

FCC Releases Video Description Rules

August 25, 2011

On August 25, 2011, the Federal Communications Commission (FCC or Commission) issued a Report and Order reinstating, with a few modifications, the video description rules that it adopted in 2000. While the rules officially take effect on October 8, 2011, as required by the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), the FCC is not requiring that broadcasters and multichannel video programming distribution (MVPD) systems begin full compliance until July 1, 2012.

Video description adds audio descriptions of a program's video elements during natural pauses in a program's dialogue. In the Report and Order, the Commission adopted three primary video description requirements:

- ABC, CBS, NBC and Fox affiliates in the 25 largest Designated Market Areas must provide 50 hours of video-described prime time and/or children's programming each quarter;
- MVPD systems with more than 50,000 subscribers must provide 50 hours of video-described prime time and/or children's programming each quarter on the top five national non-broadcast networks they carry; and
- All broadcast stations affiliated with any network (including non-commercial stations) and all MVPD systems must pass through video description contained in programming that they carry as long as they have the technical capability to do so.

For the purpose of measuring compliance with the 50 hour requirement, the Report and Order clarified the following:

- Children's programming includes programming targeted to children 16 years and younger;

Authors

Kathleen A. Kirby
Partner
202.719.3360
kkirby@wiley.law

John M. Burgett
Partner
202.719.4239
jburgett@wiley.law

Wayne D. Johnsen
Partner
202.719.7303
wjohnsen@wiley.law

Ari Meltzer
Partner
202.719.7467
ameltzer@wiley.law

Practice Areas

Media
Telecom, Media & Technology

- The same program can count up to two times toward the 50 hour quarterly requirement for each station or MVPD channel; and
- The 50 hour requirement only applies to a broadcast station's primary program stream, unless the station carries another top-four network on a secondary stream; in such case the 50 hour requirement will also apply separately to the secondary stream.

To determine the top 25 broadcast markets, the Commission will rely on Nielsen market rankings as of January 1, 2011. The FCC declined to adopt a process for redefining the top 25 markets in future years. New ABC, CBS, NBC and Fox affiliates in those markets will have three months from the date their affiliation agreement is finalized to come into compliance. MVPD systems reaching the 50,000 subscriber threshold will also have a three month grace period to provide the requisite amount of video description.

The CVAA requires the Commission to expand the broadcast requirement to the 60 largest markets after it files a report to Congress. The Commission designated July 1, 2015 as the date when ABC, CBS, NBC and Fox affiliates in the top 60 markets (based on Nielsen market rankings as of January 1, 2015) will be required to offer video description on 50 hours of prime time and/or children's programming each quarter.

As explained above, the requirement to pass-through any video-described programming received applies to all network-affiliated broadcasters and all MVPD systems, as long as the broadcaster or MVPD system has or can obtain with "minimal cost" the technical capability to support video description. The Commission clarified that this pass-through requirement is in addition to the quarterly requirement, such that a broadcast station or MVPD system otherwise obligated to provide 50 hours of video description must continue to pass through any video description it receives even after it has provided the 50 required hours. However, broadcasters and MVPD systems are not required to pass-through video description if it would require the broadcaster or MVPD system to disrupt another program-related service (such as Spanish-language audio). While the Commission states that it is deferring to stations and systems to determine how to serve their audiences, the Report and Order "strongly encourage[s]" them to use digital technologies to provide both video description and other program-related services, where possible. Any program aired with video description must include video description when it is re-aired on the same station or MVPD channel.

The FCC extended the video description rules to both low power television (LPTV) stations and Mobile DTV broadcasts. For LPTV stations, however, the Commission said it will entertain a petition to delay the rules for stations that have yet to transition to digital if the petitioners can demonstrate that compliance would be economically burdensome. Further, the Commission delayed the effective date of the rules for Mobile DTV until October 8, 2013.

The Commission also designated the top-five non-broadcast networks for the MVPD requirement as: USA, the Disney Channel, TNT, Nickelodeon (combined with Nick at Nite), and TBS. The FCC determined that ESPN and Fox News Channel should be excluded because most of their programming is either live or "near-live" (performed and recorded less than 24 hours before it is first aired) and thus exempt under the rules. The Commission will update the top five non-broadcast network list every three years, beginning on July 1, 2015 (based on Nielsen data for the 2013-2014 ratings year).

The FCC declined to add exemptions for local programming, news programming or any other types of programs other than “live” or “near-live” programming. Instead, the Commission stated that broadcasters and MVPD systems may choose what programming to describe to meet the quarterly requirement.

The FCC did grant a request by the National Association of Broadcasters to adopt a “breaking news exemption.” If video described programming is preempted for breaking news, a station or system may still count that programming toward its quarterly requirement. This is consistent with the Commission’s practice regarding its “core” educational and informational children’s programming requirement.