Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

NATIONAL ASSOCIATION OF BROADCASTERS

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EXECUTIVE SUMMARY

The Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) directs the Commission to reinstate previously-written video description rules with only a limited list of modifications. Since the rules were adopted over ten years ago, there have been numerous technological changes, including the transition from analog television to digital television (DTV). Given the numerous changes in the digital world, implementation of the CVAA has many moving parts and will require coordination among broadcasters, non-broadcast programmers, multichannel video programming distributors (MVPDs), and manufacturers. The Commission's new rules must take all these moving parts into account; the Commission should regulate with sufficient clarity to provide certainty to all sectors of the industry, while also affording sufficient flexibility where appropriate to accommodate technical differences and new developments.

Without a regulatory mandate, some broadcasters are already providing video description and therefore have already faced many of the challenges associated with it. The Commission can learn from these first-hand experiences of implementing video description in the DTV world. For example, these broadcasters can attest to the level of coordination required between networks and affiliates, the costs associated with both the production of video-described programming and outfitting a station to provide it, and the post-production time required to add audio descriptions to video programming.

While the CVAA requires the reinstatement of the rules largely adopted by the Commission in 2000, it still provides the Commission with discretion in certain areas. At this time, the Commission should apply the near-term requirements of the statute only to those entities specified in the CVAA. Specifically, the Commission should apply the video description requirements to the top-four network affiliates in the top 25 markets, but should gain experience and understand implementation difficulties before applying the rules to markets 26-60. In addition, the Commission should allow a reasonable phase-in period of six months for stations that become top-four affiliates (or alternatively, top 25 market stations) but are not yet technically ready to pass through video description. Further, due to the substantial expense of outfitting a local broadcast station to pass through video-described programming, the Commission should only apply the rules to stations once they are technically capable, rather than requiring them to become technically capable upon enactment of the rules. Utilizing this approach, the Commission will allow sufficient time for stations to overcome significant challenges to deploy the requisite technical capability. Moreover, this will provide regulatory certainty both for top-market stations and for stations outside the top 25 markets.

Due to these significant technical challenges, as well as the realities of the broadcast network program production process, video description programming requirements should not become effective until October 1, 2012. The first of October is the beginning of a calendar quarter and traditionally marks the start of the fall broadcast television season, which would be a convenient and logical date to implement rules based on the 50-hour quarterly obligation.

In addition, the Commission should adopt certain categorical exemptions to the video description rules:

- *Live and Near-Live Programming*. The Commission should adopt its proposed definition of live programming, but needs to account for practical challenges when adopting a near-live definition. Inserting video description can take up to seven days after receipt by the video description vendor of a final script. The key to defining "near live" thus is the delivery of a final product to a network, not the time at which a program was recorded. At a minimum, the Commission should define near-live to mean programming *delivered to a network in final edited and approved form* less than 168 hours (seven days) after the work is created. This will allow producers sufficient time to carefully write, time, record, and coordinate the addition of video description into programming.
- *Locally-Produced Programming*. The Commission should exempt locally-produced programming from video description requirements in order to avoid creating a disincentive for stations to produce local programming.
- *News and Other Preemptions*. The Commission should create a general exemption for news programming to avoid any subjectivity and potential liability regarding the addition of video description to editorial products. In other circumstances, such as the children's television rules, the Commission has provided important flexibility for broadcasters to make scheduling changes in the event of news alerts and other reasons (*e.g.*, live sports). The Commission should do the same here.
- *Spanish-Language*. The Commission should ensure that the provision of video-described programming on an additional audio stream does not undermine service to diverse audiences, such as the provision of Spanish-language audio on prime time programming. At a minimum, the Commission should allow a repeat airing of a described program without the video description if the additional audio stream is used for another purpose, such as Spanish language.
- *Mobile DTV*. Mobile DTV is a nascent service that should be afforded flexibility as it is developed, and applying video description pass-through requirements would be premature.

In addition to these categorical exemptions, the Commission should reinstate its process for considering requests for video description exemptions on a case-by-case basis, using the "economically burdensome" standard. This approach will reflect the substantial costs of video description, particularly for smaller broadcasters.

Finally, in addition to adopting carefully crafted technical rules, the Commission should serve as a consumer education clearinghouse. The Commission, and perhaps other government partners, can be useful in assisting blind or visually-impaired individuals to identify programming with video description. Likewise, as NAB has advocated in the past, the Commission can coordinate industry and public-private consumer education efforts. In such a role, the Commission can effectively promote accessibility through consumer education. Because of significant practical and legal constraints, the Commission should not address quality standards or program selection in any way.

In implementing the CVAA to best serve consumers, the Commission should look to the experiences of broadcasters, keep in mind the challenges and costs associated with providing video description, and establish rules that are technically and economically feasible. Practical, viable implementation will best ensure full access to video programming for all Americans, a shared goal among all parties.

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To: The Commission

COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (NAB)[1] hereby responds to the above-referenced *Notice of Proposed Rulemaking* (*NPRM*)[2] regarding implementation of the video description provisions of the "Twenty-First Century Communications and Video Accessibility Act of 2010" (the CVAA).[3] The video description provisions of the statute have been codified in Section 713 of the Communications Act of 1934, as amended (the

[1] NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission ("FCC" or the "Commission") and other federal agencies, and the courts.

[2] *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43, Notice of Proposed Rulemaking, FCC 11-36 (rel. Mar. 3, 2011) (*NPRM*).

[3] Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of Title 47 of the United States Code). The law was enacted on October 8, 2010 (S. 3304, 111th Cong.). *See also* Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010), also enacted on October 8, 2010, to make technical corrections to the CVAA and the CVAA's amendments to the Communications Act of 1934.

Act)[4] and, among other things, reinstate the video description regulations originally established by the Commission in 2000, with certain modifications.[5]

I. INTRODUCTION.

Although the CVAA directs the Commission to reinstate previously-written rules and provides only a limited list of required modifications to those rules, the Commission's task here is not a simple one. With more than ten years of technological changes – including the digital television (DTV) transition – since the previous rules were adopted, the landscape for applying video description requirements has dramatically changed. Implementation of the CVAA in the 2011 digital world necessarily will have many moving parts and will require significant technical coordination among broadcasters, non-broadcast programmers, multichannel video programming distributors (MVPDs), and manufacturers. Discussion among all stakeholders thus is an essential component of a video description regulatory regime. In addition to coordinating with MVPDs and manufacturers, NAB and its members are working with disabilities access groups through the Commission's Video Programming Access Advisory Committee (VPAAC). The Commission's new rules must take all of these moving parts into account, regulating with sufficient clarity to provide certainty to all sectors of the industry, while affording flexibility where appropriate to accommodate technical differences and new developments.

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[4] *See* 47 U.S.C. § 613.

[5] *Implementation of Video Description of Video Programming*, MB Docket No. 99-339, Report and Order, FCC 00-258 (rel. Aug. 7, 2000) ("*2000 Order*"), *vacated by Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (finding the Commission had exceeded its authority in implementing video description regulations).

Significantly, video description in a digital environment presents serious technical and operational challenges that will make it difficult to implement video description in a manner that ensures accessibility of programming by the blind and visually impaired. As the *NPRM* notes, while some broadcast networks and affiliates already are providing and passing through programming with video descriptions, others are working toward these capabilities.[6] The Commission can learn from the experiences of broadcasters who have deployed – or are well on the way to deploying – video description. To assist the Commission in this regard, Section II of these Comments describes the general process for creating video-described broadcast programming, and Sections III-V discuss specific technical, practical, and other implementation issues for the Commission's consideration.

As the *NPRM* notes, the CVAA requires reinstatement of the rules largely as adopted by the Commission in 2000, but it affords the Commission discretion in some areas.[7] Because digital technology is much more complex than the analog world of 2000, it is critical for the Commission to use its discretion to ensure that the requirements of the CVAA are implemented in a manner that works both for consumers and industry. This will allow for the full benefits of the statute to be realized in a timely manner. Below we have detailed some guiding principles to govern a holistic approach to video description.

First, the Commission should apply any near-term statutory requirements only to those entities specified in the CVAA. There is no need at this juncture to adopt rules requiring the provision of video description by top-four network affiliates in markets

[6] *NPRM* at ¶ 4.

[7] *See NPRM* at ¶ 8.

outside the top 25, even if such rules would not immediately become effective. Nor should the Commission require pass-through of video description by stations outside of the top-four network affiliates in the top 25 markets, if such stations do not currently possess the technical capability to do so.

Second, the Commission should adopt certain categorical exemptions, including news programming and mobile DTV. The Commission also should maintain the "other program-related service" exception from the 2000 rules.[8]

Third, in implementing the video description provisions of the CVAA, it is essential to recognize that the transition to DTV does *not* mean that broadcasters can provide consumers an unlimited number of additional audio streams for any video programming stream.[9] While it is possible for over-the-air DTV broadcasters to *transmit* more than one additional audio stream under the current ATSC standard,[10] *reception* is an entirely different matter. For example, due to the limitations of some MVPDs, as well as the over 100 million legacy analog television receivers connected to digital-to-analog converter boxes, many consumers are limited to only two audio program channels. Because the use of multiple additional audio streams may be impractical in the near-term, the provision of video description may unavoidably create tension with other uses of a single additional audio stream, such as provision of Spanish-language audio.

[8] *See NPRM* at ¶ 15.

[9] *Compare with NPRM* at ¶ 15 ("Digital transmission … enables broadcasters and MVPDs to provide numerous audio channels for any given video stream. … [D]igital technology allows simultaneous transmission of a variety of program-related secondary audio tracks.").

[10] See *NPRM* at fn. 51.

Finally, in addition to adopting carefully crafted technical rules, the Commission should serve as a consumer education clearinghouse for information on video-described programming. Currently, it is not clear how consumers will in fact access video description on today's receivers or identify programming that is available with video description. The Commission can play an important role in this regard, and it should focus on serving as an information resource in these areas, rather than seeking to address inherently subjective quality standards or program selection questions. Broadcasters look forward to working with the Commission on addressing consumer education issues.

II. BROADCAST VIDEO DESCRIPTION NEEDS SUFFICIENT RAMP-UP TIME IN THE DIGITAL ECOSYSTEM.

It would be unreasonable for the Commission to attempt to simply reinstate the previous video description rules without considering the major impact of more than ten years of technological changes in the video programming industry – including the DTV transition. And, it is incorrect to assume, as suggested in the *NPRM*, that the digital environment simply eliminates all of the capacity issues faced when the previous rules were adopted.

In the *2000 Order*, the Commission described the process of providing video description as follows:

> [It] begins with a describer viewing a program, and writing a script to describe key visual elements. The describer times the placement and length of the description to fit within natural pauses in the dialogue. The narration is recorded and mixed with the original program audio to create a full audio track with video description. That audio track is then laid back to the master on a spare channel if the programming is intended for broadcast…. When the audio track with video description is provided on a separate audio channel for broadcast, viewers decide whether they wish to hear the video description. Viewers who wish to hear the video

> description must activate the Second Audio Program (SAP) channel on their TV sets….[11]

In 2000, the Commission was discussing video description in an *analog* environment, noting that a third audio *channel* was necessary because two audio channels were necessary to support left and right stereo, with the third audio channel for video description.[12] Eleven years later, the process remains largely the same, except the video programming community now speaks in terms of audio "streams." A stream may consist of a number of different channels, but typically in ATSC DTV it is (a) stereo (2 channels); (b) 5.1 surround sound (6 channels); or (c) mono (1 channel).

Additionally, audio streams in the ATSC standard are labeled as CM (complete main), VI (visually impaired), or HI (hearing impaired) as well as for the language spoken on the stream, *e.g.*, English (eng) or Spanish (spa). The metadata[13] carried in a broadcast station's transmission announcing the available audio associated with a particular video program might be, for example [5.1,CM,eng] for a 5.1 channel, complete main, English stream and [2,CM,spa] for a stereo, complete main, Spanish stream.[14] The *NPRM* contemplates that, since the ATSC standard allows for multiple audio streams to be broadcast, video descriptions could be placed on an additional

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[11] *2000 Order* at ¶ 11.

[12] *Id*. at ¶ 13.

[13] Metadata is "data about data." In this context, it is data carried in a broadcaster's transmission that describes the attributes of the video and audio. It also tells a DTV receiver how to find and assemble the component parts of a program for display on the receiver.

[14] This is a simplification of how the audio metadata is represented in the ATSC standard. Information announcing the attributes of the audio is actually carried in the AC-3 Audio Descriptor in the bsmod field (for CM, VI, HI) and num_channels field (for the number of audio channels), using ISO 639 language descriptor. *See* ASTC A/53 Part 3.

(third) stream which might be announced,[15] for example, as [2,VI,eng] for stereo, visually impaired, English. As explained below, there are practical problems associated with this multichannel audio approach.

While the most recent version of the relevant section of the ATSC digital television standard (A/53 Part 3: 2009) provides the methodology to label and transmit multiple audio streams, NAB is not aware of any DTV receiver currently available in the market that can recognize and allow a consumer to choose an audio stream “tagged” as VI. Thus, even if a broadcaster were to *transmit* video description on a third audio stream, announced in accordance with the current ATSC standard, it is highly unlikely that a consumer would be able to *locate* it on the consumer’s television receiver.[16]

Moreover, there are well over 100 million DTV Coupon Eligible Converter Boxes (CECB) in use by consumers that are also likely incapable of finding a VI audio stream. Notwithstanding a CECB’s ability to detect a VI stream, because it is designed to interface with analog and not DTV sets, it is limited to delivering two audio streams – a main and SAP – to the viewer. Thus, a consumer would not be able to access the VI stream.

In addition, many MVPDs currently are incapable of passing more than two audio streams through their distribution systems, and many of the installed base of the

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[15] *See NPRM* at ¶ 15.

[16] As the Commission notes, the method of announcing and transmitting video description is contained in Part 5 of the ATSC DTV standard –A/53. The *NPRM* seeks comment on its proposal to update section 73.682 of its rules to incorporate the 2010 version of A/53 Part 5. *See NPRM* at ¶ 31. While NAB does not object to the incorporation of A/53 Part 5, *per se*, we are concerned that the Commission is incorporating only one section of the updated ATSC standard. Five other parts have also been updated since the ATSC standard was incorporated. To omit their inclusion would be illogical. In lieu of the proposed rule in Appendix A, we propose that the Commission consider a separate *Notice of Proposed Rulemaking* on this issue.

MVPDs' legacy set top boxes are incapable of decoding more than two audio streams. Thus, the vast majority of MVPD subscribers will also not be able to receive broadcasters' video described programming should it be transmitted on a third stream.

Given these limiting technical factors, it is likely that broadcasters' use of a third audio stream to *deliver* video descriptions, under the current ATSC standard, may actually disenfranchise many blind and visually impaired consumers because they will not be able to *access* video-described programming, irrespective of whether they view television over-the-air or via an MVPD service. NAB therefore believes that, in the near term, use of a two-audio stream approach for the distribution of video description may be necessary to ensure that consumers are immediately able to access video description. We recognize these limitations in consumer electronic equipment and MVPD distribution systems may create tension with the delivery of some second language programming (*see infra* section V.D).

This near-term two audio stream approach, furthermore, is not without its own challenges. For example, how broadcasters' metadata would be interpreted by existing DTV receivers and equipment at MPVDs' headends is still to be determined. NAB believes that these technical challenges can be met through cooperation in cross-industry technical standards bodies. NAB also recognizes that the CVAA is intended to be technologically forward-looking and is confident that solutions that take advantage of new receiver and MVPD developments can be implemented to realize the full potential of the CVAA.[17]

[17] In the longer term, NAB anticipates that the VPAAC will address many of these concerns. The VPAAC is charged with, among other things, identifying "the performance objectives for protocols, technical capabilities and technical procedures

Beyond the technological challenges that will take time to address, video description also requires careful coordination between networks and affiliates. Currently, CBS and Fox are voluntarily providing some video-described prime time programming, which is passed through by their affiliates that have the technical capability to do so. These networks work with outside vendors to create the video-described programming. Based on the experience of these networks, the cost per hour of video-described programming will range from $1,800 to $5,000.[18] It is likely the vendors experienced in providing video-described services will be in greater demand once the new video description rules go into effect.

We note that adding video description to video programming does take considerable time. It may take up to seven days to create a single hour of video description and marry it to the programming. Vendors may receive preliminary scripts and recordings of unfinished versions of programs, but they will not finalize description scripts until receipt of the final air masters. Nor should they, given the need to avoid any conflict with program dialogue or other important audio.[19] As explained previously by NAB, provision of video description "will necessitate alterations in the entire program

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needed to permit" reliable encoding, transport, receipt, and rendering of video description of video programming. *See FCC Requests Nominations for Membership on Video Programming and Emergency Access Advisory Committee in Accordance with the Twenty-First Century Communications and Video Accessibility Act*, Public Notice, DA 10-2002 at 3 (rel. Oct. 19, 2010).

[18] The cost per program hour depends on broadcasters' individual contractual agreements and/or operational practices, including use of guild voice talent. In addition, there are ancillary costs such as internal manpower and facility costs, costs to make dubs for the outside description vendor to use as program reference, and costs to perform the physical audio playback of description into the air masters.

[19] Video description inherently requires this elongated process, as it is defined to be the insertion of audio descriptions into "natural pauses in the program's dialogue." *NPRM* at ¶ 1 (*citing* CVAA § 202(a)).

production process."[20] In light of all of these technological and program production and distribution challenges, broadcasters will need sufficient time to prepare to provide video-described programming. Similarly, the Commission must be aware of the myriad challenges involved in the delivery of video descriptions to consumers in an accessible manner.

III. IN REINSTATING THE VIDEO DESCRIPTION RULES, THE COMMISSION SHOULD APPLY NEAR-TERM REQUIREMENTS ONLY TO THOSE ENTITIES SPECIFIED IN THE CVAA.

Due to the significant technical and coordination issues involved in providing video description, as well as Congress's intent to focus the video description mandate of the CVAA initially on larger markets, the Commission should now adopt the near-term requirements only for those entities specified in the CVAA.[21] Thus, as discussed below, the rules governing provision of video description should apply to affiliates of the top four national broadcast networks located in the top 25 markets and to prime time or children's programming.[22] The pass-through rules should apply to any full-power

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[20] NAB Comments in MB Docket No. 99-339 at 24 (filed Feb. 25, 2000).

[21] *Compare* CVAA § 202(a) (directing the Commission to phase in video description regulations for top 60 DMAs over six years and capping additional phase-in to ten markets per year) *with* H.R. 3101, 111th Cong. § 202(a) (as passed by House, Aug. 5, 2010) (directing the Commission to phase in video description regulations to *all* markets within six years). At this time, the Commission should refrain from applying the rules to LPTV stations, given the impending low-power digital transition. After the LPTV digital transition is complete, the Commission can revisit the question.

[22] 47 U.S.C. §§ 613(f)(1)-(2); *2000 Order* at ¶¶ 19-35. In the *NPRM*, the Commission correctly proposes to define prime time as 8-11 p.m. Monday through Saturday and 7-11 p.m. Sunday (earlier in Central; Mountain Time zone stations may choose). In addition, the Commission should adopt the proposal to apply the "children's programming" definition of 16 years of age and younger. These definitions are appropriate in light of past Commission decisions and the goals of the CVAA.

broadcast affiliate that receives video description from a network, subject to technical capability.

A. Broadcast Networks and Stations Required to Provide Video Description.

As proposed, we agree that the Commission should reinstate the rules to apply to ABC, CBS, Fox, and NBC as the top four commercial television broadcast networks.[23] In addition, the Commission should adopt its proposal to reinstate the rules to apply to the top 25 markets as determined by Nielsen as of January 1, 2011 (i.e., the 2010-2011 DMA rankings).[24]

Although the *NPRM* proposed to require stations affiliated with the top-four networks to provide video description regardless of when affiliation begins,[25] NAB urges the Commission to allow a six-month phase-in period for any station that previously is not a top-four affiliate but becomes one. A station that becomes a top-four affiliate but is not technically ready to pass through video description will need a reasonable period to deploy the requisite technical capability. The CVAA does not require an immediate imposition of the video description rules on a station that newly becomes a top-four, top-25 affiliate, and NAB anticipates that without such a grace period, a station in this situation would seek a waiver of the rules. Accordingly, rather than burdening Commission staff with waiver requests, a reasonable six-month period should be permitted to allow such stations time to become technically capable of passing through video description.

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[23] *NPRM* at ¶ 9.

[24] *Id.*

[25] *Id.*

While the new rules will apply to the top 25 television markets as of January 1, 2011, the markets on this list may change in subsequent years. The Commission should address only those markets in the top 25 at the time it implements the CVAA, and should not increase the complexities of compliance by reconsidering the ranking of the top 25 markets at multiple intervals.[26] Rather than reconsidering the top 25 at intervals, the Commission should wait until it extends the requirements to the top 60 markets and capture any market changes at that time.

The Commission should not presently identify the dates on which it will determine which markets are those ranked 26-60. The broadcast television industry is dynamic, and more experience is needed before any realistic timeframe can be established. An arbitrary implementation schedule may prove either unworkable or may not reflect market conditions at the time such rules would go into effect. Between January 1, 2014 and October 8, 2016, the Commission should examine Nielsen or other applicable data and determine relevant markets, then afford stations in those markets time to come into compliance with the relevant video description requirements. Delaying consideration of markets 26-60 will ensure that stations in the appropriate markets prepare for video description and will reduce uncertainty for stations in markets ranked near, but not in, the top 60.

B. Pass-Through of Video-Described Programming Should Be Limited To Those Who Are Technically Capable at the Commencement of the First Quarter of Programming Requirements.

As a practical matter, the provision of video programming by top-four affiliates in the top 25 markets primarily applies to the networks themselves, with the obligation on

[26] *See id.* at ¶ 10.

the stations essentially equal to a pass-through requirement. And as described above, pass-through of video-described programming involves many moving parts and complex coordination. NAB described pass-through of video-described programming in 2000:

> This chain includes the broadcast origination centers of the television networks and the networks' distribution facilities (typically satellite systems), as well as the affiliated stations' local television studios and local television transmitter facilities (which generate the SAP channel)…. [A]dapting all these systems of the networks and their affiliates to carry three full channels of audio presents technical challenges that will entail significant financial outlays to overcome.[27]

While NAB was referring at the time to the pass-through of video-described programming in the analog television ecosystem, many of the moving parts remain today and because of the DTV transition, the technical challenges have increased exponentially (*see supra* Section II).

From our discussions with member stations, outfitting a local broadcast station to pass through video-described programming can cost between $25,000 and $50,000. This assumes that local stations (whether top-four affiliates in the top 25 markets, or otherwise) must only pass through video description and are not required to create their own video described programming; station-based "technical capability" does not include the capability to insert video description into locally-produced programming.[28] Nor does it include additional costs of updating feeds to MVPD systems.[29] In addition, it will take

[27] NAB Comments in MB Docket No. 99-339 at 14-15 (filed Feb. 25, 2000).

[28] In any event, as discussed further below, locally-produced programming should be categorically exempt from the video description rules. *See infra* Section V.B.

[29] It is NAB's understanding that many MVPDs also have certain technical limitations that may further complicate pass-through.

time to work out numerous issues between different parts of the program distribution chain, including which costs are allocated to each part.

Considering the substantial expense of outfitting a local broadcast station to pass through video-described programming, stations outside the top 25 markets should not be required to undertake expenditures within a short time frame in order to *become* technically capable. Instead, the rules should apply to these stations only once they *are* technically capable, consistent with the business plan for each station. Congress intended larger markets to bear the cost of compliance, not smaller markets – the CVAA's focus for the provision of video description is on the top 25 markets, and the Commission should view these markets as Congress's priority. Requiring affiliates in all markets to pass through video description, regardless of their current technical capabilities, would undermine Congress's attempt not to impose new burdens on smaller market stations.

Moreover, the Commission should not require stations outside the top 25 markets that multicast another top-four national network on a secondary stream to pass through video description if they are not technically capable of doing so.[30] Such a policy would discourage the Commission's goal of encouraging this still nascent digital service, particularly in smaller markets.

C. Broadcasters' Compliance with the Video Description Rules Should Be Limited to the Specific Provision and Pass-Through Issues Contemplated by the Statute.

As noted above, video description requires technical coordination and involves many moving parts, including consumer electronics manufacturers and MVPDs. NAB

[30] *NPRM* at ¶ 28. So far as NAB is aware, currently no major network affiliated station in the top 25 markets is broadcasting another major network on a multicast channel.

understands that pass-through of video description may cause technical issues for cable operators beyond the broadcast station technical issues discussed herein. In addition, a broadcast station cannot control whether a consumer's television receiver is equipped to provide a video description audio stream, or the means by which a consumer directs a television receiver to provide such audio. As described throughout these comments, NAB welcomes the opportunity to work with the Commission to increase accessibility to broadcast programming for blind and visually-impaired individuals. However, the Commission should explicitly state that broadcasters' obligations are met by the provision and pass-through of video-described programming and that broadcasters are not responsible for ensuring *receipt* of such programming by individuals who are blind or vision impaired. The capabilities of MVPD systems and television receivers produced by various manufacturers are not within the control of broadcasters.

IV. VIDEO DESCRIPTION PROGRAMMING REQUIREMENTS SHOULD BECOME EFFECTIVE OCTOBER 1, 2012.

Commercial television networks traditionally premiere their new programs starting in the fall of each year. To have a definite date for the implementation of video description rules, a television season should be regarded as starting on the first of October. Thus, NAB recommends that implementation of the video description rules commence on October 1, 2012. The first of October is also the beginning of a calendar quarter, which would be a convenient date to implement rules based on the 50-hour quarterly obligation. An effective date of October 1, 2012 would also better account for the changes that need to be made in network program production systems, so as to include the time-consuming process of producing video-described programming (*see* *supra* Section II).[31] It would also allow sufficient time for both broadcasters and the Commission to sufficiently promote the availability of such video-described programming.

V. THE COMMISSION SHOULD ADOPT CERTAIN CATEGORICAL EXEMPTIONS AND CONSIDER CASE-BY-CASE WAIVER REQUESTS BASED ON ECONOMIC BURDENS.

A. Live and Near-Live Programming.

The Commission is directed by statute to adopt live and near-live exemptions to the video description rules.[32] For obvious reasons, Congress determined that it would be impractical and infeasible to require that live programming be video-described. The Commission appropriately has defined live programming as "programming aired substantially simultaneously with its performance."[33] The Commission also should apply this exemption to delayed or repeated live programming, such as local newscasts. It would be nonsensical to require a network or station to assume the costs of video description for programming primarily intended to be aired live, simply because such programming was re-aired at a later time.

While live programming is simple to define, near-live programming poses more complex issues. The question is not what type of programming is similar to live programming, but rather what type of programming is produced with a production time

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[31] For example, broadcast networks typically receive programs (such as prime time series) a very short time before air, which obviously creates significant challenges for the inclusion of video description. Moreover, given the copyright protections involved in the separate scripts needed for video description, the provision of described programming will require additional authorizations to be obtained from the creators of the pre-existing scripts and the revising of existing contractual obligations with the creative communities. This process will also require additional time.

[32] 47 U.S.C. § 613(f)(2)(E).

[33] *NPRM* at ¶ 21.

so limited that it does not allow for video description. As the *NPRM* explains, Congress wished to exempt programs produced such a short time before airing that there is not sufficient time for the creation of video descriptions.[34] Therefore, the critical factor in near-live programming is not when the program was "performed and recorded," but rather when the program is delivered to a network in final edited and approved form to begin the video description insertion process. Focusing only on when a program was "performed and recorded" would ignore Congressional concern about the turnaround time for creating video description.

By this measure, the proposal to define near-live programming as programming performed and recorded less than 24 hours prior to the time it is first aired[35] is insufficient to accommodate the process of creating video-described programming. Because insertion of video description can take up to seven days following receipt by the video description vendor of a final script, and networks are subject to uncontrollable delays caused by the program producer's delivery of the finished product, the Commission should define near-live as programming *delivered* to the network in final, edited and approved form no less than 168 hours (seven days) prior to the time it is first aired. Inserting video description in post production requires careful writing, timing, recording, and coordination, and the programming must also be properly formatted and copied for re-air – these processes can take significant time and may vary by broadcaster or network. Moreover, broadcast networks cannot even *begin* the video description insertion process until they receive the finished program from the producer, often a process that is beyond the networks' control. As the *NPRM* notes, the

[34] *Id.*

[35] *Id*.

Commission can revisit the definition in the future as broadcasters, MVPDs, and producers gain experience integrating video description into the production and transmission cycle.[36] The near-live exemption also should also apply to delayed or repeated near-live programming.

B. Locally-Produced Programming.

The Commission should exempt locally-produced programming from any video description requirements. As discussed above, video description costs between $1,800 and $5,000 per program hour. Adding such a burden to locally-produced programming, particularly in smaller markets, could deter stations from producing local programming. Moreover, many locally-produced programs, such as coverage of public affairs programming, local news, high school sports, etc. would be untimely for audiences if they were required to be video described (due to up to seven days of production), even if the Commission were to adopt the definition of near-live programming proposed by NAB. Indeed, the Commission in the closed captioning rules has recognized similar local programming exemptions.[37] Failure to exempt locally-produced programming would result in a reduction of local programming and therefore would be contrary to the Commission's localism goals.

C. News and Related Preemptions.

In addition to the live, near-live, and local programming exemptions, the Commission should enact a general news exemption for video description. While the exemptions for live and near-live programming will include most news programming, there may be certain exceptions such as news magazine or documentary programs that

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[36] *Id*.

[37] *See* 47 C.F.R. § 79.1(d)(8).

are completed with more time before airing than the maximum hourly limit as determined by the Commission. If these programs were required to have video description, broadcasters would be forced to add subjective video descriptions from non-journalists into the middle of news reporting.

Including non-journalists' subjective video descriptions in news reporting is inappropriate for several reasons. First, it would be an unwarranted intrusion into newsroom editorial decision-making.[38] Second, it could open up broadcasters to potential defamation and false light liability – liability that may vary state-by-state. For example, broadcast of an interview might require highly subjective audio descriptions of the visual picture of an interviewee's facial reactions or movements while the interviewee considers how to answer allegations of wrongdoing. Such descriptions could affect the audience's perception of the subject, including his or her guilt or innocence as to those allegations. Unlike closed captioning, which is intended to repeat words spoken as precisely as possible, video description inherently carries a subjective element, and accordingly should not be required to add a non-journalist describer's words into an editorial product.[39]

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[38] The Supreme Court has consistently recognized that broadcasters are entitled to exercise wide journalistic freedom and that, if the public interest is to be served, "we must necessarily rely . . . upon the editorial initiative and judgment" of broadcasters. *FCC v. League of Women Voters of California*, 468 U.S. 364, 378 (1984); *accord CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 121 (1973). The required insertion of audio material from video describers into broadcasters' news and other journalistic programming would, in essence, "[c]ompel[ ] editors or publishers to publish" material they do not choose to publish, thereby raising serious First Amendment questions. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

[39] Unlike closed captioning, the Electronic Newsroom Technique (ENT) method is not available for video description, and therefore the video description news exemption should apply to all stations in all markets.

For video description, the Commission should also apply the breaking news exemption and allow other preemptions consistent with the Commission's other programming rules. In particular, the Commission should look to the breaking news exemption and preemption rules in the quarterly children's programming requirements as a model for video description rules, as discussed below. In adopting the news exemption and preemption allowances from the children's programming rules, the Commission recognized the importance of flexibility for broadcasters to make scheduling changes. The same reasoning applies to the video description rules.

In 2004, the Commission adopted a breaking news exemption for the children's programming requirements, recognizing the importance of allowing broadcasters to interrupt scheduled programming for news alerts, without the burden to reschedule such programming.[40] For the same reason, the Commission should allow video described programming to be preempted for breaking news and emergency information without negative consequences for stations.

D. Second Language Programming and Evolving Solutions in a Digital Environment.

As the Commission implements the CVAA, it should ensure that provision of video-described programming does not undermine the service to diverse audiences that is afforded by second-language audio, such as Spanish on top-four network prime time programming. As discussed in detail above, implementation of video description may require a two audio stream approach, using the same stream on which some local broadcasters offer Spanish-language audio. And in a number of the top 25 markets,

[40] *See Children's Television Obligations of Digital Television Broadcasters*, MM Docket No. 00-167, Report and Order and Further Notice of Proposed Rulemaking, FCC 04-221 at ¶ 39 (rel. Nov. 23, 2004).

top-four network affiliates provide a substantial amount of Spanish-language audio.[41] These affiliates generally will rely on their networks to provide sufficient programming to allow the affiliates to meet the 50 hours per calendar quarter requirement. If a network program is delivered to an affiliate with video description, and the affiliate already is airing such program on a regular basis with Spanish-language audio, the affiliate must then choose between depriving its Spanish-language audience of the opportunity to listen in Spanish or a potential violation of the new video description rules.

Under the FCC's previous rules, once a broadcaster had aired a program with video description, all of its subsequent airings of that program were to contain video description, unless another use was being made of the SAP channel (the "other program-related service" exception).[42] In 2000, the Commission stated that this would allow broadcasters to use the SAP channel on a repeat airing for another purpose, such as Spanish language.[43] In the current *NPRM*, the Commission proposes that any programming aired with description must always include description if re-aired on the same station.[44] The Commission asks whether it is necessary or appropriate to apply

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[41] *Compare with 2000 Order* at ¶ 34 ("Those few networks that provide more extensive Spanish language audio are not among the networks that will be affected by our rules.").

[42] *See id.* at ¶ 33 ("[O]nce a broadcast station or MVPD has aired a particular program with video description, all of the broadcast station's or MVPD's subsequent airings of that program should contain video description *unless another use is being made of the SAP channel*.") (emphasis added).

[43] *Id.*

[44] *NPRM* at ¶ 6 ("Any programming aired with description must always include description if re-aired on the same station or MVPD channel.") (*citing* proposed 47 CFR 79.3(c)(3)). *But see* 47 CFR 79.3(c)(3) ("Once a commercial television station…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 using the technology for providing video description in a connection with the*

the “other program-related service” exception to digital transmissions.[45] Simply stated, it is.

While we are confident that future technological developments, including potential updates to the ATSC standard, could alleviate this issue, NAB recognizes that in the near term, use of a two channel approach throughout the program distribution chain makes this potential conflict unavoidable. Given the already complicated issues surrounding MVPD pass-through and the installed base of consumer electronics equipment, it would not be realistic to require broadcasters to provide video description in any manner other than the use of the single additional audio stream. Thus, to mitigate the potential harm to program diversity, the Commission at a minimum should provide that a repeat airing with video description is not required if the additional audio stream is used for another purpose, such as Spanish language.

E. Mobile DTV.

The *NPRM* does not specifically mention how mobile DTV should be treated for purposes of the newly reinstated video description rules. Although the CVAA ultimately requires mobile devices to include video description capabilities, this requirement does not apply for a mandated minimum of two years and may require separate implementing rules.[46] Moreover, mobile DTV is a nascent service that should be afforded flexibility in

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program for another purpose that is related to the programming would conflict with providing the video description.”) (emphasis added).

[45] *Id.*

[46] CVAA § 204(d) (“Deferral of Compliance with ATSC Mobile DTV Standard A/153. --- A digital apparatus designed and manufactured to receive or play back the Advanced Television Systems Committee’s Mobile DTV Standards A/153 shall not be required to meet the requirements of regulations prescribed [to implement video description capabilities] for a period of not less than 24 months after the date on which the final regulations are published in the Federal Register.”).

its early stages, as broadcasters experiment with technologies and business models.[47]

As Chairman Genachowski recognized at the 2011 NAB Show:

> I'm encouraged to see that many broadcasters are tackling the challenges and seizing the opportunities of a multi-platform broadband world – seeking to reach the audience where the audience is going – experimenting with new technologies, new platforms and new business models. Mobile DTV is an example…. These are all energetic efforts to capitalize on broadcasters' transition to DTV. We don't know what will work in the marketplace, but nothing we are considering would or should interfere with market-based innovation around Mobile DTV.[48]

Accordingly, applying video description pass-through rules to mobile DTV signals in this proceeding would be premature.

F. Economically Burdensome Case-by-Case Analysis.

Finally, as proposed, the Commission should reinstate its process for requesting video description exemptions on a case-by-case basis.[49] Use of the "economically burdensome" standard rather than the "undue burden" standard is sensible in light of the standard applied for closed captioning.[50] However, as discussed in the *NPRM*, the Commission should consider all of the factors in Section 713(e) of the Act (relating to "undue burden") when determining whether the rule is economically burdensome in a particular case.[51]

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[47] *See* S. REP. 111-386, at 15 ("The Committee notes that the market for mobile broadcast DTV services is nascent….").

[48] Prepared Remarks of FCC Chairman Julius Genachowski, NAB Show 2011, Las Vegas, NV, 2 (Apr. 12, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305708A1.pdf.

[49] *NPRM* at ¶ 22.

[50] *See* CVAA § 202(c).

[51] *NPRM* at ¶ 23.

As discussed above, the cost of video description per program hour ranges from $1,800 to $5,000. The cost of readying a station for pass-through of video description may range from $25,000 to $50,000. These costs are substantial, and may be particularly burdensome for smaller broadcasters.

VI. THE COMMISSION SHOULD SERVE AS A CONSUMER EDUCATION CLEARINGHOUSE, BUT SHOULD NOT ADDRESS QUALITY STANDARDS OR PROGRAM SELECTION.

As explained above, beyond the many technical issues that must be coordinated to facilitate video description, video-described programming presents significant additional challenges. For example, as discussed above, it is unclear how consumers will find the video description audio stream or identify which programs are available with video description. The Commission can and should play an important role in educating consumers and facilitating discussions to ensure that individuals who are blind and visually-impaired can benefit from the availability of video-described programming.

However, there is no basis for the Commission to impose quality standards for video description, either on the network that provides the video described programming or on the local broadcast affiliate stations that have no ability to monitor quality of the programming they pass through.

Moreover, as the *NPRM* acknowledges, evaluating quality of video description would require subjective determinations by the Commission that are not appropriate in light of First Amendment concerns and the no censorship provision of the Act.[52] It would be almost wholly subjective and clearly inappropriate for the Commission to attempt to determine, for example, that a particular scene in a video program should

[52] *See NPRM* at ¶ 29; U.S. CONST. amend. I; 47 U.S.C. § 326.

have been described differently or somehow "better." Similarly, the Commission should not collect information regarding how programs are likely to be chosen for video description. This information is based on subjective and creative determinations – a subject the Commission should not and cannot evaluate.

Concerns regarding the Commission's evaluation of the quality of video description should not preclude the Commission from playing a key role in consumer education regarding the availability of video description. For example, the Commission could assist blind or visually impaired individuals to identify programming available with video description. The CVAA requires that on-screen text menus and guides provided by navigation devices be audibly accessible.[53] However, these requirements cannot become effective for at least three years after the Commission adopts rules based on the *NPRM*, and they might not be implemented until 2016.[54] In the interim, the Commission, and perhaps other government partners, can serve as a clearinghouse for information regarding how video-described programming can be accessed and what programs are available with video description.

The Commission could also coordinate industry and public-private consumer education efforts. NAB previously has advocated for the Commission to serve such a

[53] CVAA § 205(a).

[54] Under the CVAA, the Commission must provide at least three years after the adoption of accessibility requirements for on-screen text menus and navigation device guides for affected entities to place in service devices that comply with the requirements. *See* CVAA § 205(b)(6)(A)(ii). Prior to that, the CVAA directs the Commission to enact the regulations within 18 months of the VPAAC report, and such report is required to be provided to the Commission within 18 months of the enactment of the CVAA. *See id.* at §§ 205(b)(1), 201(e)(2). In establishing these time frames, Congress considered that the VPAAC and the Commission would face complicated issues and thus would need sufficient time to address them. Thus, such devices must be placed into service by 2016, six years after enactment of the CVAA, and are unlikely to be deployed substantially earlier.

role,[55] and Commission efforts of this type have proven effective. In this role, NAB believes that the Commission could effectively promote consumer education of accessibility choices in video programming.

VII. CONCLUSION.

NAB welcomes the opportunity to serve as a resource for the Commission as it undertakes the challenge of implementing the CVAA. It would be misleading to assume that reinstating the video description rules is a simple matter. Many complicated factors must be addressed in implementing video description in a digital environment, and the Commission must be aware of these challenges. The rules adopted should be technically and economically feasible for broadcasters, while affording access to video programming for blind or visually-impaired individuals. The Commission also should consider non-regulatory actions regarding consumer education in order to best promote accessibility in accordance with the goals of Congress.

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[55] *See, e.g.,* NAB Reply Comments in *Empowering Parents and Protecting Children in an Evolving Media Landscape*, MB Docket No. 09-194 at 22 (filed Mar. 26, 2010).

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Proceeding

Name	Subject
11-43	In the Matter of Video Description: implementation of the Twenty-First Century Communications and Video Accessiblity Act of 2010.

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