

ALERT

FCC Proposes Expanding Video Description Requirements

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On April 1, 2016, the Federal Communications Commission (FCC or Commission) released a Notice of Proposed Rulemaking (NPRM) seeking comment on whether to expand its video description requirements to cover additional networks, to increase the number of hours of programming that must be video described, and to improve consumer access to video description information. Comments are due thirty days after the NPRM is published in the Federal Register; Reply Comments are due sixty days after Federal Register publication.

The Commission's current video description rules require commercial television stations affiliated with the top four networks and located in the top 60 television markets to provide 50 hours per calendar quarter of video described prime time or children's programming. In addition, 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 of the top five national nonbroadcast networks (currently USA, TNT, TBS, History, and Disney Channel). The current rules also require all network-affiliated broadcast stations regardless of market size, and all MVPDs regardless of numbers of subscribers, to pass through video description if the station or network has the technical capacity to do so. The current rules were adopted pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), which authorizes the FCC, subject to certain limitations, to issue additional regulations, if the benefits of doing so outweigh the costs.

As detailed further below, the Commission proposes increasing both (1) the number of hours of programming that must be video described, and (2) the number of covered networks. It also proposes

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to adopt rules designed to enhance consumer access to information about video described programming and to increase the availability of such programming. The NPRM does not propose to expand video description obligations beyond the top 60 DMAs (in part because the CVAA prohibits the Commission from doing so until 2020) or any changes to the pass through requirement.

Required Number of Video Description Hours

The Commission proposes revising its rules to increase the number of hours of required video described programming. Specifically, the Commission seeks comment on raising the quarterly requirement for video described programming from 50 to 87.5 hours per quarter, per included network. Noting that commenters previously expressed concerns about having sufficient eligible prime time and children's programming to meet the total hours requirement, the Commission also asks whether it should allow some amount of non-prime time, non-children's described programming to count towards the increased hours requirement. If so, the Commission further asks whether it should continue to require that at least 50 hours of video described programming per quarter be provided in either prime time or children's programming. The FCC notes its previous estimation that an additional hour of programming carries a one-time cost of \$2,500 to \$4,100 and seeks comment on whether there will be any other costs associated with its proposed increase, as well as on its tentative conclusion that the benefits of its proposal will outweigh the costs.

Covered Broadcast and Nonbroadcast Networks

The Commission seeks comment on increasing the number of broadcast and nonbroadcast networks required to provide video description to the top five and top 10 networks, respectively. The top five commercial broadcast networks will include ABC, CBS, Fox and NBC, regardless of their relative rankings. The Commission suggests that the fifth covered network be determined triennially using an average of the national audience share during prime time as calculated by Nielsen for the preceding ratings year. Only quarters with at least 50 hours of prime time programming that is not live, near-live, or otherwise exempt would be included in the calculation.

As to nonbroadcast networks, the Commission proposes revising its rules to require any MVPD system that serves 50,000 or more subscribers to provide required video description on each channel on which it carries one of the top 10 national non-broadcast networks. As under the current rules, the top 10 non-broadcast networks would be determined triennially using an average of the national audience share during prime time as calculated by Nielsen for the preceding ratings year. Only those quarters meeting the 50-hours of prime time programming threshold would count.

Once a network is designated as an included network subject to the video description rules, the Commission proposes to adopt a "no-backsliding" rule such that the network would remain an included network even if it falls out of the top five or top 10 ranking. The FCC notes that it declined to adopt a no-backsliding rule in 2011 because it concluded that it did not have authority at that time to implement such a rule. Now, however, "[g]iven the passage of time and the continuing authority granted to the Commission in the CVAA to adopt additional video description regulations," the FCC states that it believes that it has authority to adopt a no-

backsliding rule. The Commission characterizes the no-backsliding rule as a means to ensure the fulfillment of consumer expectations about which networks provide video description.

The FCC further proposes to eliminate the current exemption for nonbroadcast networks that are not available in 50 percent or more of MVPD homes. The exemption effectively exempts premium networks from the video description requirements. If the proposed rule change is adopted, any premium network among the 10 most popular networks would be covered.

Timing

Under the current rules, the new list of included nonbroadcast networks will go into effect on July 1, 2018. The Commission asks whether the effective date of the new rules should establish the beginning of a three year cycle, or whether the FCC should retain the existing cycle even if the implementation of expanded rules requires a mid-cycle addition of some networks. In addition, if the proposed rules go into effect sooner, the Commission asks which ratings period the agency should use to determine included networks. The Commission also seeks comment on whether 10 months (approximately the same timeframe permitted in 2011) is an appropriate amount of time to allow distributors to come into compliance.

Improving Consumer Access

The CVAA requires the Commission to submit periodic reports to Congress on the costs and benefits of video description requirements. The Commission's 2014 report found "significant consumer dissatisfaction with the availability of information about which programming is video described" and urged industry to take voluntary action to resolve the identified concerns.

As one means to address these reported deficiencies, the FCC seeks comment on requiring covered distributors to notify programming guide publishers when a program will be video described. In this regard, the Commission asks a series of questions in the NPRM related to consumer access, including the following:

- "Do networks provide information about video description to program guide services, and if not, why not?"
- "Would a requirement that distributors consistently provide notice when a program is going to be described make guide services more likely to include that information in guides?"
- "Instead of, or in addition to the programming guide information, should distributors create an easily accessible list of described video programming?"

The Commission also proposes requiring covered entities to provide to consumers contact information for a person or office responsible for accessibility compliance issues, and mandating responses to consumer inquiries within one business day. As an alternative, the FCC asks whether it should adopt rules that parallel its closed captioning rules (at 47 C.F.R. § 79.1(i)(1)-(3)) as they relate to consumer contacts. The FCC further seeks comment on the costs and benefits of these alternatives as well as how, specifically, contact information should be provided to consumers under either approach.

Electronic Filing, VOD Programming, Secondary Audio and Terminology

The Commission seeks comment on a number of other issues related to its video description rules, including the following:

- A mandatory electronic filing requirement for all petitions for exemption from the video description rules and related filings. The FCC notes that such a requirement would be consistent with other changes to its procedural rules designed to increase the efficiency of Commission decision-making and modernize the agency's procedures in the digital age.
- A potential requirement that Video-on-Demand (VOD) programming include video description if it has been previously carried by the MVPD with video description. The FCC notes a lack of clarity regarding whether MVPDs are making previously provided video description available for programs viewed on their VOD services, and asks whether a failure to do so comports with existing rules. The Commission also notes that it has expressly confirmed that closed captioning must be preserved in VOD programming, and asks whether it should make such a requirement explicit in the video description context as well.
- The state of the marketplace with regard to the use of multiple audio streams. In its 2011 video description order, the Commission found that video description was likely to be provided on the same secondary audio stream as other alternative audio uses, like foreign language audio tracks, but expected "that at some point in the near future, due to voluntary upgrades and equipment obsolescence, broadcasters, MVPDs, and the installed base of consumer equipment will be sufficiently advanced to handle a video description audio track that does not conflict with any other program-related service." The NPRM asks if the marketplace has moved towards a realization of this expectation.
- The terminology used to reference video described programming. The Commission notes that many other federal agencies use the term "audio described" to reference video programming containing audio description and asks whether it should revise its rules and/or change its usage to reflect the different terminology.

If you have questions about the video description rules or would like to file comments in this proceeding, please contact the Wiley Rein attorney who routinely handles your FCC matters or one of the attorneys listed on this client alert.