

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

In the Matter of
Closed Captioning of Video Programming
Telecommunications for the Deaf and Hard of Hearing, Inc.
Petition for Rulemaking
CG Docket No. 05-231

SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: December 12, 2014

Released: December 15, 2014

Comment Date: [20 days after date of publication in the Federal Register]
Reply Comment Date: [30 days after date of publication in the Federal Register]

By the Commission:

I. INTRODUCTION

1. In this Second Further Notice of Proposed Rulemaking (Second Further Notice), the Commission seeks additional comment on several issues related to matters raised in the Commission's February 24, 2014 Further Notice of Proposed Rulemaking (Further Notice) on closed captioning.

II. BACKGROUND

2. In February 2014, the Commission adopted rules governing the quality of closed captioning in order to improve the accessibility of television programming for people who are deaf and hard of hearing.

1 See Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc., Petition for Rulemaking, CG Docket No. 05-231, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 2221 (2014) (Closed Captioning Quality Order).

2 Id.

3 Id. at 2255, ¶ 53.

closed captioning of video programming “by providers and *owners* of video programming,”⁴ in the *1997 Closed Captioning Report and Order* adopting the initial closed captioning rules, the Commission had chosen to place exclusive responsibility for compliance with the closed captioning requirements on VPDs because they are ultimately responsible for ensuring the delivery of programming to consumers.⁵ At the same time, because closed captioning is most likely to be done at the production stage,⁶ the Commission in the *Closed Captioning Quality Order* agreed with the National Cable and Telecommunications Association (NCTA) that “the creation and delivery of good quality captions is not solely within the control of any one entity and often requires coordination and execution among many connected parties in the video delivery chain.”⁷

3. Accordingly, the Commission kept open the question of which programming entities should bear responsibility for compliance with the captioning rules and in the Further Notice accompanying the *Closed Captioning Quality Order* sought comment on extending some of the responsibilities for complying with its rules regarding the provision and quality of closed captioning on television beyond VPDs, to other entities involved in the production and delivery of video programming.⁸ The Commission also sought comment in the Further Notice on adopting a burden-shifting approach for complaint resolution that would require both VPDs and video programmers to be involved in the

⁴ *Id.* at 2254, ¶ 51 (citing *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, Report and Order, 13 FCC Rcd 3272, 3286, ¶ 27 (1997) (*1997 Closed Captioning Report and Order*), *recon. granted in part*, Order on Reconsideration, 13 FCC Rcd 19973 (1998)). Both the *Closed Captioning Quality Order* and the *1997 Closed Captioning Report and Order* cited sections 713(b)(2), (d)(1) and (d)(3) of the Act, 47 U.S.C. § 613(b)(2), (d)(1) and (d)(3). See *Closed Captioning Quality Order*, 29 FCC Rcd at 2254, n.460; *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286, n.62. Section 713(b)(2) directs the Commission to prescribe regulations that “shall ensure” that “video programming providers or *owners* maximize the accessibility of video programming first published or exhibited prior to the effective date of such regulations through the provision of closed captions” (emphasis added); sections 713(d)(1) and (3) authorize the Commission to exempt classes of programs where “the provision of closed captioning would be economically burdensome to the provider or *owner* of such programming” and authorize the “provider of video programming or *program owner*” to petition the Commission for an exemption from the captioning requirement (emphasis added). See also *Closed Captioning Quality Order*, 29 FCC Rcd at 2291, n.460.

⁵ *Closed Captioning Quality Order*, 29 FCC Rcd at 2254, ¶ 51 (citing *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3286, ¶ 27); see also *id.* at 2291, ¶ 122; 47 U.S.C. § 613(b)(2), (d)(2) and (d)(3).

⁶ *Closed Captioning Quality Order*, 29 FCC Rcd at 2254, ¶ 52 (citing *1997 Closed Captioning Report and Order*, 13 FCC Rcd at 3364, ¶ 199 (“[C]losed captioning is most likely to be done at the production stage or prior to distribution where it is most economically and technically efficient.”)).

⁷ *Id.* at 2254, ¶ 52 (quoting NCTA January 27, 2014 *Ex Parte* at 1).

⁸ *Id.* at 2291-96, ¶¶ 122-30. The Further Notice explained that in two other contexts, the Commission has extended some of the captioning responsibilities to entities, other than VPDs, who are involved in the production and delivery of video programming. *Id.* at 2291-92, ¶ 122. Specifically, in the *IP Captioning Report and Order* (requiring television programs to retain their captions when re-shown over Internet protocol), the Commission required video programming owners to send program files used for the delivery of programming over Internet protocol to VPDs with all required captions. *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, 27 FCC Rcd 787, 798, ¶ 15. Similarly, the Commission’s rules requiring access to emergency information on television by individuals who are blind or visually impaired place some responsibilities on video programming providers. *In the Matter of Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, 28 FCC Rcd 4871, 4898-99, ¶ 34.

resolution of consumer complaints.⁹ Further, the Commission asked whether section 79.1(g)(6) of the Commission's rules, which permits VPDs to rely on certifications from programming suppliers to demonstrate compliance with the Commission's captioning requirements,¹⁰ should be eliminated if the Commission were to reapportion responsibility for compliance with the Commission's television closed captioning rules,¹¹ and more generally whether other changes to its rules would be appropriate if the Commission decides to impose some obligations directly on programming entities other than VPDs.¹²

III. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

4. In response to the Further Notice, some commenters have raised concerns regarding the ability of VPDs and consumers to locate the correct contact information for video programmers¹³ for the resolution of closed captioning complaints, should the Commission decide to extend to video programmers some of the responsibilities for compliance with its closed captioning rules and for the resolution of captioning complaints.¹⁴ Several commenters have proposed requiring video programmers to file contact information with the Commission for inclusion in the registry of VPD contact information (VPD Registry) or a separate database.¹⁵

5. We therefore invite comment on whether such contact information should be filed, and if

⁹ *Closed Captioning Quality Order*, 29 FCC Rcd at 2293-94, ¶¶ 125-26.

¹⁰ 47 C.F.R. § 79.1(g)(6).

¹¹ *Closed Captioning Quality Order*, 29 FCC Rcd at 2295, ¶ 129.

¹² *Id.* at 2295-96, ¶ 129.

¹³ "Video programmer" is defined as "[a]ny entity that provides video programming that is intended for distribution to residential households including, but not limited to, broadcast and nonbroadcast television networks and the owners of such programming." 47 C.F.R. § 79.1(a)(9); *Closed Captioning Quality Order*, 29 FCC Rcd at 2254, ¶ 52.

¹⁴ See Letter from Lisa Chandler Cordell, Attorney for Cincinnati Bell Extended Territories LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission at 3 (August 11, 2014) (Cincinnati Bell August 11, 2014 *Ex Parte*); Letter from Barbara Esbin, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary, Federal Communications Commission at 3 (September 4, 2014) (ACA September 4, 2014 *Ex Parte*).

¹⁵ See 47 C.F.R. § 79.1(i)(3) (requiring VPDs to file with the Commission contact information for the handling of immediate and non-immediate closed captioning complaints). In the Further Notice, the Commission sought comment on amending 47 C.F.R. § 79.1(i)(3) to require VPDs to file contact information through a web form, thereby eliminating the options to file with the Chief of the Disability Rights Office or by sending an email to CLOSEDCAPTIONING_POC@fcc.gov. *Closed Captioning Quality Order*, 29 FCC Rcd at 2303, ¶ 147. Several commenters suggested having such video programmer information filed with the Commission. See e.g., ACA September 4, 2014 *Ex Parte* at 2-3 (discussing the possibility of "including video programmers in the Commission's online VPD registry with the name of a dedicated contact person and information for reaching him or her"); Letter from Ian Dillner, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC at 2 (August 21, 2014) (Verizon August 21, 2014 *Ex Parte*) (suggesting that "the Commission require [video programming owners (VPOs)] to add their names to the FCC contact database"); Verizon July 9, 2014 Comments at 9 (recommending that "the Commission require collection of similar contact information [to that required from VPDs] from video programmers and owners, and use this information to allow consumers and the Commission to contact video programmers and owners with complaints regarding closed captioning"); Letter from William M. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, Federal Communications Commission at 1 (August 11, 2014) (DIRECTV August 11, 2014 *Ex Parte*) (stating that resolution of closed captioning complaints "would be facilitated by having VPO contact information added to the existing VPD captioning contact registry"); Cincinnati Bell August 11, 2014 *Ex Parte* at 3 (suggesting that "much like the VPD registry, programmers should be obligated to provide the FCC with, and keep current, their contact information").

so, whether such filings should utilize a web form.¹⁶ What are the costs and benefits of requiring video programmers to file contact information with the Commission? Should the Commission require video programmers to provide the same contact information as is currently required of VPDs by our existing rules?¹⁷ Do video programmers generally have a designated person available to handle immediate closed captioning concerns, and if not, what benefits and burdens would result from a requirement that programmers designate such a person? Is there additional information beyond that required of VPDs that the Commission should require video programmers to file? Should video programmers also be required to place the contact information on their websites, if they have a website, or to provide the information in some other way for added access by the public?¹⁸

6. We also seek comment on whether the Commission should alter its requirements regarding certifications by video programmers as to their compliance with rules on the provision and quality of closed captioning,¹⁹ if the Commission decides to extend some responsibilities for compliance with its closed captioning rules to video programmers. Section 79.1(g)(6) of the Commission's rules allows VPDs to rely on certifications from video programming suppliers, including programming producers, programming owners, networks, syndicators and other distributors, to demonstrate compliance with the Commission's rules for the provision of closed captioning.²⁰ Section 79.1(j)(1) requires VPDs to exercise best efforts to obtain a certification from each video programmer from which the VPD obtains programming stating (i) that the video programmer's programming satisfies the required caption quality standards;²¹ (ii) that in the ordinary course of business, the video programmer adopts and follows the Best Practices in captioning its programming;²² or (iii) that the video programmer is exempt from the closed captioning rules, under one or more properly obtained exemptions.²³

7. One commenter on the Further Notice suggests that the Commission require video programmers to file certifications pursuant to sections 79.1(g)(6) and 79.1(j)(1) with the Commission, rather than providing them to the VPD (in the case of section 79.1(g)(6)) or making them widely available (in the case of section 79.1(j)(1)).²⁴ We seek comment on whether the Commission should amend section

¹⁶ By web form, we mean an interactive form on the Commission's website designed to receive and transfer information to a publicly available Commission database.

¹⁷ See 47 C.F.R. § 79.1(i)(1), (2) (requiring VPDs to provide a telephone number, fax number, and e-mail address for immediate closed captioning concerns and the name of a person with primary responsibility for captioning issues and who can ensure compliance with our rules and the person's title or office, telephone number, fax number, postal mailing address, and e-mail address for written closed captioning complaints).

¹⁸ See *id.* (requiring VPDs to make contact information for the handling of immediate closed captioning concerns and written closed captioning complaints available "on their Web sites (if they have a Web site), in telephone directories, and in billing statements (to the extent the distributor issues billing statements)"); *id.* § 79.1(c)(2)(iii) (requiring video programming distributors and providers to make contact information available to end users for the receipt and handling of written IP closed captioning complaints, but not specifying where the contact information must appear).

¹⁹ See *id.* §§ 79.1(g)(6), (j)(1).

²⁰ *Id.* § 79.1(g)(6).

²¹ See *id.* § 79.1(j)(2) (stating the requirements with regard to the captioning quality standards).

²² See *id.* § 79.1(k)(1) (stating the specific requirements with regard to Best Practices); see also *id.* § 79.1(k)(1)(iv) (stating the requirement for programmers who adopt the Best Practices to provide certification to VPDs that they adhere to Best Practices).

²³ *Id.* § 79.1(j)(1). If a video programmer claims exemption from the captioning rules, it must specify the exact exemption. *Id.*

²⁴ See ACA September 4, 2014 *Ex Parte* at 3 (stating that video programmers should be required to file certifications with the Commission that they "have either provided captions as required and are in compliance with the new closed

(continued....)

79.1(j)(1) of its rules to require video programmers to file certifications on captioning quality with the Commission, or whether the Commission should require them to make such certifications widely available through other means. Should the Commission additionally modify the Video Programmer Best Practices' certification procedures set forth in section 79.1(k)(1)(iv) to make filing certifications with the Commission part of the video programmers' best practices?²⁵ Why should the Commission change its position and require video programmer certifications to be filed with the Commission rather than making such certifications widely available through other means? What are the benefits and costs of requiring the certifications mandated by section 79.1(j)(1) and section 79.1(k)(1)(iv) to be filed with the Commission? What would be the expected volume of such video programmer certifications on captioning quality? Would requiring video programmers to file these certifications with the Commission assist VPDs, consumers and the Commission in locating the certifications, in addition to providing video programmers with a convenient means of making their certifications widely available?²⁶

8. We further seek comment on whether the Commission should otherwise amend its rules regarding certifications for the provision of closed captioning. Currently, section 79.1(g)(6) allows VPDs to rely upon certifications from "programming suppliers" to demonstrate compliance with the Commission's closed captioning rules.²⁷ According to section 79.1(g)(6), "programming supplier" includes "programming producers, programming owners, networks, syndicators and *other distributors*."²⁸ If the Commission retains section 79.1(g)(6) in some form, either as a separate rule or incorporated into another rule, should the Commission amend the rule to replace the term "programming supplier" with the term "video programmer"? We note that unlike the term "programming supplier," the term "video programmer" does not include VPDs. Rather, the term "video programmer" is defined as "any entity that provides video programming that is intended for distribution to residential households including, but not limited to, broadcast or nonbroadcast television networks and the owners of such programming."²⁹ Is this rule amendment necessary to help differentiate the responsibilities of regulated entities, if the Commission were to decide to impose some obligations directly on video programmers? The term "programming supplier" also is used in section 79.1(e)(6).³⁰ Should the use of the term in section 79.1(e)(6) be replaced to be consistent with any changes to section 79.1(g)(6) or its successor rule? Are there other subsections contained within section 79.1 in which the term "programming supplier" should be replaced with "video programmer"?

9. Further, although section 79.1(g)(6) allows VPDs to rely upon certifications from programming suppliers, it does not require programming suppliers to provide such certifications.³¹ Should the Commission amend section 79.1(g)(6) of its rules to require programming suppliers or video programmers to file certifications with the Commission certifying that they are in compliance with the

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captioning quality rules or are following best practices, or if they maintain they are not obligated to provide captions, identify the exemption they claim is applicable to their programming").

²⁵ 47 C.F.R. § 79.1(k)(1)(iv).

²⁶ See ACA September 4, 2014 *Ex Parte* at 3 (stating that if video programmers were required to file certifications with the Commission, "VPDs would immediately know where to go to find the information they need, and the information would always be current").

²⁷ See 47 C.F.R. § 79.1(g)(6).

²⁸ *Id.* (emphasis added).

²⁹ *Id.* § 79.1(a)(9). Compare *id.* § 79.1(a)(11) (defining "video programming distributor"); see also *Closed Captioning Quality Order*, 29 FCC Rcd at 2292, n.470 (explaining that "[i]n the television captioning context, VPPs include VPDs as well as video programmers").

³⁰ 47 C.F.R. § 79.1(e)(6).

³¹ See *id.* § 79.1(g)(6).

Commission's rules for the provision of closed captioning? The Commission currently does not require such certifications from either VPDs or video programmers. Is there a reason why the Commission should change its approach? If a programming supplier or video programmer claims that it is exempt from providing closed captioning, should the Commission require it to specify the exemption it claims as part of the certification? As an alternative to amending section 79.1(g)(6), should the Commission include within section 79.1(j)(1) or section 79.1(k)(1)(iv) certification language to the effect that the video programmer is in compliance with the Commission's rules for the provision of closed captioning? What are the benefits and costs of requiring programming suppliers or video programmers to provide such certification? Would such certification help to ensure programming supplier or video programmer compliance with the Commission's rules requiring the provision of closed captioning? If so, how?

10. If the Commission requires video programmers to file certifications regarding the provision and quality of closed captioning with the Commission, should the Commission require each VPD, when arranging to carry a video programmer's programming, to alert the video programmer to the requirement to provide such certification to the Commission? Once a VPD alerts a video programmer of any such requirement and a video programmer fails to provide a certification to the Commission, should that video programmer be solely responsible for failing to comply with Commission rules? Or, alternatively, should we task VPDs with monitoring video programmers' compliance with a certification requirement and require them to report to the Commission any failure by a video programmer to comply? Would placing such an obligation on VPDs be inconsistent with the approach of shifting certain responsibilities in the areas of closed captioning from VPDs to video programmers? What would be the costs and benefits of these requirements? We seek comment on these and any other matters relating to VPDs' obligations pertaining to such certifications. Is there any reason that the Commission would not have statutory authority to impose the requirements proposed in this and other paragraphs of this Second Further Notice?

IV. PROCEDURAL MATTERS

11. *Regulatory Flexibility.* As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this Second Further Notice. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in response to the Second Further Notice and must have a separate and distinct heading designating them as responses to the IRFA.

12. *Comment Filing Procedures.* Pursuant to sections 1.415 and 1.419 of the Commission's rules,³² interested parties may file comments and reply comments regarding the Second Further Notice on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).³³

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- **Paper Filers:** Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

³² *Id.* §§ 1.415, 1.419.

³³ *See Electronic Filings of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- All hand-delivered or messenger-delivered paper filings for the Commission’s Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

13. *Ex Parte Presentations.* This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.³⁴ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must: (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made; and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b).³⁵ In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

14. *Initial Paperwork Reduction Act of 1995.* This Second Further Notice seeks comment on proposed rule amendments that may result in new or revised information collection requirements. If the Commission adopts any such proposals, the Commission will publish a separate notice in the Federal Register inviting the public to comment on the requirement, as mandated by the Paperwork Reduction Act of 1995.³⁶ In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198,³⁷ we seek comment on how the Commission might “further reduce the information collection for small business concerns with fewer than 25 employees.”³⁸

15. *People with Disabilities:* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

³⁴ 47 C.F.R. §§ 1.1200–1.1216.

³⁵ *Id.* § 1.1206(b).

³⁶ Pub. L. 104-13; 44 U.S.C. § 3501 *et seq.*

³⁷ 44 U.S.C. § 3506(c)(4).

³⁸ *Id.*

V. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 4(i), 303(r) and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 613, this Second Further Notice of Proposed Rulemaking IS ADOPTED.

17. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended,¹ this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the Second Further Notice has been prepared. An IRFA was previously included with the Further Notice of Proposed Rulemaking (Further Notice or FNPRM) in the *Closed Captioning Quality Order*.² Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Second Further Notice. The Commission will send a copy of the entire Second Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).³ In addition, the Second Further Notice and the IRFA (or summaries thereof) will be published in the Federal Register.⁴

A. Need For, and Objectives of, the Proposed Rules.

2. In the Further Notice, the Commission sought comment on extending some of the responsibilities for complying with its rules regarding the provision and quality of closed captioning on television beyond video programming distributors (VPDs) to other entities involved in the production and delivery of video programming.⁵ The Commission also sought comment on adopting a burden-shifting approach for complaint resolution that would require both VPDs and video programmers to be involved in the resolution of consumer complaints.⁶ Further, the Commission asked whether section 79.1(g)(6) of the Commission’s rules, which permits VPDs to rely on certifications from programming suppliers to demonstrate compliance with the Commission’s captioning requirements,⁷ should be eliminated if the Commission were to reapportion responsibility for compliance with the Commission’s television closed captioning rules,⁸ and more generally whether other changes to its rules would be appropriate if the Commission decides to impose some obligations directly on programming entities other than VPDs.⁹

3. In response to the Further Notice, some commenters have raised concerns regarding the ability of VPDs and consumers to locate the correct contact information for video programmers for the resolution of closed captioning complaints, should the Commission decide to extend to video programmers some of the responsibilities for compliance with its closed captioning rules and for the resolution of captioning complaints.¹⁰ Several have proposed requiring video programmers to file contact

¹ See 5 U.S.C. § 603. The RFA, *see id.* §§ 601-612, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² *Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc., Petition for Rulemaking*, CG Docket No. 05-231, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 2221, 2348-66, Appendix D (2014) (*Closed Captioning Quality Order*).

³ See 5 U.S.C. § 603(a).

⁴ See *id.*

⁵ *Closed Captioning Quality Order*, 29 FCC Rcd at 2291-96, ¶¶ 122-30.

⁶ *Id.* at 2293-94, ¶¶ 125-26.

⁷ 47 C.F.R. § 79.1(g)(6).

⁸ *Closed Captioning Quality Order*, 29 FCC Rcd at 2295, ¶ 129.

⁹ *Id.* at 2295-96, ¶ 129.

¹⁰ See Letter from Lisa Chandler Cordell, Attorney for Cincinnati Bell Extended Territories LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission at 3 (August 11, 2014) (Cincinnati Bell August 11, 2014

information with the Commission for inclusion in a database.¹¹ The Commission is therefore inviting comment on whether such contact information should be filed, and if so, whether such filings should utilize a web form.¹²

4. Section 79.1(g)(6) of the Commission's rules allows VPDs to rely on certifications from video programming suppliers, including programming producers, programming owners, networks, syndicators and other distributors, to demonstrate compliance with the Commission's rules for the provision of closed captioning.¹³ Section 79.1(j)(1) requires VPDs to exercise best efforts to obtain a certification from each video programmer from which the VPD obtains programming stating (i) that the video programmers' programming satisfies the required caption quality standards,¹⁴ (ii) that in the ordinary course of business, the video programmers adopt and follow the Best Practices in captioning its programming,¹⁵ or (iii) that the video programmers are exempt from the closed captioning rules, under one or more properly attained exemptions.¹⁶

5. One commenter on the Further Notice suggests that the Commission require video programmers to file certifications pursuant to sections 79.1(g)(6) and 79.1(j)(1) with the Commission, rather than providing them to the VPD (in the case of section 79.1(g)(6)) or making them widely available (in the case of section 79.1(j)(1)).¹⁷ The Commission is inviting comment on whether the Commission should amend section 79.1(j)(1) of its rules to require video programmers to file certifications on captioning quality with the Commission, or whether the Commission should require video programmers to make such certifications widely available through other means. The Commission specifically asks for comment on whether requiring video programmers to file these certifications with the Commission would assist VPDs, consumers and the Commission in locating the certifications, in addition to providing video programmers with a convenient means of making their certifications widely available.¹⁸

6. The Commission is also inviting comment on whether the Commission should amend other Commission rules regarding certifications for the provision of closed captioning. Although section 79.1(g)(6) allows VPDs to rely upon certifications from programming suppliers, it does not require

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Ex Parte); Letter from Barbara Esbin, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary, Federal Communications Commission at 3 (September 4, 2014) (ACA September 4, 2014 *Ex Parte*).

¹¹ See e.g., ACA September 4, 2014 *Ex Parte* at 2-3; Letter from Ian Dillner, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC at 2 (August 21, 2014) (Verizon August 21, 2014 *Ex Parte*); Verizon July 9, 2014 Comments at 9; Letter from William M. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, Federal Communications Commission at 1 (August 11, 2014) (DIRECTV August 11, 2014 *Ex Parte*); Cincinnati Bell August 11, 2014 *Ex Parte* at 3.

¹² By web form, the Commission means an interactive form on the Commission's website designed to receive and transfer information to a publicly available Commission database.

¹³ 47 C.F.R. § 79.1(g)(6).

¹⁴ See *id.* § 79.1(j)(2) (stating the requirements with regard to the captioning quality standards).

¹⁵ See *id.* § 79.1(k)(1) (stating the specific requirements with regard to Best Practices); see also *id.* § 79.1(k)(1)(iv) (stating the requirement for programmers who adopt the Best Practices to provide certification to VPDs that they adhere to Best Practices).

¹⁶ *Id.* § 79.1(j)(1). If a video programmer claims exemption from the captioning rules, it must specify the exact exemption. *Id.*

¹⁷ See ACA September 4, 2014 *Ex Parte* at 3.

¹⁸ See *id.* (stating that if video programmers were required to file certifications with the Commission, "VPDs would immediately know where to go to find the information they need, and the information would always be current").

programming suppliers to provide such certifications.¹⁹ The Commission is therefore asking whether it should amend section 79.1(g)(6) of its rules to require video programmers to file certifications with the Commission certifying that they are in compliance with the Commission's rules for the provision of closed captioning. Alternatively, the Commission is asking whether it should include within section 79.1(j)(1) or section 79.1(k)(1)(iv) certification language to the effect that the video programmer is in compliance with the Commission's rules for the provision of closed captioning. The Commission also seeks comment on whether such certification would help to ensure video programmer compliance with the Commission's rules requiring the provision of closed captioning.

7. Additionally, the Commission is seeking comment on whether it should require each VPD, when arranging to carry a video programmer's programming, to alert the video programmer to the requirement to provide certification to the Commission, and whether the VPD should be required to report to the Commission any video programmers that have failed to do so.

B. Legal Basis.

8. The authority for this proposed rulemaking is contained in sections 4(i), 303(r) and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 613.

C. Description and Estimate of the Number of Small Entities Impacted

9. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.²⁰ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."²¹ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.²² 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.²³

10. *Small Businesses, Small Organizations, and Small Governmental Jurisdictions.* Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards that encompass entities that could be directly affected by the proposals under consideration.²⁴ As of 2009, small businesses represented 99.9% of the 27.5 million businesses in the United States, according to the SBA.²⁵ Additionally, a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."²⁶ Nationwide, as of 2007, there were approximately

¹⁹ See 47 C.F.R. § 79.1(g)(6).

²⁰ 5 U.S.C. § 603(b)(3).

²¹ *Id.* § 601(6).

²² *Id.* § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

²³ 15 U.S.C. § 632.

²⁴ See 5 U.S.C. § 601(3)–(6).

²⁵ See SBA, Office of Advocacy, "Frequently Asked Questions," available at <http://web.sba.gov/faqs/faqindex.cfm?areaID=24> (last visited Aug. 31, 2012).

²⁶ 5 U.S.C. § 601(4).

1,621,315 small organizations.²⁷ Finally, the term “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”²⁸ Census Bureau data for 2007 indicate that there were 89,527 governmental jurisdictions in the United States.²⁹ We estimate that, of this total, as many as 88,761 entities may qualify as “small governmental jurisdictions.”³⁰ Thus, we estimate that most governmental jurisdictions are small.

11. *Cable Television Distribution Services.* These services have been included within the broad economic census category of Wired Telecommunications Carriers, which 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.”³¹ The SBA has developed a small business size standard for this category, which is all such firms having 1,500 or fewer employees.³² To gauge small business prevalence for the Cable Television Distribution service, the Commission relies on data from the U.S. Census Bureau for the year 2007, the most recent year currently available.³³ According to that source, there were 3,188 Wired Telecommunications Carrier firms that operated for the entire year in

²⁷ INDEPENDENT SECTOR, *THE NEW NONPROFIT ALMANAC & DESK REFERENCE* (2010).

²⁸ 5 U.S.C. § 601(5).

²⁹ U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2011*, Table 427 (2007).

³⁰ The 2007 U.S. Census data for small governmental organizations are not presented based on the size of the population in each such organization. There were 89,476 local governmental organizations in 2007. If we assume that county, municipal, township, and school district organizations are more likely than larger governmental organizations to have populations of 50,000 or less, the total of these organizations is 52,095. If we make the same population assumption about special districts, specifically that they are likely to have a population of 50,000 or less, and also assume that special districts are different from county, municipal, township, and school districts, in 2007 there were 37,381 such special districts. Therefore, there are a total of 89,476 local government organizations. As a basis of estimating how many of these 89,476 local government organizations were small, in 2011, we note that there were a total of 715 cities and towns (incorporated places and minor civil divisions) with populations over 50,000. CITY AND TOWNS TOTALS: VINTAGE 2011 – U.S. Census Bureau, *available at* <http://www.census.gov/popest/data/cities/totals/2011/index.html>. If we subtract the 715 cities and towns that meet or exceed the 50,000 population threshold, we conclude that approximately 88,761 are small. U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES 2011*, Tables 427, 426 (Data cited therein are from 2007).

³¹ U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers,” (partial definition), <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>, NAICS Search (last visited February 3, 2014).

³² See 13 C.F.R. § 121.201, NAICS code 517110 (2012).

³³ The Census Bureau conducts the Economic Census, an official five-year measure of American business and economy, for years ending in ‘2’ and ‘7.’ U.S. Census Bureau, *Economic Census Frequently Asked Questions*, <http://www.census.gov/econ/census/faqs.html> (last visited February 4, 2014). In December 2013, the Census Bureau began publishing the Advance Report of the 2012 Economic Census, which provides the preliminary totals for all economic sectors, and the U.S. Census Bureau will publish additional results from the 2012 Economic Census over the next few years. *Id*; see also U.S. Census Bureau, *Data Release Schedule – 2012 Economic Census*, <https://www.census.gov/econ/census/schedule.html> (last visited February 4, 2014). Currently, the American FactFinder, which provides comprehensive data from Census Bureau censuses and surveys, contains all data from the 2007 Economic Census, but not the 2012 Economic Census. U.S. Census Bureau, *Data Release Schedule – 2007 Economic Census*, http://www.census.gov/econ/census07/www/data_release_schedule/index.html (last visited February 4, 2014).

2007.³⁴ Of these, 3,144 operated with less than 1,000 employees, and 44 operated with 1,000 or more employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees.³⁵ Thus, under this category and the associated small business size standard, the vast majority of firms can be considered small.

12. *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.³⁶ Industry data shows that there are 1,100 cable companies.³⁷ Of this total, all but 10 incumbent cable companies are small under this size standard.³⁸ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.³⁹ Current Commission records show 4,945 cable systems nationwide.⁴⁰ 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 second size standard, most cable systems are small.

13. *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."⁴¹ There were approximately 56.4 million incumbent cable video subscribers in

³⁴ See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table (last visited February 3, 2014).

³⁵ See *id.*

³⁶ 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 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 at ¶ 28 (1995).

³⁷ NCTA, Industry Data, Number of Cable Operating Companies (June 2012), <http://www.ncta.com/industry-data> (last visited February 3, 2014). 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, 28 FCC Rcd 10496, 10505, ¶ 24 (2013) (*15th Annual Competition Report*).

³⁸ See *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, 15267, ¶ 8 (2013) ("*CALM Act FNPRM*") (citing 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 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> (last visited February 3, 2014). The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. See *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17245-46, ¶ 37 (2011) (*CALM Act Report and Order*) (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

³⁹ 47 C.F.R. § 76.901(c).

⁴⁰ See *CALM Act FNPRM*, 28 FCC Rcd at 15268, ¶ 8 (citing information from the Commission's Cable Operations and Licensing System (COALS) database on Aug. 28, 2013 and noting that "[a] cable system is a physical system integrated to a principal headend").

⁴¹ 47 U.S.C. § 543(m)(2); see also 47 C.F.R. § 76.901(f) and nn.1-3.

the United States as of 2012.⁴² 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.⁴³ Based on available data, we find that all but 10 incumbent cable operators are small under this size standard.⁴⁴ 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.⁴⁵ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million 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.

14. *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 of Wired Telecommunications Carriers,⁴⁶ which was developed for small wireline firms. Under this category, the SBA deems a Wired Telecommunications Carrier to be small if it has 1,500 or fewer employees.⁴⁷ Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.⁴⁸ 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.

15. *Wireless Cable Systems – Broadband Radio Service and Educational Broadband Service.* Wireless cable systems use the Broadband Radio Service (BRS)⁴⁹ and Educational Broadband Service (EBS)⁵⁰ to transmit video programming to subscribers. In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross

⁴² See NCTA, Industry Data, Cable Video Customers, <http://www.ncta.com/industry-data> (last visited February 3, 2014).

⁴³ 47 C.F.R. § 76.901(f); see *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

⁴⁴ See NCTA, Industry Data, Top 25 Multichannel Video Service Customers, <http://www.ncta.com/industry-data> (visited February 3, 2014).

⁴⁵ 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).

⁴⁶ See 13 C.F.R. § 121.201, NAICS code 517110 (2012). The 2012 NAICS definition of the category of “Wired Telecommunications Carriers” is discussed under Cable Television Distribution Service, *supra*.

⁴⁷ 13 C.F.R. § 121.201, NAICS code 517110 (2012).

⁴⁸ See *15th Annual Competition Report*, 28 FCC Rcd at 10507, ¶ 27. As of June 2012, DIRECTV was the largest DBS operator and the second largest MVPD in the United States, serving approximately 19.9 million subscribers. DISH Network was the second largest DBS operator and the third largest MVPD, serving approximately 14.1 million subscribers. *Id.* at 10507, 10546, ¶¶ 27, 110-11.

⁴⁹ BRS was previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS). See *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, ¶ 7 (1995).

⁵⁰ EBS was previously referred to as the Instructional Television Fixed Service (ITFS). See *id.*

revenues of no more than \$40 million in the previous three calendar years.⁵¹ The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.⁵² After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.⁵³ The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.⁵⁴ Auction 86 concluded in 2009 with the sale of 61 licenses.⁵⁵ Of the 10 winning bidders, two bidders that claimed small business status won four licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

16. In addition, the SBA's placement of Cable Television Distribution Services in the category of Wired Telecommunications Carriers is applicable to cable-based Educational Broadcasting Services. 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."⁵⁶ The SBA has

⁵¹ See *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9668-9669, ¶¶ 191-192 (1995).

⁵² 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1,500 or fewer employees.

⁵³ *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

⁵⁴ *Id.* at 8296.

⁵⁵ *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

⁵⁶ U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition) at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited November 8, 2013). 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 (CCT) services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (DTH)

(continued....)

developed a small business size standard for this category, which is all such businesses having 1,500 or fewer employees.⁵⁷ Census Bureau data for 2007, the most recent year currently available, shows that there were 3,188 Wired Telecommunications Carrier firms that operated for the entire year in 2007.⁵⁸ Of these, 3,144 operated with less than 1,000 employees, and 44 operated with 1,000 or more employees.⁵⁹ However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees.⁶⁰ Therefore, under this size standard, we estimate that the majority of these businesses can be considered small entities. In addition to Census Bureau data, the Commission's internal records indicate that as of September 2012, there are 2,239 active EBS licenses.⁶¹ The Commission estimates that of these 2,239 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.⁶²

17. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.⁶³ The 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.⁶⁴ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Although some entities have filed for certifications to operate OVS systems, the Commission believes that most OVS subscribers are included in cable MVPD subscriber data and the Commission does not have a way to count them separately.⁶⁵ Because OVS operators provide subscription services,⁶⁶ OVS falls within the SBA small business size standard covering cable services, which is Wired Telecommunications Carriers.⁶⁷ The SBA has developed a small business size standard for this category, which is all such firms having 1,500 or fewer employees.⁶⁸ To gauge small business prevalence for the OVS service, the Commission relies on data from the U.S. Census for the year 2007, the most recent year currently

(Continued from previous page) _____

services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (MMDS).

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

⁵⁸ See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table (last visited February 3, 2014).

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ <http://wireless2.fcc.gov/UlsApp/UlsSearch/results.jsp> (last searched February 10, 2014) (active, regular licenses, excluding spectrum leases, were included in the search).

⁶² The term "small entity" within SBREFA applies to small organizations (non-profits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6).

⁶³ See 47 U.S.C. § 573.

⁶⁴ *Id.* § 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*).

⁶⁵ *15th Annual Competition Report*, 28 FCC Rcd at 10509, ¶ 32.

⁶⁶ See 47 U.S.C. § 573.

⁶⁷ U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers"; <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2012>, NAICS Search (last visited February 3, 2014).

⁶⁸ 13 C.F.R. § 121.201, NAICS code 517110 (2012).

available. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with 1,000 or more employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees.⁶⁹ Based on this data, the majority of these firms can be considered small.

18. *Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than \$35.5 million in annual receipts.⁷⁰ Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.”⁷¹ The Commission has estimated the number of licensed full power commercial television stations to be 1,388.⁷² To gauge the number of broadcast stations that are owned by small businesses, the Commission relies on data from the U.S. Census for the year 2007, the most recent year currently available. According to that source, there were 2,076 television broadcasting establishments in 2007.⁷³ Of these, 1,515 establishments had receipts under \$ 10 million, and 561 had receipts of \$10 million or more.⁷⁴ However, as to the latter 561 there is no data available that shows how many had receipts in excess of \$35.5 million.⁷⁵ Based on this data, the majority of these establishments can be considered small. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business control affiliations must be included.⁷⁶ Because many of these stations may be held by large group owners, and the revenue figures on which our estimate is based does not include or aggregate revenues from control affiliates, our estimate likely overstates the number of small entities that might be affected by our action.

19. The Commission has estimated the number of licensed noncommercial educational (NCE) full power television stations to be 396.⁷⁷ The Commission does not compile and otherwise does

⁶⁹ See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table (last visited February 3, 2014).

⁷⁰ See 13 C.F.R. § 121.201, NAICS Code 515120 (2012).

⁷¹ U.S. Census Bureau, 2012 NAICS Definitions “515120 Television Broadcasting,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 3, 2014). This category description continues, “These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.” *Id.* Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Postproduction Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

⁷² See *Broadcast Station Totals as of December 31, 2013*, News Release, January 8, 2014 (*Broadcast Station Totals*), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0108/DOC-325039A1.pdf (last visited February 11, 2014).

⁷³ See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Receipts Size of Establishments for the United States: 2007, NAICS code 515120, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ1&prodType=table (last visited February 3, 2014). We recognize that this total differs from that contained in *Broadcast Station Totals*; however, we are using the U.S. Census Bureau estimate for purposes of this revenue comparison.

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ “[Business concerns] are affiliates of each other when one 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. § 121.103(a)(1).

⁷⁷ See *Broadcast Station Totals*.

not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities. There are also 428 Class A television stations and 1,986 low power television stations (LPTV).⁷⁸ Given the nature of these services, the Commission will presume that all Class A television and LPTV licensees qualify as small entities under the SBA definition, even though a number of these stations may be owned by entities that do not qualify as small entities.

20. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation.⁷⁹ The Commission is unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and is therefore over-inclusive to that extent. Also as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated.⁸⁰ The Commission notes that it is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

21. *Incumbent Local Exchange Carriers (ILECs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for ILECs. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees⁸¹ and “is not dominant in its field of operation.”⁸² The SBA’s Office of Advocacy contends that, for RFA purposes, small ILECs are not dominant in their field of operation because any such dominance is not “national” in scope.⁸³ The Commission has therefore included small ILECs in this RFA analysis, although the Commission emphasizes that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

22. Census Bureau data for 2007, the most recent year currently available, show that there were 3,188 firms in this category that operated for the entire year.⁸⁴ Of this total, 3,144 had employment of less than 1000 employees, and 44 firms had had employment of 1,000 or more.⁸⁵ According to Commission data, 1,307 carriers have reported that they are engaged in the provision of ILEC services.⁸⁶ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500

⁷⁸ *See id.*

⁷⁹ 5 U.S.C. § 632.

⁸⁰ *Id.*

⁸¹ 13 C.F.R. § 121.201, NAICS code 517110 (2012).

⁸² 15 U.S.C. § 632.

⁸³ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

⁸⁴ *See* U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table (last visited February 3, 2014).

⁸⁵ *See id.*

⁸⁶ *See Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf (last visited February 4, 2014).

employees.⁸⁷ Consequently, the Commission estimates that most providers of ILEC service are small entities that may be affected by the rules and policies adopted. The Commission estimates that three large ILECs, each of whom employs more than 1,500 people, currently provide video programming.⁸⁸

23. *Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁸⁹ Census Bureau data for 2007, the most recent year currently available, show that there were 3,188 firms in this category that operated for the entire year.⁹⁰ Of this total, 3,144 had employment of less than 1000 employees, and 44 firms had had employment of 1,000 employees or more.⁹¹ According to Commission data, 1,442 carriers reported that they were engaged in the provision of either CLEC services or CAP services.⁹² Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.⁹³ In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.⁹⁴ Seventy-two carriers have reported that they are Other Local Service Providers,⁹⁵ and of the 72, 70 have 1,500 or fewer employees and 2 have more than 1,500 employees.⁹⁶ Consequently, most CLECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers can be considered small entities.

24. *Electric Power Distribution Companies.* These entities can provide video services over power lines (BPL).⁹⁷ The Census Bureau defines Electric Power Distribution companies as “electric power establishments primarily engaged in either (1) operating electric power distribution systems (i.e., consisting of lines, poles, meters, and wiring) or (2) operating as electric power brokers or agents that arrange the sale of electricity via power distribution systems operated by others.”⁹⁸ These types of MVPDs serve few subscribers and their subscriber base is declining.⁹⁹ To gauge small business prevalence in the Electric Power Distribution category, the Commission relies on data from the U.S.

⁸⁷ See *id.*

⁸⁸ See *15th Annual Competition Report*, 28 FCC Rcd at 10549-10551, ¶¶ 118-124.

⁸⁹ 13 C.F.R. § 121.201, NAICS code 517110 (2012).

⁹⁰ See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Establishments for the United States: 2007, NAICS code 517110, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table (last visited February 3, 2014).

⁹¹ See *id.*

⁹² See *Trends in Telephone Service* at Table 5.3.

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems, Carrier Current Systems, Including Broadband Over Power Line Systems*, 19 FCC Rcd 21265 (2004).

⁹⁸ U.S. Census Bureau, 2012 NAICS Definitions, 221122 Electric Power Distribution, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 4, 2014).

⁹⁹ See *15th Annual Competition Report*, 28 FCC Rcd at 10508-10509, ¶ 31.

Census Bureau for the year 2007, the most recent year currently available. The SBA has developed a small business size standard for this category, which is all such firms having 1,000 or fewer employees.¹⁰⁰ Census Bureau data for 2007 show that there were 1,174 firms that operated for the entire year in this category.¹⁰¹ Of these firms, 50 had 1,000 employees or more, and 1,124 had fewer than 1,000 employees.¹⁰² Based on this data, a majority of these firms can be considered small.

25. *Cable and Other Subscription Programming.* These entities may be directly or indirectly affected by our action. The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.”¹⁰³ To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data from the U.S. Census Bureau for the year 2007, the most recent year currently available. The size standard established by the SBA for this business category is that annual receipts of \$35.5 million or less determine that a business is small.¹⁰⁴ According to 2007 Census Bureau data, there were 396 firms that were engaged in production of Cable and Other Subscription Programming.¹⁰⁵ Of these, 349 had annual receipts below \$25 million, 12 had annual receipts ranging from \$25 million to \$49,999,999, and 35 had annual receipts of \$50 million or more.¹⁰⁶ Thus, under this category and associated small business size standard, the majority of firms can be considered small.

26. *Motion Picture and Video Production.* These entities may be directly or indirectly affected by our action. The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials.”¹⁰⁷ We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for VPDs. To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data from the U.S. Census Bureau for the year 2007, the most recent year currently available. The size standard established by the SBA for this business category is that annual receipts of \$30 million or less determine that a business is small.¹⁰⁸ According to 2007 Census Bureau data, there were 9,095 firms that were engaged in Motion

¹⁰⁰ 13 C.F.R. § 121.201, NAICS Code 221122 (2012).

¹⁰¹ See U.S. Census Bureau, American FactFinder, Utilities: Subject Series - Establishment and Firm Size: Summary Statistics by Revenue Size of Firms for the United States: 2007, NAICS code 221122, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_22SSSZ5&prodType=table (last visited February 4, 2014).

¹⁰² See *id.*

¹⁰³ U.S. Census Bureau, 2012 NAICS Definitions, 515210 Cable and Other Subscription Programming, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 4, 2014).

¹⁰⁴ 13 C.F.R. § 121.201, NAICS Code 515210 (2012).

¹⁰⁵ See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2007, NAICS code 515210, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table (last visited February 4, 2014).

¹⁰⁶ See *id.*

¹⁰⁷ U.S. Census Bureau, 2012 NAICS Definitions, NAICS Code 512110, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 4, 2014).

¹⁰⁸ 13 C.F.R. § 121.201, NAICS Code 512110 (2012).

Picture and Video Production.¹⁰⁹ Of these, 8,995 had annual receipts of less than \$25 million, 43 had annual receipts ranging from \$25 million to \$49,999,999, and 57 had annual receipts of \$50 million or more.¹¹⁰ Thus, under this category and associated small business size standard, the majority of firms can be considered small.

27. *Internet Publishing and Broadcasting and Web Search Portals.* These entities may be indirectly affected by our action. The Census Bureau defines this category to include “establishments primarily engaged in (1) publishing and/or broadcasting content on the Internet exclusively or (2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals). The publishing and broadcasting establishments in this industry do not provide traditional (non-Internet) versions of the content that they publish or broadcast. They provide textual, audio, and/or video content of general or specific interest on the Internet exclusively. Establishments known as Web search portals often provide additional Internet services, such as e-mail, connections to other web sites, auctions, news, and other limited content, and serve as a home base for Internet users.”¹¹¹

28. In this category, the SBA has deemed an Internet publisher or Internet broadcaster or the provider of a web search portal on the Internet to be small if it has fewer than 500 employees.¹¹² For this category of manufacturers, Census Bureau data for 2007, the most recent year currently available, show that there were 2,705 such firms that operated that year.¹¹³ Of those 2,705 firms, 2,682 (approximately 99%) had fewer than 500 employees, and 23 had 500 or more employees.¹¹⁴ Accordingly, the majority of establishments in this category can be considered small under that standard.

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

29. Certain rule changes proposed in the FNPRM, if adopted by the Commission, would modify rules or add requirements governing reporting, recordkeeping and other compliance obligations.

30. If the Commission were to adopt rules requiring video programmers to register and file contact information with the Commission or to make such contact information widely available through other means, such regulations would impose new reporting and recordkeeping obligations on video programmers, video programming owners, and other entities, including small entities.

31. If the Commission were to adopt rules requiring video programmers to file certifications with the Commission regarding compliance with the Commission’s rules on the provisioning and quality of closed captioning, such regulations would impose different reporting and recordkeeping obligations than currently required on video programmers, video programming owners, and other entities, including

¹⁰⁹ See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Receipts Size of Firms for the United States: 2007, NAICS code 512110, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table (last visited February 4, 2014).

¹¹⁰ See *id.*

¹¹¹ See U.S. Census Bureau, 2012 NAICS Definitions, « 519130 Internet Publishing and Broadcasting and Web Search Portals, » <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 4, 2014).

¹¹² 13 C.F.R. § 121.201, NAICS Code 519130 (2012).

¹¹³ See U.S. Census Bureau, American FactFinder, 2007 Economic Census, Establishment and Firm Size: Employment Size of Firms for the United States: 2007, NAICS code 519130, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table (last visited February 4, 2014).

¹¹⁴ See *id.*

small entities.

32. If the Commission were to adopt rules requiring each VPD, when arranging to carry a video programmer's programming, to alert the video programmer of the requirement to provide certification to the Commission and to report to the Commission any video programmers that have failed to do so, such regulations would impose different reporting and recordkeeping obligations than currently required on VPDs, video programmers, video programming owners, and other entities, including small entities.

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

33. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹¹⁵

34. If the Commission were to adopt rules requiring video programmers to register and file contact information with the Commission or to make such contact information widely available through other means, such regulations would impose new reporting and recordkeeping obligations on video programmers, video programming owners, and other entities, including small entities. However, the proposed requirement takes into consideration the impact on small entities. The filing of contact information is a simple task that should take no more than a few minutes. In addition, such requirements may benefit other entities, such as VPDs and consumers, who would be able to search the registration information for contact information, thereby enabling them to more readily contact video programmers who can address their closed captioning concerns.

35. If the Commission were to adopt rules requiring video programmers to file certifications with the Commission regarding compliance with the Commission's rules on the provisioning and quality of closed captioning, such regulations would impose different reporting and recordkeeping obligations than currently required on video programmers, video programming owners, and other entities, including small entities. The proposed rules would not impose additional burdens on such entities, because video programmers are already required to provide certifications to VPDs and to make such certifications widely available under the Commission's rules.¹¹⁶ The proposed rule may ease the burden on video programmers, because video programmers would know to go directly to the Commission's website to provide certification and would not need to determine how to make such certification widely available, and the proposed rules would ease the burden on VPDs and consumers by having all certifications in one easy to find place.

36. If the Commission were to adopt rules requiring each VPD, when arranging to carry a video programmer's programming, to alert the video programmer of the requirement to provide certification to the Commission and to report to the Commission any video programmers that have failed to do so, such regulations would impose different reporting and recordkeeping obligations than currently required on VPDs, video programmers, video programming owners, and other entities, including small entities. The proposed rules would not impose additional burdens on such entities, because VPDs who are unable to locate certifications on widely available sources are already required to alert video

¹¹⁵ 5 U.S.C. § 603(b).

¹¹⁶ See 47 C.F.R. § 79.1(j)(1) and (k)(1)(iv); see also *id.* § 79.1(g)(6).

programmers of the requirement and report such noncompliance to the Commission.¹¹⁷ The proposed rule may ease the burden on VPDs, because VPDs would be able to go directly to the Commission's website to confirm whether the video programmer has registered and certified, which may be easier than having to determine on which website or other widely available place the information appears.

F. Federal Rules Which Duplicate, Overlap, or Conflict With, the Commission's Proposals.

37. None.

¹¹⁷ See *id.* § 79.1(j)(1).