

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

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

ORDER AND PUBLIC NOTICE

Adopted: March 8, 2021

Released: March 8, 2021

By the Chief, Media Bureau:

I. INTRODUCTION

1. In this Order, we grant requests filed on behalf of Fox News,¹ MSNBC,² CNN,³ and ESPN⁴ for exemption from the Commission’s audio description rules applicable to the top five national nonbroadcast networks. We conclude that Fox News, MSNBC, CNN, and ESPN provide less than 50 hours per calendar quarter of prime time programming that is not live or near-live and we therefore grant their requests. We also provide notice of changes to the list of top five national nonbroadcast networks subject to the audio description requirements based on changes in ratings, accounting for the granted requests for exemption. Beginning July 1, 2021, the top five national nonbroadcast networks will be TLC, HGTV, Hallmark, History, and TBS.

¹ Request of Fox Corporation and Fox News Network, LLC for Exclusion from List of Top Five National Nonbroadcast Networks Subject to Audio Description Rules, MB Docket No. 11-43 (filed Dec. 9, 2020) (Fox News Request); Supplement to Request of Fox Corporation and Fox News Network, LLC for Exclusion from List of Top Five National Nonbroadcast Networks Subject to the Commission’s Audio Description Rules, MB Docket No. 11-43 (filed Feb. 22, 2021) (Fox News Supplement). The Request was filed jointly by Fox Corporation and Fox News Network, LLC.

² Request of MSNBC for Further Exemption from List of Top Five Non-Broadcast Networks, MB Docket No. 11-43 (filed Dec. 9, 2020) (MSNBC Request). NBCUniversal, LLC, which wholly owns MSNBC, filed the Request on behalf of MSNBC. *Id.* at 1.

³ Request for Exemption of CNN from List of Top Five Nonbroadcast Networks, MB Docket No. 11-43 (filed Dec. 9, 2020). The Request was filed by AT&T Services, Inc. on behalf Warner Media, LLC for its wholly-owned nonbroadcast programming network, CNN. *Id.* at 1, 3.

⁴ Request of ESPN, Inc. for Further Exemption from List of Top Five Non-Broadcast Networks, MB Docket No. 11-43 (filed Dec. 9, 2020) (ESPN Request). The Request was filed jointly by The Walt Disney Company and ESPN, which is 80 percent owned by The Walt Disney Company. *Id.* at 1 & n.3.

⁵ The Commission recently modernized the terminology in part 79 of the Commission’s rules to use the more common and widely understood term “audio description” rather than “video description.” *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 35 FCC Rcd 12577 (Oct. 27, 2020) (*2020 Audio Description Order*). The Commission has long considered the terms “video description” and “audio description” to be synonymous. *See, e.g.*, 47 CFR § 79.3(a)(3).

II. ORDER

A. Background

2. Audio description⁵ makes video programming⁶ more accessible to individuals who are blind or visually impaired through “[t]he insertion of audio narrated descriptions of a television program’s key visual elements into natural pauses between the program’s dialogue.”⁷ To access audio description, consumers generally switch from the main program audio to the secondary audio stream on which audio description is typically provided. In 2011, pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA),⁸ the Commission adopted rules requiring certain television broadcast stations and multichannel video programming distributors (MVPDs) to provide audio description for a portion of the video programming that they offer to consumers on television.⁹

3. Specifically, MVPD systems that serve 50,000 or more subscribers must provide 50 hours of audio description per calendar quarter during prime time or on children’s programming, and an additional 37.5 hours of audio description per calendar quarter at any time between 6 a.m. and midnight, on each of the top five national nonbroadcast networks that they carry on those systems.¹⁰ For the purposes of the rules, the top five national nonbroadcast networks are defined by an average of the national audience share during prime time of nonbroadcast networks that reach 50 percent or more of MVPD households and have at least 50 hours per quarter of prime time programming that is not live or near-live or otherwise exempt under the audio description rules.¹¹ In addition, the audio description rules currently require commercial television broadcast stations that are affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC) and are located in the top 70

⁶ “Video programming” refers to programming provided by, or generally considered comparable to programming provided by, a television broadcast station but does not include consumer-generated media. 47 U.S.C. § 613(h)(2); 47 CFR § 79.3(a)(4).

⁷ *Id.* § 79.3(a)(3).

⁸ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010); Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA).

⁹ *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43, Report and Order, 26 FCC Rcd 11847 (2011) (*2011 Audio Description Order*). See also 47 CFR § 79.3. In accordance with the CVAA, the *2011 Audio Description Order* reinstated with certain modifications the Commission’s audio description rules that the United States Court of Appeals for the District of Columbia Circuit previously had vacated due to its finding that the Commission had insufficient authority for its rules. See *Motion Picture Ass’n of America, Inc. v. Federal Communications Comm.*, 309 F.3d 796 (D.C. Cir. 2002).

¹⁰ 47 CFR § 79.3(b)(4). The list of the top five nonbroadcast networks is updated every three years based on changes in ratings and was last updated on July 1, 2018 (remaining in effect until June 30, 2021). See *id.*; *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket 11-43, Order and Public Notice, 33 FCC Rcd 4915 (MB 2018) (*2018 Audio Description Exemption Order*). The rules also require MVPD systems of any size to pass through audio description provided by a broadcast station or nonbroadcast network, if the channel on which the MVPD distributes the station or programming has the technical capability necessary to do so and if that technology is not being used for another purpose related to the programming. 47 CFR § 79.3(b)(5)(i)-(ii).

¹¹ 47 CFR § 79.3(b)(4). See also *2011 Audio Description Order*, 26 FCC Rcd at 11854-55, paras. 12-15. “Live or near-live programming” is defined as programming performed either simultaneously with, or recorded no more than 24 hours prior to, its first transmission by a video programming distributor. 47 CFR § 79.3(a)(7). The *2011 Audio Description Order* explained that the Commission was adopting a proposal to “explicitly exclude from the top five any non-broadcast network that does not provide, on average, at least 50 hours per quarter of prime time nonexempt programming.” *2011 Audio Description Order*, 26 FCC Rcd at 11854, para. 12.

television markets to provide 50 hours of audio-described programming per calendar quarter during prime time or on children’s programming,¹² and an additional 37.5 hours of audio-described programming per calendar quarter at any time between 6 a.m. and midnight.¹³ The top five nonbroadcast networks currently subject to the audio description requirements are USA Network, HGTV, TBS, Discovery, and History.¹⁴ As discussed below, Fox News, MSNBC, and ESPN have each previously received exemptions from these requirements.¹⁵

4. The rules provide that the list of top five nonbroadcast networks will update at three-year intervals to account for changes in ratings, and that the third triennial update will occur on July 1, 2021, based on the 2019 to 2020 ratings year.¹⁶ In anticipation of this update, the Media Bureau (Bureau) issued a Public Notice on November 2, 2020 announcing the top ten nonbroadcast networks for the 2019 to 2020 ratings year according to data provided by the Nielsen Company: Fox News, MSNBC, CNN, ESPN, TLC, HGTV, Hallmark, History, TBS, and Discovery.¹⁷ The Public Notice indicated that a program network could seek an exemption no later than 30 days after publication of the Public Notice, if it believed it should be excluded from the list of top five networks covered by the audio description rules because it does not air at least 50 hours of prime time programming per quarter that is not live or near-live

¹² 47 CFR § 79.3(b)(1). See also *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43, Report and Order, 32 FCC Rcd 5962 (2017) (*2017 Audio Description Order*) (increasing the amount of described programming that covered broadcast stations and MVPDs are required to provide). The *2020 Audio Description Order* expanded the Commission’s audio description rules by phasing them in for an additional 10 designated market areas (DMAs) each year through 2023. *2020 Audio Description Order*, 35 FCC Rcd at 12582, para. 10. The Commission’s audio description rules extended to DMAs 61 through 70 as of January 1, 2021, and will extend to DMAs 71 through 80 as of January 1, 2022, to DMAs 81 through 90 on January 1, 2023, and to DMAs 91 through 100 as of January 1, 2024. *Id.*

¹³ 47 CFR § 79.3(b)(1). See also *2017 Audio Description Order*, 32 FCC Rcd at 5965, 5970, paras. 7, 15. The rules also require “[t]elevision broadcast stations that are affiliated or otherwise associated with any television network [to] pass through audio description when the network provides audio description and the broadcast station has the technical capability necessary to pass through the audio description, unless it is using the technology used to provide audio description for another purpose related to the programming that would conflict with providing the audio description.” 47 CFR § 79.3(b)(3).

¹⁴ See *2018 Audio Description Exemption Order*, 33 FCC Rcd at 4915, para. 1. In 2019, the Media Bureau released an order that granted a limited waiver of the audio description rules with respect to USA Network for the remainder of the three-year period ending on June 30, 2021, but it declined to grant a safe harbor from the audio description requirements for other similarly situated, top five nonbroadcast networks. See *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Memorandum Opinion and Order, MB Docket No. 11-43, 34 FCC Rcd 9335, 9338 (MB 2019). As a condition of the waiver, USA Network is required to air at least 1,000 hours of audio-described programming each quarter without regard to the number of repeats and describe at least 75 percent of any newly produced, non-live programming aired between 6:00 a.m. and midnight per quarter. *Id.* at 9338, para. 8.

¹⁵ *2011 Audio Description Order*, 26 FCC Rcd at 11855, para. 14. See also *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Order and Public Notice, 30 FCC Rcd 2071, 2073, para. 10 (MB 2015) (*2015 Audio Description Exemption Order*); *2018 Audio Description Exemption Order*.

¹⁶ 47 CFR § 79.3(b)(4). See also *2011 Audio Description Order*, 26 FCC Rcd at 11857, para. 18.

¹⁷ Public Notice, *Media Bureau Announces National Nonbroadcast Network Rankings for Purposes of July 1, 2021 Update to Audio Description Requirements*, MB Docket No. 11-43, 35 FCC Rcd 12715 (2020) (Public Notice).

or is otherwise exempt.¹⁸ Fox News, MSNBC, CNN, and ESPN filed timely requests for exemption from the list of top five nonbroadcast networks.¹⁹

B. Discussion

5. Based on the evidence presented in the record, we find that Fox News, MSNBC, CNN, and ESPN provide on average less than 50 hours per calendar quarter of prime time programming that is not live or near-live. We, therefore, exempt these four networks from the Commission's audio description requirements applicable to the top five national nonbroadcast networks. In making our determination, we reviewed data pertaining to the six most recent calendar quarters submitted by each network and sample programming schedules.²⁰ We also considered additional information each individual network submitted to support or explain aspects of each request, when available.

6. *Fox News*. We grant Fox News' request that the Commission exclude Fox News from the list of top five national nonbroadcast networks subject to the Commission's audio description rules because it does not provide, on average, at least 50 hours per quarter of non-exempt prime time programming.²¹ The Commission previously excluded Fox News from the list of top five networks in 2011, and the Bureau did so again during the 2018 triennial update of covered nonbroadcast networks, because Fox News did not provide at least 50 hours per quarter of prime time programming that is not live or near-live.²² Fox News explains that it is a 24/7 cable- and satellite-delivered news network, and its programming consists of a blend of news coverage and analysis, opinion commentary, and in-depth reporting featuring a variety of news anchors, correspondents, program hosts, and contributors.²³ Fox News contends that because its weekday prime time schedule consists entirely of live or near-live programming, and given that live or near-live programming makes up a substantial portion of its weekend prime time schedule, Fox News does not provide an average of at least 50 hours per quarter of non-exempt prime time programming.²⁴ To support its request for exemption, Fox News reviewed programming line-ups for six quarters, from July 1, 2019, through December 31, 2020.²⁵ Over the six-quarter period, Fox News averaged 48.5 hours of non-exempt programming during prime time.²⁶

¹⁸ *Id.* at 12716. The Public Notice was published in the Federal Register on November 9, 2020. See Federal Communications Commission, Audio Description: Preliminary Nonbroadcast Network Rankings, Notice, 85 Fed. Reg. 71336 (Nov. 9, 2020). Accordingly, requests for exemption were due on December 9, 2020.

¹⁹ See generally Fox News Request, MSNBC Request, CNN Request, and ESPN Request.

²⁰ While the Bureau has not previously specified the exact type and amount of information a network should submit in support of an exemption request, we will examine at least six consistent calendar quarters worth of programming data and representative programming schedules in future triennial reviews of national nonbroadcast network rankings.

²¹ Fox News Request at 1; Fox News Supplement at 2.

²² Fox News Request at 2; *2011 Audio Description Order*, 26 FCC Rcd at 11855, para. 14; *2018 Audio Description Exemption Order*, 33 FCC Rcd at 4919, para. 9. During the first triennial update of covered nonbroadcast networks in 2015, Fox News was not listed in the top five nonbroadcast networks based on 2013-2014 network ratings.

²³ Fox News Request at 2.

²⁴ *Id.* at 3 & Exh. 1 (declaration of Paula Firestone, Vice President of Program Operations for Fox News Network, LLC). Fox News explains that it airs live or near-live content from at least 4 a.m. to 11:59 p.m. Eastern time Monday through Friday, from at least 6 a.m. to 8 p.m. on Saturdays, and from at least 5 a.m. to 2 p.m. on Sundays. *Id.* Fox News also provides additional live coverage "[w]here appropriate to cover breaking news or for other events." *Id.*

²⁵ Fox News Supplement at 1-2 & Exh. 2.

²⁶ *Id.* at Exh. 2. Fox News indicates that it aired more than 50 hours of non-exempt programming in the fourth quarters of 2019 and 2020 due to airing certain pre-taped programming during some holidays but, on average, the programming remained below 50 hours per quarter. *Id.* at Exh. 2 & n.1.

Additionally, Fox News submitted illustrative programming schedules from each quarter reviewed to demonstrate that it presented nearly all live or near-live programming during prime time, including weekend prime time hours.²⁷ After reviewing the record, the Bureau finds that Fox News has not aired, on average, at least 50 hours of non-exempt prime time programming per quarter. Accordingly, we find that Fox News is excluded from the list of top five nonbroadcast networks and exempt from the Commission's audio description requirements applicable to the top five national nonbroadcast networks.

7. *MSNBC*. We grant MSNBC's request that the Commission extend MSNBC's existing exemption from the list of top five national nonbroadcast networks subject to the audio description requirements because it airs, on average, fewer than 50 hours of non-exempt prime time programming.²⁸ The Bureau previously excluded MSNBC from the list of top five nonbroadcast networks during the 2018 triennial update of covered nonbroadcast networks, based on a determination that MSNBC did not provide at least 50 hours per quarter of prime time programming that is not live or near-live.²⁹ MSNBC contends that its programming offers around-the-clock substantially live news coverage, including breaking news, commentary, and live interview programs.³⁰ MSNBC airs live prime time programming, including *The Rachel Maddow Show*, *All In with Chris Hayes*, and *The Last Word with Lawrence O'Donnell*.³¹ To support its request for exemption, MSNBC reviewed its recent prime time programming line-ups for six quarters, from April 1, 2019, through September 30, 2020.³² MSNBC submits that over the six-quarter period, it averaged only 33 hours of non-exempt programming during prime time.³³ Additionally, MSNBC submitted programming schedules from October 2020 to provide additional details with respect to MSNBC's extensive live programming offered throughout the day.³⁴ After reviewing the record, the Bureau finds that MSNBC has not aired, on average, at least 50 hours of non-exempt prime time programming per quarter. Accordingly, we find that MSNBC is excluded from the list of top five nonbroadcast networks and exempt from the Commission's audio description requirements applicable to the top five national nonbroadcast networks.

8. *CNN*. We grant Warner Media, LLC's request on behalf of its wholly-owned subsidiary, CNN, to be excluded from the list of the top five national nonbroadcast networks subject to the Commission's audio description rules because it does not air, on average, at least 50 hours per quarter of prime time nonexempt programming.³⁵ CNN explains that prime time programming largely consists of live or near-live news and information programming anchored by journalists such as Wolf Blitzer, Chris Cuomo, Don Lemon, and Anderson Cooper.³⁶ Specifically, CNN contends that it airs live or near-live programming around-the-clock, except for a two-hour block in prime time Saturdays, a two-hour block in prime time Sundays, and a two-hour block after prime time Sundays.³⁷ To support its request for exemption, CNN examined its programming over six quarters, from July 1, 2019, through December 31,

²⁷ *Id.* at Exh. 3.

²⁸ MSNBC Request at 1.

²⁹ *2018 Audio Description Exemption Order*, 33 FCC Rcd at 4918, para. 8.

³⁰ MSNBC Request at 3.

³¹ *Id.*

³² *Id.*

³³ *Id.* at Attach. (affidavit of Angela Y. Ball, Vice President, Regulatory Affairs, for NBCUniversal).

³⁴ *Id.* at 4-5 & Attach.

³⁵ CNN Request at 1-2.

³⁶ *Id.* CNN also explains that, when needed, it provides additional breaking news coverage and other live programming. *Id.*

³⁷ *Id.*

2020, and determined that CNN averaged only 41.7 hours of nonexempt prime time programming during that period.³⁸ Additionally, CNN submitted a generic weekly programming grid representative of programming that it intends to air during the forthcoming triennial period beginning July 1, 2021, to demonstrate that CNN does not anticipate airing, on average, at least 50 hours of primetime programming per quarter that will be neither live nor near-live.³⁹ After reviewing the record, the Bureau finds that CNN has not aired, on average, at least 50 hours of non-exempt prime time programming per quarter. Accordingly, we find that CNN is excluded from the list of top five nonbroadcast networks and exempt from the Commission's audio description requirements applicable to the top five national nonbroadcast networks.

9. *ESPN*. We grant ESPN's request that the Commission extend its existing exclusion from the list of top five national nonbroadcast networks subject to the audio description requirements because it does not provide, on average, at least 50 hours per quarter of prime time non-exempt programming.⁴⁰ The Commission previously excluded ESPN from the list of top five nonbroadcast networks when it reinstated the audio description rules in 2011, and the Bureau did so again during the 2015 and 2018 triennial updates of covered nonbroadcast networks, based on a determination that ESPN did not provide at least 50 hours per quarter of prime time programming that is not live or near-live.⁴¹ ESPN contends that given its mixture of live and near-live programming, it is exactly the type of network that the CVAA intended to exempt from audio description regulation.⁴² ESPN explains that its programming contains a mixture of live sporting events, live studio sports reporting shows, and replays of very-recently taped studio sports programs, featuring college football, college basketball, the NBA, the NFL, and MLB, among others.⁴³ In particular, ESPN reviewed its programming for the past eleven quarters and found that, on average, it aired 42.6 hours per quarter of non-exempt programming during prime time.⁴⁴ ESPN also submitted illustrative programming schedules from August and September 2020 to provide additional details with respect to the predominately live and near-live content of its programming schedule.⁴⁵

10. ESPN explains that it "aired more than 50 hours of programming that was not live or near-live during prime time" during two of the past eleven quarters.⁴⁶ Specifically, during the first and second quarters of 2020, ESPN was forced to "modify its prime time programming lineup due to the

³⁸ *Id.* at 3 and Declaration (declaration of Richard Orrell-Jones, Vice President of Business Operations at CNN). CNN exceeded 50 hours of nonexempt programming during the third and fourth quarter of 2019, explained in part due to large blocks of prerecorded programming aired on Thanksgiving Day and Christmas Day. *Id.* However, on average, the programming remains below the 50-hour threshold.

³⁹ CNN Request at Attachment: Programming Grid.

⁴⁰ ESPN Request at 1.

⁴¹ *2011 Audio Description Order*, 26 FCC Rcd at 11855, para. 14; *2015 Audio Description Exemption Order*, 30 FCC Rcd at 2073, para. 9; *2018 Audio Description Exemption Order*, 33 FCC Rcd at 4917-18, para. 7. In 2011, the Commission made this determination based on ESPN's comments, which indicated that "ESPN does not provide, on average, at least 50 hours per quarter of prime-time non-exempt programming," as well as a supporting affidavit and illustrative programming schedules. *2011 Audio Description Order*, 26 FCC Rcd at 11855, para. 14. The Bureau made this determination based on similar supporting evidence in 2015 and 2018. See *2015 Video Description Exemption Order*, 30 FCC Rcd at 2073, para. 8; *2018 Audio Description Exemption Order*, 33 FCC Rcd at 4917-18, para. 7.

⁴² ESPN Request at 3.

⁴³ *Id.* at 3-4 & Attach. A (declaration of Amy L. Klein, Principal Counsel for ESPN).

⁴⁴ ESPN Request at Attach. A.

⁴⁵ *Id.* at 3 & Attach. B.

⁴⁶ *Id.* at Attach. A

cancellation of most live sporting events as a result of the COVID-19 virus.²⁴⁷ ESPN further explains that “[b]ecause of the extreme reduction in the availability of live sporting events, it became virtually impossible for a sports programming network like ESPN to air sufficient live or near-live sports programming to remain below the threshold during this time.”²⁴⁸ However, ESPN notes that “by the third quarter of 2020, ESPN was again airing fewer than 50 hours of non-exempt . . . programming during prime time hours, and ESPN expects its longstanding practice of airing fewer than 50 hours of non-exempt . . . programming during prime time hours to continue going forward.”²⁴⁹

11. After reviewing the record, the Bureau finds that ESPN has not aired, on average, at least 50 hours of non-exempt prime time programming per quarter. Because the cancellation of live sporting events in the first and second quarters of 2020 due to COVID-19 caused ESPN to alter its programming schedule in unprecedented ways, we believe it is appropriate to exclude those two quarters from our calculation of non-exempt prime time programming hours. A review of the six most recent quarters not impacted by pandemic-related programming changes demonstrates that ESPN typically airs only 25.8 hours of non-exempt programming per quarter – well below the 50 hour threshold.⁵⁰ In fact, a review of any six programming quarters submitted by ESPN, with the exclusion of only the severely impacted second quarter of 2020, shows that ESPN would still fall under the 50 hour threshold no matter how the data is parsed.⁵¹ This determination is supported by the representative programming schedules submitted by ESPN which demonstrate ESPN’s ongoing practice of airing primarily live or near-live programming during prime time hours.⁵² As was the case in 2011, 2015, and 2018, ESPN continues to primarily air prime time programming that is live or near-live. Accordingly, we find that ESPN is excluded from the list of top five nonbroadcast networks and exempt from the Commission’s audio description requirements applicable to the top five national nonbroadcast networks.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and Sections 0.61, 0.283, and 79.3 of the Commission's rules, 47 CFR §§ 0.61, 0.283, 79.3, this Order **IS ADOPTED**.

14. **IT IS FURTHER ORDERED** that, pursuant to Section 79.3 of the Commission's rules, 47 CFR § 79.3, the requests filed by Fox News, MSNBC, CNN, and ESPN for exemption from the Commission's audio description rules **ARE GRANTED**.

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey
Chief, Media Bureau

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⁵⁵ 2017 Audio Description Order, 32 FCC Rcd at 5962, para. 1.