

§ 73.622(i) [Amended]

2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Tennessee, is amended by adding channel 25 and removing channel 5 at Nashville.

[FR Doc. 2011-5097 Filed 3-17-11; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION
47 CFR Parts 73 and 79

[MB Docket No. 11-43; FCC 11-36]

Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission takes an initial step to implement the Twenty-First Century Communications and Video Accessibility Act of 2010, by seeking comment on the mandated reinstatement of video description rules that would apply to MVPDs and network-affiliated broadcasters.

DATES: Comments must be submitted by interested parties on or before April 18, 2011. Reply comments must be submitted no later than May 17, 2011. Written PRA comments on the proposed information collection requirements contained herein must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before May 17, 2011.

ADDRESSES: You may submit comments, identified by MB Docket No. 11-43, FCC 11-36, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Federal Communications Commission's Web site:* <http://www.fcc.gov/cgb/ecfs/>. Follow the instructions for submitting comments.

- *Mail:* Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- *People With Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters,

CART, etc.) by e-mail: FCC504@fcc.gov or phone: 202-418-0530 or TTY: 202-418-0432.

In addition to filing comments with the Secretary, a copy of any PRA comments on the proposed collection requirements contained herein should be submitted to the Federal Communications Commission via e-mail to PRA@fcc.gov and to Nicholas A. Fraser, Office of Management and Budget, via e-mail to nfraser@omb.eop.gov or via fax at 202-395-5167. For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Lyle Elder, Lyle.Elder@fcc.gov, of the Media Bureau, Policy Division, at (202) 418-2120. For additional information concerning the information collection requirements contained in this document, send an e-mail to PRA@fcc.gov or contact Cathy Williams, (202) 418-2918. To view or obtain a copy of this information collection request (ICR) submitted to OMB: (1) Go to this OMB/GSA Web page: <http://www.reginfo.gov/public/do/PRAMain>, (2) look for the section of the Web page called "Currently Under Review," (3) click on the downward-pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, and (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of this ICR as shown in the Supplementary Information section below (or its title if there is no OMB control number) and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: This is a summary of document FCC 11-36, adopted March 2, 2011 and released March 3, 2011. The full text is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY-A257, Washington, DC, 20554. These documents will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat. The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY-B402,

Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

This document contains proposed information collection requirements. As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3520), the Federal Communications Commission invites the general public and other Federal agencies to comment on the following information collection(s). Public and agency comments are due May 17, 2011.

Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

OMB Control Number: 3060-xxxx.
Title: Video Description of Video Programming.

Form Number: N/A.

Type of Review: New collection.

Respondents: Individuals or households; Businesses or other for-profit entities; Not-for-profit institutions.

Number of Respondents and Responses: 76 respondents; 80 responses.

Estimated Time per Response: 1-5 hours.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Voluntary and required to obtain or retain benefits. The statutory authority for this collection of information is contained in 47 U.S.C. 613(f).

Total Annual Burden: 144 hours.

Total Annual Costs: \$26,250.

Privacy Act Impact Assessment: Yes. The Privacy Impact Assessment (PIA) was completed on June 28, 2007. It may

be reviewed at: http://www.fcc.gov/omd/privacyact/Privacy_Impact_Assessment.html. The Commission is in the process of updating the PIA to incorporate various revisions made to the SORN.

Nature and Extent of Confidentiality: Confidentiality is an issue to the extent that individuals and households provide personally identifiable information, which is covered under the FCC's system of records notice (SORN), FCC/CGB-1, "Informal Complaints and Inquiries." As required by the Privacy Act, 5 U.S.C. 552a, the Commission also published a SORN, FCC/CGB-1 "Informal Complaints and Inquiries", in the **Federal Register** on December 15, 2009 (74 FR 66356) which became effective on January 25, 2010.

Needs and Uses: The Commission is seeking approval for this proposed information collection from the Office of Management and Budget (OMB). On March 3, 2011, the Commission released a Notice of Proposed Rulemaking, MB Docket No. 11-43; FCC 11-36. This rulemaking proposed information collection requirements that support the Commission's video description rules that would be codified at 47 CFR 79.3, as required by the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA"). In 2000, the Commission adopted rules requiring certain broadcasters and multichannel video program distributors (MVPDs) to carry programming with video description. The United States Court of Appeals for the District of Columbia Circuit vacated the rules due to insufficient authority soon after their initial adoption. The CVAA directs the Commission to reinstate those rules, with certain modifications, on October 8, 2011.

The proposed information collection requirements consist of:

Petitions for exemption based on "economic burden."

Pursuant to proposed 47 CFR 79.3(d), a video programming provider may petition the Commission for a full or partial exemption from the video description requirements based upon a showing that they would be economically burdensome.

Petitions for exemption must be filed with the Commission, placed on Public Notice, and be subject to comment from the public.

Complaints alleging violations of the video description rules.

Section 79.3(e) of the proposed rules provides that a complaint alleging a violation of the video description rules may be transmitted to the Commission by "any reasonable means" that would best accommodate the complainant's

disability, and that each complaint must include:

The name and address of the complainant;

The name and address of the broadcast station against whom the complaint is alleged and its call letters and network affiliation, or the name and address of the MVPD against whom the complaint is alleged and the name of the network that provides the programming that is the subject of the complaint;

A statement of facts sufficient to show that the video programming distributor has violated or is violating the Commission's rules, and, if applicable, the date and time of the alleged violation;

The specific relief or satisfaction sought by the complainant;

The complainant's preferred format or method of response to the complaint (such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, or some other method that would best accommodate the complainant's disability); and

A certification that the complainant attempted in good faith to resolve the dispute with the broadcast station or MVPD against whom the complaint is alleged.

The Commission is seeking OMB approval for the proposed information collection requirements.

Summary of the Notice of Proposed Rulemaking

I. Introduction

1. In compliance with the recently enacted Twenty-First Century Communications and Video Accessibility Act of 2010 (the "Communications and Video Accessibility Act" or "CVAA"),¹ the *Notice of Proposed Rulemaking* ("NPRM") proposes and seeks comment on reinstatement of the video description rules adopted by the Commission in 2000. The CVAA directs us to "reinstate [our] video description regulations" with certain modifications.² "Video description," sometimes referred to as "audio description," which is the insertion of audio narrated descriptions of a television program's key visual elements into natural pauses in the

¹ Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111-260, 124 Stat. 2751 (2010).

² CVAA 202(a), Public Law 111-260, 124 Stat. 2751(2010) (to be codified at 47 U.S.C. 613). The regulations were promulgated in *Implementation of Video Description of Video Programming*, MM Docket No. 99-339, Report and Order, 15 FCC Rcd 15230 (2000) ("2000 Report and Order"), recon. granted in part and denied in part, 16 FCC Rcd 1251 (2001) ("Recon") (attached at Appendix C) and were codified at 47 CFR 79.3.

program's dialogue,³ makes video programming more accessible to individuals who are blind or visually impaired. The United States Court of Appeals for the District of Columbia Circuit vacated the Commission's video description rules due to insufficient authority soon after their initial adoption.⁴ The CVAA now directs the Commission to reinstate those rules with certain modifications.⁵ We anticipate that the revised and reinstated rules will afford 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.

2. The Commission's rules required large-market broadcast affiliates of the top four national networks and multichannel video programming distributors ("MVPDs") with more than 50,000 subscribers to provide video description.⁶ Covered broadcasters were required to provide 50 hours of video-described prime time or children's programming, per quarter, and covered MVPDs were required to provide the same number of hours on each of the five most popular nonbroadcast networks.⁷ The rules also required that all network-affiliated broadcasters (commercial or non-commercial) and all MVPDs pass through any video description provided with programming they carried, to the extent that they are technically capable of doing so.⁸ As required under the CVAA, we propose to reinstate these rules, with the modifications required by the law, on October 8, 2011, and to require broadcast stations and MVPDs subject to our rules to begin providing the requisite number of hours of programming with video description beginning in the first quarter of 2012.

3. We seek comment on the modifications to the rules required by the CVAA. Notably, these modifications include the exemption of "live or near-live" programming from the rules. We seek comment on the definition of "near-live," and propose that programs produced within 24 hours of their first airing be considered "near-live" under the rules. We also seek information about the number of hours of non-exempt programming provided by the top nonbroadcast programming

³ CVAA at Title II, sec. 202(a), 713(h)(1).

⁴ *Motion Picture Ass'n of America, Inc. v. Federal Communications Comm.*, 309 F.3d 796 (D.C. Cir. 2002).

⁵ CVAA at Title II, sec. 202(a), 713(f)(1-2).

⁶ 47 CFR 79.3(b).

⁷ *Id.* at § 79.3(b)(1), (3).

⁸ *Id.* at § 79.3(b)(2), (4).

networks to enable us to identify which networks will be subject to our rules.

II. Background

4. In 1996, at Congress's direction, the Commission issued a report on the use of video description in video programming.⁹ In 2000, the Commission adopted rules requiring certain broadcasters and MVPDs to carry programming with video description.¹⁰ The Commission found that the record demonstrated the importance of video description, stating, for example, that

[t]he comments of the American Council of the Blind contained more than 250 e-mails and letters of support for rules, which explained how video description enhances the understanding of blind and low vision people of television programming and cultural behavior such as body language, and gives them a feeling of independence. One commenter said that * * * “[w]hether entertaining, educational or cultural, television has become an integral part of American life. I, and other blind and visually impaired people, have always participated in television viewing, but with [video description], we are finally participating equally.” Helen Harris, founder of a description service, says that “[v]ideo description effectively bridges the gap between the blind and mainstream society by creating a shared experience which leaves the blind with an increased sense of normalcy in their lives.”¹¹

Five months after the rules went into effect, they were vacated by the United States Court of Appeals for the District of Columbia Circuit on the ground that the Commission lacked sufficient authority to promulgate video description rules.¹² Nonetheless, some broadcast and nonbroadcast networks have voluntarily continued to provide this important service; for instance, CBS, Fox, PBS, TCM, and TNT all provide description of selected programming. We commend these networks and all others that are voluntarily offering described programming, for recognizing the importance of video description to the

members of their audiences who are blind or visually impaired.

5. On October 8, 2010, President Obama signed the CVAA,¹³ which increases the access of persons with disabilities to modern communications services and technologies and gives the Commission express authority to adopt video description rules. The statute directs the Commission, as an initial step, to reinstate the previously adopted video description rules, with certain modifications.¹⁴ To fulfill our statutory mandate, we begin the process with requests for comment in this Notice of Proposed Rulemaking. The CVAA imposes other requirements with respect to video description. For example, we are required to submit a report within two years of phasing in the reinstated rules, discussing the status, benefits, and costs of video description on television and Internet-provided video programming.¹⁵ We must file a second report, nine years after the enactment of the CVAA, that provides a detailed review of the video description market and the potential need for expansion of the description mandates.¹⁶ The CVAA also gives us authority to expand the video description hour requirements and the number of markets in which broadcasters are required to provide description if we determine that the benefits of televised description outweigh its costs.¹⁷ We will address these additional requirements and potential expansions in a separate proceeding.

III. Discussion

A. Reinstated Rules

6. Section 713(f)(1) of the Communications Act, as added by the CVAA, states that the Commission shall, after a rulemaking, reinstate its video description regulations contained in the Implementation of Video Description of Video Programming Report and Order (15 F.C.C.R. 15,230 (2000)), recon. granted in part and denied in part, (16 F.C.C.R. 1251 (2001)), modified as provided in paragraph (2).¹⁸

Consistent with Congress' directive, we will reinstate the Commission's 2000 rules on October 8, 2011 with the

modifications required by the CVAA.¹⁹ The most significant elements of those rules are:

- Affiliates of the top four national networks²⁰ located in the top 25 television markets²¹ must provide 50 hours per calendar quarter of video-described prime time and/or children's programming. For this purpose, prime time means 8–11 pm Monday through Saturday, and 7–11 pm on Sunday, except that these times are an hour earlier in the central time zone, and stations in the mountain time zone may choose which “prime time” period to adopt for the purpose of these rules. 47 CFR 79.3(a)(6). In this item, we propose to define children's programming as being directed at children 16 years of age and younger. See paragraph 32, below, and Appendix A. MVPDs with 50,000 or more subscribers must provide 50 hours per calendar quarter of video-described prime time and/or children's programming on each of the top five nonbroadcast networks that they carry. Our ranking of the Top 5 networks will be based on Nielsen national prime time audience share, the number of subscribers reached, and amount of non-exempt programming. See paragraph 12, below.

- To count toward the requirement, the programming must not have been previously aired with video description, on that particular MVPD channel or broadcast station, more than once.²² The CVAA defines “video programming” in the video description context as “programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media (as defined in section 3).” CVAA at Title II, sec. 202(a), 713(h)(2). Section 3 of the Communications Act, as amended in the CVAA, defines consumer-generated media as “content created and made available by consumers to online Web sites and services on the Internet, including video, audio, and multimedia

⁹ 47 U.S.C. 613 (this section, Video Programming Accessibility, was added to the Communications Act by Section 305 of the Telecommunications Act of 1996); see also *Implementation of Section 305 of the Telecommunications Act of 1996—Video Programming Accessibility*, MM Docket No. 95–176, Report, 11 FCC Rcd 19214 (1996) (“Report”). The Commission had initiated the inquiry in 1995, before enactment of the 1996 Act. *Closed Captioning and Video Description of Video Programming*, MM Docket No. 95–176, Notice of Inquiry, 11 FCC Rcd 4912 (1995).

¹⁰ 2000 Report and Order, *supra* note 2.

¹¹ 2000 Report and Order, *supra* note 2, at para. 4 (internal citations omitted).

¹² *Motion Picture Ass'n of America, Inc. v. Federal Communications Comm.*, 309 F.3d 796 (D.C. Cir. 2002).

¹³ Communications and Video Accessibility Act, *supra* note 1.

¹⁴ *Id.* at Title II, sec. 202(a), 713(f)(1) (requiring reinstatement of the rules one year after the date of enactment of the CVAA).

¹⁵ *Id.* at 713(f)(3).

¹⁶ *Id.* at 713(f)(4)(C)(iii).

¹⁷ *Id.* at 713(f)(4)(A), (B), (C)(i), (iv).

¹⁸ *Id.* at 713(f)(1). See also *id.* at 713(f)(2) (“Such regulations shall be modified only as follows * * *”).

¹⁹ See generally *2000 Report and Order and Recon*, *supra* note 2. We incorporate the discussion of these rules in the *2000 Report and Order and Reconsideration Order* into the record of this proceeding.

²⁰ For the purpose of the video description rules, these are ABC, CBS, Fox, and NBC. 47 CFR 79.3(b)(1).

²¹ Markets are ranked by Nielsen based on their total number of television households. TVB Market Profiles at http://www.tvb.org/market_profiles/131627. Nielsen Media Research, Inc. (“Nielsen”) is now known as The Nielsen Company.

²² 47 CFR 79.3(c)(2); see also *Recon*, *supra* note 2, at fn. 74 (“Broadcast stations and MVPDs can count a repeat of a previously aired program in the same quarter or in a later quarter, but only once altogether”).

content.” CVAA at Title I, sec. 101(1), 3 (54). The proposed rules adopt the CVAA definition of video programming.

- Any broadcast station, regardless of its market size, affiliated or otherwise associated with any television network, must “pass through” video description when the network provides it and the station has the technical capability necessary to do so.²³ Similarly, any MVPD, regardless of its number of subscribers, must “pass through” video description when a broadcast station or nonbroadcast network provides it, if it has the technical capability necessary to do so on the channel on which it distributes the broadcast station or nonbroadcast network programming.²⁴ Any programming aired with description must always include description if re-aired on the same station or MVPD channel.²⁵

- Complaints alleging a failure to comply with these rules may be filed with the Commission by any viewer, and the Commission will act to resolve such complaints in consultation with the video programming distributor.²⁶

B. Identifying Stations Required To Provide Video Description

7. As discussed above, under the reinstated rules, certain broadcast stations and MVPDs will have an obligation to provide video description of some of the programming they provide. Specifically, affiliates of ABC, CBS, Fox, and NBC that are located in the 25 television markets with the largest number of television households must provide 50 hours per calendar quarter of video-described programming during prime time, or at any time if it is children’s programming. To count toward this 50-hour requirement, video-described programming must be airing either the first or second time on the station; that is, a video described program may be counted toward the 50 hours when it is originally aired and once more when it is re-run. Although we anticipate that much of the programming aired with video description will be newly produced, we propose that the reinstated rules permit stations to count any program that they are airing for the first or second time with video description after the reinstated rules become effective, even if the program has previously been aired on that station. Similarly, a station may count programming toward its 50 hour obligation even if that programming has

aired elsewhere with description, so long as it is airing with description for the first or second time on that station. The rules are identical for MVPDs with 50,000 or more subscribers, except that they apply to the programming of each of the top five national non-broadcast networks carried by the MVPDs.

8. Although the CVAA requires reinstatement of the rules largely as adopted by the Commission in 2000, the Commission does have some discretion in determining the stations, MVPDs, and networks to which they apply. We therefore seek comment on these issues, as discussed below.

1. Broadcast Stations

9. As established in the 2000 rules, the broadcast stations subject to the requirement to provide video description²⁷ were those “[c]ommercial television broadcast stations that [were] affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC), as of September 30, 2000, and that [were] licensed to a community located in the top 25 DMAs, as determined by Nielsen Media Research, Inc. for the year 2000.”²⁸ We propose to reinstate the rules insofar as they designate ABC, CBS, Fox, and NBC as the broadcast networks affected.²⁹ Although the original rule refers only to “commercial television broadcast stations,” the *2000 Report and Order* is unclear about whether this requirement was intended to be limited to full-power commercial stations, or to apply to commercial low power stations as well. We seek comment on the appropriate scope of the requirement to provide description. The CVAA directs us to “update the list of the top 25 designated market areas.”³⁰ We propose to apply the rules to the Top 25 markets as determined by Nielsen as of January 1, 2011 (*i.e.*, the 2010–2011 DMA rankings), and, within those markets, to require stations affiliated with ABC, CBS, Fox, or NBC to provide video description, regardless of when the affiliation begins. We seek comment on this proposal.

10. The relative size of markets often changes over time. We want to ensure that the rules apply to the top 25 markets, as required by the CVAA. At the same time, we seek to ensure that regulatees and the public at large have adequate advance notice regarding which broadcast stations will be subject to the requirement to provide video

description, and to avoid undue disruption for audiences who come to rely upon video described programming. Further, we recognize that a significant amount of video described programming (potentially all the programming required under the rules) will be provided by national network programmers and passed through by local stations, even in the top 25 markets. Because of the “pass-through” obligations of network stations outside the top 25 markets, discussed below, there may be little to no difference in the amount of video described programming available from affiliates of the top 4 networks in larger and smaller markets.³¹ In light of these considerations, we seek comment on whether we should reconsider the ranking of the top 25 markets at certain intervals to reflect current market conditions better and, if so, what those intervals should be.

11. The CVAA mandates that the Commission extend the video description requirements to the top 60 markets after filing a report to Congress on the state of the video description market, as discussed above,³² and no later than six years after the enactment date of the CVAA (*i.e.*, October 8, 2016). If, as we propose in this Notice, the first phase is complete on January 1, 2012, the Report will be submitted to Congress no later than January 1, 2014. Should we identify now the date to be used to determine the top 60 markets and a compliance deadline for stations in markets 26–60, or should we set those dates following the required report to Congress?

2. Top Five National Nonbroadcast Networks

12. In order to implement the requirement that MVPDs provide video description, we must also update the “top 5 national nonbroadcast networks that have at least 50 hours per quarter of prime time programming that is not exempt.”³³ The prior rules determined the top nonbroadcast networks using “an average of the national audience share during prime time of nonbroadcast networks, as determined by Nielsen Media Research, Inc., for the time period October 1999–September 2000, that reach 50 percent or more of MVPD households.”³⁴ Those rules did not contemplate that any programming would be exempt, which made identification of those networks more

²³ 47 CFR 79.3(b)(2); *see infra* paras. 14–16.

²⁴ 47 CFR 79.3(b)(4); *see infra* paras. 14–16.

²⁵ 47 CFR 79.3(c)(3); *see also Recon, supra* note 2, at para. 27 and fn. 83.

²⁶ 47 CFR 79.3(e).

²⁷ 47 CFR 79.3(b)(1), (3) (requirement to provide description).

²⁸ 47 CFR 79.3(b)(1).

²⁹ *Id.*

³⁰ CVAA, Title II, sec. 202(a), 713(f)(2)(B).

³¹ *See infra* para. 14.

³² *Id.* at 713(f)(4)(C)(i–ii). *See supra* para. 5.

³³ CVAA, Title II, sec. 202(a), 713(f)(2)(B).

³⁴ “Exempt” programming includes “live or near-live programming.” *See infra* para. 21.

³⁴ 47 CFR 79.3(b)(3).

straightforward than under the new statutory requirements.³⁵ We propose to update the definition's time period to October 2009—September 2010 (These dates cover the 2009–2010 television season, which will be the most recent full television season from which ratings will have been calculated and be available when the rules are adopted). We also propose to explicitly exclude from the top five any non-broadcast network that does not provide, on average, at least 50 hours per quarter of prime time non-exempt programming, i.e., programming that is not live or near-live.³⁶ We seek comment regarding this proposal, and particularly seek detailed information from any network that believes it should be excluded from the top five covered networks due to an insufficient amount of non-exempt programming. We note that Nielsen treats some nonbroadcast “channels” as more than one “network” for ratings purposes; for example, Nickelodeon/Nick at Nite and Cartoon Network/Adult Swim. We seek comment as to how we should take this into account when determining which networks are subject to the requirement to provide video description for 50 hours per quarter of prime time or children's programming. According to staff analysis of Nielsen data for the 2009–2010 television season, the top 5 national nonbroadcast networks, based on an average of the national audience share during prime time of nonbroadcast networks, are USA, the Disney Channel, ESPN, TNT, and Nickelodeon's Nick at Nite. FCC Staff Analysis based on data provided by Nielsen. Additional networks, some of which are tied for audience share during the 2009–2010 television season, which have the potential to be covered under the statute if any of the top 5 do not provide the requisite hours of non-exempt programming, include Fox News, TBS, A&E, History, the Cartoon Network's Adult Swim, the Family Channel, and HGTV. Any network that believes it should be excluded from the top five due to an insufficient amount of nonexempt programming should provide notice in the Record before the close of the Comment period. The network's Comments should be accompanied by an affidavit stating how many hours of nonexempt programming it typically airs per quarter (including how many hours of live programming and how many hours of near-live programming, as we propose to define those terms), as well as supporting documentation such as program schedules. Parties that wish to challenge

any such claims may do so in their Reply Comments. If the Media Bureau determines that the information submitted is insufficient to determine whether a particular network has at least 50 hours per quarter of non-exempt prime time programming, we authorize the Bureau to seek additional information from the network or networks, consistent with the requirements of the Paperwork Reduction Act.³⁷

13. Ratings of nonbroadcast networks often change over time. We want to ensure that the rules apply to the top five national nonbroadcast networks, as required by the CVAA. At the same time, we also want to ensure that regulatees and the public at large have adequate advance notice regarding which networks will be subject to the rules, and to avoid undue disruption for audiences who will come to rely upon video described programming. In light of these considerations, we seek comment on whether we should reconsider the ranking of the top five nonbroadcast networks at certain intervals to better reflect current market conditions and, if so, what those intervals should be.

C. Pass-Through of Video Described Programming

14. As noted above, under our previous video description rule, broadcasters affiliated with any network and all MVPDs were required to pass through any video description that they received from a broadcast or cable network or, in the case of MVPDs, from a broadcast station they carried, whenever they had the technical capability on the relevant channel to pass through the video description, unless they were using the technology necessary to provide such video description for another purpose related to the programming that would conflict with providing the video description.³⁸ We propose to reinstate this rule without revision. We also note that the must carry provision of the Communications Act requires cable operators to carry “the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers.”³⁹ Although

the original rule refers to all “television broadcast stations,” the *2000 Report and Order* is unclear about whether this requirement was intended to include low power stations. We seek comment on the appropriate scope of the obligation to pass through description. This obligation is distinct from the requirement to provide video description that we propose to impose on certain broadcasters and MVPDs. First, it applies to all MVPDs and network-affiliated broadcast stations (including non-commercial stations), rather than a subset of large-market entities.⁴⁰ Second, broadcast stations and MVPDs with the obligation to provide 50 hours of description must continue to pass through any video description that they receive even after they have provided the 50 required hours of description.⁴¹ Broadcast stations and MVPDs that pass through video-described programming from a network can count that programming toward their 50 hour obligation, so long as it is either aired during prime time or is children's programming, and has not been previously aired more than once since the adoption of our rules. We note that, historically, most video described programming has been provided by the broadcast and non-broadcast networks to the broadcast stations and MVPDs, which pass it through and make it available to consumers.

15. In the *2000 Report and Order*, the Commission required any station or MVPD with the “technical capability” to do so to pass through video description.⁴² We said that we would “consider broadcast stations and MVPDs to have the technical capability necessary to support video description if they have virtually all necessary equipment and infrastructure to do so, except for items that would be of minimal cost.”⁴³ On reconsideration, the Commission adopted an exception to this requirement. When the secondary audio program (“SAP”) equipment and channel was being used to provide another program-related service, a station or MVPD did not have to stop providing that service in order to pass through the video description. This was based on the fact that the SAP

Satellite Home Viewer Improvement Act of 1999, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, paras. 60–61 (2001).

⁴⁰ *2000 Report and Order*, *supra* note 2, at para. 30.

⁴¹ *Recon*, *supra* note 2, at para. 14 (The National Association of Broadcasters recognized that entities that had met their 50 hour obligation were still required to pass description through to viewers).

⁴² *2000 Report and Order*, *supra* note 2, at para. 30.

⁴³ *Id.*

³⁷ See *infra* note 51.

³⁸ 3847 CFR 79.3(b)(2), (4).

³⁹ 3947 U.S.C. 534(b)(3), 47 CFR 76.62(e), (f) (cable); 47 U.S.C. 338(j), 47 CFR 76.66(j) (DBS). See also *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules and Implementation of the*

³⁵ See *infra* para. 20, *et seq.*

³⁶ See *infra* para. 21.

channel could not be used to provide two services simultaneously.⁴⁴ For the same reason, the Commission also adopted this “other program-related service” exception in subsections (c)(3) and (4) of the video description rules (subsequent airings of described programming).⁴⁵ In the analog world, the SAP channel gave an entity the technical capability to pass through video description, but the inherent limitations of the technology meant that the entity could not provide video description simultaneously with another secondary audio track. Digital transmission, however, enables broadcasters and MVPDs to provide numerous audio channels for any given video stream. Unlike with SAP, therefore, digital technology allows simultaneous transmission of a variety of program-related secondary audio tracks. Digital video signals can have an enormous number of alternative audio tracks; although as a practical matter that number may be limited by the amount of bandwidth allocated to the programming stream, digital programming can technically include more than three audio tracks.⁴⁶ Given this flexibility, is it necessary or appropriate to apply the “other program-related service” exception to digital transmissions?

16. Transmission of multiple audio tracks, even digitally, may require the use of additional equipment by broadcasters and MVPDs. We seek comment on what is needed for broadcast stations and MVPDs to have the “technical capability necessary” to pass through video description of digital programming, the extent to which affected entities already have any necessary equipment or have incentives to upgrade to this equipment for other purposes, and the cost of such equipment and any other necessary upgrades. Specifically, we seek comment on the costs of providing additional audio tracks once an entity is technically capable of providing a secondary digital audio track. What standards should we use to take these costs into account when determining whether a distributor has “the technical capability necessary to pass through the video description”?

D. Phase-In

17. The CVAA requires us to reinstate the revised video description rules “on the day that is 1 year after the date of

enactment,”⁴⁷ to provide “an appropriate phased schedule of deadlines for compliance,”⁴⁸ and to determine “the beginning calendar quarter for which compliance shall be calculated.”⁴⁹ We propose to adopt and publish modified rules before October 8, 2011 (the date one year after enactment) that will be effective thirty days after publication,⁵⁰ except for those requirements subject to Office of Management and Budget (OMB)⁵¹ approval or that are phased-in as described below. We seek comment on this proposed timeline.

18. We propose that on January 1, 2012, 85 days after the reinstatement of the rules,⁵² affiliates of the top four networks located in the top 25 markets begin providing 50 hours per calendar quarter of video-described prime time and/or children’s programming. Similarly, we propose that on January 1, 2012,⁵³ MVPDs with 50,000 or more subscribers begin providing 50 hours per calendar quarter of video-described prime time and/or children’s programming on each of the top five non-broadcast networks that they carry. We propose that, should any MVPD not serving at least 50,000 subscribers on the effective date of the rules begin to do so at a later date, it must provide video description on the top five non-broadcast networks, in the same manner as MVPDs currently serving 50,000 or more subscribers, beginning no more than three months after reaching 50,000 subscribers. Given that an MVPD should be aware in advance that it is approaching the 50,000 subscriber threshold, we believe three months is adequate time to ensure that it will be able to comply with this requirement. We further propose that compliance with the “50-described hours” requirement be calculated for these broadcasters and MVPDs beginning in the first calendar quarter of 2012.⁵⁴ We also propose that broadcasters and MVPDs comply with the pass-through

⁴⁷ CVAA, Title II, sec. 202(a), 713(f)(1).

⁴⁸ *Id.* at 713(f)(2)(F).

⁴⁹ *Id.* at 713(f)(2)(B).

⁵⁰ The Administrative Procedure Act requires that “[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date,” with certain exceptions. 5 U.S.C. 553(d).

⁵¹ The Paperwork Reduction Act requires that any new regulation imposing a paperwork burden be reviewed and approved by OMB before it becomes effective. The Paperwork Reduction Act of 1995 (“PRA”), Pub. L. No. 104–13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

⁵² The effective date of rules requiring OMB approval may be later.

⁵³ The effective date of rules requiring OMB approval may be later.

⁵⁴ The first quarter of measured compliance with any rules requiring OMB approval may be later.

requirement⁵⁵ commencing January 1, 2012.

19. We seek comment on these phase-in proposals. Will this compliance schedule provide sufficient time for covered entities to begin providing and passing through video described programming? Given the limited number of hours of video description required at this stage, we do not expect any significant delay in compliance as a result of a need to negotiate with rights holders. We seek comment on this conclusion. We note that although the CVAA deferred certain implementation issues to the Commission, to a great extent the entities that will be subject to our reinstated rules have been aware of the pending requirements since at least the enactment of the CVAA on October 8, 2010.

E. Exemptions

20. The CVAA recognizes the unique difficulties of providing video description for programming that is produced live or shortly before it is first aired, i.e., programming that is “live or near-live.” As a result, the statute explicitly states that the regulations we adopt “shall not apply to live or near-live programming,” and directs us to take this exemption into consideration when determining whether a non-broadcast network is covered by the video description rules.⁵⁶ The CVAA also gives the Commission authority to provide certain other categorical or individual exemptions, and we seek comment on whether and how such exemptions should be provided.

1. Live or Near-Live Programming

21. Section 713(f)(2)(E) of the Communications Act, as added by the CVAA, states that: “[t]he regulations shall not apply to live or near-live programming.”⁵⁷ We believe that “live” programming is, self-evidently, programming aired substantially simultaneously with its performance. This programming is often non-scripted, and would include, for example, many sporting events and news programs.⁵⁸ We are, however, unaware of an accepted definition of “near-live programming.” Some television programs, even if not aired “live,” are filmed and produced just hours before they are first aired. In addition, we understand that some programs aired live on the East Coast are aired three hours later on the West Coast. By

⁵⁵ See *supra* paras. 14–16.

⁵⁶ CVAA, Title II, sec. 202(a), 713(f)(2)(B), (E).

⁵⁷ *Id.* at 713(f)(2)(E).

⁵⁸ See, e.g., Merriam-Webster Dictionary available at <http://www.merriam-webster.com/dictionary/live> (“broadcast directly at the time of production”).

⁴⁴ *Id.* at para. 15.

⁴⁵ 47 CFR 79.3(c)(3), (4).

⁴⁶ See MPEG Compression Standard ISO/IEC 13818–1; Advanced Television Systems Committee A/53, A/52 Standards.

including “near-live” programming within the exemption, Congress apparently wished to exempt programs produced such a short time before airing that there is not sufficient time for the creation of video descriptions. We therefore seek comment on a definition of “near-live programming” that will ensure that programming is not covered by the reinstated rules unless there is ample time to create and insert video descriptions in the programming before it is aired. We propose that programming performed and recorded less than 24 hours prior to the time it is first aired be deemed “near-live,” and seek comment on this proposal. We seek comment on how long it takes to produce video descriptions, and request that those who prefer a shorter or longer window for near-live programming support their alternative proposals with information regarding the length of time needed to produce video descriptions. How should our rule address the situation where a program is substantially completed before the beginning of the “near-live” window, but edited during that window in ways which do not change the basic content? How commonly does this occur in the production of major network prime time programming? We note that we may modify our definition of “near-live programming” in the future as broadcasters, MVPDs, and programming producers gain experience with integrating video description into their production and transmission cycle and it becomes feasible to incorporate video descriptions closer to the time of transmission of the programming.

2. Other Exemptions

22. Section 713(f)(2)(C) of the Communications Act, as added by the CVAA, states that

[t]he regulations may permit a provider of video programming or a program owner to petition the Commission for an exemption from the requirements of [the video description provisions] upon a showing that the requirements contained in this section be[isic] economically burdensome.⁵⁹

We propose to reinstate the previously adopted process for requesting an exemption from our rules. We also propose to replace the term “undue burden” in the rules with “economically burdensome,” as described in the

⁵⁹ *Id.* at 713(f)(2)(C). We note that Section 713(f)(2)(C) is expressed in permissive terms (e.g., “the regulations may permit”), rather than the mandatory language that appears in other subsections of the legislation. Compare 713(f)(2)(A) (“the regulations shall apply”). Accordingly, under subsection (C), the Commission may permit exemptions based on the “economically burdensome” standard, but is not required to do so.

CVAA, and propose that we use the same factors as applied to the undue burden standard. In the closed captioning context, the Commission has previously found the standards to be quite “closely related.”⁶⁰ This will allow the video description rules to mirror the “economically burdensome” standard currently used in the closed captioning context. In the CVAA, Congress revised Section 713(d)(3) of the Communications Act, dealing with closed captioning exemptions, to remove the reference to the “undue burden” standard and replace it with a reference to the “economically burdensome” standard. CVAA, Title II, sec. 202(c). The Senate Commerce Committee report, in discussing this provision of the CVAA, states that the Committee “encourages the Commission, in its determination of ‘economically burdensome’ to use the factors listed in section 713(e).” S. Rep. 111–386, at 14 (2010). Section 713(e) of the Communications Act, which was not amended by the CVAA, lists the factors to be considered when determining if the closed captioning rules create an “undue burden” on a party (these factors are repeated in the Commission’s rules at 47 CFR 79.1(f)(2); see paragraph 23, below). Thus, the Committee appears to consider the two standards to be interchangeable, at least in the closed captioning context. We seek comment on this proposal.

23. The Commission previously determined in the closed captioning context that compliance would constitute an “undue burden” for an entity, therefore justifying an individual exemption from the rule, upon a showing that the captioning requirements would result in “significant difficulty or expense” for the petitioner. Commission rules explain that such exemptions may be granted for “a channel of video programming, a category or type of video programming, an individual video service, a specific video program or a video programming provider.” 47 CFR 79.1(f)(1). The factors to be taken into consideration when making an exemption determination under this section are: (1) The nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or

⁶⁰ *Closed Captioning and Video Description of Video Programming, et al*, MM Docket No. 95–176, Report and Order, 13 FCC Rcd 3272, para. 143 (1997); *but see* para. 168 (noting the paucity of useful legislative history).

program owner.⁶¹ What are the circumstances under which the video description rules might be, or might become, “economically burdensome” for covered entities? What are the necessary costs for broadcasters, MVPDs, and the producers of programming to begin providing 50 hours per calendar quarter of video described programming? How are these costs different in digital than in analog transmission? Specifically, are there any considerations unique to particular MVPD delivery technologies, such as DBS or IPTV, that might justify a partial exemption or delay?⁶²

24. What are the anticipated ongoing costs, per program or hour described? What, on average, is the total cost to produce a single program or hour of prime time programming on the major networks covered by the requirement to provide video description? Will this requirement add any ongoing costs other than the description itself? Comments from both the purchasers and producers of video description would be of great value in understanding these costs.

25. For those entities subject to the requirement to provide (and not merely pass through) video description, we find it unlikely that the modest requirement of 50 hours per quarter will be economically burdensome; as discussed above, in the first phase this requirement only applies to the top broadcast network affiliates in the biggest markets, MVPDs serving more than 50,000 subscribers, and the most popular nonbroadcast networks. Are there any particular concerns regarding the economic burden of pass-through obligations, which will apply to a much larger number of entities than the requirement to provide video description? We seek comment on these issues.

26. Section 713(f)(2)(D) of the Communications Act, as added by the CVAA, provides that

[t]he Commission may exempt from the regulations * * * a service, class of services, program, class of programs, equipment, or class of equipment for which the Commission has determined that the application of such regulations would be economically burdensome for the provider of such service, program, or equipment.⁶³

We are unaware of a need to exempt any such categories at this time, beyond the

⁶¹ 47 CFR 79.1(f)(2). *See also* 47 U.S.C. 613(e) and *supra* note 68.

⁶² For the purposes of this proceeding, we consider Internet Protocol delivery only to the extent it is used by an MVPD. The Act directs the Commission to initiate a future inquiry about video description in video programming distributed via the Internet. CVAA, Title II, sec. 202(a), 713(f)(3)(B).

⁶³ *Id.* at 713(f)(2)(D).

exemption for “live or near-live” programming discussed above. The Commission will be actively studying the impact of our video description rules over the next several years, as part of our continuing Congressional reporting obligations.⁶⁴ As a result, we anticipate that there will be ample opportunity to resolve any problems that impact an entire class of “service, program, or equipment” in future Orders in this proceeding. We seek comment on our proposal not to adopt new categorical exemptions, and on whether there are any classes of “service, program, or equipment” that should be so exempted.

F. Digital Format

27. Section 713(f)(2)(A) of the Communications Act, as added by the CVAA, states that “[t]he regulations shall apply to video programming, as defined in subsection (h), insofar as such programming is transmitted for display on television in digital format.”⁶⁵ When the video description rules were originally adopted in 2000, digital television was in its relative infancy, and those rules explicitly did not extend to digital transmission of programming.⁶⁶ At the time, the Commission indicated that it expected to extend the rules to cover digital broadcasting “after there has been further experience with both digital broadcasting and video description.”⁶⁷ On June 12, 2009 full-power television broadcasters nationwide completed their transition to digital-only broadcasting,⁶⁸ and a number of digital broadcasters and digitally transmitted nonbroadcast networks have been providing video description to viewers for even longer.⁶⁹ We propose, therefore, to extend the reinstated rules to cover all video programming, including that transmitted for display on television in digital format. We seek comment on this proposal.

28. A separate issue, exclusive to digital broadcasting, is the ability of

digital television broadcasters to transmit multiple streams of programming on a single channel. We propose to consider only programming on the primary programming stream when measuring a broadcast station’s compliance with the “50 described hours” requirement, unless the station carries a top-four national network on another stream. How should we apply the rules when a station is affiliated with more than one network? In situations in which a broadcast station carries another top-four network’s programming on a secondary stream, we propose to apply the rules in the same manner as if the network programming were carried by a separate station. We seek comment on this proposal. We also propose to impose the pass-through requirement, discussed above, on all network-provided programming carried on all of an affiliated station’s programming streams. This approach would ensure the availability of described programming to the widest possible audience. In particular, this requirement would ensure that those who subscribe to an MVPD service that only carries the broadcast station’s primary stream would have access to described programming. We seek comment on these proposals.

G. Other Issues

29. *Quality Standards.* We seek comment on whether we should adopt quality standards for video description. Although some quality issues might be subjective (dealing with the content of the narration) and therefore difficult to enforce, others might be addressed in an objective standard. For example, the Commission could adopt a standard requiring that video description not conflict with dialogue or other important audio in the program. Additionally, the Commission could require video description to be synchronous with the action it is describing. Is it necessary for the Commission to adopt these or other standards? If so, what standards would be necessary or appropriate? Does the Commission have authority to adopt such standards and could we do so consistent with the First Amendment? Commenters who support adoption of such quality standards should also propose either standards or existing sources that could serve as the basis for standards. Whether or not the Commission adopts mandatory standards, are there existing sources of such standards? Should the industry develop a list of best practices? We solicit input on what some of these practices might be.

30. *Program Selection.* For informational purposes, we also seek comment on how programs are likely to be chosen for description. Do entities plan to determine which shows to describe based on popularity or input from community advisory groups, or the degree to which a particular program would be enhanced by video description, or do they anticipate taking a different approach to choosing programs for video description? Do the costs or benefits of description change with different types or formats of program? How do entities intend to publicize the availability of video description? Only a subset of programming will contain video description. Therefore, should the Commission require that the availability of video description on certain programs be publicized in a certain manner, and if so, what is the best way to do so and does the Commission have authority to require the covered entities to publicize this information? We seek comment on these questions.

31. *Updated A/53 Standard.* The Commission’s Rules incorporate the ATSC digital broadcast standard by reference, but have not been updated to reflect the 2010 revisions to the A/53 standard.⁷⁰ The 2007 standard currently in effect under our rules includes two options for transmission of the Visually Impaired (“VI”) audio service that would typically carry video descriptions. The first option is compatible with all DTV receivers. The second option requires support in DTV receivers that is rarely implemented. In the latest version of A/53 Part 5 adopted by ATSC, the second option has been eliminated.⁷¹ We propose to update our rules to incorporate A/53 Part 5: 2010 in order to ensure that video description can be received by all DTV receivers. We seek comment on this proposal.

32. *Children’s Programming.* Under the proposed rules, broadcast stations and MVPDs required to provide 50 hours of video described programming per quarter may do so during prime time or children’s programming.⁷² The

⁷⁰ 47 CFR 73.682(d).

⁷¹ ATSC Digital Television Standard, Document A/53 Part 5: 2010 (July 6, 2010).

⁷² As the Commission explained in the 2000 *Report and Order*, Prime time programming is the most watched programming, and so programming provided during this time will reach more people than programming provided at any other time. In addition, as we noted in the *Notice*, the several thousand dollars per hour cost to describe programming is a very small portion of the production budget for the typical prime time program. At the same time, as we noted in the *Notice*, programming with video description may provide a benefit not only to children who are visually disabled, but also to those who are learning

Continued

⁶⁴ *Id.* at 713(f)(3), (4)(C)(iii).

⁶⁵ *Id.* at 713(f)(2)(A). *See also id.* at 713(h)(2) (“The term ‘video programming’ means programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media (as defined in section 3).”); *see also id.* at Title I, sec. 101, § 3(54) (“The term ‘consumer generated media’ means content created and made available by consumers to online Web sites and services on the Internet, including video, audio, and multimedia content.”).

⁶⁶ 2000 *Report and Order*, *supra* note 2, at para. 7; *Recon*, *supra* note 2, at para. 18.

⁶⁷ *Id.*

⁶⁸ Press Release, Federal Communications Commission, Full-Power TV Broadcasters Go All-Digital (June 13, 2009).

⁶⁹ *See supra* para. 4.

proposed rules define “prime time” for video description purposes.⁷³ The Commission’s rules define “children’s programming” differently in different contexts. For instance, we impose limits on commercial advertising in programming “produced and broadcast primarily for an audience of children 12 years old and younger.”⁷⁴ Our processing guidelines regarding “educational and informational” programming for children, on the other hand, apply to programming that “furthers the educational and informational needs of children 16 years of age and under.”⁷⁵ Because older children with vision or other impairments can benefit from video description, we propose to define children’s programming in this context as programming directed at children 16 years of age and under. We seek comment on this proposal.

33. *Subsection G.* Section 713(f)(2)(G) of the Communications Act, as added by the CVAA, says that

[t]he Commission shall consider extending the exemptions and limitations in the reinstated regulations for technical capability reasons to all providers and owners of video programming.⁷⁶

We propose not to take any action under this provision. We seek comment on this proposal.

34. *Non-Substantive Revisions.* In addition to the proposals above, we intend to make necessary non-substantive revisions to the rules. These include revisions and additions to the Definitions section of the prior rules,⁷⁷ changes to the second paragraph of the Procedures for Exemptions section⁷⁸ to reflect that they apply to video programming “providers” rather than just video programming “distributors,”⁷⁹

disabled. Programming with video description has both audio description and visual appeal, and so has the potential to capture the attention of learning disabled children and enhance their information processing skills. Requiring broadcast stations and MVPDs to provide children’s or prime time programming with video description thus ensures that the programming reaches the greatest portion of the audience it is intended to benefit the most. Permitting broadcast stations and MVPDs to select between the two provides them flexibility without compromising that goal.

2000 Report and Order, *supra* note 2, at para. 36 (internal citations omitted).

⁷³ *Supra* para. 6; see also Appendix A.

⁷⁴ 47 CFR 73.670, note 2.

⁷⁵ 47 CFR 73.671(c).

⁷⁶ CVAA, Title II, sec. 202(a), 713(f)(2)(G).

⁷⁷ 47 CFR 79.3(a). At a minimum, this will include a definition of “Live or Near-live Programming.”

⁷⁸ 47 CFR 79.3(d)(2).

⁷⁹ The *Recon* changed the scope of the undue burden exemption so that it applied to “providers” rather than just to “distributors,” but while 47 CFR 79.3(d)(1) was updated to reflect this change, 47 CFR 79.3(d)(2) was not.

updates to the Complaint Procedures⁸⁰ to reflect the valid current address and name of the Consumer and Governmental Affairs Bureau, and non-substantive wording changes intended to make the meaning of the rules clearer. We seek comment on any other necessary technical revisions to the reinstated rules.

35. *Other Comments Requested.* Finally, we invite comment on any other issues relating to the reinstatement and modification of our Video Description rules.

IV. Procedural Matters

A. Initial Paperwork Reduction Act of 1995 Analysis

36. 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.”

B. Ex Parte Rules

37. *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.⁸¹ *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.⁸² Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

C. Filing Requirements

38. Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR

⁸⁰ 47 CFR 79.3(e).

⁸¹ See 47 CFR 1.1206(b); see also 47 CFR 1.1202, 1.1203.

⁸² See 47 CFR 1.1206(b)(2).

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 St., 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 a.m. to 7 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).

39. *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.,

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.

40. *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>.

41. *Additional Information.* For additional information on this proceeding, contact John Norton, John.Norton@fcc.gov, or Lyle Elder, Lyle.Elder@fcc.gov, of the Media Bureau, Policy Division, (202) 418–2120.

D. Initial Regulatory Flexibility Analysis

42. With respect to the *NPRM*, an Initial Regulatory Flexibility Analysis (“IRFA”), see generally 5 U.S.C. 603, follows. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM* specified *supra*. The Commission will send a copy of the *NPRM*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.⁸³

Initial Regulatory Flexibility Analysis

43. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”) ⁸⁴ the Commission has prepared this Initial Regulatory Flexibility Analysis (“IRFA”) of the possible economic impact on a substantial number of small entities by the policies and rules proposed in this *Notice of Proposed Rulemaking* (“*NPRM*”). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM* as indicated on its first page. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).⁸⁵ In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.⁸⁶

⁸³ 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**.

⁸⁴ See 5 U.S.C. 603. The RFA, see 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Public Law 104–121, Title II, 110 Stat. 857 (1996).

⁸⁵ See 5 U.S.C. 603(a).

⁸⁶ See *id.*

E. Need for, and Objectives of, the Proposals

44. This *NPRM* proposes and seeks comment on reinstatement of the Commission's video description rules, which make television programming more accessible to persons with visual disabilities. The United States Court of Appeals for the District of Columbia Circuit vacated the rules due to insufficient authority soon after initial adoption.⁸⁷ With its enactment, the CVAA now directs the Commission to reinstate the rules with certain modifications.⁸⁸ The proposed rules require large-market broadcast affiliates of the top four national networks and multichannel video programming distributors (“MVPDs”) with more than 50,000 subscribers to provide video description.⁸⁹ Covered broadcasters are required to provide 50 hours of video-described prime time or children's programming, per quarter, and covered MVPDs are required to provide the same number of hours on each of the five most popular nonbroadcast networks.⁹⁰ This requirement to provide description will effect few, if any, small entities. The rules also require, to the extent technically possible, that all network-affiliated broadcasters (commercial or non-commercial) and all MVPDs pass through any video description provided with programming they carried.⁹¹ This pass-through requirement will effect any small MVPDs and network-affiliated broadcasters. As required under the CVAA, we propose to reinstate these rules on October 8, 2011, and to require broadcast stations and MVPDs subject to our rules to begin full compliance in the first quarter of 2012. We also propose to make certain modifications to the rules, as directed by the CVAA. Notably, these modifications include the exemption of “live or near-live” programming from consideration under the rules. We seek comment on the definition of “near-live,” propose that programs produced within 24 hours of their first airing be considered “near-live” in the context of video description, and also seek comment on other possible grounds for exemption from the rules.

F. Legal Basis

45. The authority for the action proposed in this rulemaking is

⁸⁷ *Motion Picture Ass'n of America, Inc. v. Federal Communications Comm.*, 309 F.3d 796 (D.C. Cir. 2002).

⁸⁸ Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–260, 124 Stat. 2751 (2010) (“CVAA”) at Title II, sec. 202(a), 713(f)(1–2).

⁸⁹ 47 CFR 79.3(b).

⁹⁰ *Id.* at § 79.3(b)(1), (3).

⁹¹ *Id.* at § 79.3(b)(2), (4).

contained in the Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 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.

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

46. 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.⁹² The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁹³ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁹⁴ A “small business concern” is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁹⁵ The rule changes proposed herein will directly affect small television broadcast stations and small multichannel video program distributors (MVPDs), which include cable operators and satellite video providers. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

47. *Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than \$14.0 million in annual receipts.⁹⁶ Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.”⁹⁷ The Commission has

⁹² 5 U.S.C. 603(b)(3).

⁹³ 5 U.S.C. 601(b).

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

⁹⁵ 15 U.S.C. 632.

⁹⁶ See 13 CFR 121.201, NAICS Code 515120 (2007).

⁹⁷ *Id.* This category description continues, “These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to

estimated the number of licensed commercial television stations to be 1,392.⁹⁸ According to Commission staff review of the BIA/Kelsey, MAPRO Television Database (“BIA”) as of April 7, 2010, about 1,015 of an estimated 1,380 commercial television stations⁹⁹ (or about 74 percent) have revenues of \$14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 390.¹⁰⁰ We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations¹⁰¹ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

48. 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 do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. We note that it is difficult

the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.” Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

⁹⁸ See News Release, “Broadcast Station Totals as of December 31, 2009,” 2010 WL 676084 (F.C.C.) (dated Feb. 26, 2010) (“*Broadcast Station Totals*”); also available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296538A1.pdf.

⁹⁹ We recognize that this total differs slightly from that contained in *Broadcast Station Totals*, *supra*, note 15; however, we are using BIA’s estimate for purposes of this revenue comparison.

¹⁰⁰ See *Broadcast Station Totals*, *supra*, note 15.

¹⁰¹ “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 CFR 121.103(a)(1).

at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

49. *Satellite Telecommunications*. Since 2007, the SBA has recognized satellite firms within this revised category, with a small business size standard of \$15 million.¹⁰² The most current Census Bureau data are from the economic census of 2007, and we will use those figures to gauge the prevalence of small businesses in this category. Those size standards are for the two census categories of “Satellite Telecommunications” and “Other Telecommunications.” Under the “Satellite Telecommunications” category, a business is considered small if it had \$15 million or less in average annual receipts.¹⁰³ Under the “Other Telecommunications” category, a business is considered small if it had \$25 million or less in average annual receipts.¹⁰⁴

50. The first category of Satellite Telecommunications “comprises establishments primarily engaged in providing point-to-point telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”¹⁰⁵ For this category, Census Bureau data for 2007 show that there were a total of 512 firms that operated for the entire year.¹⁰⁶ Of this total, 464 firms had annual receipts of under \$10 million, and 18 firms had receipts of \$10 million to \$24,999,999.¹⁰⁷ Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by rules adopted pursuant to the NPRM.

51. The second category of Other Telecommunications consists of firms “primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting

telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.”¹⁰⁸ For this category, Census Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year.¹⁰⁹ Of this total, 2,346 firms had annual receipts of under \$25 million.¹¹⁰ Consequently, we estimate that the majority of Other Telecommunications firms are small entities that might be affected by our action.

52. *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,”¹¹¹ which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.¹¹² To gauge small business prevalence for the DBS service, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with more than 1,000 employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees. Based on this data, the majority of these firms can be considered small.¹¹³ Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and EchoStar Communications Corporation (“EchoStar”) (marketed as the DISH Network).¹¹⁴ Each currently offers

¹⁰⁸ U.S. Census Bureau, 2007 NAICS Definitions, “517919 Other Telecommunications”, <http://www.census.gov/naics/2007/def/ND517919.HTM>.

¹⁰⁹ See 13 CFR 121.201, NAICS code 517919.

¹¹⁰ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517919” (issued Nov. 2010).

¹¹¹ See 13 CFR 121.201, NAICS code 517110 (2007). The 2007 NAICS definition of the category of “Wired Telecommunications Carriers” is in paragraph 7, above.

¹¹² 13 CFR 121.201, NAICS code 517110 (2007).

¹¹³ See http://www.factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=600&-ds_name=EC0751SSZ5&-lang=en.

¹¹⁴ See Annual Assessment of the Status of Competition in the Market for the Delivery of Video

¹⁰² See 13 CFR 121.201, NAICS code 517410.

¹⁰³ *Id.*

¹⁰⁴ See 13 CFR 121.201, NAICS code 517919.

¹⁰⁵ U.S. Census Bureau, 2007 NAICS Definitions, “517410 Satellite Telecommunications”.

¹⁰⁶ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=900&-ds_name=EC0751SSZ4&-lang=en.

¹⁰⁷ *Id.*

subscription services. DIRECTV¹¹⁵ and EchoStar¹¹⁶ each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

53. *Fixed Microwave Services.* Fixed microwave services include common carrier,¹¹⁷ private operational-fixed,¹¹⁸ and broadcast auxiliary radio services.¹¹⁹ At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees.¹²⁰ The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is

Programming, Thirteenth Annual Report., 24 FCC Rcd 542, 580, para. 74 (2009) (“13th Annual Report”). We note that, in 2007, EchoStar purchased the licenses of Dominion Video Satellite, Inc. (“Dominion”) (marketed as Sky Angel). See Public Notice, “Policy Branch Information; Actions Taken,” Report No. SAT-00474, 22 FCC Rcd 17776 (IB 2007).

¹¹⁵ As of June 2006, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. See 13th Annual Report, 24 FCC Rcd at 687, Table B-3.

¹¹⁶ As of June 2006, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. *Id.* As of June 2006, Dominion served fewer than 500,000 subscribers, which may now be receiving “Sky Angel” service from DISH Network. See *id.* at 581, para. 76.

¹¹⁷ See 47 CFR 101 *et seq.* (formerly, Part 21 of the Commission’s Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

¹¹⁸ Persons eligible under parts 80 and 90 of the Commission’s Rules can use Private Operational-Fixed Microwave services. See 47 CFR parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee’s commercial, industrial, or safety operations.

¹¹⁹ Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission’s Rules. See 47 CFR part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

¹²⁰ See 13 CFR 121.201, NAICS code 517210.

unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA’s small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

54. *Cable and Other Program Distribution.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”¹²¹ The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees.¹²² According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.¹²³ Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.¹²⁴ Thus, under this size standard, the majority of firms can be considered small and may be affected by rules adopted pursuant to the NPRM.

55. *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 company” is one serving 400,000 or fewer subscribers, nationwide.¹²⁵

¹²¹ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

¹²² 13 CFR 121.201, NAICS code 517110 (2007).

¹²³ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

¹²⁴ See *id.*

¹²⁵ See 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. See *Implementation of Sections of the 1992 Cable Television Consumer Protection and Competition Act: Rate Regulation*,

Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.¹²⁶ In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.¹²⁷ Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers.¹²⁸ Thus, under this second size standard, most cable systems are small and may be affected by rules adopted pursuant to the NPRM.

56. *Cable System Operators.* The Act 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.”¹²⁹ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.¹³⁰ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.¹³¹ 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,¹³² and therefore

MM Docket Nos. 92–266, 93–215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 para. 28 (1995).

¹²⁶ These data are derived from *R.R. Bowker, Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); *Warren Communications News, Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

¹²⁷ See 47 CFR 76.901(c).

¹²⁸ *Warren Communications News, Television & Cable Factbook 2006*, “U.S. Cable Systems by Subscriber Size,” page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

¹²⁹ 47 U.S.C. 543(m)(2); see also 47 CFR 76.901(f) & nn.1–3.

¹³⁰ 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).

¹³¹ These data are derived from *R.R. Bowker, Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); *Warren Communications News, Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

¹³² The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s

Continued

we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

57. *Open Video Services.* The open video system (“OVS”) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.¹³³ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,¹³⁴ OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”¹³⁵ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, there were a total of 3,188 firms in this previous category that operated for the entire year.¹³⁶ Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.¹³⁷ Thus, under this size standard, most cable systems are small and may be affected by rules adopted pursuant to the NPRM. In addition, we note that the Commission has certified some OVS operators, with some now providing service.¹³⁸ Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.¹³⁹ The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules.

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

¹³⁴ See 47 U.S.C. 573.

¹³⁵ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

¹³⁶ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

¹³⁷ See *id.*

¹³⁸ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovscer.html>.

¹³⁹ See *Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606–07 para. 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

H. Description of Projected Reporting, Record Keeping, and Other Compliance Requirements for Small Entities

58. The NPRM seeks comment on rules that would affect small television broadcast stations and MVPDs by requiring them to pass through a secondary audio track, containing video description, with any described programming that is provided by a network. The description need not be passed through if the station or MVPD does not have the technical capability to pass it through, or if the entity is already using all of the secondary audio capacity associated with that program for other program-related material. If any small entities are subject to the separate requirement to “provide” video description, we anticipate that they will do so by passing description through to viewers. This separate requirement will thus impose no distinct burden on small broadcasters or MVPDs. These requirements may in some cases result in the need for engineering services. The NPRM seeks comment, in part, on whether the rules could require the purchase of additional equipment.

I. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

59. 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.¹⁴⁰ We seek comment on the applicability of any of these alternatives to affected small entities.

60. The requirements proposed in the NPRM, including those affecting small broadcasters and MVPDs, are largely mandated by Congress. They would in most cases create minimal economic impact on small entities, and could provide positive economic impact by increasing viewership by persons with visual impairments. The Commission has statutory authority to determine the effective date of the rules, and to exempt parties or classes from operation of any or part of the proposed rules. We invite small entities to submit comment on the

impact of the proposed rules, and on how the Commission could further minimize potential burdens on small entities if the proposals provided in the NPRM, or those submitted into the record, are ultimately adopted.

J. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

V. Ordering Clauses

61. *It is ordered* that, pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 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*.

62. *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.

List of Subjects

47 CFR Part 73

Civil defense, Communications equipment, Defense communications, Education, Equal employment opportunity, Foreign relations, Mexico, Political candidates, Radio, Reporting and recordkeeping requirements, Television.

47 CFR Part 79

Cable television.

Federal Communications Commission.

Marlene H. Dortch,
Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission Proposes 47 CFR parts 73 and 79 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336, and 339.

2. Section 73.682 is amended by revising paragraph (d) to read as follows:

§ 73.682 TV Transmission Standards.

* * * * *

¹⁴⁰ 5 U.S.C. 603(c)(1)–(c)(4).

(d) *Digital broadcast television transmission standard.* Effective May 29, 2008 transmission of digital broadcast television (DTV) signals shall comply with the standards for such transmissions set forth in ATSC A/52: “ATSC Standard Digital Audio Compression (AC-3)” (incorporated by reference, see § 73.8000), ATSC A/53, Parts 1–4 and 6: 2007 “ATSC Digital Television Standard,” (January 3, 2007), and ATSC A/53, Part 5: 2010 “ATSC Digital Television Standard,” (July 6, 2010), except for section 6.1.2 (“Compression Format Constraints”) of A/53 Part 4: 2007 (“MPEG-2 Video Systems Characteristics”) and the phrase “see Table 6.2” in section 6.1.1 Table 6.1 and section 6.1.3 Table 6.3 (incorporated by reference, see § 73.8000), and ATSC A/65C: “ATSC Program and System Information Protocol for Terrestrial Broadcast and Cable, Revision C With Amendment No. 1 dated May 9, 2006,” (January 2, 2006) (incorporated by reference, see § 73.8000). Although not incorporated by reference, licensees may also consult ATSC A/54A: “Recommended Practice: Guide to Use of the ATSC Digital Television Standard, including Corrigendum No. 1,” (December 4, 2003, Corrigendum No. 1 dated December 20, 2006, and ATSC A/69: “Recommended Practice PSIP Implementation Guidelines for Broadcasters,” (June 25, 2002) (Secs. 4, 5, 303, 48 Stat., as amended, 1066, 1068, 1082 (47 U.S.C. 154, 155, 303)). ATSC A/54A and ATSC A/69 are available from Advanced Television Systems Committee (ATSC), 1750 K Street, NW., Suite 1200, Washington, DC 20006, or at the ATSC Web site: <http://www.atsc.org/standards.html>.

PART 79—CLOSED CAPTIONING AND VIDEO DESCRIPTION OF VIDEO PROGRAMMING

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

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

2. Section 79.3 is revised to read as follows:

§ 79.3 Video description of video programming.

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

(1) *Designated Market Areas (DMAs).* Unique, county-based geographic areas designated by Nielsen Media Research, a television audience measurement service, based on television viewership in the counties that make up each DMA.

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

(3) *Video description.* The insertion of audio narrated descriptions of a television program’s key visual elements into natural pauses between the program’s dialogue.

(4) *Video programming.* Programming provided by, or generally considered comparable to programming provided by, a television broadcast station, but not including consumer-generated media.

(5) *Video programming distributor.* Any television broadcast station licensed by the Commission and any multichannel video programming distributor (MVPD), and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission.

(6) *Prime time.* The period from 8 to 11 p.m. Monday through Saturday, and 7 to 11 p.m. on Sunday local time, except that in the central time zone the relevant period shall be between the hours of 7 and 10 p.m. Monday through Saturday, and 6 and 10 p.m. on Sunday, and in the mountain time zone each station shall elect whether the period shall be 8 to 11 p.m. Monday through Saturday, and 7 to 11 p.m. on Sunday, or 7 to 10 p.m. Monday through Saturday, and 6 to 10 p.m. on Sunday.

(7) *Live or near-live programming.* Programming performed either simultaneously with, or recorded no more than 24 hours prior to, its first transmission by a video programming distributor.

(8) *Children’s Programming.* Television programming directed at children 16 years of age and under.

(b) The following video programming distributors must provide programming with video description 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 Nielsen Media Research, Inc. 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;

(2) 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;

(3) Multichannel video programming distributors (MVPDs) 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, as determined by Nielsen Media Research, Inc., for the time period October 2009–September 2010, 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; and

(4) Multichannel video programming distributors (MVPDs) 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.

(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 January 1 through March 31, 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) 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) 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.

(d) *Procedures for exemptions based on economic burden.* (1) A video programming provider may petition the Commission for a full or partial exemption from the video description requirements of this section, which the Commission may grant upon a finding that the requirements would be economically burdensome.

(2) The petitioner must support a petition for exemption with sufficient evidence to demonstrate that compliance with the requirements to provide programming with video description would be economically burdensome. The term "economically burdensome" means imposing significant difficulty or expense. The Commission will consider the following factors when determining whether the requirements for video description would be economically burdensome:

- (i) The nature and cost of providing video description of the programming;
- (ii) The impact on the operation of the video programming provider;
- (iii) The financial resources of the video programming provider; and
- (iv) The type of operations of the video programming provider.

(3) In addition to these factors, the petitioner must describe any other factors it deems relevant to the Commission's final determination and any available alternative that might constitute a reasonable substitute for the video description requirements. The Commission will evaluate economic burden with regard to the individual outlet.

(4) The petitioner must file an original and two (2) copies of a petition requesting an exemption based on the economically burdensome standard, and all subsequent pleadings, in accordance with § 0.401(a) of this chapter.

(5) The Commission will place the petition on public notice.

(6) Any interested person may file comments or oppositions to the petition within 30 days of the public notice of the petition. Within 20 days of the close of the comment period, the petitioner may reply to any comments or oppositions filed.

(7) Persons that file comments or oppositions to the petition must serve the petitioner with copies of those comments or oppositions and must include a certification that the petitioner was served with a copy. Parties filing replies to comments or oppositions must serve the commenting or opposing party with copies of such replies and shall include a certification that the party was served with a copy.

(8) Upon a finding of good cause, the Commission may lengthen or shorten any comment period and waive or establish other procedural requirements.

(9) Persons filing petitions and responsive pleadings must include a detailed, full showing, supported by affidavit, of any facts or considerations relied on.

(10) The Commission may deny or approve, in whole or in part, a petition

for an economic burden exemption from the video description requirements.

(11) During the pendency of an economic burden determination, the Commission will consider the video programming subject to the request for exemption as exempt from the video description requirements.

(e) *Complaint procedures.* (1) A complainant may file a complaint concerning an alleged violation of the video description requirements of this section by transmitting it to the Consumer and Governmental Affairs Bureau at the Commission by any reasonable means, such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, audio-cassette recording, and Braille, or some other method that would best accommodate the complainant's disability. Complaints should be addressed to: Consumer and Governmental Affairs Bureau, 445 12th Street, SW, Washington, DC 20554. A complaint must include:

(i) The name and address of the complainant;

(ii) The name and address of the broadcast station against whom the complaint is alleged and its call letters and network affiliation, or the name and address of the MVPD against whom the complaint is alleged and the name of the network that provides the programming that is the subject of the complaint;

(iii) A statement of facts sufficient to show that the video programming distributor has violated or is violating the Commission's rules, and, if applicable, the date and time of the alleged violation;

(iv) The specific relief or satisfaction sought by the complainant;

(v) The complainant's preferred format or method of response to the complaint (such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, or some other method that would best accommodate the complainant's disability); and

(vi) A certification that the complainant attempted in good faith to resolve the dispute with the broadcast station or MVPD against whom the complaint is alleged.

(2) The Commission will promptly forward complaints satisfying the above requirements to the video programming distributor involved. The video programming distributor must respond to the complaint within a specified time, generally within 30 days. The Commission may authorize Commission staff either to shorten or lengthen the time required for responding to complaints in particular cases. The answer to a complaint must include a certification that the video programming

distributor attempted in good faith to resolve the dispute with the complainant.

(3) The Commission will review all relevant information provided by the complainant and the video programming distributor and will request additional information from either or both parties when needed for a full resolution of the complaint.

(i) The Commission may rely on certifications from programming suppliers, including programming producers, programming owners, networks, syndicators and other distributors, to demonstrate compliance. The Commission will not hold the video programming distributor responsible for situations where a program source falsely certifies that programming that it delivered to the video programming distributor meets our video description requirements if the video programming distributor is unaware that the certification is false. Appropriate action may be taken with respect to deliberate falsifications.

(ii) If the Commission finds that a video programming distributor has violated the video description requirements of this section, it may impose penalties, including a requirement that the video programming distributor deliver video programming containing video description in excess of its requirements.

(f) *Private rights of action are prohibited.* Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Chapter I

[DA 11-412]

Possible Revision or Elimination of Rules

AGENCY: Federal Communications Commission.

ACTION: Review of regulations; comments requested.

SUMMARY: This document invites members of the public to comment on the Federal Communication Commission's (FCC's or Commission's) rules to be reviewed pursuant to section 610 of the Regulatory Flexibility Act of 1980, as amended (RFA). The purpose

of the review is to determine whether Commission rules whose ten-year anniversary dates are in the year 2009, as contained in the Appendix, should be continued without change, amended, or rescinded in order to minimize any significant impact the rules may have on a substantial number of small entities. Upon receipt of comments from the public, the Commission will evaluate those comments and consider whether action should be taken to rescind or amend the relevant rule(s).

DATES: Comments may be filed on or before May 17, 2011.

FOR FURTHER INFORMATION CONTACT: Sharon K. Stewart, Chief of Staff, Office of Communications Business Opportunities (OCBO), Federal Communications Commission, (202) 418-0990. People with disabilities may contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov or phone: 202-418-0530 or TTY: 202-418-0432.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554.

SUPPLEMENTARY INFORMATION: Each year the Commission will publish a list of ten-year old rules for review and comment by interested parties pursuant to the requirements of section 610 of the RFA.

Public Notice

FCC Seeks Comment Regarding Possible Revision or Elimination of Rules Under the Regulatory Flexibility Act, 5 U.S.C. 610

CB Docket No. 09-229

Released:

1. Pursuant to the Regulatory Flexibility Act (RFA), see 5 U.S.C. 610, the FCC hereby publishes a plan for the review of rules adopted by the agency in calendar year 1999 which have, or might have, a significant economic impact on a substantial number of small entities. The purpose of the review is to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objective of section 610 of the RFA, to minimize any significant economic impact of such rules upon a substantial number of small entities.

2. This document lists the FCC regulations to be reviewed during the next twelve months. In succeeding years, as here, the Commission will publish a list for the review of regulations promulgated ten years preceding the year of review.

3. In reviewing each rule in a manner consistent with the requirements of section 610 the FCC will consider the following factors:

- (a) The continued need for the rule;
- (b) The nature of complaints or comments received concerning the rule from the public;
- (c) The complexity of the rule;
- (d) The extent to which the rule overlaps, duplicates, or conflicts with other Federal rules and, to the extent feasible, with State and local governmental rules; and
- (e) The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

4. Appropriate information has been provided for each rule, including a brief description of the rule and the need for, and legal basis of, the rule. The public is invited to comment on the rules chosen for review by the FCC according to the requirements of section 610 of the RFA. All relevant and timely comments will be considered by the FCC before final action is taken in this proceeding.

Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS") or by filing paper copies. Comments filed through the ECFS may be sent as an electronic file via the Internet to <http://www.fcc.gov/cgb/ecfs/>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket (proceeding) and "DA" number.

Parties may also submit an electronic comment by Internet e-mail. To obtain filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message: "get form." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. Again, please include the docket (proceeding) and "DA" 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 hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW-A325, Washington, DC 20554. Again, please include the docket (proceeding) and "DA" number.

The filing hours at this location are 8 a.m. to 7 p.m.