

FCC Adopts Video Description Regulations

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On August 25, 2011, the Federal Communications Commission (FCC) issued a Report & Order (R&O) reinstating its video description rules with certain modifications, pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010 (Act). The rules require large-market broadcast affiliates of the top four national networks, and cable operators and DBS providers with more than 50,000 subscribers, to provide programming with audio-narrated descriptions of a program's key visual elements, beginning mid-2012. Davis Wright Tremaine previously summarized the Act in an earlier advisory available [here](#), and discussed the FCC's rulemaking notice announcing how it proposed to reinstate the rules [here](#).

Per the Act, the R&O restores the video description regulations that the FCC previously adopted in 2000, but which were subsequently vacated by the U.S. Court of Appeals for the D.C. Circuit. Now with explicit congressional authorization under the Act, the FCC has reinstated the video description rules as of the statutorily-mandated date of Oct. 8, 2011. While the FCC originally proposed to require full compliance by Jan. 1, 2012, the R&O pushes that date back six months, to **July 1, 2012**. The most significant elements of the reinstated video description rules are as follows:

- Broadcast affiliates of the top four national networks—ABC, CBS, Fox, and NBC—located in the top 25 television markets as determined by Nielsen as of Jan. 1, 2011, must provide 50 hours per calendar quarter of prime-time and/or children's programming with video descriptions.
- The list of the top 25 television markets are those determined by Nielsen as of Jan. 1, 2011. To the extent a station in a top 25 market becomes newly affiliated with a top-four network, it must start providing video description in the same manner as current ABC, CBS, Fox, and NBC affiliates in the top 25 markets, beginning no later than three months after finalizing the new affiliation agreement.
- Multichannel video programming distributors (MVPDs), including cable operators and DBS providers, with 50,000 or more subscribers must also provide 50 hours per calendar quarter of prime-time and/or children's programming with video descriptions, for each of the top-five Nielsen-rated nonbroadcast networks (see below), which presumably will be bound through affiliation agreements to aid MVPDs in meeting this obligation. MVPDs that currently do not have 50,000 subscribers but later grow to that size have three months after doing so to come into compliance with the rules.
- The top five Nielsen-rated national nonbroadcast networks with enough non-exempt prime-time programming to provide 50 hours per calendar quarter of prime-time and/or children's programming with video descriptions are—at least initially—USA, Disney Channel, TNT, Nickelodeon, and TBS. ESPN and Fox News were not in the “top five” because they primarily air exempt “near live programming,” i.e., programming recorded less than 24 hours before it is first aired, even though their ratings would otherwise rank them in the top five.
- The top five nonbroadcast networks required to offer video description will be reassessed at three-year intervals, with each updated list being based on the previous year (to allow any network newly covered enough time to ramp-up). To the extent a network that otherwise would become top five based on such updates does not air at least 50 hours of prime-time programming that is not exempt (like ESPN and Fox News), it must seek an exemption from the video description requirement no later than 30 days after publication of the 2013-2014 Nielsen ratings.
- To count toward the 50 hours per quarter requirement, programming must not have aired previously with video descriptions on that particular broadcast station or MVPD channel, more than once. Though most programs aired with video description will likely be newly produced, previously produced programs airing for the first or second time with video description after the rules' effective date may be counted. A programming distributor subject to the rules may count a program with video descriptions even if it previously aired elsewhere with video description, so long as it is being aired for the first or second time by that distributor. Once a program is aired with video description, subsequent airings must also include video description (unless the “pass through” exception

applies).

- All broadcast stations, regardless of market size or affiliation, and all MVPDs, regardless of number of subscribers, must “pass through” video description when such descriptions are provided by the program source and the station or MVPD has the technical capability to do so and that technical capacity is not being used for another purpose related to the programming (for example, if a station can offer only one secondary audio channel, which is already occupied by a Spanish language audio stream, the station is not required to bump the Spanish audio stream in order to pass through video descriptions). The “technical capability to do so” is defined as having “virtually all necessary equipment and infrastructure ... except for items that would be of minimal cost,” with the FCC anticipating that as equipment prices drop and older architecture is updated, more stations and MVPDs will become “technically capable” of passing through video descriptions.
- The rules clarify that “children’s programming,” for purposes of what counts toward the video description requirement, is the more general standard (taken from broadcast requirements) for that directed at children 16 years old or younger, rather than the more restrictive rule (applicable to advertising in “children’s” shows) of 12 and younger.
- The rules are updated to reflect the latest version of A/53 Part 5 adopted by ATSC.

On other matters, the FCC stated that for covered DTV broadcasters who multicast, the video description obligation does not apply to secondary streams, but rather only programming on the primary programming stream, unless the station carries another top-four national broadcast network on a secondary stream (in which case the rules apply in the same manner as if the network programming on that stream were a separate station). The “pass through” requirement, however, applies to all multicast streams. In addition, the FCC delayed the effectiveness of the rules for broadcasters offering Mobile DTV to 24 months after the date of reinstatement (i.e., until Oct. 8, 2013) to bring those broadcasts into compliance.

Further, the FCC announced that, going forward, the video description requirements will extend to major network broadcast affiliates in the top 60 markets beginning July 1, 2015. Rankings for the top 60 markets at that time will be based on Nielsen ratings as of Jan. 1, 2015.

The FCC also declined to dictate the precise video programming that must be described aside from it being prime-time or children’s programming.

The FCC declined to adopt any other blanket exemptions, though it retained a case-by-case exemption, using an “economically burdensome” standard rather than an “undue burden” standard. In doing so, it specifically rejected calls for exemptions for locally produced and/or news programs while also, however, adopting from its closed captioning regime the policy that if a program with video description is interrupted by breaking news that lacks video description, the program can still be counted toward the station’s or MVPD’s quarterly requirement. In addition, the FCC clarified that if a “live” or “near live” program later re-airs, it loses exempt status (though it need not necessarily have video description added to it, as there is broad discretion, and usually a wealth of other programming to choose from, in determining what to provide with video descriptions).

The FCC further rebuffed requests for a “no backsliding” rule that would have prevented stations in markets that fall out of the top 25 (or, later, top 60), or non-broadcast networks that fall out of the top five, from ceasing to provide video description upon doing so. It also declined to adopt quality standards, or require any particular means for program providers to publicize those shows that have video description (though it noted it expects programmers, stations, and systems to provide the information in an accessible manner, including on websites and to companies that publish TV listings).

Complaints alleging failure to comply with any of the requirements described above may be filed by any viewer by any reasonable means with the FCC, which will resolve such complaints after collecting and reviewing all relevant information furnished by the complainant and video programming distributor. The FCC also notes it will address special or unique situations on a case-by-case basis, and that the Act requires it to review and reconsider the rules numerous times over the next decade, providing ample opportunity to resolve issues that arise upon implementation.

For further questions or assistance interpreting or complying with the video description rules, please contact Burt Braverman, Maria T. Browne, Robert Corn-Revere, Paul Glist, Brendan Holland, Brian J. Hurh, or Ronald G. London.

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