

**FCC FACT SHEET\***  
**Accessibility of User Interfaces, and Video Programming Guides and Menus**  
Third Report and Order – MB Docket No. 12-108

**Background:** Closed captioning displays the audio portion of a television program as text on the screen, providing access to news, entertainment, and information for individuals who are deaf and hard of hearing. The Commission requires the provision of closed captioning on nearly all television programming, as well as on a large portion of Internet protocol (IP)-delivered programming. The Commission has adopted standards for the display settings for closed captions on digital television receivers, and those standards enable users to customize the display of closed captions by changing the font, size, color, and other features of captions. The Commission also has adopted standards for the display settings for closed captions on other video devices, specifically for apparatus designed to receive or play back video programming transmitted simultaneously with sound. However, many consumers continue to have difficulty accessing the display settings for closed captioning on televisions and other video devices—a technical barrier that prevents the use and enjoyment of captioning.

**What the *Third Report and Order* Would Do:**

- Further the Commission’s efforts to enable individuals with disabilities to access video programming through closed captioning by requiring manufacturers of covered apparatus and multichannel video programming distributors (MVPDs) to make display settings for closed captioning “readily accessible” to individuals who are deaf and hard of hearing.
- Apply these efforts to apparatus, including pre-installed applications, designed to receive or play back video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States and uses a picture screen of any size.
- Determine whether display settings are readily accessible to consumers by evaluating the following factors, as described in a joint proposal filed by NCTA and a collation of consumer groups: proximity, discoverability, previewability, and consistency and persistence.
- Provide covered entities flexibility in the precise manner of compliance.
- Impose a compliance deadline of two years after publication of the Order in the *Federal Register*.

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\* This document is being released as part of a “permit-but-disclose” proceeding. Any presentations or views on the subject expressed to the Commission or its staff, including by email, must be filed in MB Docket No. 12-108, which may be accessed via the Electronic Comment Filing System (<https://www.fcc.gov/ecfs/>). Before filing, participants should familiarize themselves with the Commission’s *ex parte* rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. See 47 CFR § 1.1200 *et seq.*

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

In the Matter of
Accessibility of User Interfaces, and Video
Programming Guides and Menus
MB Docket No. 12-108

THIRD REPORT AND ORDER\*

Adopted: []

Released: []

By the Commission:

TABLE OF CONTENTS

Heading Paragraph #
I. INTRODUCTION..... 1
II. BACKGROUND..... 3
III. DISCUSSION ..... 8
A. Authority ..... 9
B. Access to Closed Captioning Display Settings Must Be “Readily Accessible” ..... 21
1. “Readily Accessible”..... 22
2. Public Interest Benefits of New Display Settings Requirement..... 31
3. Covered Devices and Entities..... 36
4. Waivers and Exemptions..... 45
5. Compliance Deadline ..... 51
IV. PROCEDURAL MATTERS..... 55
V. ORDERING CLAUSES..... 58
APPENDIX A – Final Rules
APPENDIX B – Final Regulatory Flexibility Analysis

I. INTRODUCTION

- 1. This Order furthers our efforts to enable individuals with disabilities to access video

\* This document has been circulated for tentative consideration by the Commission at its July 18, 2024 open meeting. The issues referenced in this document and the Commission’s ultimate resolutions of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairwoman has determined that, in the interest of promoting the public’s ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The Commission’s ex parte rules apply and presentations are subject to “permit-but-disclose” ex parte rules. See, e.g., 47 CFR §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission’s ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. See 47 CFR §§ 1.1200(a), 1.1203.

programming through closed captioning. Closed captioning displays the audio portion of a television program as text on the screen, providing access to news, entertainment, and information for individuals who are deaf and hard of hearing. The Federal Communications Commission requires the provision of closed captioning on nearly all television programming,<sup>1</sup> as well as on a large portion of Internet protocol (IP)-delivered programming.<sup>2</sup> Through the Commission's implementation of the Television Decoder Circuitry Act of 1990 (TDCA)<sup>3</sup> and the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA),<sup>4</sup> it has made significant progress in enabling video programming to be accessible to persons who are deaf and hard of hearing. Pursuant to the TDCA, the Commission adopted standards for the display of closed captions on digital television receivers, and those standards enable users to customize caption display by changing the font, size, color, and other features of captions. Subsequently, pursuant to the CVAA, the Commission adopted display standards for other video devices, specifically for apparatus designed to receive or play back video programming transmitted simultaneously with sound. However, many consumers continue to have difficulty accessing the closed captioning display settings on televisions and other video devices—a technical barrier that prevents the use and enjoyment of captioning. Today we take steps to alleviate this problem and thereby ensure meaningful access to captioning.

2. Specifically, the rule we adopt requires manufacturers of covered apparatus<sup>5</sup> and multichannel video programming distributors (MVPDs) to make closed captioning display settings readily accessible to individuals who are deaf and hard of hearing. We afford covered entities flexibility in how they meet this obligation, and the Commission will determine whether settings are readily accessible to consumers by evaluating the following factors: proximity, discoverability, previewability, and consistency and persistence. We adopt a compliance deadline of two years after publication of this Order in the *Federal Register*.

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<sup>1</sup> 47 CFR § 79.1. Currently, all new English and Spanish language programming that is not exempt from the Commission's rules must be closed captioned. *Id.* § 79.1(b)(1). In addition, 75 percent of all non-exempt pre-rule English and Spanish language programming must be closed captioned. *Id.* § 79.1(b)(2). The Commission further facilitated the use of captioning by adopting closed captioning quality standards in 2014. *Id.* § 79.1(j); *Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc. Petition for Rulemaking*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, CG Docket No. 05-231, 29 FCC Rcd 2221 (2014).

<sup>2</sup> 47 CFR § 79.4.

<sup>3</sup> Pub. L. No. 101-431, 104 Stat. 960 (1990) (codified at 47 U.S.C. §§ 303(u), 330(b)).

<sup>4</sup> 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). Implementing sections 202 and 203 of the CVAA, the Commission adopted closed captioning requirements for the owners, providers, and distributors of IP-delivered video programming, as well as rules governing the closed captioning capabilities of certain apparatus on which consumers view video programming. *See Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, MB Docket No. 11-154, 27 FCC Rcd 787 (2012) (*IP Closed Captioning Order*). Implementing sections 204 and 205 of the CVAA, the Commission adopted rules requiring that closed captioning activation mechanisms be simple and easy to use on digital apparatus and navigation devices. *See Accessibility of User Interfaces, and Video Programming Guides and Menus; 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*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket Nos. 12-108 and 12-107, 28 FCC Rcd 17330 (2013) (*Report and Order and Further Notice*).

<sup>5</sup> As discussed below, the requirements adopted herein apply to devices covered by section 303(u) of the Act, in other words, apparatus, including pre-installed applications, designed to receive or play back video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States and uses a picture screen of any size. *See infra* section III.B.3.

## II. BACKGROUND

3. Prior to adoption of the TDCA, consumers needed to purchase a separate TeleCaption decoder device and connect it to a television set in order to display closed captions.<sup>6</sup> The TDCA amended section 303 of the Communications Act of 1934, as amended (the Act), to require that television receivers contain built-in decoder circuitry designed to display closed captioning.<sup>7</sup> It also amended section 330 of the Act to require that the Commission's rules provide performance and display standards for such built-in decoder circuitry.<sup>8</sup> In the TDCA, Congress observed that the availability of televisions with built-in decoders "will significantly increase the audience that can be served by closed-captioned television" and outlined the significant benefits of closed captioning for people who are deaf and hard of hearing as well as other segments of the population, including children and older Americans who have some loss of hearing.<sup>9</sup> Congress also mandated in section 330(b) of the Act that the Commission take appropriate action to ensure that closed captioning service continues to be available to consumers as new video technology is developed.<sup>10</sup>

4. In 1991, the Commission adopted rules that codified standards for the display of closed captioned text on analog television receivers.<sup>11</sup> Following the transition to digital broadcasting, the Commission in 2000 adopted technical standards for the display of closed captions on digital television receivers "to ensure that closed captioning service continues to be available to consumers."<sup>12</sup> In particular, the Commission adopted with some modifications section 9 of EIA-708, an industry standard addressing closed captioning for digital television, which allows the caption display to be customized for a particular viewer by enabling the viewer to change the appearance of the captions to suit his or her needs.<sup>13</sup> When the Commission adopted the technical standards, it explained that the "capability to alter fonts, sizes, colors, backgrounds and more, can enable a greater number of persons who are deaf and hard of hearing to take advantage of closed captioning."<sup>14</sup>

5. In 2010, Congress enacted the CVAA to "update the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming."<sup>15</sup> Section 203 of the CVAA broadened section 303(u) of the Act, which previously applied to "apparatus designed to receive television pictures broadcast simultaneously with sound," to cover "apparatus designed to receive or play back video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in

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<sup>6</sup> TDCA, § 2(7).

<sup>7</sup> *Id.* § 3; 47 U.S.C. § 303(u).

<sup>8</sup> TDCA, § 4; 47 U.S.C. § 330(b).

<sup>9</sup> TDCA § 2(2)-(6), (9).

<sup>10</sup> 47 U.S.C. § 330(b). *See also* TDCA, § 4.

<sup>11</sup> *See Amendment of Part 15 of the Commission's Rules to Implement the Provisions of the Television Decoder Circuitry Act of 1990*, Report and Order, GN Docket No. 91-1, 6 FCC Rcd 2419 (1991) (*TDCA Report and Order*).

<sup>12</sup> 47 U.S.C. § 330(b); *Closed Captioning Requirements for Digital Television Receivers; Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, ET Docket No. 99-254, MM Docket No. 95-176, 15 FCC Rcd 16788 (2000) (*DTV Closed Captioning Order*).

<sup>13</sup> *DTV Closed Captioning Order*, 15 FCC Rcd at 16791, para. 7.

<sup>14</sup> *Id.* at 16792, para. 10. After pointing out that Congress noted that captioning will benefit "older Americans who have some loss of hearing," the Commission found that the benefits of being able to alter closed captions extend to older Americans who may have some hearing loss along with a visual disability. *Id.* at 16793, para. 11 (quoting TDCA, § 2(4)).

<sup>15</sup> *See* S. Rep. No. 111-386, 111<sup>th</sup> Cong., 2d Sess. at 1 (2010) (CVAA Senate Committee Report); H.R. Rep. No. 111-563, 111<sup>th</sup> Cong., 2d Sess. at 19 (2010) (CVAA House Committee Report).

the United States and uses a picture screen of any size.”<sup>16</sup> Such apparatus must “be equipped with built-in closed caption decoder circuitry or capability designed to display closed-captioned video programming.”<sup>17</sup> In 2012, the Commission adopted performance and display standards for such built-in decoder circuitry in accordance with section 330(b) of the Act,<sup>18</sup> and in particular it adopted functional requirements to ensure that consumers can modify caption display features on covered apparatus.<sup>19</sup> These rules require that apparatus provide functionality that allows users to change the presentation, color, opacity, size, and font of captions, caption background color and opacity, character edge attributes, and caption window color.<sup>20</sup> But the rules do not mandate how users *access* such features on the device. In the Commission’s subsequent proceedings on implementing the accessibility requirements of sections 204 and 205 of the CVAA, Consumer Groups described the difficulties consumers who are deaf and hard of hearing face in accessing closed captioning display features on apparatus used to view video programming.<sup>21</sup>

6. In November 2015, in a *Second Further Notice of Proposed Rulemaking* in the above-captioned docket, the Commission proposed to adopt rules that would require manufacturers and MVPDs to ensure that consumers are able to readily access user display settings for closed captioning, and on the Commission’s authority to do so under the TDCA.<sup>22</sup> Among other things, the *Second Further Notice*

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<sup>16</sup> CVAA, § 203(a); 47 U.S.C. § 303(u)(1). Specifically, prior to enactment of the CVAA, section 303 of the Act applied to “apparatus designed to receive television pictures broadcast simultaneously with sound . . . when such apparatus is manufactured in the United States or imported for use in the United States, and its television picture screen is 13 inches or greater in size.” TDCA, § 3.

<sup>17</sup> 47 U.S.C. § 303(u)(1)(A). The language differs only slightly from the requirement in the TDCA that television receivers “be equipped with built-in decoder circuitry designed to display closed-captioned television transmissions.” TDCA, § 3. Section 203 of the CVAA also modified section 303(u) of the Act to require that covered apparatus have the capability to decode and make available audio description services and accessible emergency information. CVAA, § 203(a); 47 U.S.C. § 303(u)(1)(B)-(C).

<sup>18</sup> CVAA, § 203(c); 47 U.S.C. § 330(b). The CVAA modified section 330(b) of the Act by requiring the Commission to provide performance and display standards for the transmission and delivery of audio description services and accessible emergency information, in addition to performance and display standards for built-in decoder circuitry or capability designed to display closed captioned video programming. *See id.*

<sup>19</sup> *IP Closed Captioning Order*, 27 FCC Rcd at 850-54, paras. 109-13; 47 CFR § 79.103(c).

<sup>20</sup> *See* 47 CFR § 79.103(c).

<sup>21</sup> *See, e.g.*, National Association of the Deaf *et al.* Comments, MB Docket No. 12-108, at 8 (July 15, 2013) (Consumer Groups 2013 Comments); Letter from Andrew S. Phillips, Policy Counsel, National Association of the Deaf, *et al.*, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-108, at 3 (Sept. 11, 2013) (noting that “[t]o this day, many people who are deaf or hard of hearing continue to have difficulties accessing closed captioning controls,” and that consumers must “navigate complex menu settings in order to find the closed captioning control or configuration settings”); National Association of the Deaf *et al.* Comments, MB Docket No. 12-108, at 8-9, 11 (Feb. 18, 2014) (Consumer Groups 2014 Comments); National Association of the Deaf *et al.* Reply Comments, MB Docket No. 12-108, at 4 (Mar. 18, 2014) (Consumer Groups 2014 Reply). The following organizations are parties to the Consumer Groups 2013 Comments, the Consumer Groups 2014 Comments, and the Consumer Groups 2014 Reply: National Association of the Deaf; Telecommunications for the Deaf and Hard of Hearing, Inc.; Deaf and Hard of Hearing Consumer Advocacy Network; Association of Late-Deafened Adults, Inc.; Hearing Loss Association of America; California Coalition of Agencies Serving the Deaf and Hard of Hearing; Cerebral Palsy and Deaf Organization; and Telecommunication RERC.

<sup>22</sup> *See Accessibility of User Interfaces, and Video Programming Guides and Menus*, Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, MB Docket No. 12-108, 30 FCC Rcd 13914, 13932-35, paras. 33-40 (2015) (*Second Report and Order and Second Further Notice*). In the *Further Notice of Proposed Rulemaking* in MB Docket No. 12-108, the Commission had previously inquired whether sections 204 and 205 of the CVAA provide the Commission with authority to adopt such a requirement. *See Report and Order and Further Notice*, 28 FCC Rcd at 17415, para. 140. Given our conclusion herein that our authority derives from

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asked whether the Commission should require the inclusion of closed captioning display settings no lower than the first level of a menu, whether such an approach would provide industry with sufficient flexibility, and whether there are “alternative ways to implement this requirement.”<sup>23</sup> In January 2022, the Media Bureau released a Public Notice seeking to refresh the record on the proposals contained in the *Second Further Notice*.<sup>24</sup> While some comments in the refreshed record assert that caption display settings are accessible, others explain that problems with the accessibility of such settings continue to persist.<sup>25</sup>

7. In January 2023, the Media Bureau released another Public Notice, seeking comment on a proposal in the record that the Commission require compliance with the following factors when determining whether captioning display settings are readily accessible: proximity, discoverability, previewability, and consistency and persistence.<sup>26</sup> On March 14, 2024, NCTA and a coalition of consumer groups filed in the record a joint proposal to make caption display settings readily accessible.<sup>27</sup> The Media Bureau released a Public Notice seeking comment on the joint proposal.<sup>28</sup>

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the statutory provisions of the TDCA, as codified in sections 303(u) and 330(b) of the Act, we find it unnecessary to reach this issue.

<sup>23</sup> See *Second Report and Order and Second Further Notice*, 30 FCC Rcd at 13934, para. 37.

<sup>24</sup> See *Media Bureau Seeks to Refresh the Record on Accessibility Rules for Closed Captioning Display Settings Under the Television Decoder Circuitry Act*, MB Docket No. 12-108, 37 FCC Rcd 95 (Jan. 10, 2022) (asking stakeholders to “update the record after reviewing the specific proposals, underlying analysis, and questions contained in the *Second Further Notice*, as well as the existing record in this proceeding”) (internal footnote omitted). The January 2022 Public Notice was published in the Federal Register. See Federal Communications Commission, *Accessibility Rules for Closed Captioning Display Settings*, 87 FR 2607 (Jan. 18, 2022).

<sup>25</sup> See, e.g., Accessibility Advocacy and Research Organizations Comments, MB Docket No. 12-108, at 4 (filed Feb. 17, 2022) (Consumer Groups 2022 Comments); NCTA – The Internet & Television Association Comments at 2-6 (filed Feb. 17, 2022) (NCTA 2022 Comments); Georgia Tech’s Center for Advanced Communications Policy Reply Comments, MB Docket No. 12-108, at 4 (filed Mar. 4, 2022) (CACP 2022 Reply); Accessibility Advocacy and Research Organizations Reply Comments, MB Docket No. 12-108, at 2-3, 5 (filed Mar. 4, 2022) (Consumer Groups 2022 Reply); Consumer Technology Association (CTA) Reply Comments, MB Docket No. 12-108, at 7-8 (filed Mar. 4, 2022) (CTA 2022 Reply); NCTA – The Internet & Television Association Reply Comments, MB Docket No. 12-108, at 1 (filed Mar. 4, 2022) (NCTA 2022 Reply). The following organizations are parties to both the Consumer Groups 2022 Comments and the Consumer Groups 2022 Reply: Telecommunications for the Deaf and Hard of Hearing, Inc.; Association of Late-Deafened Adults; Cerebral Palsy and Deaf Organization; Communication Service for the Deaf; Conference of Educational Administrators of Schools and Programs for the Deaf; Deaf Seniors of America; Hearing Loss Association of America; National Association of the Deaf; National Association of State Agencies of the Deaf and Hard of Hearing; Registry of Interpreters for the Deaf; Turtle Island Hand Talk; Disability and Rehabilitation Research Project on Twenty-First Century Captioning Technology, Metrics and Usability, Gallaudet University; Rehabilitation Engineering Research Center on Universal Interface & Information Technology Access; and RIT/NTID Center on Access Technology. The following organizations are also parties to the Consumer Groups 2022 Comments: American Association of the DeafBlind; Helen Keller National Center; National Cued Speech Association; and Northern Virginia Resource Center for Deaf and Hard of Hearing Persons.

<sup>26</sup> *Media Bureau Seeks Comment on Closed Captioning Display Settings Proposal*, MB Docket No. 12-108, 38 FCC Rcd 429 (Jan. 24, 2023) (*2023 Caption Display Settings Public Notice*). The *2023 Caption Display Settings Public Notice* was published in the Federal Register. See Federal Communications Commission, *Accessibility Rules for Closed Captioning Display Settings*, 88 FR 6725 (Feb. 1, 2023).

<sup>27</sup> See Letter from Mary Beth Murphy, Vice President & Deputy General Counsel, NCTA – The Internet & Television Association, *et al.*, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-108 (Mar. 14, 2024) (NCTA/Consumer Groups Mar. 14, 2024 *Ex Parte*). The proposal’s signatories represent the following organizations: NCTA, National Association of the Deaf, TDIforAccess (TDI), Communication Service for the Deaf, and Hearing Loss Association of America.

<sup>28</sup> *Media Bureau Seeks Comment on Joint Closed Captioning Display Settings Proposal*, MB Docket No. 12-108, DA 24-276 (Mar. 19, 2024) (*2024 Caption Display Settings Public Notice*). The *2024 Caption Display Settings*

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### III. DISCUSSION

8. Below, we first find that we have authority under the TDCA to require that closed captioning display settings are readily accessible to consumers. Second, we adopt the requirement that such settings must be “readily accessible,” and we detail factors the Commission will require when making this determination. Third, we explain our finding that the public interest benefits outweigh the costs for a requirement that the closed captioning display settings be readily accessible. Fourth, we find that the rule we adopt herein applies to the full range of devices covered by section 303(u) of the Act, and that both manufacturers of covered apparatus and MVPDs are responsible for compliance with the rule. Fifth, we discuss the availability of waivers or exemptions based on achievability and technical feasibility. Finally, we establish a compliance deadline of two years after publication of the *Third Report and Order* in the *Federal Register*.

#### A. Authority

9. We conclude that the Commission has authority under the TDCA to require that closed captioning display settings be readily accessible to consumers. Section 303(u)(1)(A) of the Act authorizes the Commission to require that “apparatus designed to receive or play back video programming transmitted simultaneously with sound” must “be equipped with built-in closed caption decoder circuitry or capability designed to display closed-captioned video programming.”<sup>29</sup> Section 330(b) of the Act directs the Commission to adopt rules to “provide performance and display standards for such built-in decoder circuitry or capability designed to display closed captioned video programming” and, “[a]s new video technology is developed,” to take such action as it “determines appropriate to ensure that closed-captioning service . . . continue[s] to be available to consumers.”<sup>30</sup>

10. We find that sections 303(u) and 330(b) authorize the Commission, in implementing the TDCA, to consider the practical usability of closed captioning features by consumers and to adopt “performance and display standards” that will make closed captioning “available to consumers” by ensuring the usability of the display options.<sup>31</sup> We find that meaningful access to user display settings “is essential to making closed captioning ‘available’ to consumers” within the meaning of the TDCA.<sup>32</sup> As Consumer Groups explain, “[i]f a consumer cannot readily locate and use display settings, then closed captioning itself is not truly ‘available’ because the consumer cannot ensure that captions are rendered in a readable and accessible format,”<sup>33</sup> and, thus the directive and purpose of the statute will not be fulfilled. Given “the increased volume and variety of both the programming and devices available to consumers” today, it is “more important now than ever” that the Commission modify its rules to ensure that closed captioning is meaningfully – not just nominally – available to viewers in order to serve Congressional intent.<sup>34</sup> The record shows that expecting consumers to “search[] for settings which are buried in menus”

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*Public Notice* was published in the Federal Register. See Federal Communications Commission, Accessibility Rules for Closed Captioning Display Settings, 89 FR 20965 (March 26, 2024).

<sup>29</sup> 47 U.S.C. § 303(u).

<sup>30</sup> *Id.* § 330(b).

<sup>31</sup> *Id.* §§ 303(u), 330(b). See Consumer Groups and RERC Comments, MB Docket No. 12-108, at 3 (filed Feb. 24, 2016) (Consumer Groups 2016 Comments). See also Consumer Groups 2022 Comments at 12. The following organizations are parties to both the Consumer Groups 2016 Comments and the below-cited Consumer Groups 2016 Reply: Telecommunications for the Deaf and Hard of Hearing, Inc.; National Association of the Deaf; Hearing Loss Association of America; and Rehabilitation Engineering Research Center on Technology for the Deaf and Hard of Hearing, Gallaudet University.

<sup>32</sup> See Consumer Groups 2016 Comments at 3.

<sup>33</sup> *Id.* See also CACP 2022 Reply at 4.

<sup>34</sup> Consumer Groups 2016 Comments at 3. See also Consumer Groups 2022 Comments at 4 (“Because viewers now use an increasingly wide and evolving range of different devices, applications, and services to view video

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is an “intimidating and frustrating experience.”<sup>35</sup> Thus, simply including captioning circuitry somewhere in a device is not enough to satisfy the requirements of the statute; for the captions to be “available” as Congress intended, consumers must be able to adjust the caption display settings in a manner that makes the captions accessible—i.e., “available” to the consumer.

11. We find that the structure, text, purpose, and history of the TDCA support Commission authority to regulate consumer access to closed captioning display settings. First, the statutory structure and text support this interpretation. Section 303(u)(1)(A) directs the Commission to adopt regulations that, among other things, require (if technically feasible) that covered devices “be equipped with built-in closed caption decoder circuitry or capability designed to display closed-captioned video programming.”<sup>36</sup> Section 330(b) directs the Commission to adopt “performance and display standards” and to take such action as it deems necessary to ensure that closed captioning continues to be “available,” as new technology is developed.<sup>37</sup> Congress did not define the term “available” for purposes of section 330(b). We believe that the better reading is to interpret “available” to mean that consumers can readily access the various functions and features of closed captioning capability.<sup>38</sup> We find that this reading is supported by the statute as a whole and the surrounding text. Specifically, section 330(b) identifies certain requirements that Commission rules “shall provide” in implementing section 303(u), including “performance and display standards,”<sup>39</sup> a requirement that is sufficiently broad to encompass regulation of how closed captioning is accessed by consumers. Indeed, Consumer Groups discuss the meaning of the word “performance” in the phrase “performance and display standards,” explaining that “[a]n interpretation of the statute that would prohibit the Commission from setting standards for easy access to configuration controls would undermine” Congress’s accessibility goals, and the “grant of authority to implement performance standards” provides the Commission with “substantial discretion” in adopting requirements “to specify how users might interact with functions required by those performance standards.”<sup>40</sup> We agree. By exercising our authority in this manner, we fulfill the statutory requirement to include in our rules “performance” standards for closed captioning. In addition, section 330(b) directs the Commission “[a]s new video technology is developed” to “take such action as [it] determines appropriate to ensure that closed-captioning service . . . continue[s] to be available to consumers.”<sup>41</sup> The “take such action as [it] determines appropriate” mandate further supports a broad, rather than narrow, view of the Commission’s authority to “ensure that closed-captioning service . . . continue[s] to be available to consumers”—an objective advanced by ensuring access to closed caption display options. We thus believe this interpretation of the statute is the most reasonable and best serves the statutory purpose, as discussed below.

12. Second, our interpretation is consistent with the express purpose of the TDCA, which is to increase the number of consumers who can avail themselves of closed captioning, with increased

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programming, interfaces for customizing captions have remained esoteric, inscrutable, and difficult to find and use.”).

<sup>35</sup> Consumer Groups 2016 Comments at 4. *See also* Consumer Groups 2022 Comments at 4-7 (providing examples of caption display settings “described more than six years ago” that “remain problematic”).

<sup>36</sup> 47 U.S.C. § 303(u)(1)(A).

<sup>37</sup> *Id.* § 330(b).

<sup>38</sup> Further, our interpretation of this term as used in the TDCA is consistent with the meaning of the term “available” as defined in Webster’s Third New International Dictionary (2002): “such as may be availed of: capable of use for the accomplishment of a purpose: immediately utilizable.” If consumers are unable to easily select their closed captioning display preferences to ensure that the captions are legible, then the captions will not be “capable of accomplishing” their purpose, and they will not be “immediately utilizable.”

<sup>39</sup> 47 U.S.C. § 330(b).

<sup>40</sup> Consumer Groups 2014 Comments at 5, 7.

<sup>41</sup> 47 U.S.C. § 330(b).



demand spurring the provision of more captioned programming.<sup>42</sup> In enacting the TDCA, Congress stated that “to the fullest extent made possible by technology,” persons who are deaf and hard of hearing “should have equal access to the television medium.”<sup>43</sup> Third, we observe that the legislative history reveals that Congress believed the TDCA would increase the audience for closed captioned programming and thereby create market incentives for investment in closed captioned programming.<sup>44</sup> If a covered apparatus has the ability to process and display closed captions but does so in a way that makes it practically infeasible or undesirable for consumers to use that capability, the intent of broadening the potential audience for captioned programming is undermined.<sup>45</sup> By requiring that closed captioning performance and display functionality be “readily accessible,” we fulfill the purpose of the TDCA and Congressional intent as reflected in the legislative history by ensuring that captions are meaningfully available, and we can increase the likelihood that the audience for closed captioned programming will continue to grow as unmet needs are fulfilled, consistent with the statutory purpose.

13. We do not agree that relying on sections 303(u)(1)(A) and 330(b) of the Act here is “a belated Commission reinterpretation of the TDCA.”<sup>46</sup> To the contrary, the Commission historically has recognized and exercised authority under sections 303(u) and 330(b) of the Act, prior to the enactment of the CVAA, in a manner that supports its exercise of that authority to regulate access to closed captioning display options here. Previously, the Commission concluded that “[i]t is essential” that closed captions be readable,<sup>47</sup> and it relied on sections 303(u) and 330(b) of the Act to adopt closed captioning rules that required consumers to be able to modify settings such as font size and color.<sup>48</sup> Interpreting the TDCA to

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<sup>42</sup> TDCA, § 2(9) (“[T]he availability of decoder-equipped television sets will significantly increase the audience that can be served by closed-captioned television, and such increased market will be an incentive to the television medium to provide more captioned programming.”). *See also TDCA Report and Order*, 6 FCC Rcd at 2420, para. 3 (“The [TDCA] is intended to reduce significantly the cost to consumers of receiving closed captioning, make closed captioning more widely available, and create market incentives for broadcasters to invest in and provide more closed-captioned programming.”).

<sup>43</sup> TDCA, § 2(1).

<sup>44</sup> S. Rep. No. 101-393 at 1, *reprinted at* 1990 U.S.C.C.A.N. 1438 (July 25, 1990) (TDCA Senate Report) (“This legislation will reduce significantly the cost to consumers to receive closed captioning, make closed captioning more widely available, and create market incentives for broadcasters to invest in and provide more closed-captioning programming.”); H. Rep. No. 101-767 at 3 (Sept. 27, 1990) (The relevant requirements under the TDCA “will increase the audience for closed captioned television programming, thereby enhancing commercial incentives for private funding of captioning and ensuring the continued availability of captioning services to all those who could benefit.”).

<sup>45</sup> *See, e.g., Second Report and Order and Second Further Notice*, 30 FCC Rcd at 13933-34, paras. 35-36 (discussing consumer difficulties accessing closed captioning display settings and potential benefits from making them more accessible); *Report and Order and Further Notice*, 28 FCC Rcd at 17415-16, paras. 141-42 (similar).

<sup>46</sup> Consumer Technology Association Comments, MB Docket No. 12-108, at 6-7 (filed Feb. 24, 2016) (CTA 2016 Comments); CTA Comments, MB Docket No. 12-108, at 9 (filed Feb. 17, 2022) (CTA 2022 Comments).

<sup>47</sup> *TDCA Report and Order*, 6 FCC Rcd at 2430, para. 31.

<sup>48</sup> *See, e.g., DTV Closed Captioning Order*, 15 FCC Rcd at 16796, para. 20 (“We are persuaded by commenters that in order to make closed captions accessible to the greatest number of viewers with hearing disabilities, we must require that decoders support standard, small, and large caption pen size and support the ability of the viewer to choose size.”); *id.* at 16798, para. 25 (“The ability to alter the color of the character background, in addition to the text, will make otherwise inaccessible closed captions accessible for certain viewers. We require, therefore, that decoders implement the same 8 character background colors as those implemented for character foreground; that the decoder should display the color chosen by the caption provider; and that viewers should be able to override the foreground and or background color chosen by the caption provider and select alternative colors from among the remaining colors.”) (footnote omitted); *TDCA Report and Order*, 6 FCC Rcd at 2430, para. 31 (“[W]e are requiring that the television user be provided the ability to select a black background to ensure legibility.”). *See also, e.g., Second Report and Order and Second Further Notice*, 30 FCC Rcd at 13933, para. 34 (quoting the *DTV Closed Captioning Order*).

authorize regulations ensuring that consumers can easily access the required display settings to make closed captions readable, therefore, is entirely consistent with our prior interpretations. For the same reason, there is no logical basis to conclude that Congress, with respect to the TDCA modifications it adopted via the CVAA,<sup>49</sup> interpreted the TDCA as not having granted the Commission authority to regulate access to display settings, as some commenters advocate.<sup>50</sup>

14. Further, we reject the argument that the penultimate sentence of section 330(b) does not support the adoption of new requirements here because currently there is “no threat to the availability of closed-captioning service.”<sup>51</sup> To the contrary, we find that the requirements we are adopting herein are a proper exercise of our authority under section 330(b) because the record shows that the development of new technology for viewing video programming has made it more difficult for consumers to access the necessary caption display settings. Specifically, consumers today watch video programming on a multitude of different devices, and “it is difficult for consumers to readily anticipate where display settings are located because the location varies depending on the device used.”<sup>52</sup> With the proliferation of online video programming, a consumer that views captioned video programming using the same application or website on multiple devices may adjust the display settings for one device, only to find that

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<sup>49</sup> See CVAA, § 203(a), (c); 47 U.S.C. §§ 303(u)(1), 330(b).

<sup>50</sup> See, e.g., National Cable & Telecommunications Association (NCTA) Comments, MB Docket No. 12-108, at 4 (filed Feb. 24, 2016) (NCTA 2016 Comments) (“Congress was well aware of the requirements of the TDCA when it enacted the CVAA. If Congress wanted to provide additional authority to the Commission with respect to ensuring access to enhanced captioning display settings, it would have done so with the later statute.”) (footnote omitted); ACA Connects – America’s Communications Association Comments, MB Docket No. 12-108, at 2 and 7, n.15 (filed Feb. 17, 2022) (ACA Connects 2022 Comments) (arguing that “there are no changed circumstances . . . to require that closed captioning display settings be readily accessible” and “[h]ad Congress intended the TDCA to be imputed with such a requirement, it would have done so explicitly”).

<sup>51</sup> See NCTA 2016 Comments at 4. See also National Cable & Telecommunications Association Reply Comments, MB Docket No. 12-108, at 2 (filed Mar. 7, 2016) (NCTA 2016 Reply); AT&T Services, Inc. Comments, MB Docket No. 12-108, at 3 (filed Feb. 24, 2016) (AT&T 2016 Comments) (asserting that the Commission “has not established a record as to what ‘new technologies’ have developed that would warrant the imposition of rules regulating display settings”); AT&T Services, Inc. Reply Comments, MB Docket No. 12-108, at 3-4 (filed Mar. 7, 2016) (AT&T 2016 Reply) (“Nothing has changed regarding the availability of closed captioning since the implementation of the TDCA . . .”). That sentence reads: “As new video technology is developed, the Commission shall take such action as [it] determines appropriate to ensure that closed-captioning service . . . continue[s] to be available to consumers.” 47 U.S.C. § 330(b). NCTA claims that “the legislative history shows that this particular sentence was not intended to provide additional authority to the Commission, but instead reflects Congress’ desire to ensure that the particular technical requirements Congress directed the Commission to adopt would be revised as necessary to keep pace with future technology changes.” NCTA 2016 Comments at 4 (*citing* TDCA Senate Report at 7); NCTA – The Internet & Television Association Comments at 11-12 (filed Mar. 3, 2023) (NCTA 2023 Comments). We disagree with NCTA’s interpretation of the legislative history. The legislative history that NCTA cites merely indicates an intention to *permit* the Commission not to impose the same requirements for both older and newer technologies so long as closed captioning remains widely available to consumers. See NCTA 2016 Comments at 4, n.13 (quoting the TDCA Senate Report’s use of the example of the transition to HDTV); TDCA Senate Report at 7, *reprinted at* 1990 U.S.C.C.A.N. 1438, 1447 (“The Committee does not intend to mandate that FCC impose the same requirements on new technologies as those on older technologies if there are other means to achieve the objective of this legislation – to ensure that closed captioning continues to be widely available to consumers. For example, in the FCC’s consideration of High Definition Television, the FCC should ensure that whatever standards are adopted provide for closed captioning of programming without the need for a separate decoder.”).

<sup>52</sup> Consumer Groups 2016 Comments at 7. See also Consumer Groups 2022 Comments at 3-4 (indicating that these problems have continued to persist).

the settings need to be adjusted again when the programming is viewed on a different device.<sup>53</sup>

15. We also disagree with commenters who argue that the directives of sections 303(u) and 330(b) are satisfied as long as closed captioning circuitry or capability is included somewhere in their devices, that the statute's use of the term "available" should be read narrowly to exclude consideration of the accessibility of the closed captioning by consumers,<sup>54</sup> and that section 330(b) does nothing more than "authorize the Commission to update specifications as necessary to keep up with new video technologies."<sup>55</sup> As explained above, Congress used broad language in section 330(b), authorizing the Commission to "take such action as [it] determines appropriate" to ensure the continued availability of closed captioning.<sup>56</sup> We thus reject ACA's assertion that the Commission's authority under section 330(b) "is limited to updating the specific technical requirements identified in the TDCA" to avoid requiring manufacturers to adhere to "outdated technical requirements."<sup>57</sup> Further, our interpretation better serves the statutory purpose of ensuring that persons who are deaf and hard of hearing "should have equal access to the television medium."<sup>58</sup> Thus, we believe our adoption of a rule ensuring the accessibility of closed captioning display functions fits comfortably within the broad scope of this language. The language also informs our interpretation and implementation of our authority under section 303(u) to ensure that video apparatus is "equipped" with closed captioning capabilities, which requires both that the apparatus possesses the necessary capabilities and that consumers are able to access them.<sup>59</sup> Thus, our advancement of the objectives identified in section 330(b) also supports our use of

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<sup>53</sup> See Consumer Groups 2016 Comments at 7. See also Consumer Groups 2022 Comments at 10-11 (explaining the need for consistent and persistent user interfaces "across devices and video platforms and across different applications on the same device").

<sup>54</sup> See, e.g., NCTA 2016 Comments at 3-4 ("The TDCA provides authority to adopt rules addressing the parameters for caption display and standards for the transmission and receipt of captions. But that is a far cry from what would be entailed in requiring cable operators and others to make those captioning settings 'readily accessible' through their on-screen menus and guides."); American Cable Association Reply Comments, MB Docket No. 12-108, at 4 (filed Mar. 7, 2016) (ACA 2016 Reply) ("In short, the TDCA grants the Commission authority to ensure that apparatus are designed and manufactured to ensure the technical availability of captioning. But authority to require manufacturers to ensure the availability of closed captioning in apparatus is separate and distinct from the authority to require an MVPD to ensure the accessibility of closed captioning displays, which the TDCA simply does not grant the Commission.") (footnotes omitted); AT&T 2016 Reply at 3-4 ("Nothing has changed regarding the availability of closed captioning since the implementation of the TDCA; closed captioning will continue to be available without the proposed rules."); CTA 2022 Comments at 8 ("The Commission already has ensured that, consistent with the TDCA and CVAA, closed captioning is available."); NCTA 2023 Comments at 10 ("Granting the Commission authority to ensure that apparatus are designed and manufactured to ensure the technical availability of captioning simply cannot be ready to convey broad authority to dictate how distributors make caption display settings accessible.") (footnote omitted). NCTA cites as support for its statutory analysis the approach the Commission took in the *TDCA Report and Order* and the *DTV Closed Captioning Order*, but both of those orders are distinguishable. See NCTA 2016 Comments at 3, n.11. First, the *TDCA Report and Order* was a pre-digital order that also predated the amendment of the TDCA to extend beyond television sets. See *TDCA Report and Order*, 6 FCC Rcd 2419. Second, the *DTV Closed Captioning Order* applied only to DTV receivers. See *DTV Closed Captioning Order*, 15 FCC Rcd 16788.

<sup>55</sup> ACA 2016 Reply at 6. See also ACA Connects 2022 Comments at 5-8; NCTA 2016 Comments at 4 & n.13.

<sup>56</sup> 47 U.S.C. § 330(b).

<sup>57</sup> ACA 2016 Reply at 6.

<sup>58</sup> TDCA, § 2(1).

<sup>59</sup> Interpreting the second to last sentence of section 330(b) to, at a minimum, inform our interpretation and implementation of section 303(u) is consistent with the remaining text of section 330(b). Among other things, that language directs the Commission to adopt rules implementing section 303(u) that "provide performance and display standards for [] built-in decoder circuitry or capability designed to display closed captioned video programming." 47 U.S.C. § 330(b). As explained above, the rules we adopt here readily fit within the scope of "performance and display standards." See *supra* para. 11.

section 303(u)(1)(A) authority to adopt the requirements of this order.<sup>60</sup>

16. We further reject arguments that the statutory language does not permit the Commission to regulate the manner in which consumers are able to access and use such circuitry or capability.<sup>61</sup> AT&T, for example, points to language in section 330(b) directing the Commission to ensure that covered apparatus “be able to receive and display closed captioning which have been transmitted by way of line 21 of the vertical blanking interval,” consistent with specific “signal and display specifications.”<sup>62</sup> Yet, that text is preceded by the phrase, “Such rules shall *further* require,”<sup>63</sup> which belies the notion that Congress intended to use that language to limit the Commission’s authority to the implementation of the identified specifications. To the contrary, we conclude that the reference in section 330(b) of the Act to “performance and display standards,” which Congress did not define, is sufficiently broad to encompass the regulation of how consumers are able to access and use closed captioning.<sup>64</sup> To interpret the language more narrowly, as some commenters advocate,<sup>65</sup> would have the perverse result of allowing a manufacturer or MVPD to bury those settings so deep in a complicated series of menus that they are not readily accessible, undermining the purpose of the statute to ensure they are “available to consumers.”<sup>66</sup>

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<sup>60</sup> NCTA overstates the significance of certain language from the legislative history of the TDCA as allegedly demonstrating that the Commission is precluded from interpreting the second to last sentence of section 330(b) as a grant of authority. *See* NCTA 2016 Comments at 4, n.13 (“Indeed, the [TDCA] Senate Report specifically references the transition to HDTV as an example: ‘The Committee does not intend to mandate that FCC impose the same requirements on new technologies as those on older technologies if there are other means to achieve the objective of this legislation—to ensure that closed captioning continues to be widely available to consumers. For example, in the FCC’s consideration of High Definition Television, the FCC should ensure that whatever standards are adopted provide for closed captioning of programming without the need for a separate decoder.’”) (citing TDCA Senate Report at 7 (emphasis added)). By its terms, that excerpt is an “example” of the relevance of the second to last sentence of section 330(b), rather than an exhaustive description of the role of that provision. *See, e.g., CEA v. FCC*, 347 F.3d 291, 299 (D.C. Cir. 2003) (indications in legislative history that Congress was particularly focused on a given problem does not require broader enacted statutory language to be read as narrowly limited to that issue). That language from the TDCA Senate Report also reinforces the view that, at a minimum, the considerations identified in section 330(b) inform our interpretation and implementation of our authority under section 303(u). Moreover, this legislative history demonstrates our authority to take steps reasonably necessary, as demonstrated above, to “ensure” that closed captioning continues to be “widely available” to consumers.

<sup>61</sup> *See, e.g.,* AT&T 2016 Comments at 2-3; CTA 2016 Comments at 5-6; CTA 2022 Comments at 3-4; NCTA 2022 Comments at 2 n.2; CTA 2022 Reply at 3-5; Consumer Technology Association Comments, MB Docket No. 12-108, at 2 (filed Mar. 3, 2023) (CTA 2023 Comments); NCTA 2023 Comments at 10-11; Consumer Technology Association and Information Technology Industry Council Reply Comments, MB Docket No. 12-108, at 2-3 (filed Mar. 20, 2023) (CTA/ITI 2023 Reply).

<sup>62</sup> AT&T 2016 Reply at 2, n.5 (quoting TDCA, § 4(a), codified in 47 U.S.C. § 330(b)).

<sup>63</sup> 47 U.S.C. § 330(b) (emphasis added).

<sup>64</sup> *Id.*

<sup>65</sup> *See, e.g.,* Consumer Technology Association Reply Comments, MB Docket No. 12-108, at 3 (filed Mar. 7, 2016) (CTA 2016 Reply) (“[T]he plain language of the TDCA only provides the Commission limited authority to impose technical rules for decoder circuitry, not the user interface requirements proposed in the *Notice*.”); CTA 2022 Comments at 7 (asserting that the TDCA “is intended only to address the accessibility of broadcast television receivers”); Letter from J. David Grossman, Vice President, Regulatory Affairs, CTA, and Brian Markwalter, Senior Vice President, Research & Standards, CTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-108, at 3 (June 30, 2022) (CTA June 30, 2022 *Ex Parte*) (citing the D.C. Circuit’s approach to the All Channel Receiver’s Act as support for the claim that the Commission “cannot use its limited and explicit grant of authority over decoder circuitry to regulate user interfaces”); NCTA 2023 Comments at 9 (“[T]he TDCA, by its own terms, covers only apparatus and is specifically targeted to decoder functionality.”) (footnote omitted).

<sup>66</sup> *See* Consumer Groups and RERC Reply Comments, MB Docket No. 12-108, at 2-3 (filed Mar. 7, 2016) (Consumer Groups 2016 Reply). *See also id.* at 4 (indicating that, currently, “closed captioning settings remain difficult to access and, in many instances, are becoming less accessible”); Consumer Groups 2022 Comments at 9.

Further, the reference that AT&T highlights in the statute to the “line 21 of the vertical blanking interval” relates only to analog transmission. There is no vertical blanking interval in digital transmissions. The digital transition occurred in 2009 for the majority of stations,<sup>67</sup> and the requirement contained in this sentence cannot transfer directly into a digital environment. Thus the requirement contained in this sentence cannot reasonably be read to limit the Commission’s authority here. The directive in section 330(b) that the Commission “take such action as [it] determines appropriate” supports a broad view of the Commission’s authority to ensure that closed captioning “continue[s] to be available to consumers.”<sup>68</sup>

17. Further, Congress’s enactment in the CVAA of sections 303(aa) and (bb) of the Act does not undercut the Commission’s exercise of its authority under sections 303(u) and 330(b) of the Act. Section 303(aa) contains accessibility requirements for certain digital apparatus functions and features, while section 303(bb) contains accessibility requirements for certain navigation device functions and features.<sup>69</sup> First, we reject suggestions that sections 303(aa) and (bb) are more specific than sections 303(u) and 330(b) and thus are controlling with regard to Commission authority to regulate consumer access to closed captioning display settings.<sup>70</sup> These arguments invoke the general canon of interpretation that “specific statutory language should control more general language when there is a conflict between the two.”<sup>71</sup> Such an interpretation would represent a narrowing of the authority that the Commission previously understood itself to have and that it has exercised,<sup>72</sup> and there is no indication that Congress intended the CVAA to have such an effect.<sup>73</sup> It is more consistent with the accessibility objectives of the CVAA to conclude that Congress intended sections 303(u), (aa), (bb), and 330(b) of the Act to be available collectively as a source of Commission authority to pursue disability access objectives.<sup>74</sup> While sections 303(aa)(3) and (bb)(2) specifically address access to closed captioning activation, they are silent

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<sup>67</sup> See Digital Television Transition and Public Safety Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (extending the digital transition deadline to February 17, 2009); DTV Delay Act of 2009, Pub. L. No. 111-4, 123 Stat. 112 (2009) (extending the deadline to June 12, 2009).

<sup>68</sup> See Consumer Groups 2016 Reply at 2-3; 47 U.S.C. § 330(b).

<sup>69</sup> See 47 U.S.C. § 303(aa)(1) (requiring “if achievable . . . that digital apparatus designed to receive or play back video programming transmitted in digital format simultaneously with sound . . . be designed, developed, and fabricated so that control of appropriate built-in apparatus functions are accessible to and usable by individuals who are blind or visually impaired”); § 303(aa)(3) (requiring such apparatus to have “built in access to . . . closed captioning and [audio] description features through a mechanism that is reasonably comparable to a button, key, or icon designated for activating the closed captioning or accessibility features”); § 303(bb)(1) (requiring “if achievable . . . that the on-screen text menus and guides provided by navigation devices . . . for the display or selection of multichannel video programming are audibly accessible in real-time upon request by individuals who are blind or visually impaired”); § 303(bb)(2) (requiring “navigation devices with built-in closed captioning capability, [to provide] access to that capability through a mechanism . . . reasonably comparable to a button, key, or icon designated for activating the closed captioning, or accessibility features”).

<sup>70</sup> See, e.g., CTA 2016 Comments at 5-7; AT&T 2016 Reply at 3. See also NCTA 2023 Comments at 7-8.

<sup>71</sup> *NCTA v. Gulf Power*, 534 U.S. 327, 335-336 (2002).

<sup>72</sup> See *supra* n.48 and accompanying text.

<sup>73</sup> See, e.g., *CSX Trans. v. U.S.*, 867 F.2d 1439, 1443 (D.C. Cir. 1989) (“‘repeal by implication’ is a disfavored method of statutory construction and will not be found absent a clear intent to repeal,” with “such an intent . . . inferred from an ‘irreconcilable conflict’ between two provisions”) (quoting *Rodriguez v. U.S.*, 480 U.S. 522, 524-525 (1987)).

<sup>74</sup> The stated purpose of the CVAA is “[t]o increase the access of persons with disabilities to modern communications, and for other purposes.” See CVAA, Preamble. See also CVAA Senate Committee Report at 1 (stating that the purpose of the CVAA is “to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming”); CVAA House Committee Report at 19 (same). See also Consumer Groups 2022 Reply at 8 (“Congress’s enactment of the CVAA complements and ratifies the Commission’s authority to use the TDCA to require caption display settings to be readily accessible.”).

regarding access to closed captioning display options.<sup>75</sup> Had Congress intended to curtail the Commission’s authority to take further action under section 330(b) to promote the continued availability of closed captioning service, it could have done so explicitly. It did not, and we find it unlikely that Congress intended to do so *sub silentio*.<sup>76</sup>

18. Second, contrary to the suggestion of some commenters,<sup>77</sup> we find that Congress’s decision to require closed caption activation via a mechanism reasonably comparable to a key, button, or icon does not mean that it considered and rejected such a requirement for closed captioning display settings.<sup>78</sup> Rather, as stated above,<sup>79</sup> we find that Congress intended the relevant provisions of the Act—section 303(u), as amended by the CVAA; sections 303(aa) and (bb), added to the Act by the CVAA; and section 330(b), added to the Act by the TDCA—to be available collectively as a source of Commission authority regarding disability access issues. Given Congress’s interest in expanding access to video programming through the CVAA, we do not believe that it intended the provisions of that statute to negate the express language of section 330(b) to ensure that closed captions continue to be available to consumers as new video technology is developed, nor the overall intent of the TDCA to bring more programs that are closed captioned into the homes of Americans. Congress required closed caption activation via a certain mechanism in the CVAA, but Congress left it to the Commission’s discretion to determine whether and to what extent to regulate other matters pertaining to the ability of consumers to access closed captioning on video apparatus pursuant to its earlier grant of authority, including specifically through establishment of “performance and display standards.”<sup>80</sup>

19. Third, we disagree with commenters who contend that Congress would not have needed to adopt provisions in the CVAA directing the Commission to require closed caption activation through a mechanism reasonably equivalent to a button, key, or icon if the Commission already had authority pursuant to the TDCA to regulate access to closed captioning display settings.<sup>81</sup> There are legally meaningful differences in the Commission’s authority under section 303(u) as compared to sections 303(aa) and (bb) of the Act, which indicate that Congress intended to give the Commission new authority to accomplish a particular purpose, rather than supplant the Commission’s authority to adopt closed-captioning regulations pursuant to a specific legal standard under section 303(u). For example, section 303(u)(1)(A) directs the Commission to adopt closed captioning requirements that apply if compliance is

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<sup>75</sup> See 47 U.S.C. § 303(aa)(3), 303(bb)(2); *supra* n.69. Similarly, the provisions in sections 204 and 205 of the CVAA that were not incorporated in sections 303(aa) and (bb) of the Act are silent regarding access to closed captioning display options. CVAA, §§ 204(b)-(c), 205(b). Contrary to CTA’s suggestion, sections 204 and 205 did not “express[] an intent to limit the Commission’s authority” in this regard. CTA June 30, 2022 *Ex Parte* at 3. In addition, sections 303(aa)(1) and (2) apply to an unenumerated universe of “functions” to be made accessible to individuals who are blind or visually impaired, and thus also are not more specific than sections 303(u)(1)(A) and 330(b) regarding the requirements for closed captioning display options that we adopt here. See 47 U.S.C. § 303(aa)(1), (2).

<sup>76</sup> See *supra* n.48.

<sup>77</sup> See, e.g., Comments of DISH Network L.L.C. and EchoStar Technologies L.L.C., MB Docket No. 12-108, at 6-7 (Feb. 18, 2014).

<sup>78</sup> See 47 U.S.C. § 303(aa)(3), (bb)(2). This argument invokes the “expressio unius est exclusio alterius” canon of interpretation, which “presum[es] that an omission is intentional where Congress has referred to something in one subsection but not in another.” *NAB v. FCC*, 569 F.3d 416, 421 (D.C. Cir. 2009) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).

<sup>79</sup> See *supra* para. 17.

<sup>80</sup> See, e.g., 47 U.S.C. § 330(b).

<sup>81</sup> See, e.g., AT&T 2016 Comments at 3-4.

“technically feasible,” whereas sections 303(aa)(3) and (bb)(2) contain no such limitation.<sup>82</sup> Additionally, the Commission has statutory authority to exempt certain apparatus from the requirements of section 303(u) that it cannot exercise with respect to the requirements of sections 303(aa)(3) and (bb)(2).<sup>83</sup> Further, the CVAA established deadlines for the Commission to adopt rules initially implementing the requirements of sections 303(aa)(3) and (bb)(2) that differ from those for implementing the CVAA’s revisions to section 303(u).<sup>84</sup> There is no logical basis to conclude that the “button, key, or icon” requirement in sections 303(aa)(3) and (bb)(2) presupposes the absence of authority in sections 303(u)(1) or 330(b) to adopt different regulations to ensure that closed captioning performance and display functions continue to be “available” to consumers. Thus, we conclude that enactment of sections 303(aa)(3) and (bb)(2) does not diminish our authority to adopt the new rule set forth herein.

20. Finally, as a separate and independent basis of authority, in addition to the TDCA, we find authority to adopt accessibility requirements under sections 4(i) and 303(r) of the Act.<sup>85</sup> The Commission is specifically delegated authority under the Act to require that covered apparatus must “be equipped” with closed caption capability and to adopt rules as it “determines appropriate to ensure that closed-captioning service...continue[s] to be available to consumers” “[a]s new video technology is developed.”<sup>86</sup> Ensuring that the required caption capabilities are actually accessible by consumers is essential to fulfill these statutory requirements. Otherwise, if a consumer cannot readily locate and use display settings to ensure that captions are rendered in a readable and accessible format, then closed captioning itself is not truly “available” as required under the statute. The rules we adopt today are thus necessary to carry out the specific requirements set forth in sections 303(u) and 330(b) of the Act.<sup>87</sup>

#### **B. Access to Closed Captioning Display Settings Must Be “Readily Accessible”**

21. As proposed in the *Second Further Notice*, we adopt a rule that requires covered manufacturers and MVPDs to ensure that consumers are able to readily access user display settings for closed captioning on covered apparatus pursuant to our authority under the TDCA.<sup>88</sup> Congress directed the Commission to provide performance and display standards for built-in decoder circuitry or capability designed to display closed captioned video programming and to take action to ensure that closed captioning continues to be available to consumers as video programming technology evolves.<sup>89</sup> The rule we adopt herein serves these statutory directives.<sup>90</sup> As discussed below, we afford covered entities

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<sup>82</sup> 47 U.S.C. § 303(u)(1)(A), (aa)(3), (bb)(2). The Commission previously concluded that section 303(bb)(2) contains no limiting language and therefore imposes an unconditional obligation, noting that it does not contain “upon request” language or any reference to specific types of individuals found elsewhere in section 205 of the CVAA; lacks language found elsewhere that allows entities to provide required functionalities using separate equipment or software; and is not qualified by the phrase “if achievable,” in contrast with other provisions. *Report and Order and Further Notice*, 28 FCC Rcd at 17396-97, paras. 105-107. Section 303(aa)(3) likewise lacks any limiting language.

<sup>83</sup> 47 U.S.C. § 303(u)(2)(C).

<sup>84</sup> CVAA, § 203(d)(1) (prescription of regulations to implement amendments to section 303(u) of the Act required within 6 months of submission of an advisory committee report under section 201(e)(1) of the CVAA); *id.* § 204(b) (prescription of regulations to implement section 303(aa) of the Act required within 18 months of submission of an advisory committee report under section 201(e)(2) of the CVAA); *id.* § 205(b)(1) (prescription of regulations to implement section 303(bb) of the Act required within 18 months of submission of an advisory committee report under section 201(e)(2) of the CVAA).

<sup>85</sup> 47 U.S.C. §§ 154(i); 303(r).

<sup>86</sup> *Id.* §§ 303(u), 330(b).

<sup>87</sup> *Id.*

<sup>88</sup> *Second Report and Order and Second Further Notice*, 30 FCC Rcd at 13932, para. 33.

<sup>89</sup> 47 U.S.C. § 330(b).

<sup>90</sup> *See supra* section III.A (Authority).

(MVPDs and manufacturers) flexibility in how they meet this obligation, and the Commission will determine whether settings are readily accessible to consumers by evaluating the following factors, as described in the March 2024 joint proposal: proximity, discoverability, previewability, and consistency and persistence.<sup>91</sup> Below we explain the public interest benefits of these new requirements.<sup>92</sup> We also describe which devices and entities are covered by the rule, set forth exemptions for achievability and technical feasibility, and set a compliance deadline of two years from publication of the rule in the *Federal Register*.<sup>93</sup>

### 1. “Readily Accessible”

22. “*Readily Accessible*” Requirement in General. We first require manufacturers and MVPDs to ensure that consumers are able to readily access user display settings for closed captioning on covered apparatus.<sup>94</sup> To determine whether particular settings are readily accessible, the Commission will require compliance with the following factors, which we further define below: proximity, discoverability, previewability, and consistency and persistence.<sup>95</sup> Failure to comply with any of the factors may be deemed a violation of the Commission’s rules.<sup>96</sup>

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<sup>91</sup> See *infra* section III.B.1 (“Readily Accessible”). Although the March 2024 joint proposal does not explicitly reference the previously proposed four factor framework, we believe it fits within that framework. Accordingly, we adopt the contents of the joint proposal as clarifying or modifying the meaning of the previously proposed factors.

<sup>92</sup> See *infra* section III.B.2 (Public Interest Benefits of New Display Settings Requirement).

<sup>93</sup> See *infra* sections III.B.3 (Covered Devices and Entities), III.B.4 (Waivers and Exemptions), III.B.5 (Compliance Deadline).

<sup>94</sup> See, e.g., Letter from Drew Simshaw, Institute for Public Representation, Counsel to Telecommunications for the Deaf and Hard of Hearing, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-108, at 2 (Oct. 24, 2016) (explaining the need for “[l]ogical and readily accessible interfaces”); Janice S. Lintz Comments, MB Docket No. 12-108, at 1 (filed Mar. 28, 2024) (Lintz 2024 Comments). See also Brief Comment of Sean Hegyi, Disability Rights South Dakota, MB Docket No. 12-108 (Feb. 8, 2022) (noting that different interfaces on different devices increase user apprehension about inadvertently changing a setting).

<sup>95</sup> See, e.g., Accessibility Advocacy and Research Organizations Comments, MB Docket No. 12-108, at 2 (filed Mar. 3, 2023) (Consumer Groups 2023 Comments); Letter from Zainab Alkebsi, Policy Counsel, National Association of the Deaf, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-108, at 1 (Nov. 16, 2023) (Consumer Groups Nov. 16, 2023 *Ex Parte*). The following organizations are parties to the Consumer Groups 2023 Comments: Telecommunications for the Deaf and Hard of Hearing, Inc.; Communication Service for the Deaf; Hearing Loss Association of America; National Association of the Deaf; and Disability and Rehabilitation Research Project on Twenty-First Century Captioning Technology, Metrics and Usability, Gallaudet University. We note that ITI expresses vague concerns that the proposal uses terms, definitions, and requirements that “do not necessarily reflect internationally-accepted practices for this technology . . . .” Information Technology Industry Council Comments at 2 (filed Mar. 3, 2023) (ITI 2023 Comments). See also CTA/ITI 2023 Reply at 3-4 (stating that any new rules should “[h]armonize with existing international standards to avoid confusion and imposing additional burdens on companies”); Letter from Rachel Nemeth, Sr. Director, Regulatory Affairs, and Brian Markwalter, Senior Vice President, Research & Standards, Consumer Technology Association, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-108, at 2 (Apr. 28, 2023). Given the lack of specific information in the record as to precisely what rules the Commission should adopt in this area to ensure consistency with international standards, we are unable to take any further action in response to the cited pleadings.

<sup>96</sup> See, e.g., Consumer Groups 2023 Comments at 6 (“[T]he functional requirements should not be treated as parts of a multi-factor test, but should be treated as distinct requirements for all covered apparatuses.”). While ACA Connects expresses concern that some of the factors could be contradictory, we believe that is no longer the case given the meaning of the factors we adopt below. See ACA Connects – America’s Communications Association Reply at 6 (filed Mar. 20, 2023) (ACA Connects 2023 Reply); *infra* paras. 24-30. In the event that an allegation of non-compliance arises, the covered entity will need to demonstrate how it has complied with the applicable requirements. For example, if there is an allegation that a covered entity has not provided the required employee training discussed below, the entity could, for instance, offer information by providing training materials and a training schedule.



23. The readily accessible requirement, which the Commission will evaluate based on the four factors, will ensure that consumers who are deaf and hard of hearing can easily access closed captioning display settings, while still giving covered entities flexibility in the manner of compliance.<sup>97</sup> While display settings already may be readily accessible for some devices, using such settings generally has not been easy for consumers.<sup>98</sup> As Consumer Groups explain, “these functional requirements provide a workable middle ground between strict design mandates and the *laissez faire* approach called for by industry commenters, allowing the industry substantial flexibility while requiring it to finally address the long-standing gaps in the accessibility of closed captioning display setting interfaces.”<sup>99</sup> We believe that this approach will alleviate the challenges faced by consumers who are deaf and hard of hearing in accessing closed captioning and will ensure that these viewers can adjust the font, size, color, and other features of closed captions wherever they are watching video programming on devices without the undue complexity experienced today. This approach is also consistent with how the Commission has implemented accessibility requirements for closed captioning activation mechanisms on video devices pursuant to sections 204 and 205 of the CVAA.<sup>100</sup>

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<sup>97</sup> See NCTA 2022 Comments at 2 (“The Commission’s current rules . . . grant[] industry the flexibility needed to innovate and respond to consumer needs, so that the manner in which captioning settings are accessed can change as needed or as new innovative displays are deployed.”). See also Consumer Technology Association Comments, MB Docket No. 12-108, at 2, 9 (filed Mar. 3, 2023) (CTA 2023 Comments) (arguing that the competitive marketplace rewards easy-to-use interfaces, and regulatory mandates would chill innovation); CTA/ITI 2023 Reply at 1 (“The Commission should avoid a one-size-fits-all approach that would be complex, costly and could ultimately chill innovation, leaving consumers with fewer options.”) (footnote omitted), 4 (advocating innovation rather than regulation); Consumer Technology Association Comments, MB Docket No. 12-108, at 7 (filed Apr. 15, 2024) (CTA 2024 Comments) (“Any rules should provide sufficient flexibility to allow manufacturers, app developers and other providers of user interfaces to adjust to particular use cases.”). The adoption of flexible factors that we will require in determining if caption display settings are readily accessible should alleviate ACA Connects’ concern that rigid standards could “squelch innovation.” See ACA Connects – America’s Communications Association Reply Comments, MB Docket No. 12-108, at 13-14, n.33 (filed Mar. 4, 2022) (ACA Connects 2022 Reply). See also ACA Connects 2023 Reply at 3-4. Similarly, we expect the flexibility inherent within the factors to alleviate ITI’s concern that stringent requirements could lead to “a cluttered, overly-complex user interface” that could confuse users and have a particular negative impact on individuals with cognitive difficulties. See ITI 2023 Comments at 2.

<sup>98</sup> For example, Consumer Groups note that changing closed captioning settings for the most popular streaming service requires many users to engage in a 10-step process that involves leaving the application and navigating the service’s website. Consumer Groups 2022 Comments at 4-5. *But see, e.g.*, ACA Connects 2022 Reply at 2 (referencing “innovations over the past half-dozen years in how consumers access closed captioning advanced display features” as evidence that “there is no need for new regulations for ‘ready accessibility’”); *id.* at 3-7. We explain in section III.B.3 below that the new requirements apply to apparatus, including pre-installed applications. Such pre-installed applications may include streaming services. We encourage manufacturers of video applications that are not pre-installed on apparatus to design closed captioning display settings to be readily accessible to individuals with disabilities, including those who are blind or visually impaired.

<sup>99</sup> Letter from Blake E. Reid, Director, Samuelson-Glushko Technology Law & Policy Clinic, Counsel to TDI, to Marlene H. Dortch, Secretary, FCC, at 2 (Apr. 28, 2022) (Consumer Groups Apr. 28, 2022 *Ex Parte*). See also Accessibility Advocacy and Research Organizations Reply Comments, MB Docket No. 12-108, at 2 (filed Mar. 20, 2023) (Consumer Groups 2023 Reply). The same organizations are parties to the Consumer Groups 2023 Reply as those that are listed above as parties to the Consumer Groups 2023 Comments. *But see* CTA June 30, 2022 *Ex Parte* at 4 (claiming that these factors “represent a very heavy regulatory lift that neither the Commission nor industry has properly investigated”). We disagree with CTA’s claim, both because any regulatory burden will be alleviated by the flexible nature of the factors, and because the reply comments and subsequent 2023 and 2024 comments and replies did not demonstrate that applying these flexible factors will be unduly costly or otherwise unduly burdensome to industry. To the contrary, we intend the factors to clarify for industry how the Commission will evaluate whether particular settings are readily accessible.

<sup>100</sup> See 47 CFR § 79.109; *Report and Order and Further Notice*, 28 FCC Rcd at 17380, para. 79 (codifying the requirement that closed captioning activation mechanisms on digital apparatus and navigation devices be reasonably  
(continued....)

24. *Proximity.* In determining whether specific closed captioning display settings are readily accessible, the Commission will require that the settings are “proximate.” For this purpose, “proximity” requires that covered entities “will place . . . the closed caption display settings . . . in one area of the settings (either at the operating system or application level) that is accessed via a means reasonably comparable to a button, key, or icon.”<sup>101</sup> Consumer Groups initially argued that this factor should require access to closed captioning settings in the first level of a menu.<sup>102</sup> Industry objected to this approach as too rigid.<sup>103</sup> Consumer Groups then modified their proposed definition of “proximity,” clarifying that it is intended to ensure that consumers need not navigate a lengthy set of steps and/or switch devices or applications to access closed caption display settings.<sup>104</sup> The subsequent March 2024 joint proposal did not specifically reference that modification and instead further refined the approach to provide that caption display settings should be available in one area of the settings that can be accessed via a means

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comparable to a button, key, or icon, and explaining that the Commission will consider the simplicity and ease of use of the mechanism in determining whether it is compliant); *id.* at 17381, para. 80 (“We are mindful of the need to ensure that covered entities can continue to develop innovative compliance solutions, without being precluded from using a particular technology to achieve an activation mechanism that is ‘reasonably comparable to a button, key, or icon.’”); *id.* at 17381-82, para. 81 (providing examples of mechanisms that the Commission considers to be reasonably comparable to a button, key, or icon). With the exception of a Petition for Reconsideration filed by Consumer Groups regarding use of voice control and gestures for closed captioning activation, *see infra* para. 25, no party filed an appeal of the *Report and Order and Further Notice*. We need not address the argument that we lack sufficient notice to adopt the proposed factors, because the Media Bureau subsequently issued the *2023 Caption Display Settings Public Notice* and the *2024 Caption Display Settings Public Notice* and published both documents in the Federal Register, giving notice to all interested parties that this proposal was up for consideration. *See* CTA 2022 Reply at 6 (arguing that codifying these factors would require an additional round of notice-and-comment rulemaking); CTA June 30, 2022 *Ex Parte* at 4 (same); ACA Connects 2022 Reply at 13-14, n.33 (claiming that the Commission lacks authority to adopt the list of factors); ITI 2023 Comments at 1 (arguing that the FCC should not adopt additional rules implementing the proposed factors until it adopts a detailed notice of proposed rulemaking and engages further with stakeholders). We further note that the Commission’s authority to adopt the factors stems from the same authority it has to adopt the readily accessible requirement generally, as discussed above. *See supra* section III.A (Authority); Consumer Groups 2023 Comments at 5 (explaining that adopting the proposed functional requirements would fulfill the goals of the TDCA and the CVAA). *But see* CTA 2023 Comments at 8 (arguing that the Commission lacks authority “to extend the user control activation requirements on closed captioning display settings, let alone the multiple ‘functional requirements’ proposed by the Advocacy Groups”); ACA Connects 2023 Reply at 2; CTA/ITI 2023 Reply at 3 (arguing that, if Congress wanted the CVAA to require something more than an activation mechanism, it would have said so); Consumer Electronics Association Comments, MB Docket No. 12-108, at 6-8 (Feb. 18, 2014) (arguing that the Commission lacks authority to adopt a requirement that caption display settings are accessible via a means “reasonably comparable to a button, key, or icon”); Consumer Electronics Association Reply Comments, MB Docket No. 12-108, at 2-5 (March 20, 2014) (same).

<sup>101</sup> NCTA/Consumer Groups Mar. 14, 2024 *Ex Parte* at 1. We recognize that the joint proposal was to “place all accessibility functions – including, but not limited to, the closed caption display settings and caption on/off – in one area of the settings . . .” *Id.* The rules established in this Order, however, do not apply to any accessibility functions other than closed captioning display settings. In addition, the Commission’s rules already require that closed captioning and audio description “can be activated through a mechanism that is reasonably comparable to a button, key, or icon.” 47 CFR § 79.109(a)(1)-(2), (b). We encourage covered entities to make all accessibility functions, including closed captioning display settings and caption on/off, available in the same location.

<sup>102</sup> *See* Consumer Groups 2016 Comments at 6-7; Consumer Groups 2016 Reply at 5-6; Consumer Groups 2022 Comments at v. We recognize that commenters previously evaluated some of what we now deem “proximity” as part of the “discoverability” factor. *See, e.g.,* Consumer Groups 2023 Comments at 4 (discussing the location of caption display settings within the menu as part of the “discoverability” inquiry). The meaning of “proximity” that we adopt here is tailored to fit the joint proposal within the four-factor framework.

<sup>103</sup> *See, e.g.,* NCTA 2016 Comments at 6; AT&T 2016 Reply at 4; CTA 2016 Reply at 2, 6-7; CTA 2022 Comments at 4, 10; ACA Connects 2022 Reply at 12-13; NCTA 2022 Reply at 2-3.

<sup>104</sup> Consumer Groups Nov. 16, 2023 *Ex Parte* at 1-2.

reasonably comparable to a button, key, or icon.<sup>105</sup> We find that requiring proximity pursuant to the revised definition is in the public interest because it will ensure that consumers do not need to complete many steps or switch devices or applications to access closed caption display settings, and it is hereby required by our rules. We believe that the presence of ready access to caption display settings is paramount to the utility of such settings, and the “proximity” requirement will further that aim.<sup>106</sup>

25. Under the approach we adopt today, industry is afforded flexibility in how precisely to ensure that closed captioning display settings are made readily accessible pursuant to the proximity factor, so long as the settings are available in one area that is accessible via a means reasonably comparable to a button, key, or icon. Making closed captioning display settings available solely or primarily through the use of voice control likely would not be considered proximate. In an *Order on Reconsideration*, the Commission previously found that closed captioning activation mechanisms that rely solely on voice control do not fulfill the requirement of sections 204 and 205 of the CVAA and our implementing rules that such mechanism be reasonably comparable to a button, key, or icon.<sup>107</sup> The Commission was persuaded by a Petition for Reconsideration filed by Consumer Groups indicating that voice activation is not simple and easy to use for many individuals who are deaf and hard of hearing.<sup>108</sup> We believe that a similar rationale applies here. We cannot find that caption display settings are reasonably accessible if many of the individuals who are intended to benefit from the settings, in other words those consumers who are deaf and hard of hearing, would not actually be able to access them. As in the *Order on Reconsideration*, we clarify that covered entities are not prohibited from using voice controls to provide access to the area of the settings that contains the closed captioning display settings as long as there is an alternative way that is reasonably comparable to a button, key, or icon for individuals who are deaf and hard of hearing to readily access closed captioning display features.<sup>109</sup> In addition, CTA indicated that at least one device manufacturer was considering a long press of a button on the remote to bring up closed captioning display settings.<sup>110</sup> Compliance with the factors we adopt today is a fact-specific determination, and even if the long press of a remote control button is consistent with the proximity requirement, which requires a mechanism reasonably comparable to a dedicated button, key, or icon, it would need to comply with each of the other factors to be considered readily accessible.

26. *Discoverability.* In determining whether specific closed captioning display settings are readily accessible, the Commission will require that the settings are “discoverable.” For this purpose, to ensure that the settings are “discoverable,” covered entities must: (1) conduct usability testing to determine if caption display settings can be easily found by working with consumers and disability groups as part of the testing process; (2) demonstrate efforts to correct problems identified during the consumer testing process; and (3) train customer-facing employees on how to advise customers with regard to caption display settings. This approach is consistent with the March 2024 joint proposal between NCTA and Consumer Groups.<sup>111</sup> We note that as proposed in some comments, discoverability would have

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<sup>105</sup> NCTA/Consumer Groups Mar. 14, 2024 *Ex Parte* at 1; Lintz 2024 Comments at 1-2 (supporting this proposal); Wisconsin Department of Health Services, Office of the Promotion of Independent Living (OPIL) Comments, MB Docket No. 12-18 (filed Apr. 15, 2024) (OPIL 2024 Comments) (same).

<sup>106</sup> Consumer Groups Nov. 16, 2023 *Ex Parte* at 1-2 (explaining further that “the proximity requirement would *not* preclude offering users the ability to pre-set or adjust captioning display settings from a third party service or device, so long as they have the capability of also doing so on their programming device”) (emphasis in original).

<sup>107</sup> See *Second Report and Order and Second Further Notice*, 30 FCC Rcd at 13930-31, paras. 28-30.

<sup>108</sup> See *id.* at 13930, para. 29.

<sup>109</sup> See *Second Report and Order and Second Further Notice*, 30 FCC Rcd at 13931, para. 30.

<sup>110</sup> See Letter from Julie M. Kearney, Vice President, Regulatory Affairs, CTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-108, at 1 (July 18, 2016) (CTA July 18, 2016 *Ex Parte*).

<sup>111</sup> See NCTA/Consumer Groups Mar. 14, 2024 *Ex Parte* at 1-2 (“For cable service and navigation devices used to access multichannel video programming that cable operators sell or lease, cable operators will consult and conduct

(continued....)

considered whether it is simple and intuitive for a viewer to find closed captioning display settings.<sup>112</sup> Some commenters objected to that formulation as too subjective.<sup>113</sup> The formulation in the March 2024 joint proposal that we adopt here has the benefit of being more objective because it requires entities to conduct usability testing, demonstrate efforts to address problems that arise during such testing, and train customer-facing employees.<sup>114</sup> In addition, this approach is not superfluous of any other existing or new requirement.<sup>115</sup> We believe that discoverability, the ability to find the settings, is central to users' ability to benefit from and receive the value of closed captioning and is therefore in the public interest and is hereby required by our rules. We decline to specify the type of employee training that must be provided,<sup>116</sup> instead concluding that regulated entities should retain flexibility to determine the type of employee training needed in their particular circumstances to ensure that settings are discoverable.

27. *Previewability.* In determining whether specific closed captioning display settings are

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usability testing with consumers to assess if the means for accessing accessibility settings can be easily found. Cable operators will work with consumers, in coordination with disability groups, as part of the testing process, and they will make a good-faith effort to correct problems that are discovered as part of this process . . . . Cable operators will train customer care and support employees on how to advise customers about accessing and adjusting caption display settings for cable service and navigation devices used to access multichannel video programming that cable operators sell or lease. At cable operators' discretion, companies may use specialized teams to support accessibility concerns, and cable operators will educate relevant customer-facing employees on the availability of accessibility support services for customers." See also Consumer Groups Nov. 16, 2023 *Ex Parte* at 2 ("[I]t would be best to institute a requirement for manufacturers and service providers to consult with and provide usability testing with consumers.") (footnote omitted); Accessibility Advocacy Organizations Reply Comments, MB Docket No. 12-108, at 6 (filed Apr. 25, 2024) (Consumer Groups 2024 Reply) ("User testing and consumer coordination has proven highly successful in the implementation of previous accessibility mandates implemented by the Commission, and can provide the industry with the guidance it needs . . .") (footnote omitted). The following organizations are parties to the Consumer Groups 2024 Reply: Communication Service for the Deaf, Inc.; National Association of the Deaf; TDIforAccess, Inc.; and Hearing Loss Association of America.

<sup>112</sup> Consumer Groups 2022 Comments at 10 ("By way of example, while it is likely users could expect to find captioning settings under a button or icon labeled 'Closed Captions,' 'CC,' or 'Accessibility,' they would have no way of knowing they could find such settings under a button or icon with unfamiliar or generic description . . ."). See also Consumer Groups 2023 Comments at 4; Consumer Groups Nov. 16, 2023 *Ex Parte* at 2.

<sup>113</sup> See CTA 2024 Comments at 7 ("CTA is glad to facilitate direct dialogues to supplement company-specific user testing. However, because the record reflects no consensus on whether settings are 'easy and intuitive for viewers to access,' CTA cautions against adopting additional requirements, especially those that would incorporate this or other subjective standards.") (footnote omitted); NCTA – The Internet & Television Association Reply Comments, MB Docket No. 12-108, at 2-3 (filed Apr. 25, 2024) (NCTA 2024 Reply) (stating that, while NCTA shares CTA's concerns about subjective standards, the joint proposal solves this by requiring consumer consultation, in coordination with disability groups, and efforts to correct problems that are discovered as a result).

<sup>114</sup> See NCTA 2024 Reply at 3 (explaining that focusing on the process, rather than on a subjective standard, is a more appropriate way to make sure caption display settings are discoverable). See also Letter from Blake E. Reid, Director, Samuelson-Glushko Technology Law & Policy Clinic, Counsel to TDI, to Marlene H. Dortch, Secretary, FCC, at 4 (filed Sept. 20, 2022) (Consumer Groups Sept. 20, 2022 *Ex Parte*) (noting Consumer Groups' "ongoing willingness to work with our industry colleagues to develop collaborative solutions"); CTA 2023 Comments at 10 ("Technological breakthroughs, research, testing and user feedback should continue to drive how the consumer technology industry meets the needs of individuals with disabilities, rather than conformance to quickly outdated regulatory fiats that could stall progress.").

<sup>115</sup> See ACA Connects 2023 Reply at 5. We note that manufacturers and MVPDs are already required to provide information to consumers about how to access and use accessibility features on devices. See 47 CFR §§ 79.107(a)(5) and (d)-(e), 79.108(d) and (f). The new employee training requirement will provide further consumer benefits.

<sup>116</sup> See OPIL 2024 Comments (supporting the joint proposal's consumer testing requirements, but stating that it "recommends clarifying what kind of training requirements the cable operator would commit for customer care and support employees.").

readily accessible, the Commission will require that the settings are “previewable.” For this purpose, “previewability” means whether viewers are able to preview the appearance of closed captions on programming on their screen while changing the closed captioning display settings.<sup>117</sup> As explained in the March 2024 joint proposal between NCTA and Consumer Groups, previewed captions must appear “via a caption box overlaying the programming,” such that [c]ustomers will still be able to see the underlying programming . . . .<sup>118</sup> The caption preview may include “stock text or caption previews, rather than the captions carried on the specific program,” which “will enable customers to preview captions even in situations where the channel the customer is watching may not include captions at a particular time, e.g., during a commercial break or portions of programming that are uncaptioned due to the nature of the content.”<sup>119</sup> Although the Commission’s rules already require apparatus to enable “the user to preview default and user selection of the caption features required by this section,”<sup>120</sup> that provision does not require the preview function to be accessible without exiting the programming.<sup>121</sup> We find that requiring previewability to the extent described herein is in the public interest because it will enable a viewer to see how particular caption display settings work with the program the viewer is watching, and it is hereby required by our rules. A previewability requirement as defined herein will make it efficient for consumers to adjust captions, while giving designers flexibility as to precisely how they modify their interfaces to facilitate previewability.<sup>122</sup>

28. *Consistency and Persistence.* In determining whether specific closed captioning display settings are readily accessible, the Commission will require that the settings are “consistent and persistent.” In keeping with the March 2024 joint proposal, for this purpose, “consistency and persistence” means: (1) covered entities that provide navigation devices must “expose closed caption display settings via an application programming interface (API) that an over-the-top app provider can use upon launch of their app on the device,”<sup>123</sup> the API must “enable the app provider to use the device-level caption settings for its own content, if it chooses,” and covered entities must “make information about this API available to app developers;” (2) covered entities that provide their own video programming app hosted on third-party devices “will [utilize] the operating system-level closed caption settings of the host device upon launch of the app on the device;” and (3) manufacturers must ensure that such host devices “make[] those settings available to applications via an API or similar method.”<sup>124</sup> Consumer Groups have explained the difficulties of using different settings for each application on the same platform, and of maintaining the same settings across different platforms.<sup>125</sup> As Consumer Groups explain, a consistency and persistence requirement will subject consumers to “fewer procedures to customize captions for the same service used on different devices and for different services accessed on the same device,” which will reduce the frequency with which consumers must adjust captions.<sup>126</sup>

29. The approach to consistency and persistence that we adopt today is narrower than the

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<sup>117</sup> Consumer Groups 2022 Comments at 10.

<sup>118</sup> NCTA/Consumer Groups Mar. 14, 2024 *Ex Parte* at 2.

<sup>119</sup> *Id.*

<sup>120</sup> 47 CFR § 79.103(c)(10). *See also* NCTA 2023 Comments at 3, n.8; ACA Connects 2023 Reply at 5.

<sup>121</sup> *See* Consumer Groups Nov. 16, 2023 *Ex Parte* at 3.

<sup>122</sup> Consumer Groups 2023 Comments at 4.

<sup>123</sup> An API is an application programming interface. We understand that some devices or applications covered by our rules may use other tools comparable to APIs, such as application programming kits (APKs) or software development kits (SDKs). All references herein to APIs shall be read to include any such comparable development tools that allow one device or application to coordinate with another.

<sup>124</sup> NCTA/Consumer Groups Mar. 14, 2024 *Ex Parte* at 2.

<sup>125</sup> *See* Consumer Groups 2022 Comments at 10-11.

<sup>126</sup> Consumer Groups 2023 Comments at 4.

approach previously advocated by the Consumer Groups, which would have required covered entities to ensure that their closed captioning display settings are consistent when the same service is used on different devices and persistent when different services are used on the same device.<sup>127</sup> Industry raised several significant concerns with this broader definition of the “consistency and persistence” factor.<sup>128</sup> We believe that the narrower approach to consistency and persistence that we adopt today, which includes specific requirements that are tailored to the role of each party, will help make display settings more readily accessible to users and therefore is in the public interest.

30. We recognize that any consistency and persistence requirement could raise certain issues, including how caption display settings should be stored and transmitted, how to address privacy and competitive implications that may arise, and whether to prioritize a preset setting versus a conflicting setting that a user subsequently inputs or a setting input on a device versus a conflicting setting input on an application accessed via the device.<sup>129</sup> However, we do not believe these implementation issues are impediments to the development of solutions that satisfy the consistency and persistence requirement as defined here and we agree with NCTA that these issues “should not stop the Commission from taking positive steps now to benefit consumers.”<sup>130</sup> With respect to CTA’s objection that the requirement could compel disclosure of sensitive personal information in violation of state or federal privacy laws,<sup>131</sup> we find that such objections are vague and unsubstantiated and we disagree that the requirements adopted here to provide consumers with consistent settings when different services are used on the same device would have such a result.<sup>132</sup> Similarly, while CTA explains that a television has no way to know if the person using it is the most recent user or a guest,<sup>133</sup> the API-based approach set forth in the joint proposal still will improve the consumer experience and we do not believe that advancements in accessibility should be stalled because video equipment may be accessed by multiple viewers. To the extent compliance concerns remain even with the narrower approach we adopt today, we note that “achievability” and “technical feasibility” exemptions remain available to covered entities, as discussed further below.<sup>134</sup>

## 2. Public Interest Benefits of New Display Settings Requirement

31. We find that the public interest benefits outweigh the costs for a requirement that the closed captioning display settings be readily accessible. In enacting the TDCA, Congress stated that “to the fullest extent made possible by technology,” persons who are deaf and hard of hearing “should have

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<sup>127</sup> Consumer Groups 2022 Comments at 10.

<sup>128</sup> See, e.g., NCTA 2023 Comments at 3-4 (stating that such an approach “would require MVPDs, app developers, and equipment manufacturers to make sweeping changes to a vast array of devices and services” and caption display settings may as a result migrate “toward the lowest common denominator because any solution would need to be reasonably implementable by all.”); CTA 2023 Comments at 11 (arguing that “[t]he technology and standards simply do not exist and may not even be possible,” there are privacy implications in whether and how to communicate personal accessibility settings across devices and services, and there is no mechanism for platforms to force others to comply), 12 (explaining that caption display settings necessarily differ by platform; for example, a television may use a remote control but a smartphone does not); ACA Connects 2023 Reply at 5.

<sup>129</sup> CTA 2024 Comments at 5-6.

<sup>130</sup> NCTA 2024 Reply at 2.

<sup>131</sup> CTA 2024 Comments at 6.

<sup>132</sup> CTA’s comments do not cite any specific state or federal privacy statute or case law that would be implicated by the rule we adopt or describe how the requirement could potentially violate such requirements. See *id.* But see Consumer Groups 2024 Reply at 4 (“Further, as we have previously pointed out, video device manufacturers are already responsible for many aspects of what they or their users install on their devices, including features that affect privacy, security, interoperability, audio and video resolution and size.”)

<sup>133</sup> CTA 2024 Comments at 7-8.

<sup>134</sup> See *infra* section III.B.4 (Waivers and Exemptions).

equal access to the television medium.”<sup>135</sup> In the *Second Further Notice*, the Commission stated that there are important public interest considerations that weigh in favor of ensuring that consumers are able to readily access user display settings for closed captioning.<sup>136</sup> The record supports the continued need for this access, providing numerous examples of user interfaces across various popular platforms, services, and devices that are apparently not readily accessible.<sup>137</sup> When it adopted technical standards for the display of closed captions on digital television receivers, the Commission concluded that “[o]nly by requiring decoders to respond to these various [display] features can we ensure that closed captioning will be accessible for the greatest number of persons who are deaf and hard of hearing, and thereby achieve Congress’ vision.”<sup>138</sup> According to Consumer Groups, the ability to alter font, size, color, and other display features of captions is “a critical component of accessing closed captioning” for individuals who are deaf and hard of hearing, allowing them to change the appearance of captions to best meet their particular needs.<sup>139</sup>

32. Although the rules the Commission adopted in 2000 were intended to provide consumers with the benefits of customizing the appearance of closed captions, these features are not readily accessible to many consumers who are deaf and hard of hearing. When consumers cannot readily access the closed captioning display settings, the benefits of our rule allowing the customization of closed caption display are greatly diminished. Consumer Groups explained in 2016 that “many consumers face the intimidating and frustrating technical barrier of display settings that are difficult to locate and utilize, which prevents viewers from being able to easily customize the captions to be readable.”<sup>140</sup> There is little evidence in the record of significant progress since the Commission proposed caption display settings requirements in 2015.<sup>141</sup> Having to take cumbersome steps to access display settings that make closed

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<sup>135</sup> TDCA, § 2(1).

<sup>136</sup> *Second Report and Order and Second Further Notice*, 30 FCC Rcd at 13932-33, para. 33. *See also infra* paras. 31-33 (discussing the public interest benefits of the new requirement).

<sup>137</sup> *See, e.g.*, CACP 2022 Reply at 4 (“[T]he cited grievances are dated 2020, illustrating the persistence of these concerns despite developments in the provision of closed captioning controls.”); Consumer Groups 2022 Reply at 2-3 (stating that, while CTA touts accessibility developments in the consumer electronics industry, it does not provide “a single concrete example, much less systematic data, directly responding to the Commission’s detailed inquiry in to the accessibility of caption display settings”); Consumer Groups 2023 Comments at 2 (“[T]his problem remains in effect today, where apparatuses and navigation devices still implement caption display settings through obscure, hard-to-find, hard-to-use, and inconsistent interfaces.”); Consumer Groups 2023 Reply at 3-4; Lintz 2024 Comments at 1. While the record also contains examples of some accessible user interfaces, that does not change the fact that many user interfaces are not readily accessible. *See, e.g.*, NCTA 2022 Comments at 2-6; CTA 2022 Reply at 7-8; NCTA 2022 Reply at 1; CTA 2023 Comments at 1-2, 4 (claiming that consumers are already able to customize closed captioning display settings as needed); CTA/ITI 2023 Reply at 1 (arguing that regulations are unnecessary because consumers already have access to caption display settings); Letter from Kristine Hackman, Senior Manager, Public Policy, Amazon, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-108 (Apr. 21, 2023) (explaining that Amazon’s “devices and services provide ready access to captioning and captioning display settings”); Letter from Kristine Hackman, Senior Manager, Public Policy, Amazon, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-108 (Apr. 28, 2023) (similar); CTA 2024 Comments at 2 (“In the years since the *Second FNPRM*, the consumer technology industry, comprised of CTA representing the industry and individual companies, has continued to work with consumer advocates to create ever more user-friendly, readily accessible and customizable user interfaces”) (footnotes omitted).

<sup>138</sup> *DTV Closed Captioning Order*, 15 FCC Rcd at 16793, para. 13. *See also* TDCA, § 2(1).

<sup>139</sup> Consumer Groups 2016 Comments at 6.

<sup>140</sup> *Id.* at 4. *See also id.* at 7; Consumer Groups 2022 Comments at v, 2; CACP 2022 Reply at 5 (“[W]e recommend that information regarding the closed captioning activation and display setting customization be more prominent and more widely disseminated.”).

<sup>141</sup> *See, e.g.*, Consumer Groups 2022 Comments at 4 (observing that “[u]nfortunately, little progress appears to have been made over the past six years” and the difficulties “are only getting worse”); Consumer Groups Apr. 28, 2022

(continued....)

captions readable may discourage individuals who are deaf and hard of hearing from using closed captioning to make video programming accessible.<sup>142</sup> If consumers are unable to read default captions (e.g., if the size of the font is too small) and are unable to locate and use display settings to change the appearance of the captions, they are precluded from using closed captioning at all.<sup>143</sup>

33. As explained above,<sup>144</sup> our action ensures that the Commission can meet its continuing obligation under the TDCA to take appropriate action to ensure that closed captioning remains available to consumers as new video technology is developed.<sup>145</sup> As Consumer Groups explain, making closed captioning display settings easy to find and use is especially important given the multitude of devices and programming options available to consumers today, which may each require customization to suit a user's needs.<sup>146</sup> We agree with Consumer Groups that “the[] goals of removing technical barriers and ensuring practical accessibility and readability of captions would all be advanced by the proposed rule.”<sup>147</sup> The benefits of the rule will extend not only to the deaf and hard of hearing population, but also to other members of the public that utilize closed captioning, including in public places such as restaurants, bars, hotels, hospitals, and nursing homes.<sup>148</sup>

34. While the record reflects that there will be some costs to industry to comply with the rule we adopt herein, we find that the substantial benefits to consumers outweigh those costs. In the *Second Further Notice*, we inquired about the costs of the proposal as well as the impact of the proposed rule on small entities.<sup>149</sup> The record does not contain any specific figures or estimates quantifying the costs of compliance. However, industry commenters indicate that modifying access to closed captioning display settings may be “a significant undertaking involving design, development, testing, and manufacture [and] involving coordination among ‘multiple internal and external design and engineering teams.’”<sup>150</sup> These

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*Ex Parte* at 2-3; Consumer Groups Sept. 20, 2022 *Ex Parte* at 2 (“Given that these settings have remained inaccessible for two decades and the industry is unable or unwilling to act, it is time for the Commission to act in a design space that is not the subject of substantial market differentiation or innovation and has yielded relatively little improvement.”); Consumer Groups 2023 Comments at 2 (stating that today “apparatuses and navigation devices still implement caption display settings through obscure, hard-to-find, hard-to-use, and inconsistent interfaces.”) (footnote omitted); Consumer Groups 2024 Reply (“That captioning has won nationwide acceptance does not change, however, the challenges that caption viewers continue to experience when attempting to locate, access, and select the font, color, size and other characteristics of the captions that appear on their screens.”).

<sup>142</sup> See Consumer Groups 2016 Comments at 9; Consumer Groups 2022 Comments at 14 (“If caption display settings are not proximate, discoverable, previewable, and consistent and persistent, then closed captioning itself will not be ‘available’ because viewers will not be able to use captions to fully and effectively understand video programming.”) (footnote omitted).

<sup>143</sup> See Consumer Groups 2016 Comments at 9 (observing that “[i]n these circumstances, closed captioning is not ‘available to consumers’”).

<sup>144</sup> See *supra* section III.A (Authority).

<sup>145</sup> 47 U.S.C. § 330(b); TDCA, § 4.

<sup>146</sup> Consumer Groups 2016 Comments at 3. We thus disagree with ACA Connects’ contention that the Commission has failed to identify “how the continued availability of closed captioning service would be frustrated in the absence of consumers’ ability to readily access closed captioning display settings.” ACA Connects 2022 Comments at 6-7 (footnote omitted). See also CTA 2022 Reply at 3-4. Rather, we agree with Consumer Groups that consumers must be able to readily access closed captioning display settings to ensure that those captions are readable.

<sup>147</sup> Consumer Groups 2016 Comments at 4.

<sup>148</sup> See *id.* at 8-9.

<sup>149</sup> *Second Report and Order and Second Further Notice*, 30 FCC Rcd at 13934, para. 36.

<sup>150</sup> CTA 2016 Reply at 7 (quoting Telecommunications Industry Association Comments, MB Docket No. 12-108, at 2 (filed Feb. 24, 2016) (TIA 2016 Comments)). See also AT&T 2016 Reply at 5 (“[D]esigning a menu, especially a design to move functions to the first level of a menu, requires careful planning that could result in other functions

(continued....)



commenters assert that the efforts will involve more than a small software modification, but they do not allege that these efforts would be prohibitively burdensome or costly.<sup>151</sup> Other industry commenters state that “[a]dopting a new requirement regarding closed caption display settings . . . would chill innovation.”<sup>152</sup> However, we find that the flexibility allowed in determining how to comply will mitigate this possibility. Taking into account the industry comments, we find that the extensive benefits outlined above will outweigh the compliance costs to industry.<sup>153</sup> The benefits extend to the approximately 48 million Americans who are deaf and hard of hearing,<sup>154</sup> as well as to the DeafBlind community and the millions of individuals with low vision, including many senior citizens.<sup>155</sup> We also believe that the costs of compliance will be mitigated because we give covered entities flexibility in the manner of compliance, which allows them to choose a cost-effective solution. Further, to the extent there are companies that already provide closed captioning display settings in a readily accessible manner, they will not need to incur any additional costs to comply.<sup>156</sup>

35. In the initial comment period, industry commenters asserted that the Commission should take a “wait-and-see approach” to determine if additional accessibility rules are necessary. In particular, industry commenters asserted that manufacturers had been working hard to comply with the accessible user interfaces requirements adopted pursuant to sections 204 and 205 of the CVAA, which were subject to a December 20, 2016 compliance deadline,<sup>157</sup> and that it was premature for the Commission to adopt new rules before evaluating the technical innovations developed by covered entities to meet these

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being moved elsewhere.”); EchoStar Technologies Corporation Reply Comments, MB Docket No. 12-108, at 3 (filed Mar. 7, 2016) (EchoStar 2016 Reply) (“[T]hese changes could require extensive coordination efforts among a number of internal and external teams.”) (footnote omitted); TIA 2016 Comments at 2 (“The factory-level reconfigurations which could be required by the FCC’s proposed rules will cost MVPDs and manufacturers both time and money as they struggle to redesign, redevelop, retest, and remanufacture compliant devices.”); NCTA 2016 Reply at 4 (“In many cases adjusting the level or location where closed captioning settings appear involves significantly more than a simple software change.”) (quoting TIA 2016 Comments at 2); CTA 2023 Comments at 3 (arguing that eliminating diversity in user interfaces would not serve consumers and would hamper innovation); NCTA 2023 Comments at 3 (arguing that additional regulations are unnecessary and the proposed factors “would impose substantial burdens and require uniformity that would hamper innovation to the detriment of consumers”).

<sup>151</sup> See AT&T 2016 Reply at 5; CTA 2016 Reply at 7; EchoStar 2016 Reply at 3; NCTA 2016 Reply at 4; NCTA 2022 Comments at 6.

<sup>152</sup> CTA 2022 Comments at 1; CTA 2023 Comments at 8 (“Locking in user interfaces to conform to the Advocacy Groups’ proposal can slow future innovation and degrade the experience of individuals seeking to adjust more than just closed captioning display settings.”). See also ACA Connects 2023 Reply at 2-3 (additional mandates governing “ready accessibility” may be “well-intentioned” but they “actually may prove detrimental to efforts to promote accessibility of captioning issues” and thus may harm consumers by thwarting innovation).

<sup>153</sup> See *supra* paras. 31-33.

<sup>154</sup> See, e.g., Center for Hearing and Communication, Statistics and Facts About Hearing Loss, available at <http://chcheating.org/facts-about-hearing-loss/> (CHC Website); Consumer Groups 2022 Comments at 1.

<sup>155</sup> See CHC Website (stating that one out of three people over age 65 has a hearing loss, and that two out of three people over age 75 have a hearing loss); Consumer Groups 2022 Comments at 1. Individuals who are low vision and also rely on closed captions may need to modify caption settings to make the captions readable. See also *DTV Closed Captioning Order*, 15 FCC Red at 16795-96, 16797, paras. 20-21, 24.

<sup>156</sup> See, e.g., Letter from Stephanie L. Poday, Vice President & Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 11-43, 12-108, at 2 (Sept. 19, 2016) (NCTA Sept. 19, 2016 *Ex Parte*) (stating that “companies are already developing interfaces that provide easy access to accessibility settings in an intuitive manner”).

<sup>157</sup> See 47 CFR §§ 79.107, 79.108, 79.109.

accessibility obligations.<sup>158</sup> However, while the accessible user interfaces rules require that closed captioning be activated by a mechanism reasonably comparable to a button, key, or icon on digital apparatus and navigation devices, these requirements do not govern how closed captioning display settings should be accessed on such devices.<sup>159</sup> Further, the record at that time contained few specific examples of how closed captioning display settings actually would be made available to consumers after the December deadline.<sup>160</sup> While the accessible user interface rules and the 2016 compliance deadline were not intended to address access to closed captioning display settings, the Commission now has the benefit of a refreshed record that reflects a lack of progress since the 2016 deadline, and a basis to find that the closed captioning display setting requirements the Commission initially proposed remain necessary. Thus, we do not believe that the section 204 and 205 accessibility requirements obviate the need for Commission action with respect to closed captioning display settings, and we see no reason to further delay rules that are sorely needed by consumers who are deaf and hard of hearing to address the “long and frustrating history” of inaccessible display settings.<sup>161</sup>

### 3. Covered Devices and Entities

36. *Covered Devices.* As proposed in the *Second Further Notice*, the rule we adopt herein applies to the devices covered by section 303(u) of the Act<sup>162</sup>—apparatus, including pre-installed applications, designed to receive or play back video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States and uses a picture screen of any size, as interpreted consistently with our precedent in the *IP Closed Captioning*

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<sup>158</sup> See AT&T 2016 Comments at 5; CTA 2016 Comments at 8; NCTA 2016 Comments at 5-6; TIA 2016 Comments at 1; AT&T 2016 Reply at 5; CTA 2016 Reply at 7; EchoStar 2016 Reply at 1-2; Letter from Deborah Broderson, Communications Regulatory Counsel & Director, EchoStar, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-108, at 1 (May 4, 2016) (EchoStar May 4, 2016 *Ex Parte*); Letter from Jennifer A. Manner, Senior Vice President, Regulatory Affairs, EchoStar, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-108, at 1 (Sept. 20, 2016).

<sup>159</sup> See 47 CFR § 79.109.

<sup>160</sup> See Consumer Groups 2016 Reply at 4 (“While Consumer Groups and [the Rehabilitation Engineering Research Center on Technology for the Deaf and Hard of Hearing, Gallaudet University] appreciate the efforts of industry to make closed captioning more accessible, the record does not indicate specific steps taken by industry that negate the need for the proposed rule regarding the accessibility of settings, as requested in the Second Further Notice. Instead, industry comments assert that general progress is being made. . . .”) (footnotes omitted); *Second Report and Order and Second Further Notice*, 30 FCC Rcd at 13935, para. 38. See also CTA July 18, 2016 *Ex Parte* at 1-2 (describing how some members are planning to make closed captioning display settings accessible, but noting “that these are works in progress that will not be complete by the December 20, 2016 implementation deadline for the existing user interface rules”).

<sup>161</sup> See Consumer Groups 2013 Comments at 8. See also Consumer Groups 2016 Reply at 4 (“These unsupported assurances stand in stark contrast to the experiences of Consumer Groups, which indicate that closed captioning settings remain difficult to access and, in many instances, are becoming less accessible.”) (footnote omitted). We thus reject the argument of CTA that rather than adopt new requirements, the Commission “should encourage industry to continue to respond to user experiences, research and feedback to offer improved user interfaces that benefit all consumers, including those with disabilities.” CTA 2023 Comments at 11-12.

<sup>162</sup> *Second Report and Order and Second Further Notice*, 30 FCC Rcd at 13935, para. 39.

*Order*.<sup>163</sup> Consistent with our precedent,<sup>164</sup> the following are not subject to the requirements adopted herein: (1) apparatus exempt from the requirement to be equipped with built-in closed caption decoder circuitry or capability designed to display closed-captioned video programming (e.g., display-only video monitors, and professional or commercial equipment);<sup>165</sup> (2) equipment for which the requirement has been determined to be not achievable;<sup>166</sup> or technically feasible;<sup>167</sup> or (3) equipment for which the requirement has been waived (e.g., apparatus primarily designed for purposes other than receiving or playing back video programming).<sup>168</sup>

37. Consumer Groups agree that the rule should be applied broadly to the full range of devices covered by section 303(u) of the Act, which would “promote Congress’s goal of ensuring that closed captioning is available to consumers.”<sup>169</sup> AT&T and CTA, on the other hand, argue that the Commission’s authority with respect to the TDCA is limited to the accessibility of broadcast television receivers.<sup>170</sup> Contrary to the contention of these industry commenters, the Commission has authority under sections 303(u) and 330(b) of the Act to apply its new rules for consumer access to closed captioning display settings to apparatus beyond broadcast televisions. Although Congress’s focus at the time of enactment of the TDCA was on broadcast television-related technical standards,<sup>171</sup> that does not

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<sup>163</sup> 47 U.S.C. § 303(u)(1); 47 CFR § 79.103(a). See also *IP Closed Captioning Order*, 27 FCC Rcd at 839-43, paras. 93-96. In the *IP Closed Captioning Order*, the Commission defined “apparatus” to include “hardware (that is, physical devices such as set-top boxes, PCs, smartphones, and tablets) designed to receive or play back video programming transmitted simultaneously with sound and any integrated software (that is, software installed in the device by the manufacturer before sale or that the manufacturer requires the consumer to install after sale).” *Id.* at 839-40, para. 93. Accordingly, contrary to ITI’s suggestion, see ITI 2023 Comments at 1, the scope of covered applications is entirely consistent with Commission precedent. See NCTA 2023 Comments at 7, n.18. See also CTA 2023 Comments at 12 (asserting that smart TV manufacturers and cable set-top box providers cannot control the interface of internet video service applications, regardless of whether they are pre-installed). In subsequent CVAA orders, the Commission consistently interpreted the term apparatus to include only applications that are pre-installed by the device manufacturer or that the manufacturer requires the consumer to install after sale. See, e.g., *Report and Order and Further Notice*, 28 FCC at 17354, 17361-62, paras. 39, 51. However, the Commission stated that it “will continue to monitor the development of accessible technology in this area and will reevaluate whether we should require the accessibility of consumer-installed MVPD applications at a later date if it appears necessary to ensure access to MVPD programming” by persons with disabilities. *Id.* at 17362, n.190. Although at that time the Commission observed that there are technical challenges in ensuring that consumer-installed MVPD applications comply with accessible user interface requirements, we recognize that the industry is constantly evolving. Accordingly, if we find that MVPDs are not making their applications accessible, the Commission will consider initiating a rulemaking to determine whether we should require it. In the absence of such a rulemaking, we do not at this time require MVPDs to provide software updates that they would not otherwise provide. See CTA 2022 Comments at 12; NCTA 2022 Reply at 4 n.11.

<sup>164</sup> See *IP Closed Captioning Order*, 27 FCC Rcd at 849-50, paras. 106-08; 47 U.S.C. § 303(u)(2); 47 CFR § 79.103(b). See also *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Order on Reconsideration and Further Notice of Proposed Rulemaking, MB Docket No. 11-154, 28 FCC Rcd 8785, 8788-93, paras. 5-15 (2013).

<sup>165</sup> See 47 CFR § 79.103(b)(1)-(2).

<sup>166</sup> See *id.* § 79.103(b)(3). See also *infra* section III.B.4 (Waivers and Exemptions).

<sup>167</sup> See *id.* § 79.103(a), (b)(3). See also *infra* section III.B.4 (Waivers and Exemptions).

<sup>168</sup> See 47 CFR § 79.103(b)(4).

<sup>169</sup> See Consumer Groups 2016 Comments at 7, 10. See also OPIL 2024 Comments.

<sup>170</sup> See AT&T 2016 Comments at 1-2; CTA 2016 Comments at 3; CTA June 30, 2022 *Ex Parte* at 2-3.

<sup>171</sup> See, e.g., AT&T 2016 Comments at 1-2; CTA 2016 Comments at 4-5; ACA Connects – America’s Communications Association Comments, MB Docket No. 12-108, at 7 (Feb. 17, 2022).

preclude a broader interpretation today.<sup>172</sup> Section 303(u)(1), by its terms, applies broadly to all “apparatus designed to receive or play back video programming transmitted simultaneously with sound.”<sup>173</sup> Although this phrase is not defined in the statute, Congress had amended the original language in 303(u), which had referred to “apparatus designed to receive television pictures broadcast simultaneously with sound.”<sup>174</sup> The Commission has interpreted section 303(u)(1)’s scope broadly.<sup>175</sup> The Commission thus may reasonably interpret section 303(u) as extending beyond broadcast televisions. Because section 330(b), in pertinent part, simply refers to the “apparatus described in section 303(u),”<sup>176</sup> our analysis of the scope of section 330(b) mirrors our interpretation of the scope of section 303(u).

38. *Covered Entities.* Both manufacturers of covered apparatus and MVPDs are responsible for compliance with the rule we adopt herein. The Commission sought comment in the *Second Further Notice* on whether both manufacturers and MVPDs should be obligated to make it easier for consumers to locate and control closed captioning display settings.<sup>177</sup> Consumer Groups argue that manufacturers and MVPDs should share responsibility in ensuring that consumers can locate and use display settings, particularly because MVPDs have ongoing relationships with subscribers who are likely to turn to them to resolve any issues with accessibility features.<sup>178</sup> We are persuaded by Consumer Groups that there are significant benefits of imposing these requirements on MVPDs as well as manufacturers, including that a consumer who is viewing video programming via an MVPD service would be more likely to contact the MVPD for assistance with user display settings.<sup>179</sup> Industry commenters argue that the TDCA cannot be applied to MVPDs because the Commission’s prior rulemakings implementing the TDCA imposed requirements only on manufacturers.<sup>180</sup> We disagree. Whereas the initial order in this proceeding applied certain rules to navigation devices, which were the responsibility of MVPDs, and certain rules to apparatus, which were the responsibility of manufacturers, the overall result was that both manufacturers and MVPDs were subject to the requirements.<sup>181</sup> Similarly in this Order, we hold MVPDs responsible for the apparatus they distribute to consumers, and manufacturers responsible for the apparatus they manufacture.

39. While the joint proposal submitted in March 2024 was focused on the cable context, it indicated that “the proposals could also serve as a model for other MVPDs and equipment

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<sup>172</sup> *CEA v. FCC*, 347 F.3d at 299 (indication in legislative history that Congress was particularly focused on a given problem does not require broader enacted statutory language to be read as narrowly limited to that issue).

<sup>173</sup> 47 U.S.C. § 303(u)(1).

<sup>174</sup> Compare 47 U.S.C. § 303(u) (1990) (applying to “apparatus designed to receive television pictures broadcast simultaneously with sound”) with 47 U.S.C. § 303(u)(1) (2011) (applying to “apparatus designed to receive or play back video programming transmitted simultaneously with sound”).

<sup>175</sup> See *IP Closed Captioning Order*, 27 FCC Rcd at 839-42, para. 93-94.

<sup>176</sup> 47 U.S.C. § 330(b).

<sup>177</sup> *Second Report and Order and Second Further Notice*, 30 FCC Rcd at 13935, para. 39 (“For example, where closed captioning display settings are accessed through the television or set-top box, would the manufacturer of such device be solely responsible for ensuring that the display settings are readily accessible? Or would MVPDs also have responsibility with respect to ensuring their customers are able to readily access closed captioning display settings?”).

<sup>178</sup> See Consumer Groups 2016 Comments at 11. See also Consumer Groups 2022 Comments at 11; Consumer Groups 2022 Reply at 9; OPIL 2024 Comments.

<sup>179</sup> See Consumer Groups 2016 Comments at 11 (indicating that the manufacturer “would be difficult to identify and contact”).

<sup>180</sup> See AT&T 2016 Comments at 4-5; ACA 2016 Reply at 3-4, 5-6; ACA Connects 2022 Comments at 2-5, 8-9.

<sup>181</sup> See *Report and Order and Further Notice*, 28 FCC Rcd at 17331, para. 2 (finding that section 205 of the CVAA applies to “navigation devices,” which are the devices consumers use to access MVPD services, whereas section 204 of the CVAA applies to other digital apparatus).

manufacturers.”<sup>182</sup> We believe that it is appropriate and reasonable to adopt the joint proposal to apply to all covered entities. The Media Bureau specifically sought comment on whether the joint proposal should “apply broadly to the devices covered by section 303(u) of the Communications Act of 1934, as amended, and to both manufacturers of covered apparatus and MVPDs.”<sup>183</sup> In response, CTA argued that the Commission “should not hold manufacturers responsible for aspects of the complex video ecosystem that they do not control and over which they do not have sufficient leverage to require compliance with regulatory obligations.”<sup>184</sup> We agree, and we note that the rules we adopt today hold manufacturers responsible for apparatus they manufacture, including pre-installed applications, and MVPDs responsible for apparatus they provide to their customers. We agree with Consumer Groups that “just because responsibilities need to be coordinated among various video programming participants is no reason for these responsibilities not to be mandated and fulfilled.”<sup>185</sup>

40. We agree with Consumer Groups that we have the authority to apply the rules we adopt today to MVPDs, as well as manufacturers.<sup>186</sup> Sections 303(u) and 330(b) of the Act operate in tandem. Under section 303(u), the Commission establishes requirements for covered apparatus to be equipped with closed captioning, audio description, and emergency information capability. The first sentence of section 330(b) of the Act, in turn, states that “[n]o person shall ship in interstate commerce, manufacture, assemble, or import from any foreign country into the United States” any apparatus that fails to satisfy the requirements adopted pursuant to section 303(u) of the Act.<sup>187</sup> In other words, the duty to meet the apparatus requirements adopted under section 303(u) applies to any person engaging in the activities identified in section 330(b). MVPDs regularly “ship in interstate commerce” or “import . . . into the United States” the set-top boxes that they distribute to customers.<sup>188</sup> In this respect, the requirements adopted under section 303(u)(1)(A) relating to closed captioning capability flow through to MVPDs by restricting the devices they can ship or import for distribution to their customers. We therefore conclude that, pursuant to the express terms of section 330(b), which states that “no person shall” engage in the specified activities, we will apply our new rule implementing sections 303(u) and 330(b) of the Act to MVPDs for the purpose of proscribing the actions enumerated in the first sentence of section 330(b).<sup>189</sup>

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<sup>182</sup> NCTA/Consumer Groups Mar. 14, 2024 *Ex Parte* at 1, n.3.

<sup>183</sup> 2024 *Caption Display Settings Public Notice* at 2 (internal footnote omitted).

<sup>184</sup> CTA 2024 Comments at 3 (footnote omitted).

<sup>185</sup> Consumer Groups 2024 Reply at 4. Consumer Groups state further that the Commission previously apportioned responsibilities among some of the same entities when it adopted the IP closed captioning requirements in 2012, and the television closed captioning quality requirements in 2016. *Id.*

<sup>186</sup> *See* Consumer Groups 2016 Reply at 3-4 (stating that AT&T provides no evidence that entities other than manufacturers are precluded from the scope of the TDCA and that, “[t]o the contrary, the TDCA itself explicitly implicates non-manufacturers”).

<sup>187</sup> 47 U.S.C. §§ 303(u), 330(b).

<sup>188</sup> *See, e.g.*, Downloadable Security Technical Advisory Committee, Final Report of the DSTAC, at 31 (2015), available at <https://www.fcc.gov/document/media-bureau-seeks-comment-dstac-report> App. C (“There is a competitive multi-vendor set-top box market for MVPD-purchased devices in the US, including TiVo as a supplier of set-top boxes to cable operators that depends on CableCARD.”).

<sup>189</sup> This approach is consistent with our existing apparatus rules governing the accessibility of video programming, which apply to MVPDs to the extent that they engage in the enumerated activities. *See, e.g.*, 47 CFR § 79.103(a) (applying to “all digital apparatus designed to receive or play back video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States and uses a picture screen of any size,” and not containing any exemption for MVPDs that manufacture or import apparatus subject to the rule).

41. Although the statute defines the term “interstate commerce,”<sup>190</sup> it does not define the phrase “ship in interstate commerce,” or provide any guidance on how that phrase should be applied to specific types of shipments. We therefore interpret this phrase in a way that best meets the statutory objectives of section 330(b) and section 303(u).<sup>191</sup> We believe it is reasonable to interpret the phrase to apply to the entire transportation path from the point at which the goods leave the seller’s warehouse to the point at which the buyer, such as an MVPD, delivers the goods to its own customers, in this context an MVPD’s subscribers. Thus, we conclude that the term “interstate commerce” encompasses “commerce” in apparatus deployed by MVPDs to their subscribers, and we interpret the phrase “no person shall ship in interstate commerce” to proscribe an MVPD’s deployment of noncompliant set-top boxes or other covered apparatus to subscribers’ premises after the applicable compliance deadline, where covered apparatus originated from out of state or traversed state lines.

42. Our conclusion is supported by cases in which the phrase “in interstate commerce” has been interpreted to refer to the entire stream or flow of commerce with respect to a product.<sup>192</sup> Those cases hold that the flow of interstate commerce does not end once an intrastate shipment begins where a seller transporting goods intrastate “made interstate sales or was ‘otherwise directly involved in national markets’ or . . . the ‘local market . . . is an integral part of the interstate market in other component commodities or products.’”<sup>193</sup>

43. In the circumstances at issue here, MVPDs are an active link in the continuous flow of equipment to their subscribers. They typically order equipment from manufacturers that is shipped interstate for deployment to their subscribers. Thus, an MVPD is the pivotal intermediary between the

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<sup>190</sup> Section 330(d) of the Act defines the term “interstate commerce,” to mean: “(A) commerce between any State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States and any place outside thereof which is within the United States, (B) commerce between points in the same State, the District of Columbia, the Commonwealth of Puerto Rico, or possession of the United States but through any place outside thereof, or (C) commerce wholly within the District of Columbia or any possession of the United States.” 47 U.S.C. § 330(d).

<sup>191</sup> *UC Health v. NLRB*, 803 F.3d 669, 675 (D.C. Cir. 2015) (agency interpretation of ambiguous statutory provision is given deference “if it is reasonable and consistent with the statute’s purpose”) (citing *Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 643 (D.C. Cir. 2000)).

<sup>192</sup> See, e.g., *United States v. American Building Maintenance Industries*, 422 U.S. 271, 276 (1975) (defining “in commerce” as related to the “flow” and defining the “flow” to include “the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer”) (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974)); cf. *Jones v. United States*, 529 U.S. 848, 855 (2000) (phrase “used in commerce” “is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce”).

<sup>193</sup> *Gulf Oil Corp.*, 419 U.S. at 195-96 (cited in *Able Sales v. CAPR*, 406 F.3d56, 64 (1st Cir. 2005)). We recognize that specific outcomes under a flow of commerce analysis can vary somewhat in different decisions and in different contexts. Compare, e.g., *Able Sales v. CAPR*, 406 F.3d at 65 (finding that the flow of commerce was interrupted by the sale of a product to an independent distributor); *Shew v. Southland*, 370 F.2d 376, 380 (5th Cir. 1966) (finding “a continuous movement in interstate commerce” where commodities “originate outside of the state, are transported” to Texas “and then distributed” within Texas “sometimes the same day or the next day, to points in Texas, pursuant to pre-existing orders”) with, e.g., *Hardrives v. East Coast Asphalt*, 329 F.2d 868, 870 (5th Cir. 1964) (finding that the action of contractors was “in commerce” where they purchased a product imported from outside the country and sold it to the appellants within the same state as the contractors); *Roberts v. Levine*, 921 F.2d 804, 814 (8th Cir. 1990) (finding that although the company at issue “does not know the exact quantity of [the relevant goods] that each individual customer will receive when it ships” them, “it makes these shipments on the basis of past demand and estimated future need” and notwithstanding the temporary storage of such goods before further transportation in the same state, the “intrastate transportation of urea was one leg of an interstate journey”). In interpreting the ambiguous language of section 330 of the Act, we need not, and do not, seek to replicate the specific approach taken in any of those other regulatory contexts, but draw upon principles from that precedent that are useful in carrying out the goals and purposes of the Act.

apparatus manufacturer and the MVPD's subscribers, essentially making choices on behalf of its subscribers. This is materially different from situations in which a manufacturer sells to a wholesaler, the wholesaler sells to multiple retailers, and consumers shop at retailers and decide what to buy. Under these circumstances, we find that MVPDs engage in interstate commerce when they procure equipment across state lines and deploy it to subscribers to enable them to view their programming.

44. This conclusion is reinforced by the statutory context. The statute is intended to protect consumers with disabilities by ensuring that equipment that the MVPD selects on their behalf serves their needs. In this context, it makes sense to view all of the links in the chain as a continuous stream of commerce ultimately destined for the MVPD subscriber.<sup>194</sup> Interpreting the phrase “ship in interstate commerce” to apply to the MVPD's deployment of apparatus to subscribers' premises best serves the statutory purpose of ensuring that all consumers who are deaf and hard of hearing should have equal access to television programming. In light of this statutory purpose, and against the backdrop of judicial precedent interpreting the phrase “in interstate commerce,” we think it is reasonable to conclude that an MVPD that procures covered apparatus from a manufacturer located in another state or foreign country and deploys it to subscribers is shipping apparatus in interstate commerce.<sup>195</sup> Accordingly, we interpret the phrase “no person shall ship in interstate commerce” as prohibiting MVPDs from deploying non-compliant apparatus to subscribers after the applicable compliance deadline. Further, from a policy perspective, we agree with Consumer Groups that MVPDs play an integral role in ensuring that closed captioning service is available because, unlike manufacturers, they have an ongoing relationship with consumers.<sup>196</sup> In addition, to the extent any MVPD manufactures covered apparatus, we note that section 330(b) applies to such MVPDs for that reason alone. For all of these reasons, the statutory language and policy objectives both support application of the rule to MVPDs.

#### 4. Waivers and Exemptions

45. *Achievability.* Because we derive our authority for the rule we adopt herein from section 303(u)(1) of the Act, we find that the requirement for readily accessible caption display settings for covered apparatus that use a picture screen less than 13 inches in size is subject to the achievability provision set forth in section 303(u)(2)(A). Section 303(u)(2)(A) of the Act, as amended by section 203 of the CVAA, specifies that apparatus described in section 303(u)(1) that use a picture screen that is less than 13 inches in size must meet the requirements of that section only if such requirements “are achievable (as defined in section 617 of this title).”<sup>197</sup> In the *Second Further Notice*, the Commission sought comment on whether the provisions related to achievability in section 303(u) of the Act apply to

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<sup>194</sup> The legislative history does not discuss the definition of “interstate commerce.” It appears that congressional deliberations were informed by the 1960 legal opinion of then FCC's General Counsel, John L. Fitzgerald, which observed: “The congressional power under the commerce clause is not confined simply to the regulation of commerce among the states but extends to those activities intrastate which so affect interstate commerce as to make regulation of them proper means to the attainment of a legitimate end.” See *All Channel Television Receivers and Demixture*, Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives, on HR. 8031 et al. at 124-25, 128 (Mar. 5, 6, 7, and 9, 1962) (including the 1960 Legal Opinion of FCC General Counsel John L. Fitzgerald for the record). See also H. Rep. No. 87-1559 at 6 (Apr. 9, 1962) (discussing the constitutionality of the All Channel Television Receivers Act and noting opinions provided by the FCC's General Counsel and the Department of Justice); S. Rep. No. 87-1526 at 5 (May 24, 1962) (same).

<sup>195</sup> The MVPD is shipping apparatus “within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer.” *Gulf Oil Corp.*, 419 U.S. at 195. See also FCC General Counsel Opinion at 128 (“The congressional power under the commerce clause is not confined simply to the regulation of commerce among the states but extends to those activities intrastate which so affect interstate commerce as to make regulation of them proper means to the attainment of a legitimate end.”).

<sup>196</sup> See Consumer Groups 2016 Comments at 11; Consumer Groups 2016 Reply at 3-4.

<sup>197</sup> 47 U.S.C. § 303(u)(2)(A).

the requirement that consumers be able to readily access user display settings for closed captioning.<sup>198</sup> Industry commenters argued that we should allow covered entities to seek an exemption on the grounds of achievability,<sup>199</sup> while Consumer Groups argued that it is unnecessary to adopt an achievability exemption because compliance with the rule will involve only a minor software modification.<sup>200</sup> We find that covered apparatus that use a picture screen less than 13 inches in size must meet the requirements of section 303(u)(1), which requires covered apparatus to be equipped with built-in closed caption decoder circuitry or capability designed to display closed captioned video programming, only if such requirements “are achievable.”<sup>201</sup>

46. The Act defines “achievable” to mean “with reasonable effort or expense,” as determined by the Commission.<sup>202</sup> The Commission will determine whether compliance is “achievable” on a case-by-case basis, consistent with the approach taken by the Commission when implementing section 203 of the CVAA.<sup>203</sup> In particular, the Commission will consider the following factors in determining whether compliance with the requirements adopted herein is achievable in particular circumstances: (1) the nature and cost of the steps needed to meet the requirements of this section with respect to the specific equipment or service in question; (2) the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies; (3) the type of operations of the manufacturer or provider; and (4) the extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.<sup>204</sup> If a covered entity believes that it is not achievable for it to comply with the rule we adopt herein, it may either (i) seek a determination from the Commission that compliance with the rule is not achievable before manufacturing or importing the apparatus; or (ii) raise as a defense to a complaint or Commission enforcement action that a particular apparatus does not comply with the rules because compliance was not achievable.<sup>205</sup> If a party seeks a determination of achievability before

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<sup>198</sup> See *Second Report and Order and Second Further Notice*, 30 FCC Rcd at 13935, para. 39.

<sup>199</sup> See CTA 2016 Comments at 9; CTA 2016 Reply at 9; EchoStar 2016 Reply at 1, 3. See also CTA 2022 Comments at 4 (stating that “any such regulations should include an achievability standard”), 12; CTA 2023 Comments at 13.

<sup>200</sup> See Consumer Groups 2016 Comments at 1. *But see id.* at 11 (“If the Commission adopts technical feasibility or achievability exceptions, it should adopt the same exceptions discussed in the IP Closed Captioning Order.”); NCTA/Consumer Groups Mar. 14, 2024 *Ex Parte* at 2 (“Each of the above proposals is subject to being achievable”). See also *infra* section III.B.5 (Compliance Deadline) (explaining that compliance with the rule may involve more than a simple software update).

<sup>201</sup> 47 U.S.C. § 303(u)(2)(A).

<sup>202</sup> See 47 U.S.C. § 617(g). See also 47 CFR § 79.103(b)(3)(ii).

<sup>203</sup> See 47 U.S.C. § 617(g). The Commission will rely on the existing provision in section 79.103(b)(3) of its rules. See 47 CFR § 79.103(b)(3). See also *IP Closed Captioning Order*, 27 FCC Rcd at 848-49, paras. 104-105; *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*, MB Docket Nos. 12-107 and 11-43, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 4871, 4918-19, paras. 67-68 (2013) (*Emergency Information/Video Description Order*).

<sup>204</sup> 47 CFR § 79.103(b)(3)(ii). See also Consumer Groups 2022 Reply at 10 (“Given the many years that the industry has had to implement the simple functionality that would be required by this rule, any grants of waiver, including those based on achievability, should be recognized only upon the detailed presentation of specific data and information demonstrating technical infeasibility or other unusual circumstances – none of which are suggested by the examples raised by industry commenters.”).

<sup>205</sup> See *IP Closed Captioning Order*, 27 FCC Rcd at 848-49, para. 105; *Emergency Information/Video Description Order*, 28 FCC Rcd at 4918, para. 68.



manufacturing or importing the apparatus, it should follow the procedures for an informal request for Commission action pursuant to section 1.41 of our rules.<sup>206</sup>

47. *Technical feasibility.* In the *Second Further Notice*, we also sought comment on whether the technical feasibility exemption in section 303(u) of the Act applies to the requirement that consumers be able to readily access user display settings for closed captioning.<sup>207</sup> As discussed above,<sup>208</sup> we find that it does. In particular, the requirements set forth in section 303(u) of the Act, including the requirement that covered apparatus be equipped with built-in closed caption decoder circuitry or capability designed to display closed captioned video programming, apply only “if technically feasible.”<sup>209</sup> According to industry commenters, the Commission should permit covered entities to seek an exemption based on technical infeasibility.<sup>210</sup> Consumer Groups, on the other hand, contend that the Commission should not adopt a technical feasibility exemption because compliance can be achieved through a simple technical modification, making such an exemption unnecessary.<sup>211</sup> However, section 303(u) clearly specifies that compliance is required only “if technically feasible.”

48. We interpret the term “technically feasible” consistent with Commission precedent. Notably, to demonstrate that compliance is technically infeasible, covered entities must show that changes to the design of the apparatus to make closed captioning display settings readily accessible are not physically or technically possible, and not just that they are “merely difficult.”<sup>212</sup> We permit parties to raise technical infeasibility as a defense when faced with a complaint alleging a violation of the apparatus requirements adopted herein, or to file a request for a ruling under section 1.41 of the Commission’s rules as to technical infeasibility before manufacturing or importing the product.<sup>213</sup>

49. *Legacy navigation devices.* We decline to adopt a blanket exemption for “legacy navigation devices that are provided by small and medium-sized MVPDs,” as ACA Connects advocates.<sup>214</sup> To the extent ACA Connects is concerned about devices that were manufactured prior to the compliance deadline, any such concern should be alleviated by our decision not to apply the requirements to such apparatus.<sup>215</sup> It appears that ACA Connects’ concern applies to such previously manufactured devices,<sup>216</sup> but to the extent the concern extends to some other category of devices, we reiterate that the waiver and exemption processes adopted herein are available to MVPDs on a case-by-

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<sup>206</sup> See 47 CFR § 1.41. See, e.g., *IP Closed Captioning Order*, 27 FCC Rcd at 849, n.418.

<sup>207</sup> See *Second Report and Order and Second Further Notice*, 30 FCC Rcd at 13935, para. 39.

<sup>208</sup> See *supra* para. 19.

<sup>209</sup> 47 U.S.C. § 303(u).

<sup>210</sup> See CTA 2016 Comments at 9; TIA 2016 Comments at 2; CTA 2016 Reply at 9; EchoStar 2016 Reply at 1, 3; NCTA 2016 Reply at 4; CTA 2022 Comments at 12; CTA 2023 Comments at 13.

<sup>211</sup> See Consumer Groups 2016 Comments at 1; Consumer Groups 2016 Reply at 7. *But see* NCTA/Consumer Groups Mar. 14, 2024 *Ex Parte* at 2 (“Each of the above proposals is subject to being . . . technically feasible.”).

<sup>212</sup> See *IP Closed Captioning Order*, 27 FCC Rcd at 844, para. 98; *Emergency Information/Video Description Order*, 28 FCC Rcd at 4917-18, para. 66.

<sup>213</sup> See 47 CFR § 1.41 (permitting parties to file informal requests for Commission action, based on a clear and concise showing of the facts relied on and relief sought, among other requirements); *IP Closed Captioning Order*, 27 FCC Rcd at 845, para. 98; *Emergency Information/Video Description Order*, 28 FCC Rcd at 4917-18, para. 66.

<sup>214</sup> See ACA Connects 2022 Reply at 3, 8-11. ACA Connects defines “legacy navigation device(s)” as “any set-top box or navigation device that MVPDs sell or lease to their subscribers that provides access to the MVPDs’ ‘closed systems’ by decrypting MVPD video programming streams for display on television receivers.” See *id.* at 3, n.4.

<sup>215</sup> See *infra* section III.B.5 (Compliance Deadline).

<sup>216</sup> See ACA Connects 2022 Reply at 9 (“Changing menu hierarchies with legacy navigation devices would entail a combination of software guide upgrades and firmware upgrades – which on devices that are many years old, are more technically and financially challenging to implement, and in some cases, just infeasible.”).

case basis. Because the record does not indicate that an MVPD would need to avail itself of an exemption or extension for every “legacy navigation device,” we find that the availability of case-by-case waivers or exemptions is a preferable solution to an overbroad blanket exemption.

50. *Streamlined process for small and medium-sized providers.* ACA Connects asks the Commission to adopt a streamlined waiver process for small and medium-sized providers, enabling them to obtain a waiver without the use of any external resources.<sup>217</sup> We find that the existing waiver and exemption processes are sufficiently flexible to be workable for small and mid-sized providers. Providers have the flexibility to raise achievability and technical feasibility either prior to manufacture or in response to a complaint. Adopting a different process here for small and medium-sized providers would be inconsistent with prior orders adopting the same achievability and technical feasibility provisions.<sup>218</sup> ACA Connects has failed to justify why the same process that has been used in prior proceedings implementing the same provisions should be modified here.

## 5. Compliance Deadline

51. We adopt a compliance deadline of two years after publication of the *Third Report and Order* in the *Federal Register*. In the *Second Further Notice*, we inquired about the appropriate time frame for requiring covered entities to ensure that consumers are able to readily access user display settings for closed captioning.<sup>219</sup> According to Consumer Groups, “[i]ncluding user display settings in the first level of a menu would require only a small software modification and would not require any hardware design changes,” and thus, an extended period to come into compliance is unnecessary.<sup>220</sup> CTA disputes this contention, arguing that Consumer Groups “fail[] to acknowledge the complexity of implementing rules regarding closed captioning display settings.”<sup>221</sup> NCTA, TIA, AT&T, and EchoStar request at least two years to comply,<sup>222</sup> while CTA and ACA Connects assert that three years is a reasonable implementation period.<sup>223</sup> Consumer Groups initially sought a one year compliance deadline,

<sup>217</sup> *Id.* at 15.

<sup>218</sup> *See, e.g., IP Closed Captioning Order*, 27 FCC Rcd at 848, para. 103 (referencing the “flexible, case-by-case approach” to waivers).

<sup>219</sup> *Second Report and Order and Second Further Notice*, 30 FCC Rcd at 13935, para. 40. In particular, we sought comment on Consumer Groups’ request that the compliance deadline coincide with the December 20, 2016 deadline for the requirement to provide an accessible closed captioning activation mechanism pursuant to sections 204 and 205 of the CVAA. *Id.* Given the passage of time, Consumer Groups’ proposal to use that deadline has become moot.

<sup>220</sup> Consumer Groups 2016 Comments at 12. *See also* Consumer Groups 2016 Reply at 5-7 (“The proposed rule here, however, would not require a ‘new product,’ but rather only a small software modification to a product that already exists or is currently being developed.”); Consumer Groups 2022 Reply at 9-10.

<sup>221</sup> CTA 2016 Reply at 8. *See also* AT&T 2016 Reply at 5; EchoStar 2016 Reply at 3; NCTA 2016 Reply at 4. Providing greater specificity, EchoStar explains that making display settings available in the top level of a menu would require EchoStar to rewrite software for each set-top box remote control based on its current design and would require EchoStar to rewrite both the factory code and production code for all types of set-top boxes that it manufactures. *See* EchoStar May 4, 2016 *Ex Parte* at 2. As EchoStar explains, “[t]his factory code controls the default accessibility features for the set-top box which the consumer can customize as part of the installation process. Once the set-top box is connected to a properly aimed satellite dish, [a] production code specific to each set-top box model is downloaded and used in normal operation.” *Id.*

<sup>222</sup> *See* AT&T 2016 Comments at 2, 5-6; TIA 2016 Comments at 2; AT&T 2016 Reply at 2, 6; EchoStar 2016 Reply at 1-2; NCTA 2016 Reply at 4; NCTA Sept. 19, 2016 *Ex Parte* at 2-3; NCTA 2022 Reply at 4, n.11.

<sup>223</sup> *See* CTA 2016 Comments at 9; CTA 2016 Reply at 8; CTA 2022 Comments at 11; CTA 2024 Comments at 8-9, n.17 (also requesting a minimum of five years for any consistency and persistence requirement, with a built-in opportunity for an extension of time). *See also* CTA 2022 Comments at 4 (“any such regulations should . . . provide for a sufficient transition period”); CTA 2022 Reply at 7; ACA Connects 2022 Reply at 14 (agreeing with a three-

(continued....)

but in the comment cycle following the March 2024 joint proposal they requested two years.<sup>224</sup>

52. Based on our review of the record, we conclude that a compliance deadline of two years after publication of the *Third Report and Order* in the *Federal Register* is reasonable, though we encourage covered manufacturers and MVPDs to offer readily accessible closed captioning display settings as soon as it is technically feasible for them to do so. Consistent with the initial order in this proceeding, the requirements adopted herein will not apply to devices manufactured prior to the deadline.<sup>225</sup> MVPDs should, however, “provide new equipment upon request to any customer who is deaf or hard of hearing,” as stated in the March 2024 joint proposal.<sup>226</sup> Based on the record, it appears that the requirement to make closed captioning display settings readily accessible may involve more than a “small software modification.” Even software changes may involve a more substantial design and development process than a simple update.<sup>227</sup>

53. When the Commission adopted a rule requiring manufacturers of apparatus subject to section 79.105 of the Commission’s rules to provide a mechanism that is simple and easy to use for activating the secondary audio stream for audible emergency information, it gave covered entities approximately 17 months to comply.<sup>228</sup> In that proceeding, we similarly acknowledged that covered entities “will need some time for the design, testing, and implementation of a simple and easy to use activation mechanism for the secondary audio stream on covered apparatus,” and concluded that the time granted was sufficient to achieve these steps.<sup>229</sup> In practice, the deadline proved sufficient, with no waiver requests filed pertaining to the requirement contained in section 79.105. Likewise, we believe that a 24-month period will provide covered entities with sufficient time to achieve the steps necessary to

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year implementation period); CTA 2023 Comments at 12-13 (stating that while three years should apply generally, a consistency and persistence requirement is more complicated and would necessitate a minimum of five years).

<sup>224</sup> Consumer Groups 2022 Comments at v, 11; NCTA 2023 Comments at 5-6, n.15 (stating that a one year compliance deadline would not be sufficient); Consumer Groups 2024 Reply at 7-8.

<sup>225</sup> See *Report and Order and Further Notice*, 28 FCC Rcd at 17401, para. 113 (“We clarify that the compliance deadlines adopted herein refer only to the date of manufacture, consistent with the *IP Closed Captioning Reconsideration Order* and the *Emergency Information/Video Description Order*.”) (footnote omitted); Appx. A; CTA 2022 Comments at 12; NCTA/Consumer Groups Mar. 14, 2024 *Ex Parte* at 2. ACA maintains that any obligation placed on MVPDs should apply only “to navigation devices purchased after a certain future date,” and that our rule should not prohibit the use of existing inventory after the compliance deadline. See Letter from Barbara Esbin, Counsel to ACA, to Marlene H. Dortch, Secretary, FCC, at 6 (Oct. 25, 2016) (ACA Oct. 25, 2016 *Ex Parte*). By declining to apply the requirements to apparatus manufactured prior to the deadline, we will ensure that MVPDs are able to utilize their existing inventory. See NCTA 2023 Comments at 5-6.

<sup>226</sup> NCTA/Consumer Groups Mar. 14, 2024 *Ex Parte* at 2.

<sup>227</sup> See, e.g., EchoStar May 4, 2016 *Ex Parte* at 2. See also CTA 2022 Comments at 5-6 (providing “two examples of the standards work that is required to ensure that closed captioning is available on ‘apparatus’”).

<sup>228</sup> See *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*, Second Report and Order and Second Further Notice of Proposed Rulemaking, MB Docket No. 12-107, 30 FCC Rcd 5186, 5204-05, paras. 34-36 (2015) (*Emergency Information Second Report and Order*). The rules adopted in the *Emergency Information Second Report and Order* were published in the *Federal Register* on July 10, 2015, and the compliance deadline for that requirement was December 20, 2016. See 47 CFR § 79.105(d); *Notice of Effective Date of Second Accessible Emergency Information Order and Announcement of Comment Deadlines for Accompanying Second Further Notice*, Public Notice, MB Docket No. 12-107, 30 FCC Rcd 7245 (2015). Thus, covered entities were provided approximately 17 months from the date of *Federal Register* publication to be in compliance.

<sup>229</sup> See *Emergency Information Second Report and Order*, 30 FCC Rcd at 5205, para. 36.

comply with the rule adopted herein.<sup>230</sup>

54. We decline to adopt a later compliance deadline for certain mid-sized and smaller MVPDs, as ACA Connects requests,<sup>231</sup> because we find that such an approach is unnecessary and unworkable here. First, a longer deadline for smaller MVPDs is unnecessary because a compliance deadline based on the date of manufacture will ensure that MVPDs can utilize their existing inventory, and because MVPDs will not need to rely on their market power to compel manufacturers to comply since the rules explicitly apply to both entities. Second, a longer deadline for smaller MVPDs is unworkable because it would result in a situation in which provision of a given device that was manufactured after the deadline applicable to manufacturers, but before the deadline applicable to smaller MVPDs, would be a violation for the manufacturer but not the MVPD. We note additionally that an extended deadline for mid-sized and smaller MVPDs was justified when the Commission adopted multiple accessibility requirements in the initial *Report and Order*,<sup>232</sup> whereas here we adopt a single requirement for accessible closed captioning display settings. To the extent particular MVPDs find that they are unable to comply with the requirements adopted herein, the waiver or exemption procedures discussed above are available to them.<sup>233</sup>

#### IV. PROCEDURAL MATTERS

55. *Regulatory Flexibility Act Analysis.* The Regulatory Flexibility Act of 1980 (RFA), as amended,<sup>234</sup> requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”<sup>235</sup> Accordingly, we have prepared a Final Regulatory Flexibility Analysis (FRFA) concerning the possible impact of the rule changes contained in this *Third Report and Order* on small entities. The FRFA is set forth in Appendix B.

56. *Paperwork Reduction Act.* This document contains non-substantive modifications to an information collection requirement subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. They will be submitted to the Office of Management and Budget (OMB) for review as non-substantive changes. Because these changes are non-substantive, there is no new or modified information collection burden for small business concerns with fewer than 25 employees pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

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<sup>230</sup> Some industry commenters ask for an extended compliance timeline, arguing that this would be consistent with the timeframe needed for product development and our prior implementation of CVAA accessibility rules. *See supra* para. 51; CTA 2024 Comments at 8-9, n. 17; CTA 2023 Comments at 12-13; CTA 2022 Comments at 11-12; CTA 2016 Comments at 9; CTA 2016 Reply at 8. However, such longer timeframes were justified when the Commission adopted more extensive accessibility requirements than we are adopting in this Order. For example, we established a three-year compliance period in the initial *Report and Order* implementing sections 204 and 205 of the CVAA because there we adopted multiple requirements related to accessible program guides and menus and closed captioning and audio description activation mechanisms. *See generally Report and Order and Further Notice*, 28 FCC Rcd 17330. Additionally, while CTA suggests that a minimum of five years would be needed to comply with a “consistency and persistence” requirement, we find that the narrow approach we adopt to the “consistency and persistence” requirement does not justify a longer timeframe. *See* CTA 2024 Comments at 9, n.17; CTA 2023 Comments at 13. Industry commenters have failed to provide the details necessary to support a compliance timeline longer than two years here.

<sup>231</sup> *See* ACA Oct. 25, 2016 *Ex Parte* at 6 (requesting a longer compliance deadline for MVPDs with 400,000 or fewer subscribers); ACA Connects 2022 Reply at 3, 14-15 (same).

<sup>232</sup> *Report and Order and Further Notice*, 28 FCC at 17401, para. 114.

<sup>233</sup> *See supra* section III.B.4 (Waivers and Exemptions).

<sup>234</sup> 5 U.S.C. §§ 601–612. The RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>235</sup> 5 U.S.C. § 605(b).

57. *Congressional Review Act.* The Commission will submit this draft *Third Report and Order* to the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, for concurrence as to whether this rule is “major” or “non-major” under the Congressional Review Act, 5 U.S.C. § 804(2). The Commission will send a copy of the *Third Report and Order* in MB Docket No. 12-108 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

#### V. ORDERING CLAUSES

58. Accordingly, **IT IS ORDERED** that, pursuant to the Television Decoder Circuitry Act of 1990, Pub. L. No. 101-431, 104 Stat. 960, and the authority found in sections 4(i), 4(j), 303(r), 303(u), and 330(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 303(u), 330(b), this *Third Report and Order* **IS ADOPTED**, effective thirty (30) days after the date of publication in the *Federal Register*.

59. **IT IS FURTHER ORDERED** that, pursuant to the Television Decoder Circuitry Act of 1990, Pub. L. No. 101-431, 104 Stat. 960, and the authority found in sections 4(i), 4(j), 303(r), 303(u), and 330(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 303(u), 330(b), the Commission’s rules **ARE HEREBY AMENDED** as set forth in Appendix A, effective thirty (30) days after the date of publication in the *Federal Register*.

60. **IT IS FURTHER ORDERED** that the Commission’s Office of the Secretary **SHALL SEND** a copy of this *Third Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

61. **IT IS FURTHER ORDERED** that the Office of the Managing Director, Performance Program Management, **SHALL SEND** a copy of this *Third Report and Order* in MB Docket No. 12-108 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## Final Rules

For the reasons discussed above, the Federal Communications Commission amends Title 47 of the Code of Federal Regulations, Part 79, as follows:

## PART 79 – ACCESSIBILITY OF VIDEO PROGRAMMING

1. The authority for Part 79 continues to read as follows:

Authority: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 330, 544a, 613, 617.

2. Amend § 79.103 by revising the section title and adding paragraph (e) to read as follows:

**§ 79.103 Closed caption decoder and display requirements for apparatus.**

\* \* \* \* \*

(e) *Access to closed captioning display settings.* Manufacturers of apparatus subject to paragraph (a) of this section and multichannel video programming distributors must ensure that consumers are able to readily access user display settings for closed captioning on apparatus designed to receive or play back video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States and uses a picture screen of any size, if technically feasible, except that apparatus that use a picture screen of less than 13 inches in size must comply with this requirement only if doing so is achievable as defined in this section.

(1) In determining whether closed captioning display settings are readily accessible, the Commission will require compliance with the following factors:

(i) Proximity. This factor considers whether the closed captioning display settings are available in one area of the settings that is accessed via a means reasonably comparable to a button, key, or icon.

(ii) Discoverability. This factor requires manufacturers of apparatus subject to paragraph (a) of this section and multichannel video programming distributors to:

(A) Conduct usability testing to determine if caption display settings can be easily found by working with consumers and disability groups as part of the testing process;

(B) Demonstrate efforts to correct problems identified during the consumer testing process; and

(C) Train customer-facing employees on how to advise customers with regard to caption display settings.

(iii) Previewability. This factor considers whether viewers are able to preview the appearance of closed captions on programming on their screen while changing the closed captioning display settings.

(iv) Consistency and persistence. This factor requires covered entities to:

(A) With regard to their provision of navigation devices, expose closed caption display settings via an application programming interface (API) or similar method that an over-the-top application provider can use upon launch of their application on the device. The API or similar method must enable the

application provider to use the device-level caption settings for its own content, if it chooses, and covered entities must make information about this API or similar method available to application developers;

(B) With regard to providing their own video programming application hosted on third-party devices, utilize the operating system-level closed caption settings of the host device upon launch of the application on the device; and

(C) Ensure that host devices they manufacture make closed caption settings available to applications via an API or similar method.

(2) Compliance with this requirement is required no later than [insert date two years after *Federal Register* publication].

(3) Paragraph (e) of this section places no restrictions on the importing, shipping, or sale of apparatus that were manufactured before [insert date two years after *Federal Register* publication].

## APPENDIX B

### Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Second Further Notice of Proposed Rulemaking (Second Further Notice)* released in November 2015.<sup>2</sup> The Federal Communications Commission (Commission) sought written public comment on the proposals in the *Second Further Notice*, including comment on the IRFA. No comments were filed addressing the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>3</sup>

#### A. Need for, and Objectives of, the Final Rules

2. The *Third Report and Order* furthers the Commission's efforts to enable individuals with disabilities to access video programming through closed captioning. Closed captioning displays the audio portion of a television program as text on the screen, providing access to news, entertainment, and information for individuals who are deaf and hard of hearing. The Commission's implementation of the Television Decoder Circuitry Act of 1990 (TDCA)<sup>4</sup> and the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA)<sup>5</sup> has made significant progress in making video programming accessible to persons who are deaf and hard of hearing. However, many consumers continue to have difficulty accessing the closed captioning display settings on televisions and other video devices, which is a technical barrier that prevents the use and enjoyment of captioning.

3. In the *Third Report and Order*, the Commission takes steps to alleviate this problem and thereby ensure that persons who are deaf and hard of hearing have meaningful access to captioning by requiring manufacturers of covered apparatus<sup>6</sup> and multichannel video programming distributors

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<sup>1</sup> 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> *Accessibility of User Interfaces, and Video Programming Guides and Menus*, Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, MB Docket No. 12-108, 30 FCC Rcd 13914, 13932-35, 13959-70, paras. 33-40 and App. E (2015) (*Second Report and Order and Second Further Notice*).

<sup>3</sup> 5 U.S.C. § 604.

<sup>4</sup> Pub. L. No. 101-431, 104 Stat. 960 (1990) (codified at 47 U.S.C. §§ 303(u), 330(b)).

<sup>5</sup> 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). Implementing sections 202 and 203 of the CVAA, the Commission adopted closed captioning requirements for the owners, providers, and distributors of IP-delivered video programming, as well as rules governing the closed captioning capabilities of certain apparatus on which consumers view video programming. See *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, MB Docket No. 11-154, 27 FCC Rcd 787 (2012) (*IP Closed Captioning Order*). Implementing sections 204 and 205 of the CVAA, the Commission adopted rules requiring that closed captioning activation mechanisms be simple and easy to use on digital apparatus and navigation devices. See *Accessibility of User Interfaces, and Video Programming Guides and Menus; 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*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket Nos. 12-108 and 12-107, 28 FCC Rcd 17330 (2013) (*Report and Order and Further Notice*).

<sup>6</sup> The requirements apply to devices covered by section 303(u) of the Act, in other words, apparatus, including pre-installed applications, designed to receive or play back video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States and uses a picture screen of any size.



(MVPDs) to make closed captioning display settings readily accessible to individuals who are deaf and hard of hearing. We allow covered entities flexibility in how they comply with this obligation. The Commission will evaluate several factors – proximity, discoverability, previewability, and consistency and persistence – to determine whether the obligation to make closed captioning display settings readily accessible to consumers has been met. We also allow covered entities to raise and demonstrate compliance is not achievable and/or is technically infeasible in accordance with section 303(u) of the Act.<sup>7</sup> Further, the compliance deadline we adopt gives covered entities two years after publication of the *Third Report and Order* in the *Federal Register* to implement the closed captioning display settings accessibility requirement.

## **B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA**

3. There were no comments filed that specifically addressed the proposed rules and policies presented in the IRFA. However, comments were filed in response to the *Second Further Notice* that addressed the potential impact of the rules on small entities. Specifically, ACA Connects seeks a blanket exemption for “legacy navigation devices that are provided by small and medium-sized MVPDs.”<sup>8</sup> If ACA Connects is concerned about compliance obligations for devices that were manufactured prior to the compliance deadline, the Commission’s decision not to apply the requirements to such apparatus should address this. It appears that ACA Connects’ concern applies to such previously manufactured devices,<sup>9</sup> but to the extent the concern about compliance obligations extends to some other category of devices, we remind ACA Connects that on a case-by-case basis MVPDs can avail themselves of the waiver and exemption processes adopted in the *Third Report and Order*. The Commission also explains that the evidence in the record does not show that every legacy navigation device would require a MVPD to request an exemption or implementation extension and therefore, rather than adopting an overbroad blanket exemption as proposed by ACA Connects, we find adjudicating the availability of waivers or exemptions is preferable.<sup>10</sup>

4. ACA Connects also asks the Commission to adopt a streamlined waiver process for small and medium-sized providers.<sup>11</sup> The Commission explains that the existing waiver and exemption processes are sufficiently flexible to be workable for small and mid-sized providers in light of the flexibility that providers have to raise achievability and technical feasibility either prior to manufacture or in response to a complaint. The Commission also explains that adopting a different process in this proceeding for small and medium-sized providers would be inconsistent with prior Commission orders adopting the same achievability and technical feasibility provisions. Further, the Commission explains that ACA Connects has failed to justify why the same process that has been used in prior proceedings implementing the same provisions should be modified in this proceeding.

5. Finally, ACA Connects seeks a later compliance deadline for certain mid-sized and smaller MVPDs.<sup>12</sup> Declining to adopt a later deadline, the Commission explains that such an approach is unnecessary and unworkable here. More specifically, the Commission indicates that smaller MVPDs do not need a deadline extension because a compliance deadline based on the date of manufacture will ensure that MVPDs can utilize their existing inventory, and because MVPDs will not need to rely on their market power to compel manufacturers to comply since the rules explicitly apply to both entities. We

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<sup>7</sup> 47 U.S.C. § 303(u).

<sup>8</sup> See ACA Connects – America’s Communications Association Reply Comments, MB Docket No. 12-108, at 3, 8-11 (filed Mar. 4, 2022) (ACA Connects 2022 Reply).

<sup>9</sup> See *id.* at 9.

<sup>10</sup> See *id.* at 3, 8-11.

<sup>11</sup> *Id.* at 15.

<sup>12</sup> See Letter from Barbara Esbin, Counsel to ACA, to Marlene H. Dortch, Secretary, FCC, at 6 (Oct. 25, 2016) (requesting a longer compliance deadline for MVPDs with 400,000 or fewer subscribers); ACA Connects 2022 Reply at 3, 14-15 (same).

also indicate that a deadline extension for smaller MVPDs would create a situation where provision of a given device that was manufactured after the deadline applicable to manufacturers, but before the deadline applicable to smaller MVPDs, would be a violation for the manufacturer but not the MVPD, and therefore would not be workable. We additionally note that in the initial *Report and Order* where the Commission deemed an extended deadline for mid-sized and smaller MVPDs was warranted, it adopted multiple accessibility requirements,<sup>13</sup> unlike here where a single requirement for accessible closed captioning display settings is being adopted. Further, the Commission reiterates that to the extent particular MVPDs find that they are unable to comply with the requirements adopted in the *Third Report and Order*, the waiver or exemption procedures discussed above are available to them.

**C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration**

6. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.<sup>14</sup> The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

**D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply**

7. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.<sup>15</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>16</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>17</sup> 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.<sup>18</sup>

8. *Cable Television Distribution Services.* Cable television distribution services fall within the U.S. Census Bureau industry classification category of Wired Telecommunications Carriers.<sup>19</sup> The U.S. Census Bureau defines this industry as 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 communications networks.<sup>20</sup> 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

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<sup>13</sup> *Report and Order and Further Notice*, 28 FCC at 17401, para. 114.

<sup>14</sup> 5 U.S.C. § 604(a)(3).

<sup>15</sup> *Id.* § 604(a)(4).

<sup>16</sup> *Id.* § 601(6).

<sup>17</sup> *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.”

<sup>18</sup> 15 U.S.C. § 632.

<sup>19</sup> See U.S. Census Bureau, *2017 NAICS Definition, “517311 Wired Telecommunications Carriers,”* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>20</sup> *Id.*

programming distribution, and wired broadband Internet services.<sup>21</sup> By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.<sup>22</sup>

9. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.<sup>23</sup> U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year.<sup>24</sup> Of this number, 2,964 firms operated with fewer than 250 employees.<sup>25</sup> Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 4,590 providers that reported they were engaged in the provision of fixed local services.<sup>26</sup> Of these providers, the Commission estimates that 4,146 providers have 1,500 or fewer employees.<sup>27</sup> Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

10. *Cable Companies and Systems (Rate Regulation)*. The Commission has developed its own small business size standard 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.<sup>28</sup> Based on industry data, there are about 420 cable companies in the U.S.<sup>29</sup> Of these, only seven have more than 400,000 subscribers.<sup>30</sup> In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.<sup>31</sup> Based on industry data, there are about 4,139 cable systems (headends) in the U.S.<sup>32</sup> Of these, about 639 have more than 15,000 subscribers.<sup>33</sup> Accordingly, the Commission estimates that the majority of cable companies and cable systems are small.

11. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, contains a size standard for a "small cable operator," which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one 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

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

<sup>24</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>25</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>26</sup> Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2022), <https://docs.fcc.gov/public/attachments/DOC-391070A1.pdf>.

<sup>27</sup> *Id.*

<sup>28</sup> 47 CFR § 76.901(d).

<sup>29</sup> S&P Global Market Intelligence, S&P Capital IQ Pro, U.S. MediaCensus, *Operator Subscribers by Geography* (last visited May 26, 2022).

<sup>30</sup> S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 12/21Q* (last visited May 26, 2022); S&P Global Market Intelligence, *Multichannel Video Subscriptions, Top 10* (April 2022).

<sup>31</sup> 47 CFR § 76.901(c).

<sup>32</sup> S&P Global Market Intelligence, S&P Capital IQ Pro, U.S. MediaCensus, *Operator Subscribers by Geography* (last visited May 26, 2022).

<sup>33</sup> S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 12/21Q* (last visited May 26, 2022).

\$250,000,000.”<sup>34</sup> For purposes of the Telecom Act Standard, the Commission determined that a cable system operator that serves fewer than 498,000 subscribers, either directly or through affiliates, will meet the definition of a small cable operator.<sup>35</sup> Based on industry data, only six cable system operators have more than 498,000 subscribers.<sup>36</sup> Accordingly, the Commission estimates that the majority of cable system operators are small under this size standard. We note however, that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.<sup>37</sup> Therefore, 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.

12. *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 is included in the Wired Telecommunications Carriers industry which 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.<sup>38</sup> Transmission facilities may be based on a single technology or combination of technologies.<sup>39</sup> 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.<sup>40</sup> By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.<sup>41</sup>

13. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.<sup>42</sup> U.S. Census Bureau data for 2017 show that 3,054 firms operated in this industry for the entire year.<sup>43</sup> Of this number, 2,964 firms operated with fewer than

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<sup>34</sup> 47 U.S.C. § 543(m)(2).

<sup>35</sup> *FCC Announces Updated Subscriber Threshold for the Definition of Small Cable Operator*, Public Notice, DA 23-906 (MB 2023) (2023 Subscriber Threshold PN). In this Public Notice, the Commission determined that there were approximately 49.8 million cable subscribers in the United States at that time using the most reliable source publicly available. *Id.* This threshold will remain in effect until the Commission issues a superseding Public Notice.. See 47 CFR § 76.901(e)(1).

<sup>36</sup> S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 06/23Q* (last visited Sept. 27, 2023); S&P Global Market Intelligence, *Multichannel Video Subscriptions, Top 10* (April 2022).

<sup>37</sup> 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(e) of the Commission’s rules. See 47 CFR § 76.910(b).

<sup>38</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517311 Wired Telecommunications Carriers,” <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>39</sup> *Id.*

<sup>40</sup> See *id.* Included in this industry 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 (CCTV) services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (DTH) services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (MMDS).

<sup>41</sup> *Id.*

<sup>42</sup> See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

<sup>43</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFI, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFI&hidePreview=false>.

250 employees.<sup>44</sup> Based on this data, the majority of firms in this industry can be considered small under the SBA small business size standard. According to Commission data however, only two entities provide DBS service - DIRECTV (owned by AT&T) and DISH Network, which require a great deal of capital for operation.<sup>45</sup> DIRECTV and DISH Network both exceed the SBA size standard for classification as a small business. Therefore, we must conclude based on internally developed Commission data, in general DBS service is provided only by large firms.

14. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are included in the Wired Telecommunications Carriers' industry which includes wireline telecommunications businesses.<sup>46</sup> The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.<sup>47</sup> U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year.<sup>48</sup> Of this total, 2,964 firms operated with fewer than 250 employees.<sup>49</sup> Thus under the SBA size standard, the majority of firms in this industry can be considered small.

15. *Home Satellite Dish (HSD) Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the industry category of Wired Telecommunications Carriers.<sup>50</sup> The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.<sup>51</sup> U.S. Census Bureau data for 2017 show that there were 3,054 firms that

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<sup>44</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>45</sup> See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighteenth Report*, Table III.A.5, 32 FCC Rcd 568, 595 (Jan. 17, 2017).

<sup>46</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>47</sup> See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

<sup>48</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>49</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>50</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>51</sup> See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

operated for the entire year.<sup>52</sup> Of this total, 2,964 firms operated with fewer than 250 employees.<sup>53</sup> Thus, under the SBA size standard, the majority of firms in this industry can be considered small.

16. *Open Video Systems.* The open video system (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. The OVS framework provides opportunities for the distribution of video programming other than through cable systems. OVS operators provide subscription services and therefore fall within the SBA small business size standard for the cable services industry, which is “Wired Telecommunications Carriers.”<sup>54</sup> The SBA small business size standard for this industry classifies firms having 1,500 or fewer employees as small.<sup>55</sup> U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year.<sup>56</sup> Of this total, 2,964 firms operated with fewer than 250 employees.<sup>57</sup> Thus, under the SBA size standard the majority of firms in this industry can be considered small. Additionally, we note that the Commission has certified some OVS operators who are now providing service and broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises. The Commission does not have financial or employment information for the entities authorized to provide OVS however, the Commission believes some of the OVS operators may qualify as small entities.

17. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and “wireless cable,”<sup>58</sup> transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).<sup>59</sup> Wireless cable operators that use spectrum in the BRS often supplemented with leased channels from the EBS, provide a competitive alternative to wired cable and other multichannel video programming distributors. Wireless cable programming to subscribers

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<sup>52</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>53</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>54</sup> See U.S. Census Bureau, *2017 NAICS Definition, “517311 Wired Telecommunications Carriers,”* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>55</sup> See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

<sup>56</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>57</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>58</sup> The use of the term “wireless cable” does not imply that it constitutes cable television for statutory or regulatory purposes.

<sup>59</sup> See 47 CFR § 27.4. See also *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*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

resembles cable television, but instead of coaxial cable, wireless cable uses microwave channels.<sup>60</sup>

18. In light of the use of wireless frequencies by BRS and EBS services, the closest industry with a SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (*except* Satellite).<sup>61</sup> The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees.<sup>62</sup> U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.<sup>63</sup> Of this number, 2,837 firms employed fewer than 250 employees.<sup>64</sup> Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

19. According to Commission data as December 2021, there were approximately 5,869 active BRS and EBS licenses.<sup>65</sup> The Commission's small business size standards with respect to BRS involves eligibility for bidding credits and installment payments in the auction of licenses for these services. For the auction of BRS licenses, the Commission adopted criteria for three groups of small businesses. An entrepreneur is an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding \$3 million for the preceding three years, a very small business is an entity that, together with its affiliates and controlling interests, has average annual gross revenues between \$3 million and \$15 million for the preceding three years, and a small business is an entity that, together with its affiliates and controlling interests, has average gross revenues between \$15 million and \$40 million for the preceding three years.<sup>66</sup> Of the ten winning bidders for BRS licenses, two bidders claiming the small business status won 4 licenses, one bidder claiming the very small business status won three licenses and two bidders claiming entrepreneur status won six licenses.<sup>67</sup> One of the winning bidders claiming a small business status classification in the BRS license auction has an active license as of December 2021.<sup>68</sup>

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<sup>60</sup> Generally, a wireless cable system may be described as a microwave station transmitting on a combination of BRS and EBS channels to numerous receivers with antennas, such as single-family residences, apartment complexes, hotels, educational institutions, business entities and governmental offices. The range of the transmission depends upon the transmitter power, the type of receiving antenna and the existence of a line-of-sight path between the transmitter or signal booster and the receiving antenna.

<sup>61</sup> See U.S. Census Bureau, *2017 NAICS Definition*, "517312 Wireless Telecommunications Carriers (*except* Satellite)," <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

<sup>62</sup> See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

<sup>63</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>64</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>65</sup> Based on a FCC Universal Licensing System search on December 10, 2021, <https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp>. Search parameters: Service Group = All, "Match only the following radio service(s)", Radio Service =BR, ED; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

<sup>66</sup> See 47 CFR § 27.1218(a).

<sup>67</sup> See Federal Communications Commission, Economics and Analytics, Auctions, Auction 86: Broadband Radio Service, Summary, Reports, All Bidders, <https://www.fcc.gov/sites/default/files/wireless/auctions/86/charts/86bidder.xls>.

<sup>68</sup> Based on a FCC Universal Licensing System search on December 10, 2021, <https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp>. Search parameters: Service Group = All, "Match

(continued....)

20. The Commission's small business size standards for EBS define a small business as an entity that, together with its affiliates, its controlling interests and the affiliates of its controlling interests, has average gross revenues that are not more than \$55 million for the preceding five (5) years, and a very small business is an entity that, together with its affiliates, its controlling interests and the affiliates of its controlling interests, has average gross revenues that are not more than \$20 million for the preceding five (5) years.<sup>69</sup> In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

21. *Incumbent Local Exchange Carriers (Incumbent LECs)*. Neither the Commission nor the SBA have developed a small business size standard specifically for incumbent local exchange carriers. Wired Telecommunications Carriers<sup>70</sup> is the closest industry with an SBA small business size standard.<sup>71</sup> The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.<sup>72</sup> U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year.<sup>73</sup> Of this number, 2,964 firms operated with fewer than 250 employees.<sup>74</sup> Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 1,212 providers that reported they were incumbent local exchange service providers.<sup>75</sup> Of these providers, the Commission estimates that 916 providers have 1,500 or fewer employees.<sup>76</sup> Consequently, using the SBA's small business size standard, the Commission estimates that the majority of incumbent local exchange carriers can be considered small entities.

22. *Competitive Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. Providers of these services include several types of competitive local exchange service providers.<sup>77</sup>

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only the following radio service(s)", Radio Service =BR; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

<sup>69</sup> See 47 CFR § 27.1219(a).

<sup>70</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>71</sup> See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

<sup>72</sup> *Id.*

<sup>73</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>74</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>75</sup> Federal-State Joint Board on Universal Service, *Universal Service Monitoring Report at 26, Table 1.12 (2022)*, <https://docs.fcc.gov/public/attachments/DOC-391070A1.pdf>.

<sup>76</sup> *Id.*

<sup>77</sup> Competitive Local Exchange Service Providers include the following types of providers: Competitive Access Providers (CAPs) and Competitive Local Exchange Carriers (CLECs), Cable/Coax CLECs, Interconnected VOIP Providers, Non-Interconnected VOIP Providers, Shared-Tenant Service Providers, Audio Bridge Service Providers, Local Resellers, and Other Local Service Providers.



Wired Telecommunications Carriers<sup>78</sup> is the closest industry with a SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.<sup>79</sup> U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year.<sup>80</sup> Of this number, 2,964 firms operated with fewer than 250 employees.<sup>81</sup> Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 3,378 providers that reported they were competitive local exchange service providers.<sup>82</sup> Of these providers, the Commission estimates that 3,230 providers have 1,500 or fewer employees.<sup>83</sup> Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

23. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment.<sup>84</sup> Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.<sup>85</sup> The SBA small business size standard for this industry classifies businesses having 1,250 employees or less as small.<sup>86</sup> U.S. Census Bureau data for 2017 show that there were 656 firms in this industry that operated for the entire year.<sup>87</sup> Of this number, 624 firms had fewer than 250 employees.<sup>88</sup> Thus, under the SBA size standard, the majority of firms in this industry can be considered small.

24. *Audio and Video Equipment Manufacturing.* This industry comprises establishments primarily engaged in electronic audio and video equipment for home entertainment, motor vehicles, and public address and musical instrument amplification. Examples of products made by these establishments are video cassette recorders, televisions, stereo equipment, speaker systems, household-type video

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<sup>78</sup> See U.S. Census Bureau, *2017 NAICS Definition*, "517311 Wired Telecommunications Carriers," <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>79</sup> See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

<sup>80</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPfirm, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPfirm&hidePreview=false>.

<sup>81</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>82</sup> Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2022), <https://docs.fcc.gov/public/attachments/DOC-391070A1.pdf>.

<sup>83</sup> *Id.*

<sup>84</sup> See U.S. Census Bureau, *2017 NAICS Definition*, "334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing," <https://www.census.gov/naics/?input=334220&year=2017&details=334220>.

<sup>85</sup> *Id.*

<sup>86</sup> See 13 CFR § 121.201, NAICS Code 334220.

<sup>87</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPfirm, NAICS Code 334220, <https://data.census.gov/cedsci/table?y=2017&n=334220&tid=ECNSIZE2017.EC1700SIZEEMPfirm&hidePreview=false>.

<sup>88</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

cameras, jukeboxes, and amplifiers for musical instruments and public address systems.<sup>89</sup> The SBA small business size standard for this industry classifies firms with 750 employees or less as small.<sup>90</sup> According to 2017 U.S. Census Bureau data, 464 firms in this industry operated that year.<sup>91</sup> Of this number, 399 firms operated with less than 250 employees.<sup>92</sup> Based on this data and the associated SBA size standard, we conclude that the majority of firms in this industry are small.

#### **E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

25. *Reporting and Recordkeeping Requirements.* The *Third Report and Order* does not adopt reporting requirements. However, in the event that an allegation of non-compliance arises against an entity, regardless of the size of the covered entity, it will need to demonstrate how it has complied with the applicable requirements. For example, if there is an allegation that a covered entity has not provided the required employee training, it could refute that allegation by reference to training materials or a training schedule. The *Third Report and Order* permits small and other covered entities to seek exemptions from the adopted requirements on the basis that compliance is not technically feasibility and/or not achievable, pursuant to section 303(u) of the Act and consistent with our precedent in the *IP Closed Captioning Order*.<sup>93</sup> To demonstrate that compliance is not achievable – cannot be accomplished with reasonable effort or expense – or is not “technically feasible” will require small and other entities to have records, and to make a filing with the Commission to substantiate such claims. Small and other entities will also have to keep and be able to produce records associated with their compliance in the event they are subject to a dispute or complaint about accessibility.

26. *Other Compliance Requirements.* The *Third Report and Order* adopts other compliance requirements that are applicable to covered small entities. In particular, the *Third Report and Order* adopts a rule that requires manufacturers and MVPDs to ensure that consumers are able to readily access user display settings for closed captioning on covered apparatus. To determine whether particular settings are readily accessible, the Commission requires compliance with the following factors: proximity, discoverability, previewability, and consistency and persistence. The Commission does not otherwise dictate the precise manner of compliance as long as such settings are readily accessible. This approach will ensure that consumers who are deaf and hard of hearing can easily access closed captioning display settings, while still giving small and other covered entities flexibility in the manner of compliance and

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<sup>89</sup> See U.S. Census Bureau, *2017 NAICS Definition, “334310 Audio and Video Equipment Manufacturing,”* <https://www.census.gov/naics/?input=334310&year=2017&details=334310>.

<sup>90</sup> See 13 CFR 121.201, NAICS Code 334310.

<sup>91</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 334310, <https://data.census.gov/cedsci/table?y=2017&n=334310&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>92</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. We also note that the U.S. Census Bureau withheld publication of the number of firms that operated for the entire year and the number of firms that operated with 5 to 9 employees, to avoid disclosing data for individual companies (see Cell Notes for “Firms operated for the entire year” and “Firms operated for the entire year with 5 to 9 employees”). Therefore, the number of firms with employees that meet the SBA size standard would be higher than noted herein.

<sup>93</sup> See 47 U.S.C. §§ 303(u), 303(u)(2); *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, MB Docket No. 11-154, 27 FCC Rcd 787, 848-49, paras. 97-98, 104-05 (2012) (*IP Closed Captioning Order*). See also *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Order on Reconsideration and Further Notice of Proposed Rulemaking, MB Docket No. 11-154, 28 FCC Rcd 8785, 8788-93, paras. 5-15 (2013). Note that in accordance with the statute, achievability only applies to covered apparatus that use a picture screen less than 13 inches in size, whereas technical feasibility may apply to any covered apparatus.

allowing companies to develop innovative solutions for accessibility.

27. The Commission does not have specific information quantifying the costs and administrative burdens associated with the rules adopted in the *Third Report and Order*, including whether small entities will have to hire professionals to comply, because we do not dictate the precise manner of compliance. Comments in the record do not contain specific figures or estimates quantifying the costs of compliance. Although there may be some costs to industry to comply with the new rule, such costs will be mitigated for several reasons. First, the Commission gives small and other covered entities flexibility in the manner of compliance, which allows them to choose a cost-effective solution, so long as they comply with the four required factors. Further, as discussed in sections B & F herein, small entities subject to the rule need not comply with the requirements if they are able to demonstrate to the Commission that compliance is not achievable or technically feasible.<sup>94</sup> The availability of case-by-case exemptions will also help ensure that small entities are not affected disproportionately by these compliance requirements. Additionally, to the extent small entities already provide closed captioning display settings in a readily accessible manner, they will not incur any additional costs to comply. Accordingly, the Commission finds that the public interest benefits outweigh the costs for covered entities to implement the requirement that the closed captioning display settings be readily accessible on covered apparatus.

#### **F. Steps Taken to Minimize the Significant Impact on Small Entities and Significant Alternatives Considered**

28. The RFA requires an agency to provide “a description of the steps the agency has taken to minimize the significant economic impact on small entities...including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.”<sup>95</sup>

29. To minimize the significant economic impact the rules adopted in the *Third Report and Order* may have on small entities, in the *Second Further Notice* the Commission inquired whether the provisions of section 303(u) of the Act that allow the Commission to tailor its rules, as necessary, to small entities for whom compliance with such rules is economically burdensome should apply. Consistent with our determination that Section 303(u) of the Act should apply, we considered and find that small entities are able to avoid potentially economically burdensome compliance with the requirements in the *Third Report and Order* to ensure that users can readily access closed captioning display settings if they are able to demonstrate to the Commission that such compliance is not “achievable” (*i.e.*, cannot be accomplished with reasonable effort or expense) or is not “technically feasible.” Two of the four statutory factors that we must consider in assessing achievability are particularly relevant to small entities: (i) the nature and cost of the steps needed to meet the requirements, and (ii) the technical and economic impact on the entity’s operations.

30. In general, we afford covered entities flexibility in how they make closed captioning display settings readily accessible to consumers, and will determine whether settings are readily accessible to consumers by evaluating the following factors: proximity, discoverability, previewability, and consistency and persistence. This approach will ensure that small and other covered entities can choose how to make closed captioning display settings available, as long as such settings are readily accessible to consumers, enabling these entities to decide what works best for them. Our approach will also allow the Commission to address the impact of the rules on individual entities on a case-by-case basis, and to modify application of our rules to accommodate individual circumstances thereby potentially reducing the costs of compliance for such entities. The Commission’s adopted definition of the four required factors that we will evaluate to determine whether small and other entities have met their

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<sup>94</sup> 47 U.S.C. § 303(u)(1)-(2).

<sup>95</sup> 5 U.S.C. § 604(a)(6).

obligation to make display settings readily accessible to consumers is based on a March 2024 joint proposal filed in the record by NCTA and certain Consumer Groups. The meaning of the “discoverability” factor evolved from a previously proposed meaning, which industry objected to as being too subjective, to a meaning that focuses on consumer testing and employee training. This objective definition should make it easier and simpler for covered entities to ensure they are in compliance. Similarly, the meaning of the “consistency and persistence” factor evolved from a previously proposed broader definition, which industry objected to as raising several problems, to a meaning that focuses largely on the use of application programming interfaces (APIs) or comparable tools and the coordination between covered entities. This narrow approach should also make it easier and simpler for small and other covered entities to comply.

31. In response to commenter ACA Connects, as discussed above in section B, the Commission considered and rejected the request for a blanket compliance exemption for small and medium-sized providers of legacy navigation devices,<sup>96</sup> a streamlined waiver process for such providers,<sup>97</sup> and a later compliance deadline.<sup>98</sup> Our decision is consistent with prior orders, and the record did not provide sufficient justification for the Commission to adopt any other proposed alternatives. To the extent particular small entities find that they are unable to comply with the requirements adopted in the *Third Report and Order*, the waiver and exemption procedures are available to them.

32. Based on these considerations, the Commission believes that we have appropriately considered both the interests of individuals with disabilities and the interests of small and other entities who will be subject to the rules, consistent with Congress’s intent that “to the fullest extent made possible by technology,” persons who are deaf and hard of hearing “should have equal access to the television medium.”<sup>99</sup>

#### **G. Report to Congress**

33. The Commission will send a copy of the *Third Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.<sup>100</sup> In addition, the Commission will send a copy of the *Third Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The *Third Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register.<sup>101</sup>

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<sup>96</sup> See *Third Report and Order* at section III.B.4.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.* at section III.B.5.

<sup>99</sup> Pub. L. No. 101-431, § 2(1).

<sup>100</sup> 5 U.S.C. § 801(a)(1)(A).

<sup>101</sup> See *id.* § 604(b).