



# Virginia Association of Broadcasters Legal Review



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## SPECIAL REPORT

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October 28, 2010

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### VIDEO DESCRIPTION LAW ENACTED FOR TV STATIONS

President Obama has signed the Twenty-First Century Communications and Video Accessibility Act of 2010 (“Act”) into law. The Act reinstates the FCC’s video description rules that were struck down in 2002 by the U.S. Court of Appeals for the District of Columbia Circuit. The Act requires the Commission, on October 8, 2011, to reinstate the rules that require broadcast stations affiliated with the top four networks (ABC, CBS, FOX, and NBC) in the top 25 DMAs to provide at least 50 hours per calendar quarter (roughly four hours per week) of programming with “video description” either during prime time or children’s programming—programming that is typically provided by a network or syndicator and not originated by local television stations. Thus, the Act, initially at least, has cost and expense implications only for Big Four network affiliates in the top 25 DMAs, and these new costs (for budgeting purposes) will be relevant for these stations beginning next October.

#### I.

#### What To Expect In October 2011

The Act, literally, requires the FCC to reinstate the video description rules for Big Four network affiliates in the top 25 markets “on” October 8, 2011, but also mandates reinstatement of the rules according to “an appropriate *phased schedule* of deadlines.” Thus, the language of the Act is somewhat unusual in that it requires a hard deadline for application of the reinstated rules to Big Four network affiliates in the top 25 DMAs *and* a “phased schedule of deadlines” for compliance for these same stations. Presumably, the FCC will, during rulemaking proceedings that are required to implement the Act, reconcile these seemingly conflicting statutory mandates.

As previously reported, the House and Senate approved different versions of video description legislation in July and August, respectively. Before the bills could move out of Congress and to the President, reconciliation of the two bills was required. The legislation, as reconciled, adopts in all relevant respects the Senate, rather than the

House, version of the bill. The Senate legislation took a more gradual approach to expansion of the video description rules beyond the top 25 DMAs than the House version of the bill.

“Video description,” as defined in the FCC’s earlier adopted rules and in the Act, means the insertion of audio narrated descriptions of a television program’s “key visual elements” into natural pauses between the program’s dialogue. Video description, where it is provided, is generally transmitted through a broadcaster’s Secondary Audio Programming (SAP) channel and allows the blind and visually disabled to “hear what they cannot see.”

## **II. Post-2011 Implementation For Non-Top 25 Markets**

The Act directs the FCC, after specified periods of time, to expand the video description rules to additional markets beyond the top 25. The law *requires* the Commission to phase in its video description rules for the top 60 DMAs by 2016 and *allows* the FCC, based on certain findings and beginning in 2020, to add an additional 10 DMAs each year thereafter.

## **III. Other Considerations**

The Act also allows the FCC to consider expanding the amount of video description required per quarter to as much as 87½ hours per quarter for each affected station.

In addition to reinstating (and expanding over time) the video description rules, the Act also addresses the FCC’s emergency access rule. The law requires the Commission to complete a proceeding to “identify methods to convey emergency information in a manner accessible to individuals who are blind or visually disabled” and to issue regulations that “require video programming providers and video programming distributors and program owners to convey such emergency information in a manner accessible to individuals who are blind or visually disabled.” Exactly how this impacts the FCC’s existing emergency access rule is not yet clear, though it presumably includes providing emergency information aurally.

## **IV. Stations’ Distribution May Be Affected**

Finally, the Act also requires the Commission to revise its rules to require closed captioning to be provided in video programming delivered through the Internet that is first delivered through television. This requirement has the potential especially to affect stations that repurpose news and other content on their websites.

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A summary of the provisions of the Act of greatest importance to broadcasters is attached as Attachment A.

With the legislation now passed, the Commission has begun the process of implementing the Act. For example, the Commission is currently seeking nominees to serve on the Emergency Access Advisory Committee, a committee required by the Act. Additional video description rulemakings are likely to follow soon. We will continue to follow the Commission action on video description and related requirements and apprise you of significant developments.

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If you should have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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## **Summary Of The Twenty-First Century Communications And Video Accessibility Act Of 2010**

- \* *Video Description Defined.* “Video description,” as defined in the FCC’s earlier adopted rules and in the Act, means the insertion of audio narrated descriptions of a television program’s “key visual elements” into natural pauses between the program’s dialogue. Video description, where it is provided, is generally transmitted through a broadcaster’s Secondary Audio Programming (SAP) channel and allows the blind and visually disabled to “hear what they cannot see.”
  
- \* *Reinstatement Of FCC Video Description Rules Adopted In 2000.* The Act directs the FCC, after a rulemaking proceeding but on October 8, 2011, to reinstate its rules that require broadcast stations that are affiliated with the top four networks (ABC, CBS, FOX, and NBC) in the top 25 DMAs to provide at least 50 hours per calendar quarter (roughly four hours per week) of programming with video description either during prime time or children’s programming.

The Act limits the FCC’s authority to modify the video description rules adopted in 2000. The Commission must make the following, and only the following, changes to these rules in its initial rulemaking:

- (1) The Act flatly prohibits the FCC from applying the rules to “live or near-live programming.” This is a significant improvement for local stations as they will not be required to comply with the video description rules for live news and live sports programming. The Act does not define “near-live” programming, but, presumably, the FCC will establish a definition in its implementing regulations (after notice and an opportunity to comment).
- (2) The FCC’s rules must provide for a phased schedule of deadlines for compliance.
- (3) The Act requires the FCC to apply the rules to video programming that is transmitted for display on television in digital format (the earlier rules applied only to analog programming).
- (4) The FCC must update the list of the top 25 DMAs.
- (5) The FCC may permit a video programming provider or owner to petition the FCC for an exemption from the rules based on the economic burden of compliance.
- (6) The FCC may create one or more exceptions to the requirements, at the agency’s discretion, for a service, class of services, program, class of programs, equipment, or class of equipment based on the economic burden of compliance.

- (7) The Commission must adjust the beginning calendar quarter for mandatory compliance. (The original rules were to take effect during Second Quarter 2002, but the rules were struck down by the D.C. Circuit.)
- (8) The FCC must consider extending the exemptions and limitations in the reinstated regulations for technical capability reasons to all providers and owners of video programming.

\* *Commencement Of Further Commission Inquiries On Video Description.* The Act requires the FCC, within one year after completing the phase-in of the reinstated video description regulations, to initiate the following additional regulatory inquiries:

- (1) To gather information regarding the availability, use, and benefits of video description in programming distributed on television, the technical and creative issues associated with providing video description in television programming, and the financial costs of providing video description for providers of video programming and program owners; and
- (2) To gather data regarding the technical and operational issues, costs, and benefits of providing video description in programming delivered over the Internet.

The Commission must report to Congress its findings from these inquiries within one year after the commencement of the respective proceedings (i.e., roughly two years after completion of the video description phase-in deadlines).

\* *No Additional Video Description Regulations For 2 Years; Continuing Authority Over Video Description.* The Act prohibits the FCC from issuing additional video description regulations for at least two years after the FCC submits the reports to Congress as described above (i.e., roughly four years after completing the phase-in of the reinstated video description regulations). No further video description regulations may thereafter be issued unless the FCC determines that the need for and benefits of providing video description for programming distributed on television are greater than the technical and economic costs of providing such additional video description.

\* *Possible Expanded (But Limited) Hourly Requirements.* If the FCC does issue new video description rules under its continuing authority, these new rules may increase the total hour requirement for additional video description by no more than 75 percent of the initial 50-hour-per-quarter requirement. This means the maximum amount of video description to be required is 87½ hours per quarter (i.e., roughly 6¾ hours per week).

\* *Expanded DMA Requirements.* After the FCC submits to Congress its report described above (i.e., sometime roughly two years after completing the phase-in of the reinstated video description regulations), the Commission must phase in video description requirements for the top 60 DMAs. Recall that the regulations initially apply only to the top 25 DMAs (and only to Big Four network affiliates). The FCC may grant waivers to entities in specific market areas where the Commission “deems

appropriate.” The phase-in for these additional markets must be completed no later than October 8, 2016.

On October 8, 2019, nine years after enactment, the FCC must submit to House and Senate committees a report assessing its experience with video description, including the types of described video programming available to consumers, consumer use of described video programming, the costs of creating described video programming, the potential costs in DMAs outside of the top 60 of creating described video programming, the benefits to consumers of described video programming, the amount of described video programming available, and the need for additional described video programming in DMAs outside the top 60.

On October 8, 2020, the FCC may, based upon the nine-year report described above, phase in video description for up to an additional 10 DMAs each year, if the costs of implementing the video description regulations to program owners, providers, and distributors in those additional markets are “reasonable,” as determined by the FCC. The Commission may grant waivers to entities in specific DMAs where it “deems appropriate.”

\* *Emergency Information.* The Act requires the Commission to (1) identify methods to convey “emergency information” to the blind or visually impaired and (2) promulgate rules that require video programming providers and distributors and program owners to convey “emergency information” in a manner accessible to the blind or visually impaired. This action must occur by approximately April 8, 2013 (i.e., within one year of the date the Video Programming and Emergency Access Advisory Committee submits its report, discussed below, to the FCC). The FCC’s existing emergency access rule requires broadcasters who air “emergency information” to make the critical details of the emergency accessible to the hearing and visually impaired, but it does not require broadcasters to air “emergency information” in the first instance. It is unclear at this stage what impact, if any, the Act will have on the emergency access rule, although presumably, at a minimum, stations will be required to provide emergency information aurally if they provide such information visually.

\* *Applicability Of Closed Captioning Rules To Programming Distributed On The Internet.* The Act requires the Commission to revise its rules to require closed captioning of video programming delivered through the Internet that is first delivered through television. This revision must occur no later than April 8, 2012 (i.e., within 6 months of the date the Video Programming and Emergency Access Advisory Committee submits its closed captioning report, discussed below, to the FCC). The requirement only applies to programming aired on television after the effective date of the regulations, and it would presumably not require captioning of programming that is otherwise exempt from the closed captioning rules (e.g., programming that airs on television between 2 a.m. and 6 a.m., etc.).

The Act requires the FCC, when establishing the new closed captioning rules, to take into account whether the affected programming is prerecorded and edited for Internet distribution, or whether the programming is “live or near-live” and not edited for

Internet distribution. (The Act requires the FCC to define “near-live programming” and “edited for Internet distribution.”)

The Act further sets the framework for the FCC’s action with respect to closed captioning of video programming distributed on the Internet, including the requirement that the FCC establish an exception for “de minimis” failures.

- \* *Establishment Of Video Programming And Emergency Access Advisory Committee.* The Act requires FCC Chairman Genachowski to establish the Video Programming and Emergency Access Advisory Committee within 60 days of enactment—by December 7, 2010. The Act expressly states that representatives of the broadcast television industry or a national organization representing the industry must be included on the Committee.
- \* *Reports Of Video Programming And Emergency Access Advisory Committee.* The Act establishes a detailed list of reports and actions that the Video Programming and Emergency Access Advisory Committee is required to take following enactment of the law. By October 8, 2011 (within 6 months of the committee’s first meeting), the Committee must develop and submit to the FCC a report that recommends a schedule of deadlines for the provision of closed captioning in programming distributed on the Internet and recommends technical standards. By April 8, 2012, the Committee must develop and submit to the FCC a report that recommends a schedule of deadlines for its video description and “emergency information” requirements and recommends technical standards. In its work on closed captioning, video description, and “emergency information,” the Committee is required, to the extent possible, to incorporate standards, protocols, and procedures adopted by recognized industry standard-setting organizations.
- \* *Establishment Of Emergency Access Advisory Committee.* In addition to the Video Programming and Emergency Access Advisory Committee, the Act also requires the FCC to establish the Emergency Access Advisory Committee for the purpose of achieving equal access to emergency services by individuals with disabilities as part of the migration to a national Internet protocol enabled emergency network. The Committee must be established no later than December 7, 2010. The Commission has released a Public Notice seeking nominees for this committee, which must be received by the FCC no later than November 1, 2010. For more information, and a link to the online nominations form, visit the FCC’s website at <http://www.fcc.gov/cgb/dro/EAAC/>.

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