

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

In the Matter of
Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act
MB Docket No. 11-93

SECOND REPORT AND ORDER

Adopted: June 3, 2014

Released: June 4, 2014

By the Commission:

I. INTRODUCTION

1. In this Second Report and Order (R&O), we make minor changes to our rules that restrict the volume of television commercials. It is our hope that these changes will result in a modest decrease in the perceived loudness of certain commercials. Specifically, as required by the Commercial Advertisement Loudness Mitigation (CALM) Act, we incorporate by reference the Advanced Television Systems Committee's (ATSC) March 12, 2013 A/85:2013 Recommended Practice (RP) (Successor RP), which is the successor document to the July 25, 2011 A/85:2011 Recommended Practice (Current RP), incorporated into our rules in 2011. As discussed below, the Successor RP will become mandatory on June 4, 2015. Until this date, parties must, at a minimum, comply with the Current RP that was incorporated into our rules in 2011; however, as provided in the Order accompanying the Further Notice of Proposed Rulemaking (FNPRM), prior to that date, parties may instead choose to comply with the

1 See Appendix A – Final Rules.

2 See 47 U.S.C. § 621(a); see also Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17236, ¶ 20 (2011) (CALM Act Report and Order).

3 According to its website, ATSC is an international, non-profit organization developing voluntary standards for digital television. The ATSC member organizations represent the broadcast, broadcast equipment, motion picture, consumer electronics, computer, cable, satellite, and semiconductor industries. ATSC creates and fosters implementation of voluntary Standards and Recommended Practices to advance digital television broadcasting and to facilitate interoperability with other media. See http://www.atsc.org/aboutatsc.html.

4 ATSC A/85:2013 "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," (March 12, 2013) (Successor RP). This document is available on the ATSC website at: http://www.atsc.org/cms/standards/A_85-2013.pdf.

5 A/85:2011 "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," (July 25, 2011) (Current RP).

6 As discussed below, television station licensees and multichannel video programming distributors (MVPDs) may seek a waiver of this compliance date to the extent they demonstrate that they are unable to comply with the Successor RP by that deadline; see infra at ¶ 6.

7 Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act, MB Docket No. 11-93, Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 15258, 15261, ¶ 7 (2013) ("FNPRM" or "CALM Act FNPRM").

updated loudness measurement method contained in the Successor RP, rather than the method contained in the Current RP.⁸

II. BACKGROUND

2. The Commission's rules implementing the CALM Act, adopted December 13, 2011,⁹ require digital TV broadcasters, digital cable operators, satellite TV providers, and other digital MVPDs to ensure that the commercials they transmit to viewers comply with the television industry's 2011 ATSC A/85 Recommended Practice (RP),¹⁰ which describes how the industry can monitor and control the loudness level of digital TV programming. As mandated by the statute,¹¹ the Commission incorporated into its rules by reference and made mandatory the 2011 ATSC A/85 RP.¹² The rules took effect on December 13, 2012.

3. Section 2(a) of the CALM Act mandates that the Commission's rules incorporate by reference and make mandatory "any successor" to the RP.¹³ On March 12, 2013, the ATSC published a successor document to its 2011 A/85 RP.¹⁴ As described by the ATSC, the Successor RP applies an improved loudness measurement algorithm to conform to the International Telecommunication Union's (ITU)¹⁵ updated BS.1770 measurement algorithm, "BS.1770-3."¹⁶ BS.1770-3 employs "gating" that will exclude very quiet or silent passages of a commercial when calculating the average loudness of that commercial.¹⁷ Use of the new algorithm may reduce the volume of some commercials in certain circumstances.¹⁸ The Successor RP also contains other minor changes that do not affect our rules.¹⁹

⁸ See *infra* at ¶ 8.

⁹ See generally *CALM Act Report and Order*, 26 FCC Rcd 17222.

¹⁰ See 47 C.F.R. §§ 73.682(e) and 76.607.

¹¹ 47 U.S.C. § 621(a).

¹² See Current RP, which was incorporated as it existed on the date of its approval by the Director of the Federal Register (*i.e.*, Dec. 13, 2012). See 47 C.F.R. §§ 73.8000(a), (b)(5) and 76.602(a), (b)(2); 1 C.F.R. § 51.1(f) ("Incorporation by reference of a publication is limited to the edition of the publication that is approved. Future amendments or revisions of the publication are not included."). The Current RP is available at the ATSC website: http://www.atsc.org/cms/standards/a_85-2011a.pdf.

¹³ 47 U.S.C. § 621(a).

¹⁴ See *supra* note 4.

¹⁵ The ITU is a specialized agency of the United Nations whose goal is to promote international cooperation in the efficient use of telecommunications, including the use of the radio frequency spectrum. The ITU publishes technical recommendations concerning various aspects of radio communication technology. These recommendations are subject to an international peer review and approval process in which the Commission participates.

¹⁶ See Letter from Mark S. Richer, ATSC President, to Alison Neplokh, Chief Engineer, Media Bureau, FCC, at 1 (dated April 5, 2013) (*ATSC April 5 Letter*) (stating that "the revised version of A/85 includes an update of the reference to the [ITU] recommendation for 'Algorithms to measure audio programme loudness and true-peak audio level.' The revised A/85 now references ITU-R BS.1770-3."). As explained in the *CALM Act Report and Order*, the ITU-R BS.1770 measurement algorithm provides a numerical value that indicates the perceived loudness of the content (measured in units of LKFS – loudness, K-weighted, relative to full scale) by averaging the loudness of audio signals in all channels over the duration of the content. See *CALM Act Report and Order*, 26 FCC Rcd at 17228, ¶ 5.

¹⁷ *Id.* ("Version 3 of BS.1770, adds 'gating' (excluding low level passages from the measured value) to the measurement algorithm.")

¹⁸ We note that the potential benefit that may occur for consumers is limited to situations where a commercial has a significant amount of silent or very quiet passages. The new algorithm's use of "gating" is intended to more accurately reflect consumer perceptions in situations in which the commercial contains both very loud and very quiet passages. In this circumstance, the new algorithm would result in a greater perceived loudness measurement

(continued....)

4. On November 1, 2013, we released the *FNPRM* in this docket. The *FNPRM* proposed to replace the Current RP, incorporated into our rules in 2011, with the Successor RP published in 2013,²⁰ observing that the CALM Act afforded the Commission no discretion in this regard.²¹ The *FNPRM* sought comment on the appropriate timing for the 2013 Successor RP to become mandatory.²² We received two comments in response to our *FNPRM*.²³

III. DISCUSSION

5. As required by the statute,²⁴ we adopt the Successor RP and will incorporate it by reference into our rules.²⁵ We also find, as we tentatively concluded in the *FNPRM*, that the only substantive change created by the Successor RP as it relates to our rules is the change to the measurement algorithm to conform to BS.1770-3.²⁶ This finding is consistent with the ATSC's description of the Successor RP and is not disputed in the record.²⁷ As a practical matter, this change seems to be designed to prevent advertisers from using silent passages to offset excessively loud passages when calculating the average loudness of program material.²⁸ Thus, once this Successor RP is implemented, consumers may notice a modest decrease in the perceived loudness of certain commercials. This change is consistent with the type of updates that we believe Congress intended the Commission to incorporate in its rules by specifying in the CALM Act that the Commission shall make mandatory successor versions of the RP.

6. We adopt the proposal in the *FNPRM* to make the Successor RP mandatory as of June 4, 2015, one year from the release date of this Second Report and Order.²⁹ NAB, the only commenter on this issue, supports this approach.³⁰ We are mindful of the fact that many parties have recently purchased

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than the old algorithm, therefore requiring the commercial to be adjusted using one of the methods in the RP. Thus, the new algorithm may result in somewhat reduced loudness problems perceived by consumers in this circumstance, but is otherwise substantially the same as the existing algorithm.

¹⁹ See *ATSC April 5 Letter* at 1. ATSC explains that version 3 of BS.1770 also “includes some minor editorial updates to the loudness measurement text and a minor correction to the true-peak measurement algorithm.” *Id.* ATSC also explains that “[b]eyond the reference change, A/85 now includes improved guidance for measuring the loudness of surround programming in both its multichannel format and in its 2-channel downmix In addition, A/85 is now specific about the differences between loudness and dynamic range.” *Id.*

²⁰ *Id.* at 15260, ¶ 5.

²¹ *Id.* at 15259, ¶ 3.

²² *Id.* at 15260-61, ¶ 6.

²³ See Comments of the National Association of Broadcasters dated Dec. 24, 2013 (“NAB Comments”) and Joint Comments of Holston Valley Broadcasting Corporation, W. Russell Withers, Jr., Withers Broadcasting Company of West Virginia, Withers Broadcasting Company of Clarksburg, LLC and Ernesto Bustos dated Dec. 13, 2013 (“Holston Valley *et al.* Comments”). The filings made in this docket are available to the public both online via the Commission’s Electronic Comment Filing System (“ECFS”) at <http://www.fcc.gov/cgb/ecfs/> and during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554.

²⁴ See *supra* note 13; *CALM Act FNPRM*, 28 FCC Rcd at 15260, ¶¶ 4-5.

²⁵ See Appendix A – Final Rules.

²⁶ *CALM Act FNPRM*, 28 FCC Rcd at 15260, ¶ 5. No commenter disagreed with this finding.

²⁷ See *supra* note 16.

²⁸ See *supra* note 18.

²⁹ *CALM Act FNPRM*, 28 FCC Rcd at 15260, ¶ 6.

³⁰ See NAB Comments at 1-4 (“NAB supports the Commission’s proposed approach to implementing the revised standards”).

new equipment to comply with the Commission's rules implementing the statute, which took effect on December 13, 2012. Notably, NAB's survey of a number of its television members indicated "that most equipment deployed to comply with the A/85 RP can likely be modified through relatively low-cost software upgrades to comply with the Successor RP."³¹ Therefore, we agree with NAB that a one-year deadline to comply with the Successor RP would generally provide a reasonable amount of time for affected parties to implement any necessary equipment upgrades.³² To the extent certain regulated parties have purchased equipment that is not easily upgradable or could otherwise show that implementation of the Successor RP would be significantly burdensome, we will consider requests for additional time to comply with the Successor RP,³³ pursuant to our general waiver authority in Section 2(b)(3) of the CALM Act.³⁴ We remind stations and MVPDs that such a waiver, if granted, would extend the time to come into compliance with the Successor RP but would require continued compliance with the Current RP.³⁵

7. We reject the request by Holston Valley *et al.* to extend the existing financial hardship waivers in effect until one year after the Successor RP becomes mandatory.³⁶ The CALM Act provides that the Commission may grant a one-year waiver of the effective date of the CALM Act rules to any station or MVPD that shows it would be a "financial hardship" to obtain the necessary equipment to comply with the rules, and may renew such waiver for one additional year.³⁷ Stations and MVPDs that obtained an initial financial hardship waiver were afforded until December 13, 2013 to comply with the CALM Act rules, and those that renewed their financial hardship waiver have until December 13, 2014 to comply with the CALM Act rules. The Holston Valley *et al.* request appears to argue that the gap between when stations and MVPDs must comply with the CALM Act rules and Current RP (December 13, 2014) and when stations and MVPDs must comply with the Successor RP (one year from the release date of this Order) will cause entities in this situation to "pay twice for the equipment and software package needed to comply with the CALM Act."³⁸ Holston Valley *et al.* have not explained why a station or MVPD with a waiver delaying compliance with the CALM Act rules until December 13, 2014 cannot obtain by December 13, 2014 either equipment that complies with the Successor RP or equipment that complies with the Current RP but that is upgradeable to the Successor RP. Thus, it is not clear to us why entities still in the process of coming into compliance would end up paying twice. Because most currently available equipment will be compliant with the Successor RP – and regulated entities can ensure

³¹ NAB Comments at 2.

³² NAB Comments at 2 (calling one-year deadline "a realistic time frame that appropriately balances consumers' interests in timely implementation of the Successor RP while permitting appropriate planning and execution for television stations").

³³ See NAB Comments at 4 (asking the Commission to "look favorably upon requests for waivers for extension of time to comply with the Successor RP by stations needing to purchase new equipment.").

³⁴ Section 2(b)(3) of the CALM Act provides that the statute does not affect the Commission's authority to waive any rule required by the CALM Act, or the application of any such rule, for good cause shown with regard to any station/MVPD or class of stations/MVPDs under Section 1.3 of the Commission's rules. See 47 U.S.C. § 621(b)(3) (codifying CALM Act § 2(b)(3)). See 47 C.F.R. § 1.3 (the Commission's rules "may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission" and "[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefore is shown."). The Media Bureau has delegated authority to act on such requests. 47 C.F.R. §§ 0.61(h) and 0.283.

³⁵ See also *infra* discussion in ¶ 7.

³⁶ Holston Valley *et al.* Comments at 2 ("As the Commission seeks to make changes in the CALM Act requirements, it would seem appropriate to keep the existing waiver of the CALM Act requirements for small television stations ... until the first anniversary of the effective date of the revised rules adopted as a result of the Order and Further Notice of Proposed Rulemaking.")

³⁷ 47 U.S.C. § 621(b)(2).

³⁸ Holston Valley *et al.* Comments at 3.

that they purchase equipment that complies (or can be easily upgraded to comply) with the Successor RP – we are not persuaded that this gap will pose any problems to regulated entities. Therefore, to the extent the regulated entity has not yet purchased the necessary equipment to comply with the CALM Act, we see no reason why such entity could not ensure that the equipment it does purchase (before its financial hardship waiver expires) will comply with the Successor RP.³⁹ To the extent the regulated entity has purchased equipment that is not easily upgradable, such entity may seek more time to comply with the Successor RP (as described above). We emphasize, however, that all regulated entities with existing financial hardship waivers must comply with the CALM Act rules when their financial hardship waivers expire, whether in accordance with the Current RP or the Successor RP depending upon the timing.

8. Finally, consistent with the Commission’s decision in the Order accompanying the *FNPRM*, we will continue to permit stations and MVPDs the option to implement the Successor RP early.⁴⁰ We expect that some stations and MVPDs may be able and willing to implement the Successor RP in less time than the year allowed for them to come into compliance with the new standard. Pursuant to the waiver granted in the Order accompanying the *FNPRM*, which will remain in effect until the effective date of the new standard, stations and MVPDs may comply with our existing rules by following either the BS.1770-1 measurement method in the Current RP or the BS.1770-3 updated measurement method in the Successor RP. Although the change in the measurement method is minor, we believe that consumers may benefit from early implementation of the improved loudness measurement technique incorporated into the Successor RP.

IV. PROCEDURAL MATTERS

9. Final Regulatory Flexibility Act Analysis. As required by the Regulatory Flexibility Act of 1980 (RFA),⁴¹ the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA). The FRFA is attached as Appendix B.

10. Final Paperwork Reduction Act Analysis. This document does not contain any new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA).⁴² In addition, therefore, it does not contain any information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002.⁴³

11. Congressional Review Act. The Commission will send a copy of this Second Report and Order in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.⁴⁴

12. Additional Information. For more information, contact Evan Baranoff, Evan.Baranoff@fcc.gov, mailto:of the Media Bureau, Policy Division, (202) 418-7142 or Shabnam Javid, Shabnam.Javid@fcc.gov, of the Engineering Division, Media Bureau at (202) 418-2672. Direct press inquiries to Janice Wise at (202) 418-8165.

³⁹ Notably, *Holston Valley et al.* do not explain why they could not purchase equipment that would comply with the Successor RP.

⁴⁰ *See supra* note 7.

⁴¹ *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601, *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

⁴² 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.).

⁴³ The Small Business Paperwork Relief Act of 2002 (SBPRA), Pub. L. No. 107-198, 116 Stat 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); *see* 44 U.S.C. 3506(c)(4).

⁴⁴ *See* 5 U.S.C. § 801(a)(1)(A).

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that pursuant to the Commercial Advertisement Loudness Mitigation Act of 2010, Pub. L. No. 111-311, 124 Stat. 3294, and Sections 1, 2(a), 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), and 303(r), and 621, this Second Report and Order IS ADOPTED.

14. IT IS FURTHER ORDERED that the Commission's rules ARE HEREBY AMENDED as set forth in Appendix A, effective June 4, 2015.

15. IT IS FURTHER ORDERED that, pursuant to the Congressional Review Act, 5 U.S.C. § 801(a)(1)(A), the Commission WILL SEND a copy of this Second Report and Order in a report to Congress and the General Accounting Office.

16. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, WILL SEND a copy of this Second Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A**Final Rules**

The Federal Communications Commission amends Parts 73 and 76 of Title 47 of the Code of Federal Regulations (CFR) as set forth below:

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 73.8000 is amended in paragraph (b)(5) by removing “ATSC A/85:2011” and adding in its place “ATSC A/85:2013”, and removing the date “July 25, 2011” and adding in its place “March 12, 2013”.

PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE.

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.602 is amended in paragraph (b)(2) by removing “ATSC A/85:2011” and adding in its place “ATSC A/85: 2013”, and removing the date “July 25, 2011” and adding in its place “March 12, 2013”.

APPENDIX B

Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA)¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Further Notice of Proposed Rule Making* in this proceeding.² The Commission sought written public comment on the proposals in the *FNPRM*, including comment on the IRFA. The Commission received no comments that specifically addressed the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

A. Need for, and Objectives of, the Final Rules

2. This Second Report and Order adopts minor rule changes to the Commission's Commercial Advertisement Loudness Mitigation (CALM) Act rules. Specifically, as required by the CALM Act,⁴ the Commission incorporates by reference into the rules the Advanced Television Systems Committee's (ATSC)⁵ March 12, 2013 A/85:2013 Recommended Practice (RP) (Successor RP),⁶ which is the successor document to the July 25, 2011 A/85:2011 Recommended Practice (Current RP), incorporated into our rules in 2011.⁷ The Successor RP will become mandatory on June 4, 2015.⁸ Until this date, the Current RP that was incorporated into our rules in 2011 will continue to be mandatory; however, prior to that date, parties may instead choose to follow the loudness measurement method contained in the Successor RP, rather than that in the Current RP. As mandated by the statute, the rule changes will apply to television station broadcasters and multichannel video programming distributors (MVPDs).⁹

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

3. No comments specifically addressed the IRFA.

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

² *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*; MB Docket No. 11-93, Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 15258, 15265-71, App. B (2013) (*FNPRM*).

³ See 5 U.S.C. § 604.

⁴ See 47 U.S.C. § 621(a); see also *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17236, ¶ 20 (2011) (*CALM Act Report and Order*).

⁵ According to its website, ATSC is an international, non-profit organization developing voluntary standards for digital television. The ATSC member organizations represent the broadcast, broadcast equipment, motion picture, consumer electronics, computer, cable, satellite, and semiconductor industries. ATSC creates and fosters implementation of voluntary Standards and Recommended Practices to advance digital television broadcasting and to facilitate interoperability with other media. See <http://www.atsc.org/aboutatsc.html>.

⁶ ATSC A/85:2013 "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," (March 12, 2013) (Successor RP). This document is available on the ATSC website at: http://www.atsc.org/cms/standards/A_85-2013.pdf.

⁷ A/85:2011 "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," (July 25, 2011) (Current RP).

⁸ As discussed in Section E. of this FRFA below, we will consider requests for a waiver of this effective date from television station broadcasters and multichannel video programming distributors (MVPDs) which demonstrate that they are unable to comply with the Successor RP; see *supra* at ¶ 6.

⁹ We refer herein to covered entities collectively as "stations/MVPDs" or "regulated parties."

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

4. The RFA directs agencies to provide a description of and an estimate of the number of small entities to which the rules will apply.¹⁰ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹¹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹² 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 SBA.¹³ The final rule changes adopted herein will directly affect small television broadcast stations and small MVPD systems, which include cable operators and satellite video providers. Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

5. Television Broadcasting. This economic census category “comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.”¹⁴ The SBA has created the following small business size standard for Television Broadcasting businesses: those having \$35.5 million or less in annual receipts.¹⁵ The Commission has estimated the number of licensed commercial television stations to be 1,386.¹⁶ In addition, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on June 10, 2013, about 1,245 (or about 90 percent) the estimated 1,386 commercial television stations had revenues of \$35.5 million or less. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 396.¹⁷ NCE stations are non-profit, and therefore considered to be small entities.¹⁸ Therefore, we estimate that the majority of television broadcast stations are small entities.

6. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations¹⁹ 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. In addition, an

¹⁰ 5 U.S.C. § 604(a)(4).

¹¹ 5 U.S.C. § 601(6).

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

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

¹⁴ U.S. Census Bureau, 2012 NAICS Definitions, “515120 Television Broadcasting,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

¹⁵ 13 C.F.R. § 121.201; 2012 NAICS code 515120.

¹⁶ See *Broadcast Station Totals as of June 30, 2013*, Press Release (MB rel. July 10, 2013) (*Broadcast Station Totals Press Release*) at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-322079A1.pdf.

¹⁷ See *Broadcast Station Totals*, *supra*, note 11.

¹⁸ See generally 5 U.S.C. §§ 601(4), (6).

¹⁹ “[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 C.F.R. § 21.103(a)(1).

element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

7. Cable Television Distribution Services. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which was developed for small wireline businesses. This 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. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services.”²⁰ The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.²¹ Census data for 2007 shows that there were 31,996 establishments that operated that year.²² Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.²³ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

8. Cable Companies and Systems. The Commission has also 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.²⁴ Industry data shows that there were 1,141 cable companies at the end of June 2012.²⁵ Of this total, all but 10 incumbent cable companies are small under this size standard.²⁶ In addition, under the Commission’s rate regulation rules,

²⁰ U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition) at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. Examples of this category are: broadband Internet service providers (e.g., cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television (CCTV) services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (DTH) services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (MMDS).

²¹ 13 C.F.R. § 121.201; 2012 NAICS code 517110.

²² U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

²³ *Id.*

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

²⁵ NCTA, Industry Data, Number of Cable Operating Companies (June 2012), <http://www.ncta.com/Statistics.aspx> (visited Sept. 28, 2012). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, FCC 13-99 at ¶ 24 (rel. July 22, 2013) (*15th Annual Competition Report*).

²⁶ See SNL Kagan, “Top Cable MSOs – 12/12 Q”; available at <http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2012Q4&sortcol=subscribersbasic&sortorder=desc>. We note that, when applied to an MVPD operator, under this size standard (i.e., 400,000 or fewer subscribers) all

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a “small system” is a cable system serving 15,000 or fewer subscribers.²⁷ Current Commission records show 4,945 cable systems nationwide.²⁸ Of this total, 4,380 cable systems have less than 20,000 subscribers, and 565 systems have 20,000 subscribers or more, based on the same records. Thus, under this standard, we estimate that most cable systems are small.

9. Cable System Operators (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”²⁹ There are approximately 56.4 million incumbent cable video subscribers in the United States today.³⁰ Accordingly, an operator serving fewer than 564,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.³¹ Based on available data, we find that all but 10 incumbent cable operators are small under this size standard.³² We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.³³ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

10. Direct Broadcast Satellite (DBS) Service. DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. DBS, by exception, is now included in the SBA’s broad economic census category, Wired Telecommunications Carriers,³⁴ which was developed for small wireline

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but 14 MVPD operators would be considered small. *See* NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), <http://www.ncta.com/industry-data> (visited Aug. 30, 2013). The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. *See CALM Act Report and Order*, 26 FCC Rcd at 17245-46, ¶ 37 (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

²⁷ 47 C.F.R. § 76.901(c).

²⁸ The number of active, registered cable systems comes from the Commission’s Cable Operations and Licensing System (COALS) database on Aug. 28, 2013. A cable system is a physical system integrated to a principal headend.

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

³⁰ *See* NCTA, Industry Data, Cable Video Customers (2012), <http://www.ncta.com/industry-data> (visited Aug. 30, 2013).

³¹ 47 C.F.R. § 76.901(f); *see* Public Notice, FCC Announces New Subscriber Count for the Definition of Small Cable Operator, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

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

³³ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. *See* 47 C.F.R. § 76.901(f).

³⁴ *See* 13 C.F.R. § 121.201, 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that

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businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.³⁵ Census data for 2007 shows that there were 31,996 establishments that operated that year.³⁶ Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.³⁷ Therefore, under this size standard, the majority of such businesses can be considered small. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled “Cable and Other Program Distribution.” The definition of Cable and Other Program Distribution provided that a small entity is one with \$12.5 million or less in annual receipts.³⁸ Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.³⁹ Each currently offers subscription services. DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

11. Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs). SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA’s broad economic census category, Wired Telecommunications Carriers,⁴⁰ which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.⁴¹ Census data for 2007 shows that there were

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they operate are included in this industry.” (*Emphasis* added to text relevant to satellite services.) U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

³⁵ 13 C.F.R. § 121.201; 2012 NAICS code 517110.

³⁶ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

³⁷ *Id.*

³⁸ 13 C.F.R. § 121.201, NAICS code 517510 (2002).

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

⁴⁰ See 13 C.F.R. § 121.201, 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. *By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.*” (*Emphasis* added to text relevant to satellite services.) U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁴¹ 13 C.F.R. § 121.201; 2012 NAICS code 517110.

31,996 establishments that operated that year.⁴² Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.⁴³ Therefore, under this size standard, the majority of such businesses can be considered small.

12. 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.⁴⁴ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,⁴⁵ OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”⁴⁶ The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.⁴⁷ Census data for 2007 shows that there were 31,996 establishments that operated that year.⁴⁸ Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.⁴⁹ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities. In addition, we note that the Commission has certified some OVS operators, with some now providing service.⁵⁰ Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises.⁵¹ 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.

⁴² U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁴³ *Id.*

⁴⁴ 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, ¶ 135 (2009) (*Thirteenth Annual Cable Competition Report*).

⁴⁵ See 47 U.S.C. § 573.

⁴⁶ See 13 C.F.R. § 121.201, 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined in part as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services.” U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁴⁷ 13 C.F.R. § 121.201; 2012 NAICS code 517110.

⁴⁸ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁴⁹ *Id.*

⁵⁰ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsccer.html>.

⁵¹ See *Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer businesses that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

13. As stated above, the *Second Report and Order* incorporates by reference into our rules and ultimately makes mandatory the Successor RP published in 2013, thereby replacing the Current RP incorporated into our rules in 2011. As discussed in the *Second Report and Order*, the only substantive change created by the Successor RP as it relates to our rules is the change to the measurement algorithm to be used when calculating the average loudness of a commercial.⁵² Under the Current RP, television stations and MVPDs use the BS.1770-1 measurement method, whereas, under the Successor RP, stations and MVPDs will use the BS.1770-3 method. The primary difference is that BS.1770-3 employs “gating” that will exclude very quiet or silent passages of a commercial when calculating the average loudness of that commercial. As a result, stations and MVPDs may need a software or device upgrade for their equipment in order to perform the new loudness measurement technique. The *Second Report and Order* does not otherwise impose any new reporting, recordkeeping or other compliance requirements.⁵³

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

14. The RFA requires an agency to describe the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.⁵⁴

15. The CALM Act requires that the new technical loudness standard (*i.e.*, the 2011 ATSC A/85 RP) be made mandatory for all stations and MVPDs, regardless of size.⁵⁵ The statute also requires that the Commission make mandatory “any successor” to the ATSC A/85 RP, affording the Commission no discretion in this regard.⁵⁶ However, in this proceeding, the Commission found that it had some discretion to afford a reasonable amount of time for regulated parties to implement the Successor RP. The record in this proceeding indicates “that most equipment deployed to comply with the A/85 RP can likely be modified through relatively low-cost software upgrades to comply with the Successor RP.”⁵⁷ Accordingly, the Commission affords regulated parties with one year from the release date of the *Second Report and Order* to implement any necessary equipment upgrades. In addition, to the extent a regulated entity has purchased equipment that is not easily upgradable, such entity may request more time to comply with the Successor RP. We note, however, that no party filed comments that it had purchased equipment that was not easily upgradable, even though the *FNPRM* expressly sought such comment. Therefore, we believe that the final rules adopted in the *Second Report and Order* will not have a “significant economic impact on a substantial number of small entities.”⁵⁸

⁵² See *Second Report and Order* ¶ 5.

⁵³ For an overview of the existing compliance requirements pursuant to our implementation of the CALM Act, see *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Small Entity Compliance Guide, DA 13-1002 (MB rel. May 7, 2013); available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-13-1002A1.docx.

⁵⁴ 5 U.S.C. § 604(a)(6).

⁵⁵ See 47 U.S.C. § 621(a).

⁵⁶ *Id.*

⁵⁷ NAB Comments at 2.

⁵⁸ See 5 U.S.C. § 605(b).

F. Report to Congress

16. The Commission will send a copy of the *Second Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.⁵⁹ In addition, the Commission will send a copy of the *Second Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The *Second Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register.⁶⁰

⁵⁹ See 5 U.S.C. § 801(a)(1)(A).

⁶⁰ See *id.* § 604(b).