

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

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

ORDER AND PUBLIC NOTICE

Adopted: March 6, 2015

Released: March 6, 2015

By the Chief, Media Bureau:

I. INTRODUCTION

1. In this Order, we address a petition filed by ESPN, Inc. (“ESPN”) for an exemption from the Federal Communications Commission’s (“FCC” or “Commission”) video description rules applicable to the top five national nonbroadcast networks.¹ Because we conclude that ESPN provides less than 50 hours per calendar quarter of prime time programming that is not live or near-live, we grant the petition. We also provide notice of changes to the list of top five national nonbroadcast networks subject to the video description requirements based on changes in ratings, taking into account the grant of ESPN’s petition for exemption. Beginning July 1, 2015, the top five national nonbroadcast networks will be USA, TNT, TBS, History, and Disney Channel. Further, we take this opportunity to remind broadcast stations that the obligation to provide 50 hours of video description per calendar quarter expands from the top 25 television markets to the top 60 television markets on July 1, 2015.

II. ORDER

A. Background

2. Pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”),² the Commission reinstated rules in August 2011 requiring large-market affiliates of the top four broadcast networks and multichannel video programming distributor (“MVPD”) systems with 50,000 or more subscribers to provide video description for a portion of the video programming that they offer to consumers on television.³ Video description is “[t]he insertion of audio narrated descriptions of a television program’s key visual elements into natural pauses between the program’s dialogue.”⁴ This service makes video programming more accessible to persons who are blind or visually impaired.

¹ Request of ESPN, Inc. for Further Exemption from List of Top Five Non-Broadcast Networks, MB Docket No. 11-43 (filed Jan. 27, 2015) (“Petition”). The Petition was filed jointly by ESPN and The Walt Disney Company, which owns 80 percent of ESPN. *Id.* at 1 & n. 1.

² Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010); Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA).

³ *See* 47 C.F.R. § 79.3.

⁴ *Id.* § 79.3(a)(3).

3. Specifically, the Commission's rules require MVPD systems that serve 50,000 or more subscribers to provide 50 hours of video description per calendar quarter during prime time or children's programming on each of the top five national nonbroadcast networks that they carry on those systems.⁵ For purposes of the rules, the top five national nonbroadcast networks are defined by an average of the national audience share during prime time of nonbroadcast networks that reach 50 percent or more of MVPD households and have at least 50 hours per quarter of prime time programming that is not live or near-live or otherwise exempt under the video description rules.⁶ The nonbroadcast networks currently subject to these video description requirements are USA, the Disney Channel, TNT, Nickelodeon, and TBS.⁷ As discussed below, ESPN previously received an exemption from these requirements.⁸

4. The rules provide that the list of top five nonbroadcast networks will update at three-year intervals to account for changes in ratings, with the first update to occur on July 1, 2015 based on the 2013 to 2014 ratings year.⁹ In anticipation of this update, the Media Bureau ("Bureau") issued a Public Notice on January 7, 2015 announcing the top ten nonbroadcast networks for the 2013 to 2014 ratings year according to data provided by the Nielsen Company: USA Network, ESPN, Turner Network Television, TBS Network, History, Disney Channel, Fox News Channel, Nickelodeon, A&E Network, and FX.¹⁰ The Public Notice indicated that a program network could seek an exemption no later than 30 days after publication of the Public Notice, if it believes it should be excluded from the list of top five networks covered by the video description rules because it does not air at least 50 hours of prime time programming that is not live or near-live or is otherwise exempt.¹¹

5. ESPN timely filed a request for exemption from the list of top five nonbroadcast networks.¹² No other nonbroadcast network filed a request for an exemption.

B. Discussion

6. ESPN requests that the Commission extend ESPN's existing exclusion from the list of top five national nonbroadcast networks subject to the video description requirements because it does not provide 50 hours per quarter of non-exempt programming during prime time.¹³ As ESPN notes, the

⁵ *Id.* § 79.3(b)(4). See also *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 26 FCC Rcd 11847, 11849-50, ¶ 4 (2011) ("2011 Video Description Order"). In addition, MVPD systems of any size must pass through video description provided by a broadcast station or nonbroadcast network, if the channel on which the MVPD distributes the station or programming has the technical capability necessary to do so and if that technology is not being used for another purpose related to the programming. 47 C.F.R. §§ 79.3(b)(5)(i)-(ii). See also *2011 Video Description Order*, 26 FCC Rcd at 11850, 11858-59, ¶¶ 4, 20. For a complete list of video description requirements, see 47 C.F.R. § 79.3.

⁶ 47 C.F.R. § 79.3(b)(4). See also *2011 Video Description Order*, 26 FCC Rcd at 11854-55, ¶¶ 12-15. "Live or near-live programming" is defined as programming performed either simultaneously with, or recorded no more than 24 hours prior to, its first transmission by a video programming distributor. 47 C.F.R. § 79.3(a)(7).

⁷ *2011 Video Description Order*, 26 FCC Rcd at 11854, ¶ 12.

⁸ See *id.* at 11855, ¶ 14.

⁹ 47 C.F.R. § 79.3(b)(4); *2011 Video Description Order*, 26 FCC Rcd at 11857, ¶ 18.

¹⁰ See Public Notice, *Media Bureau Announces National Nonbroadcast Network Rankings for Purposes of July 1, 2015 Update to Video Description Requirements*, MB Docket No. 11-43, DA 15-18 (Jan. 7, 2015) ("Public Notice").

¹¹ *Id.* at 2. The Public Notice was published in the Federal Register on February 3, 2015. See Federal Communications Commission, *National Nonbroadcast Network Rankings for Purposes of July 1, 2015 Update to Video Description Requirements*, Notice, 80 FR 5749 (Feb. 3, 2015). Accordingly, petitions for exemption were due on March 5, 2015.

¹² See generally Petition.

¹³ *Id.* at 1.

Commission previously excluded ESPN from the list of top five nonbroadcast networks when it reinstated the video description rules in 2011 because it determined that ESPN did not provide at least 50 hours per quarter of prime time programming that is not live or near-live.¹⁴

7. ESPN contends that given its mixture of live and studio near-live programming, it is the type of network that the CVAA intended to exempt from video description regulation.¹⁵ ESPN's programming is comprised primarily of live sporting events, live studio sports reporting shows, and replays of recently-recorded studio sports programs, featuring college football, college basketball, the NBA, the NFL, and MLB, among others.¹⁶

8. To support its request for exemption, ESPN reviewed its programming line-up for the last six quarters, from April 1, 2013 through September 30, 2014.¹⁷ In particular, ESPN categorized its prime time content to determine whether it was live or near-live as defined by the FCC and found that for every one of the past six quarters, ESPN aired less than 50 hours of programming that was not live or near-live during prime time hours.¹⁸ As detailed in the declaration submitted with ESPN's request, "the number of hours of non-exempt programming [ESPN] aired during prime-time ranged from 9 hours per quarter to 38 hours per quarter, with all quarters well below the 50 hours per quarter threshold."¹⁹ Additionally, ESPN submitted illustrative programming schedules from September 2014 to provide additional details with respect to the predominately live and near-live content of its programming schedule.²⁰

9. After reviewing the record, the Bureau finds that for the past six quarters, ESPN has not aired at least 50 hours of non-exempt prime time programming. As was the case in 2011, ESPN continues to primarily air prime time programming that is live or near-live. Accordingly, we find that ESPN is excluded from the list of top five nonbroadcast networks and exempt from the Commission's video description requirements applicable to the top five national nonbroadcast networks.

III. PUBLIC NOTICE

10. *Top Five Nonbroadcast Networks.* In the Public Notice announcing the national nonbroadcast network rankings for purposes of the July 2015 update to the video description requirements, the Bureau indicated that it would provide notice of any resulting revisions to the list of top five networks after evaluating requests for exemption.²¹ To allow covered networks ample time to prepare to comply with the rules, we issue this subsequent Public Notice to announce that, as a result of ESPN's exemption and Nielsen ratings for the 2013 to 2014 ratings year, the top five nonbroadcast networks that will be subject to the video description requirements as of July 1, 2015 are as follows: USA Network, Turner Network Television, TBS Network, History, and Disney Channel.²² As of July 1,

¹⁴ See *2011 Video Description Order*, 26 FCC Rcd at 11855, ¶ 14. The Commission made this determination based on ESPN's comments, which indicated that "ESPN does not provide, on average, at least 50 hours per quarter of prime-time non-exempt programming," as well as a supporting affidavit and illustrative programming schedules. *Id.*

¹⁵ See Petition at 3.

¹⁶ *Id.*

¹⁷ *Id.* ESPN notes that, to qualify for its current exclusion from the list of top five national nonbroadcast networks, it submitted information regarding its programming line-up for nine quarters from January 1, 2009 through March 31, 2011. *Id.* at 3, n. 10.

¹⁸ *Id.* at 3. See 47 C.F.R. § 79.3(a)(7).

¹⁹ Petition, Attach. A (declaration of Kenneth Gordon, Jr., Principal Counsel for ESPN).

²⁰ See Petition at 3 & Attach. B.

²¹ Public Notice at 2.

²² Although Nickelodeon is no longer one of the top five nonbroadcast networks, we encourage it to continue providing video description for its programming, which will increase access by children and adults who are blind or visually impaired.

2015, MVPD systems that serve 50,000 or more subscribers must provide 50 hours of video description per calendar quarter during prime time or children's programming on each of these networks.

11. *Expansion to Top 60 Television Markets.* In addition, we take this opportunity to remind broadcast stations that the obligation to provide 50 hours of video description expands to additional television markets on July 1, 2015. Currently, the video description rules require commercial television broadcast stations that are affiliated with one of the top four commercial television broadcast networks – ABC, CBS, Fox, and NBC – and are located in the top 25 television markets to provide 50 hours per calendar quarter of video-described prime time or children's programming.²³ Beginning July 1, 2015, affiliates of the top four commercial television broadcast networks located in markets 26 to 60 will also be subject to this requirement.²⁴

IV. ORDERING CLAUSES

12. Pursuant to Section 79.3 of the FCC's rules, **IT IS ORDERED** that the petition filed by ESPN requesting an exemption from the Commission's video description rules, **IS GRANTED**.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

²³ 47 C.F.R. § 79.3(b)(1). *See also 2011 Video Description Order*, 26 FCC Rcd at 11849, ¶ 4. The rules also require any broadcast station affiliated or otherwise associated with a television network to pass through video description when it is provided by the network, if the station has the technical capability necessary to do so and if that technology is not being used for another purpose related to the programming. 47 C.F.R. § 79.3(b)(3). *See also 2011 Video Description Order*, 26 FCC Rcd at 11850, 11858-59, ¶¶ 4, 20.

²⁴ 47 C.F.R. § 79.3(b)(2). *See also 2011 Video Description Order*, 26 FCC Rcd at 11856, ¶ 16.