about video description issues, and would be required to respond to consumer inquiries within one business day. Alternatively, we seek comment on whether we should adopt rules that parallel 47 C.F.R. § 79.1(i)(1-3). The rules at Section 79.1(i)(1-3) are similar to our proposal in that they require distributors of programming with closed captioning to provide contact information to consumers and to the Commission, and to assist in resolving consumers' technical problems. They also, however, establish detailed parameters for compliance with those requirements. What would be the costs and benefits of either approach? We seek comment on how, specifically, contact information should be provided to consumers under either approach.

34. *Timing.* We also seek comment on the timing for implementing the rule changes discussed in this Section. We believe that implementation of these consumer access and customer service rules could be accomplished quickly, but we seek input on a reasonable timeframe.

35. Are there other changes to the rules that we should adopt to improve consumer access without imposing excessive burdens on regulated parties? We seek comment on any such changes.

VI. OTHER MATTERS

36. *Electronic Filing.* We propose that petitions for exemption from the video description rules, and filings related to those requests, be filed exclusively electronically. In the *2011 Electronic Filing Report and Order*,¹¹⁷ the Commission amended certain of its procedural rules to increase the efficiency of Commission decision-making and modernize Commission procedures in the digital age, including adoption of a requirement to use electronic filing whenever technically feasible.¹¹⁸ In the closed captioning context, for example, requests for exemption are filed and available to the public electronically.¹¹⁹ Should we amend our rules to require the electronic filing of individual video description exemption requests in machine readable format, and further revise our rules to require that comments on and oppositions to such petitions also be filed electronically in machine readable format? We seek comment on the benefits of this approach, whether there would be associated costs, and the appropriate timing for implementing this rule change.

37. *Described Video-on-Demand.* We seek comment on a potential requirement that Video-On-Demand ("VOD") programming include video description if it has been previously carried by that MVPD with video description. If a program is carried on a linear programming stream with description and also made available on the MVPD's VOD service, it is not clear whether MVPDs are making the

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 8025, para. 29 & n.96.

¹¹⁶ *Id.* at 8025-26, para. 31.

¹¹⁷ *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, 1599-602, paras. 14-21 (2011) ("*2011 Electronic Filing Report and Order*").

¹¹⁸ *Id.* at 1599-600, para. 15.

¹¹⁹ 47 CFR §§ 79.1(f)(4), (7); 79.4(d)(4), (6).

video description available to the VOD viewer. We seek comment on whether this comports with our existing rules.¹²⁰ In 2014, we confirmed that closed captioning must be preserved in VOD programming.¹²¹ Should we have a similarly explicit requirement in the video description context? What are the technical and financial costs of such a requirement for MVPDs and other distributors?

38. *Secondary Audio.* We seek comment on the state of the marketplace with regard to the use of multiple audio streams. The Commission previously has noted that “digital transmission enables broadcasters and MVPDs to provide numerous audio channels for any given video stream,” but that in practice many MVPDs were only capable of providing two audio streams, and many consumers were only capable of receiving two audio streams.¹²² The Commission found video description was thus likely to be provided on the same secondary audio stream as other alternate audio uses, like foreign language audio tracks, but expected “that at some point in the near future, due to voluntary upgrades and equipment obsolescence, broadcasters, MVPDs, and the installed base of consumer equipment will be sufficiently advanced to handle a video description audio track that does not conflict with any other program-related service.”¹²³ Has the marketplace moved toward a realization of this expectation? Should we revise our rules at this time to reflect any such changes, and if so, how?

39. *Terminology.* During the Commission’s Video Description Roundtable, consumers observed that many other federal agencies use the term “audio described” to reference video programming containing audio description, rather than the term “video described.”¹²⁴ We note that the CVAA uses the term “video description,” but we recognize that it may be preferable to use “audio description” if this is the term most common to a majority of federal agencies and more widely used by

¹²⁰ DVR recordings of described programming, for example, must preserve the secondary audio stream that contains video description and make it available when the recording is later replayed. *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*, MB Docket Nos. 12-107, 11-43, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 4871, 4909, para. 52 (2013) (“*Emergency Information/Video Description Order*”).

¹²¹ *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, 2290-91, paras. 118-19 (2014) (“[W]e confirm that all ‘on demand’ programming not subject to an exemption must comply with the relevant captioning requirements for new and pre-rule programming.”).

¹²² *2011 Order*, 26 FCC Rcd at 11862-63, paras. 28-31. See also *Emergency Information/Video Description Order*, 28 FCC Rcd at 4882-83, para. 14 (“At this time, we do not require covered entities to provide an audio stream that is dedicated solely to aurally accessible emergency information. MVPD commenters argue that mandating more than two audio streams – one for main audio, one for video description, and one for emergency information – would be costly and, in some cases, would pose technical difficulties.”) (footnote omitted).

¹²³ *2011 Order*, 26 FCC Rcd at 11863, para. 31.

¹²⁴ See, e.g., 36 CFR § 1194.24(d) (implementing Section 508 of the Rehabilitation Act of 1973, 29 U.S.C. § 794d, stating: “All training and informational video and multimedia productions which support the agency’s mission, regardless of format, that contain visual information necessary for the comprehension of the content, shall be audio described”). See also Architectural and Transportation Barriers Compliance Board, *Information and Communication Technology (ICT) Standards and Guidelines*, Notice of Proposed Rulemaking, 80 Fed. Reg. 10880, 10887-88 (proposed Feb. 27, 2015) (Access Board 2015 NPRM) (indicating in numerous sections the term “audio description” in proposing updates to its standards and guidelines on the accessibility and usability of electronic and information technologies for individuals with disabilities to the extent that these are covered by Section 508 of the Rehabilitation Act and Section 255 of the Communications Act, 47 U.S.C. § 255); 28 CFR parts 35-36, Appendices A-B (U.S. Department of Justice appendices to regulations for Title II and III of the Americans with Disabilities Act, also referencing “audio description services” as an auxiliary aid or service); *2011 Order*, 26 FCC Rcd at 11875, para. 58.

consumers. We seek comment on whether we should revise our rules and/or change our usage to reflect this different terminology.

40. *Statutory Authority.* As discussed above, we believe the CVAA grants the Commission “continuing authority” to regulate the provision of video described programming.¹²⁵ We seek comment on our statutory authority to adopt the changes discussed above, both the proposed rules and the others on which we seek comment. Are our proposals above consistent with the CVAA?

41. *Other Comments Requested.* Finally, we invite comment on any other changes the Commission should consider making to the video description rules. For any other changes proposed, comments should include potential costs and benefits of such changes.

VII. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Analysis

42. With respect to the *Notice of Proposed Rulemaking*, an Initial Regulatory Flexibility Analysis (“IRFA”), *see generally* 5 U.S.C. § 603, is contained in Appendix B. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice of Proposed Rulemaking* specified *supra*. The Commission will send a copy of the *Notice of Proposed Rulemaking*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.¹²⁶

B. Initial Paperwork Reduction Act of 1995 Analysis

43. This document contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

C. Ex Parte Rules

44. *Permit-But-Disclose.* This proceeding will be treated as a “permit-but-disclose” proceeding subject to the “permit-but-disclose” requirements under Section 1.1206(b) of the Commission’s rules.¹²⁷ *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.¹²⁸ Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

¹²⁵ 47 U.S.C. § 613(f)(4). *See also* 2011 Order, 26 FCC Rcd at 11858, n.88 (observing that the Commission has “the authority to expand these rules, but only after the passage of time and a review of their impact”).

¹²⁶ *See* 5 U.S.C. § 603(a). In addition, the *Notice of Proposed Rulemaking* and the IRFA (or summaries thereof) will be published in the Federal Register.

¹²⁷ *See* 47 CFR § 1.1206(b). *See also* 47 CFR §§ 1.1202, 1.1203.

¹²⁸ *See* 47 CFR § 1.1206(b)(2).

D. Filing Requirements

45. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

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

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

- Effective December 28, 2009, all hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street, SW, Room TW-A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. The filing hours are 8:00 a.m. to 7:00 p.m.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.

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

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

47. *Accessibility Information.* To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: <http://www.fcc.gov>.

48. *Additional Information.* For additional information on this proceeding, contact Maria Mullarkey, Maria.Mullarkey@fcc.gov, or Lyle Elder, Lyle.Elder@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

VIII. ORDERING CLAUSES

49. **IT IS ORDERED** that, pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751, and Sections 1, 2(a), 4(i), 303, and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 303, and 613, **COMMENT IS HEREBY SOUGHT** on the proposals described and rules set forth in this *Notice Of Proposed Rulemaking*.

50. **IT IS ORDERED** that the Reference Information Center, Consumer and Governmental Affairs Bureau, shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Proposed Rules

We propose to amend Part 79 of Title 47 of the Code of Federal Regulations as follows:

Part 73 – Closed Captioning and Video Description of Video Programming

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

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

2. Amend § 79.3 (a)-(c) to read as follows:

§79.3 Video description of video programming.

(a) *Definitions.* For purposes of this section the following definitions shall apply:

(9) *Top commercial television broadcast networks.* ABC, CBS, Fox, NBC, and any other commercial television broadcast network in the top five as determined by an average of the national audience share during prime time of broadcast networks and that has at least 50 hours per quarter of prime time programming that is not live or near-live or otherwise exempt under these rules. Initially, the top five networks are those determined by The Nielsen Company, based on the ratings for the time period October 2016-September 2017, and will update at three year intervals. The first update will be July 1, 2021, based on the ratings for the time period October 2019-September 2020; the second will be July 1, 2024, based on the ratings for the time period October 2022-September 2023; and so on. Also, any commercial television broadcast network that the Commission identified as having met this definition as of 2018 or later, even if it is no longer in the top five based on subsequent ratings.

(10) *Top national nonbroadcast television networks.* Any nonbroadcast television network in the top ten, as determined by an average of the national audience share during prime time of nonbroadcast networks that have at least 50 hours per quarter of prime time programming that is not live or near-live or otherwise exempt under these rules. Initially, the top ten networks are those determined by The Nielsen Company, based on the ratings for the time period October 2016-September 2017, and will update at three year intervals. The first update will be July 1, 2021, based on the ratings for the time period October 2019-September 2020; the second will be July 1, 2024, based on the ratings for the time period October 2022-September 2023; and so on. Also, any nonbroadcast television network that the Commission identified as having met this definition as of 2018 or later, even if it is no longer in the top ten based on subsequent ratings.

(b) The following video programming distributors must provide programming with video description **and customer support** as follows:

(1) Commercial television broadcast stations that are affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC), and that are licensed to a community located in the top 25 DMAs, as determined by The Nielsen Company as of January 1, 2011, must provide 50 hours of video description per calendar quarter, either during prime time or on children's programming, on each programming stream on which they carry one of the top four commercial television broadcast networks. If a station in one of these markets becomes affiliated with one of these networks after the

effective date of these rules, it must begin compliance with these requirements no later than three months after the affiliation agreement is finalized;

~~(2)~~ Beginning July 1, 2015, commercial television broadcast stations that are affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC), and that are licensed to a community located in the top 60 DMAs, as determined by The Nielsen Company as of January 1, 2015, must provide 50 hours of video description per calendar quarter, either during prime time or on children's programming, on each programming stream on which they carry one of the top four commercial television broadcast networks. If a station in one of these markets becomes affiliated with one of these networks after July 1, 2015, it must begin compliance with these requirements no later than three months after the affiliation agreement is finalized;

(2) Beginning July 1, 2018, commercial television broadcast stations that are affiliated with one of the top commercial television broadcast networks and licensed to a community located in the top 60 DMAs, as determined by The Nielsen Company as of January 1, 2015, must provide 87.5 hours of video description per calendar quarter, either during prime time or on children's programming, on each programming stream on which they carry one of the top commercial television broadcast networks. If a station in one of these markets becomes affiliated with one of one of the top commercial television broadcast networks after July 1, 2018, it must begin compliance with these requirements no later than three months after the affiliation agreement is finalized;

(3) Television broadcast stations that are affiliated or otherwise associated with any television network must pass through video description when the network provides video description and the broadcast station has the technical capability necessary to pass through the video description, unless it is using the technology used to provide video description for another purpose related to the programming that would conflict with providing the video description;

(4) Multichannel video programming distributor (MVPD) systems that serve 50,000 or more subscribers must provide 50 hours of video description per calendar quarter during prime time or children's programming, on each channel on which they carry one of the top five national nonbroadcast networks, as defined by an average of the national audience share during prime time of nonbroadcast networks that reach 50 percent or more of MVPD households and have at least 50 hours per quarter of prime time programming that is not live or near-live or otherwise exempt under these rules. Initially, the top five networks are those determined by The Nielsen Company, for the time period October 2009-September 2010, and will update at three year intervals. The first update will be July 1, 2015, based on the ratings for the time period October 2013-September 2014; the second will be July 1, 2018, based on the ratings for the time period October 2016-September 2017; and so on; and

(5) Beginning July 1, 2018, multichannel video programming distributor (MVPD) systems that serve 50,000 or more subscribers must provide 87.5 hours of video description per calendar quarter during prime time or children's programming, on each channel on which they carry one of the top national nonbroadcast television networks; and

~~(5)~~(6) Multichannel video programming distributor (MVPD) systems of any size:

(i) Must pass through video description on each broadcast station they carry, when the broadcast station provides video description, and the channel on which the MVPD distributes the programming of the broadcast station has the technical capability necessary to pass through the video description, unless it is using the technology used to provide video description for another purpose related to the programming that would conflict with providing the video description; and

(ii) Must pass through video description on each nonbroadcast network they carry, when the network provides video description, and the channel on which the MVPD distributes the programming of the network has the technical capability necessary to pass through the video description, unless it is using the technology used to provide video description for another purpose related to the programming that would conflict with providing the video description.

(7) Each video programming distributor subject to paragraphs (b)(1), (2), (4), and/or (5) of this section shall make readily available contact information for a person or office with primary responsibility for accessibility compliance issues to consumers who have questions about the availability of or access to video description services, or who request technical support. The point of contact must be able to address consumers' concerns about video description issues, and must respond to consumer inquiries within one business day.

(c) Responsibility for and determination of compliance.

(1) The Commission will calculate compliance on a per channel, and, for broadcasters, a per stream, calendar quarter basis, beginning with the calendar quarter July 1 through September 30, 2012.

(2) In order to meet its ~~fifty-hour~~ quarterly requirement, a broadcaster or MVPD may count each program it airs with video description no more than a total of two times on each channel on which it airs the program. A broadcaster or MVPD may count the second airing in the same or any one subsequent quarter. A broadcaster may only count programs aired on its primary broadcasting stream towards its ~~fifty-hour~~ quarterly requirement. A broadcaster carrying one of the top ~~four~~ commercial television broadcast networks on a secondary stream may count programs aired on that stream toward its ~~fifty-hour~~ quarterly requirement for that network only.

(3) Once a commercial television broadcast station as defined under paragraph (b)(1) **or (b)(2)** of this section has aired a particular program with video description, it is required to include video description with all subsequent airings of that program on that same broadcast station, unless it is using the technology used to provide video description for another purpose related to the programming that would conflict with providing the video description.

(4) Once an MVPD as defined under paragraph (b)~~(3)~~**(4) or (b)(5)** of this section:

(i) Has aired a particular program with video description on a broadcast station it carries, it is required to include video description with all subsequent airings of that program on that same broadcast station, unless it is using the technology used to provide video description for another purpose related to the programming that would conflict with providing the video description; or

(ii) Has aired a particular program with video description on a nonbroadcast network it carries, it is required to include video description with all subsequent airings of that program on that same nonbroadcast network, unless it is using the technology used to provide video description for another purpose related to the programming that would conflict with providing the video description.

(5) In evaluating whether a video programming distributor has complied with the requirement to provide video programming with video description, the Commission will consider showings that any lack of video description was de minimis and reasonable under the circumstances.

APPENDIX B

Initial Regulatory Flexibility Act Analysis

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

A. Need for and Objectives of the Proposed Rules

2. In the *Notice*, the Commission seeks comment on a series of proposals to increase the amount of video described programming available to consumers, and to make it easier to access. The NPRM tentatively concludes that the statutory requirement for the Commission to issue additional video description regulations is satisfied because “the need for and benefits of” providing video described programming as proposed here would be “greater than the technical and economic costs” if the rules are adopted. The proposed rules would require that each included network provide 75% more described programming, or 87.5 hours per quarter, and would include six additional networks within the rules, while revising the way included networks are determined. It proposes to require covered parties to provide dedicated consumer service contacts to deal with video description issues, and to file any exemption petitions electronically. It also seeks comment on a range of related issues.

B. Legal Basis

3. The authority for the action proposed in this rulemaking is contained in the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751, and Sections 1, 2(a), 4(i), 303, 307, 309, 310, and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 303, 307, 309, 310, and 613.

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

4. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted.⁴ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small government jurisdiction.”⁵ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁶ A small business concern

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

² See 5 U.S.C. § 603(a).

³ *Id.*

⁴ *Id.* § 603(b)(3).

⁵ *Id.* § 601(6).

⁶ *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

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.⁷

5. *Television Broadcasting.* This economic census category “comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.”⁸ The SBA has created the following small business size standard for Television Broadcasting firms: those having \$14 million or less in annual receipts.⁹ The Commission has estimated the number of licensed commercial television stations to be 1,390.¹⁰ In addition, according to Commission staff review of the BIA Advisory Services, LLC’s *Media Access Pro Television Database* on March 28, 2012, about 950 of an estimated 1,300 commercial television stations (or approximately 73 percent) had revenues of \$14 million or less.¹¹ We therefore estimate that the majority of commercial television broadcasters are small entities.

6. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included.¹² Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

7. In addition, the Commission has estimated the number of licensed noncommercial educational (“NCE”) television stations to be 395.¹³ These stations are non-profit, and therefore considered to be small entities.¹⁴

8. There are also 2,344 LPTV stations, including Class A stations, and 3689 TV translator stations.¹⁵ Given the nature of these services, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

9. *Wired Telecommunications Carriers.* The North American Industry Classification System (“NAICS”) defines “Wired Telecommunications Carriers” as follows: “This industry comprises

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

⁸ U.S. Census Bureau, *2012 NAICS Definitions: 515120 Television Broadcasting*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515120&search=2012><http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515120&search=2012> (last visited Mar. 6, 2014). U.S. Census Bureau, *2012 NAICS Definitions: 515120 Television Broadcasting*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515120&search=2012><http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515120&search=2012> (last visited Mar. 6, 2014).

⁹ 13 CFR § 121.201 (NAICS code 515120) (updated for inflation in 2010).

¹⁰ See FCC News Release, Broadcast Station Totals as of March 31, 2015 (rel. Apr. 8, 2015).

¹¹ We recognize that BIA’s estimate differs slightly from the FCC total given the information provided above.

¹² “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both.” 13 CFR § 121.103(a)(1).

¹³ See FCC News Release, Broadcast Station Totals as of March 31, 2015 (rel. Apr. 8, 2015).

¹⁴ See generally 5 U.S.C. § 601(4), (6).

¹⁵ See FCC News Release, Broadcast Station Totals as of March 31, 2015 (rel. Apr. 8, 2015).

establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”¹⁶ The SBA has developed a small business size standard for wireline firms for the broad economic census category of “Wired Telecommunications Carriers.” Under this category, a wireline business is small if it has 1,500 or fewer employees.¹⁷ Census data for 2007 shows that there were 3,188 firms that operated for the entire year.¹⁸ Of this total, 3,144 firms had fewer than 1,000 employees, and 44 firms had 1,000 or more employees.¹⁹ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

10. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which category is defined above.²⁰ The SBA has developed a small business size standard for this category, which is: All such businesses having 1,500 or fewer employees.²¹ Census data for 2007 shows that there were 3,188 firms that operated for the entire year.²² Of this total, 3,144 firms had fewer than 1,000 employees, and 44 firms had 1,000 or more employees.²³ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

11. *Cable Companies and Systems.* 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

¹⁶ U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. Examples of this category are: broadband Internet service providers (e.g., cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television (“CCTV”) services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (“DTH”) services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (“MMDS”).

¹⁷ 13 CFR § 121.201; NAICS code 517110.

¹⁸ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ5; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>

¹⁹ *Id.* With respect to the latter 44 firms, there is no data available that shows how many operated with more than 1,500 employees.

²⁰ See also U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

²¹ 13 CFR § 121.201; NAICS code 517110.

²² U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ5; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>

²³ *Id.* With respect to the latter 44 firms, there is no data available that shows how many operated with more than 1,500 employees.

company” is one serving 400,000 or fewer subscribers nationwide.²⁴ Industry data shows that there are currently 660 cable operators.²⁵ Of this total, all but ten cable operators nationwide are small under this size standard.²⁶ In addition, under the Commission’s rate regulation rules, a “small system” is a cable system serving 15,000 or fewer subscribers.²⁷ Current Commission records show 4,629 cable systems nationwide.²⁸ Of this total, 4,057 cable systems have less than 20,000 subscribers, and 572 systems have 20,000 or more subscribers, based on the same records. Thus, under this standard, we estimate that most cable systems are small entities.

12. *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.”²⁹ There are approximately 54 million cable video subscribers in the United States today.³⁰ Accordingly, an operator serving fewer than 540,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.³¹ Based on available data, we find that all but ten incumbent cable 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.

²⁴ 47 CFR § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer Protection And Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, MM Docket No. 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408, para. 28 (1995).

²⁵ NCTA, Industry Data, Number of Cable Operators and Systems, <http://www.ncta.com/Statistics.aspx> (visited Oct. 13, 2014). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505-06, para. 24 (2013) (“15th Annual Competition Report”).

²⁶ See SNL Kagan, “Top Cable MSOs – 12/12 Q”; available at <http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2012Q4&sortcol=subscribersbasic&sortorder=desc> <http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2012Q4&sortcol=subscribersbasic&sortorder=desc>.

²⁷ 47 CFR § 76.901(c).

²⁸ The number of active, registered cable systems comes from the Commission’s Cable Operations and Licensing System (COALS) database on October 10, 2014. A cable system is a physical system integrated to a principal headend.

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

³⁰ See NCTA, Industry Data, Cable’s Customer Base, <http://www.ncta.com/industry-data> (visited Oct. 13, 2014).

³¹ 47 CFR § 76.901(f); see *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

³² See NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), <http://www.ncta.com/industry-data> (visited Aug. 30, 2013).

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).

13. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. DBS, by exception, is now included in the SBA’s broad economic census category, Wired Telecommunications Carriers,³⁴ which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.³⁵ Census data for 2007 shows that there were 3,188 firms that operated for that entire year.³⁶ Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.³⁷ Therefore, under this size standard, the majority of such businesses can be considered small entities. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled “Cable and Other Program Distribution.” As of 2002, the SBA defined a small Cable and Other Program Distribution provider as one with \$12.5 million or less in annual receipts.³⁸ Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.³⁹ Each currently offers subscription services. DIRECTV and DISH 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 under the superseded SBA size standard would have the financial wherewithal to become a DBS service provider.

³⁴ See 13 CFR § 121.201, 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.” (*Emphasis* added to text relevant to satellite services.) U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

³⁵ 13 CFR § 121.201; 2012 NAICS code 517110.

³⁶ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ5; available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

³⁷ *Id.*

³⁸ See 13 CFR § 121.201, NAICS code 517510 (2002).

³⁹ See 15th Annual Competition Report, 28 FCC Rcd at 10507, para. 27. As of June 2012, DIRECTV is the largest DBS operator and the second largest MVPD in the United States, serving approximately 19.9 million subscribers. DISH Network is the second largest DBS operator and the third largest MVPD, serving approximately 14.1 million subscribers. *Id.* at 10507, 10546, paras. 27, 110-11.

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

14. The *Notice* proposes the following new or revised reporting or recordkeeping requirements that would be applicable to small entities. First, it proposes that all covered broadcasters and MVPDs provide dedicated customer service contacts to answer video description questions. In particular, it would require covered entities to provide contact information for a person or office with primary responsibility for accessibility compliance issues to consumers who have questions about the availability of or access to video description services, or who request technical support. The *Notice* also proposes to require all covered broadcasters and MVPDs to file petitions for exemption electronically.

15. With regard to other compliance requirements, the *Notice* proposes to revise the video description rules by requiring an increase in the amount of described programming on each included network carried by a covered broadcast station or MVPD, from 50 hours per calendar quarter to 87.5, as well as an increase in the number of included networks carried by covered distributors to five broadcast and ten nonbroadcast networks.

16. Finally, the *Notice* seeks comment on requiring distributors to notify program guides about the presence of video description, and to include video description with Video-on-Demand programming when that programming has been previously provided with descriptions.

17. While the economic impact of these proposed rules on small entities is not quantifiable at this time, they are not likely to be burdensome for small entities or to affect small entities disproportionately.⁴⁰

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

18. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁴¹

19. The *Notice* proposes rules intended to expand consumer access to video described programming. The existing requirement to provide video description applies to commercial television broadcast stations that are affiliated with ABC, CBS, Fox, or NBC and are located in the top 60 television markets, as well as MVPD systems that serve 50,000 or more subscribers. Thus, the proposed increase in the amount of video description required and expansion of the video description requirements to additional included networks will impose no direct burden on small broadcasters or small MVPDs. Although the rules currently impose “pass through” obligations on all network-affiliated broadcast stations regardless of market size and on all MVPDs regardless of the number of subscribers, most all stations and MVPDs, including small entities, now have this capability. As such, we anticipate that these proposals will have little to no impact on small entities.

20. The proposed requirement to file exemption petitions electronically will not impose an additional burden on small entities, and may reduce the burden. The proposed requirement that covered broadcasters and MVPDs provide dedicated customer service contacts to answer video description questions may not require significant additional resources for small entities. Even if it requires additional resources, however, we believe it would provide benefits to consumers that outweigh any costs, and that

⁴⁰ See *infra* paras. 19-20.

⁴¹ 5 U.S.C. § 603(c)(1)-(c)(4).

those benefits would be undermined if the requirement were not universal. The item seeks comment on the timing for implementing the requirements. Finally, we invite comment on any other changes the Commission should consider making to the video description rules. For any other changes proposed, comments should include potential costs and benefits of such changes.

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

21. None.

**STATEMENT OF
CHAIRMAN TOM WHEELER**

Re: *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43.

This week has featured action on some of the Commission's most high-profile items: the launch of the world's first Incentive Auction, the adoption of a Lifeline Modernization Order, the kickoff of a privacy rulemaking. I would contend that the least noticed item on today's Open Meeting agenda – proposed rules to increase the availability of video-described programming -- is a piece of one of the Commission's most significant – and most overlooked – achievements of the past several years: the implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA).

The CVAA is the most significant accessibility legislation since the Americans with Disabilities Act. This landmark law has helped ensure that accessibility is a first thought, not an afterthought as new broadband-enabled technologies emerge.

I'm proud that the Commission met every single major deadline in implementing the Act, expanding access to television, the Internet, and new applications and services.

Today's proposal would increase the amount of video-described programming available to consumers, marking another step forward in helping to make video programming accessible to Americans with visual disabilities.

Video description enables those who are blind or visually impaired to independently enjoy and follow popular television programs and better participate in the shared cultural experience that television offers. Popular television programs, such as *Modern Family*, *NCIS*, *New Girl*, *Chicago Fire*, *Suits*, and the live production of "The Wiz" have already utilized video description to rave reviews.

Many blind and visually impaired consumers have written the Commission calling for the expansion of video description. One consumer wrote, "It is so gratifying to be able to enjoy a movie with sighted family or friends without constantly asking questions." Another wrote, "Many of us rely on description to equally enjoy the entertainment we are paying for."

The proposals that we make today would expand these benefits to more programming and a greater audience, at what we project will be a very reasonable cost to programmers.

The NPRM tentatively concludes that the need for and benefits of providing additional video description would be greater than the costs. As required under the CVAA, we will make a final determination on this issue before adopting any new rules.

Again, these proposed rules are part of a much broader agenda to prioritize communications access issues for Americans with disabilities, some of which extend beyond the requirements of the CVAA.

Looking ahead, the Commission has also adopted rules to make emergency information in video programming and user interfaces on video devices accessible to individuals with disabilities. These rules go into effect on December 20 and will empower consumers to access talking guides and menus on a range of devices used to view video programming. Consumers will also have an easy-to-use mechanism to turn closed captioning on and off and to find audible emergency information on the secondary audio channel. The December 20 effective date is another deadline we intend to meet.

Expanding access to communications technology for the more than 50 million Americans with disabilities is one of this agency's most notable achievements and most pressing priorities going forward. Today's proposal is a notable next step in this vitally important effort.

Thank you to the Media Bureau and the Consumer and Governmental Affairs Bureau for their work on this item.

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43.

During last week's House Subcommittee hearing, I previewed the mantra "community, community, community." Today's Commission action furthers the goal of universal opportunity and cultural inclusiveness by helping individuals who are blind or visually impaired enjoy the same popular television programs as their friends, family, and others in their community.

There are many wonderful benefits, that have been realized since the Twenty-First Century Communications and Video Accessibility Act (CVAA) was signed into law in October 2010. Perhaps most important to me, is the fact that this forward looking law allows the Commission to enhance the independence, productivity, and overall quality of life for millions.

Today's Notice of Proposed Rulemaking (NPRM) seeks to expand the availability of video described programming by 75 percent, and consistent with the statute, the proposed increase from 50 hours per calendar year to 87.5 hours will make a big difference in the lives of individuals who are blind or visually impaired, allowing them to immerse themselves in the programming in a way that the audio dialogue simply does not provide.

The Notice seeks comment on whether the Commission's rules should include even more networks, and if we should apply these requirements to Video-on-Demand programming. These questions remind us that our work when it comes to making programming more accessible will never be complete and, thankfully, the statute gives the Commission the authority to continually revisit whether we are satisfactorily meeting the communications needs of those who would benefit from video description.

Last year, marked the 25th anniversary of the Americans with Disabilities Act – that landmark legislation that forever changed the lives of countless Americans. Today's NPRM marks yet another important milestone in the Commission's ongoing work to improve the lives and broadcast experiences of people who have or are experiencing vision loss.

Thanks are due to the Media Bureau and the Consumer and Governmental Affairs Bureau for their work on this important item. The Commission's steadfast commitment to fulfilling the goals of the CVAA, by expanding accessibility in communications for people who are blind or visually impaired, will make an everlasting difference in the lives of millions of Americans.

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43.

It's a question we're all familiar with: What to watch? For most of us, the answer lies in a dizzying array of channels, an expanding number of screens, and an exploding range of on-demand programming. But for the 20 million Americans with vision loss—including an increasing number of veterans—answering this question is much more difficult.

Six years ago this began to change, when Congress passed the Twenty-First Century Communications and Video Accessibility Act. This law pried open the doors of digital age opportunity and provided broader access to video programming through video description.

With video description, those with vision loss no longer miss facial expressions, visual jokes, or critical scene changes. That's because video description makes video programming accessible to individuals who are blind or visually impaired by inserting narrative descriptions of key visual elements in television programming. Ask anyone who is wrestling with vision loss—this is a policy that makes more programming more accessible to more of us.

Today, the Commission takes steps to update its video description requirements. We ask about increasing the number of required hours of video description programming and the number of networks subject to our rules. At the same time, we consider how viewing habits are changing. We ask how our policies should apply in a world where so much programming is on demand and scheduling our lives around an original air date is no longer necessary. These are important questions. I hope we can address them in short order. And I hope that as we do we can also provide more answers to the timeworn question about what to watch—for those who are visually impaired.

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

Re: *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43.

“Just because a man lacks use of his eyes doesn’t mean he lacks vision.” Legendary musician Stevie Wonder once made that keen observation. In 2014, I had the privilege of meeting him and hearing his ideas for expanding the availability of “video-described programming”—basically, a show in which one can listen to a narrator give an oral description of what is being shown on the screen. He told me how hearing such a description helped him envision what was happening and integrate that information with the dialogue that he heard.

Stevie isn’t alone. Video description currently allows millions of blind and visually impaired Americans to more fully enjoy much of the quality programming that is being produced during this Golden Age of Television.

Consider, for example, one of the most critical scenes from the AMC series *Breaking Bad*. (Spoiler alert, but you’ve had plenty of time to binge-watch the whole series, as I did.¹) Hank is in Walt’s bathroom. He finds the inscribed copy of Walt Whitman’s *Leaves of Grass* and silently, for some time, tries to come to grips with the implication. If you couldn’t see the screen and no one was describing to you what was occurring, you would miss entirely Hank’s realization that Walt is Heisenberg, a plot point that is central to upcoming episodes.

Congress recognized the value of video description in the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”). In that law, it instructed the FCC to reinstate video description rules adopted by the Commission in 2000 but subsequently struck down by the U.S. Court of Appeals for the D.C. Circuit.² One year later, in 2011, the FCC did just that.

Today, the Commission proposes to expand upon those regulations and require that more programming on more broadcast and non-broadcast networks be video-described. Because I support increasing the availability of video description, I am voting to approve in part.

At the same time, I’m concerned that taken together, the proposals in this *Notice of Proposed Rulemaking* exceed the Commission’s statutory authority. I therefore regrettably must also dissent in part. I’ll briefly describe why.

In the CVAA, Congress carefully limited the Commission’s ability to expand upon our reinstated video description rules. In particular, Congress said that any additional regulations “may not increase, in total, the hour requirement for additional described programming by more than 75 percent of the requirement” in the reinstated regulations.³ Unfortunately, the proposals set forth in this *Notice of Proposed Rulemaking* don’t respect this congressionally-imposed limit.

Specifically, the reinstated regulations require four specific broadcast networks (ABC, CBS, Fox, and NBC) and the top five non-broadcast networks in the United States to each broadcast 50 hours of video-described programming per quarter. That constitutes a total requirement of 450 hours per quarter (9 networks x 50 hours). Pursuant to the CVAA, the Commission therefore has the authority to increase

¹ See also “FCC to Fine Americans Who Don’t Keep Up with TV Shows,” *The Onion* (Jan. 6, 2011), available at <http://www.theonion.com/article/fcc-to-fine-americans-who-dont-keep-up-with-tv-sho-18725> (quoting former Chairman Genachowski as saying that “Staying abreast of popular culture is the responsibility of every citizen.”).

² See 47 U.S.C. § 613(f)(1).

³ See 47 U.S.C. § 613(f)(4)(B).

that total hours requirement by 75%, which works out to an additional 337.5 hours per quarter of video-described programming.

However, all of the proposals in this NPRM, in combination, would increase the amount of mandated video-described programming by at least 862.5 hours per quarter. That would constitute a 192% increase in the total hours requirement. First, those nine networks currently covered by the rules would have their quarterly requirement raised from 50 hours to 87.5 hours, an increase of 75%. And second, that same 87.5 hours quarterly requirement would be imposed upon one new broadcast network and five new non-broadcast networks.

But the statute doesn't allow the Commission to have its cake and eat it too. We can increase the per network hours requirement on existing networks by 75%. Or perhaps we can impose video description requirements on additional programming networks so that the increase in total hours is 75%. But Congress denied us the legal authority to do both.

And the 192% figure is a conservative estimate of the increase in the total hours requirement for video-described programming that would result from these proposals. The NPRM also proposes something called a "no-backsliding" requirement. Under this rule, a top five broadcast network or a top ten non-broadcast network would still be required to abide by our video description requirement even if its viewership fell and it was no longer a top five or top ten network. Over time, the Commission's regulations could end up applying to many more than 15 networks and the total hours requirement could increase by much more than 192% over time. This is the "Hotel California" approach to regulation: a network can check out of the upper ranks of viewership any time it likes, but it can never leave our regulatory reach.

Incredibly, the FCC even reinvents math. The NPRM explains that "the 'top five' will include ABC, CBS, Fox, and NBC, regardless of their relative rankings. In the event that one or more of those named networks suffers a sustained drop below fifth place in relative broadcast network rankings, the 'top five' broadcast networks for the purposes of these rules could consist of more than five networks."⁴ Just reflect upon that for a moment. In FCC-speak, the top five broadcast networks can mean more than five networks. This brings to mind the insistence of the Party in George Orwell's *1984* that $2 + 2 = 5$.

In the hopes of reaching a compromise, I suggested that we neutrally seek comment on a no-backsliding requirement as well as an extension of the video description requirements to additional networks. This would have given sufficient notice of these ideas for the public to have input and would have kept the proposed increase in the total hours requirement within the law. It would have led to a unanimous vote without sacrificing the majority's ability to adopt any idea teed up in the NPRM. But as is so often the case these days, my modest suggestion was rejected. It crossed some red line, the reason for which I cannot fathom.

I'm therefore not optimistic about how the Commission will handle this proceeding going forward. But to quote Stevie Wonder, I "hope my premonition misses" and that we'll work together to reach a consensus—one that makes video-described programming more available and can withstand judicial review.

⁴ NPRM at note 83.

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

Re: *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43.

Today, we take a step toward increasing the availability of video description to make television programming more accessible to those who are blind or visually impaired. This feature, made possible by many developments in video technology, has been found helpful or enjoyable by a number of visually impaired individuals, as well as their families and friends. Ultimately, I could potentially support some expansion of our requirements in this area, and I support this process to consider the merits of doing so and to give the public an opportunity to weigh in.

I appreciate the Chairman's willingness to flesh out some more specifics on the costs of this proposal. The cost-benefit analysis could be improved significantly, especially on the benefit side, and I hope to see updates and more data included if this initiative proceeds to the next stage.

For instance, the sparseness of the cost-benefit analysis makes it difficult to assess the value of the no-backsliding rule proposed. There must be some point at which a highly-ranked network can fall far enough in the ratings that the costs of compliance with these rules would clearly outweigh the benefits. I thank the Chairman for including an opportunity to comment about setting up an express exemption to address this concern.

At the same time, I share my colleague's disagreement regarding our statutory authority to expand the number of networks subject to these rules. Certainly, the proposal offered here would increase the total hour requirement for all networks well beyond the 75 percent increase specifically set as a maximum by the CVAA.¹ While the version of the bill that passed the House of Representatives included a specific grant of authority for the Commission to increase the availability of video-described programming, which according to the report included "an increase in the number of networks required to provide such programming or the number of hours required to be provided" ten years after enactment,² this concept failed to garner sufficient support, and was removed from the final version of the bill that was ultimately enacted into law. So it's implausible to think – and actually contrary to the canons of statutory construction – that we have authority to apply the rules to more networks now, *six* years after enactment, when language that would have allowed us to do the same thing *ten* years after enactment didn't even survive the legislative process. A final order following through on this specific proposal would be difficult for me to support, and, therefore, I must dissent in part.

¹ 47 U.S.C. § 613(f)(4)(b).

² H.R. Rep. No. 111-563 (2010).