

FCC Proposes Rules to Reinstate and Expand Video Description Obligations for Television Stations

by Lauren Lynch Flick and Lauren Birzon

Proposed rules reinstate prior video description rules and prepare for eventual expansion of those requirements.

On March 3, 2011, the FCC released a Notice of Proposed Rulemaking ("NPRM") setting forth proposed rules to implement the video description requirements contained in the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA"), which became law in October 2010. The CVAA mandates that the FCC take a number of steps to ensure that new communications technologies are accessible to individuals with vision or hearing impairment, including reinstating the video description rules for television broadcasters that had been thrown out by the United States Court of Appeals for the District of Columbia Circuit in 2002. The CVAA directs that the reinstated video description requirements apply to programming that is "transmitted for display in digital format" and authorizes the FCC to extend the video description requirements to stations and situations that were not covered by the prior rules. Accordingly, the FCC is using this NPRM to take a fresh look at the rules.

The Fifty Hour Minimum and Pass-Through Obligations

Video description, which is confusingly sometimes referred to as audio description, assists those who are blind or have impaired vision to view video programming by providing, during a pause in a program's dialogue, a verbal description of the key visual elements being shown.

As was the case under the FCC's former rules, **all network-affiliated television stations (including non-commercial stations) must pass through video descriptions when the network provides them and the station has the technical capability to air them.** For stations that have multiple broadcast streams, the FCC proposes to require the pass-through of video descriptions on each stream. The pass-through obligation also applies to multichannel video programming distributors ("MVPDs") that have the technical capability to pass through video-described programming on the channel containing the video-described programming. As noted below, the FCC is seeking comments on how it should determine whether a particular station or MVPD has the technical capability to pass through descriptions.

In addition, under the proposed rules, affiliates of ABC, CBS, NBC and Fox located in the Top 25 television markets must begin providing 50 hours per quarter of video-described prime time and/or children's programming by **January 1, 2012**. This obligation would only apply to a station's primary video stream, unless the station is carrying another of the listed networks on a secondary stream. In that case, the station would have to comply with the 50 hour per quarter requirement on each of those streams. MVPDs that have 50,000 or more subscribers would have to provide a similar level of video description for the top five national networks they carry. Stations and MVPDs can only count a video-described program toward the required minimum twice – once when it first airs, and one repeat airing. Any additional airings of that program on that station/channel will not count toward the video description requirement, but must still include the descriptions unless the broadcaster is using the description technology for another purpose related to the programming that would conflict with the inclusion of video descriptions.

The FCC proposes to reinstate the rules effective as of October 8, 2011, with the obligation to pass through video descriptions taking effect on **January 1, 2012**, subject to approval of the new requirement by the Office of Management and Budget. Similarly, ABC, CBS, NBC and Fox affiliates in the Top 25 markets would be expected to meet the 50 hours per quarter requirement beginning with the first quarter of 2012. In addition, **the CVAA requires that the FCC expand the 50 hours per quarter video description requirement to markets 26-60 no later than October 8, 2016.**

In addition to these requirements, the CVAA directs the FCC to implement rules requiring video description of emergency programming by 2013, and authorizes the FCC to increase the number of hours of video described programming required to 87.5 hours per quarter in 2017 if it finds that the benefits outweigh the costs of compliance. In addition, the CVAA authorizes the FCC to expand the video description requirements to additional television markets at a rate of 10 markets per year, beginning in 2020. The FCC will consider these aspects of the CVAA in one or more separate proceedings.

Exempt Programming

The CVAA exempts programming that is "live" or "near-live" from video description. However, that would reduce a station's required amount of video description per quarter only if that station had less than fifty hours of prime time and children's programming per quarter once live/near-live programming is subtracted out. The FCC proposes to define "near-live" as programming performed and recorded less than 24 hours prior to airing, and seeks comments on whether that time period is appropriate. The FCC is also seeking comments on how long it takes to add video description to a program.

The proposed rule would also allow video programming providers to petition the FCC for an exemption from the requirements by showing that compliance would be economically burdensome. The FCC is asking for comments as to what standards it should apply in determining whether compliance would be too burdensome in a particular case.

Open Questions With Regard to Reinstatement of the Rules

As noted, the FCC is broadly seeking comments on the details of implementing these proposals. Among other issues, the FCC is particularly interested in:

- What equipment or other resources are needed for broadcast stations and MVPDs to have the technical capability to pass through video descriptions, particularly in light of the shift to digital television?

- Is there a need to exempt stations already transmitting a secondary audio program, or given that digital technology allows simultaneous transmission of a variety of secondary audio tracks, can such stations nevertheless comply with the video description requirements?
- What costs are associated with passing through or providing video descriptions and should the FCC take those costs into consideration when deciding if an entity has the “technical capability” to comply with the rules or if it qualifies for an exemption on the basis of economic hardship?
- Should “children’s programming” for purposes of the video description requirements be defined as programming for children 16 and under?
- Does the proposed compliance deadline of January 1, 2012 allow sufficient time for broadcasters and MVPDs to meet their video description obligations?
- Should the FCC use the 2010-2011 DMA rankings to determine which stations are located in the Top 25 markets, and how often should it revisit those rankings for purposes of applying the video description rules?
- Should the FCC identify now the date on which stations in markets 26-60 must meet the 50 hours per quarter rule, or instead provide that information at a later date, such as when it has delivered its required report to Congress on the state of the video description market two years from now?
- Should the rules apply to both low power and full power stations?
- How should the FCC determine the top five qualified non-broadcast networks carried by MVPDs for purposes of applying the video description rules?
- Should the FCC adopt quality standards for video descriptions, and does it have the authority to do so?
- How will stations select which programs will be aired with video descriptions?

Comments in response to this NPRM will be due 30 days after Federal Register publication of the NPRM, with Reply Comments due 30 days after that.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors of this alert.

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