

THE SILENCE AFTER THE BEEP: ENVISIONING AN EMERGENCY INFORMATION SYSTEM TO SERVE THE VISUALLY IMPAIRED

BY: ELANA R. REMAN[†]

ABSTRACT

Due to a series of legal and regulatory setbacks, media accessibility regulations for consumers who are blind and visually impaired have lagged significantly behind those for deaf individuals. Until April 2014, when the Federal Communications Commission’s Emergency Information Order took effect, blind consumers were left “in the dark” when their safety mattered most—during weather emergencies—because visual emergency information displayed in the on-screen crawl during television programming was not accessible in an aural format. The Commission now mandates that this information be provided in an aural form through the secondary audio stream for linear programming viewed on televisions and mobile devices and other “second screens” used inside the home over the MVPD’s network, but this requirement leaves many issues unresolved. This Issue Brief examines and analyzes the arguments made by industry and consumer groups for and against expanded regulation, and makes several recommendations that efficiently fill gaps in the current regulatory requirements for accessible emergency information. These recommendations are technically feasible, not unduly burdensome, and necessary to effectuate the purpose of the Twenty-First Century Communications and Video Accessibility Act of 2010. Specifically, the Commission can extend emergency information regulations to the entities it failed to reach with its Emergency Information Order and Second Report and Order by adopting the Linear Programming Definition of an MVPD that it puts forth in its MVPD Definition

[†] J.D., Duke University School of Law, May 2016, *cum laude*; B.S. in Media Management; B.A. in Political Science, University of Miami, May 2012, *magna cum laude*. The opinions contained in this Issue Brief are solely those of the author and are not the opinions of any of the author’s current or former employers. She thanks the staff of the Duke Law & Technology Review for their insights and edits, as well as her family and Ryan Safner for their eternal support.

NPRM. The Commission should adopt this definition, thereby expanding the scope of entities required to comply with the Emergency Information Order, but it should curtail the Order's rigidity by not passing prioritization guidelines and by removing the requirement to include school closures and changes in the bus schedule in the secondary audio stream.

INTRODUCTION

You are snuggled up under a blanket, sipping a frothy mug of hot chocolate. Flames dance in the fireplace while you cheer on your alma mater in its post-season Bowl game. Suddenly, the announcer's rapid-fire play-by-play is interrupted by three shrill beeps. You know what those beeps mean—winter is coming. You shift your gaze to the bottom of the screen, where a crawl detailing the impending blizzard has already appeared. You follow the on-screen crawl and learn that your area is under severe weather watch for the next forty-eight hours and you are advised to stay home. You find your daughter's elementary school in the list of tomorrow's school closures. You are slightly annoyed at the interruption of the touchdown drive, but you are informed. You are safe.

Now imagine the same experience if you are visually impaired. Prior to the implementation of recent regulations,¹ individuals who are blind or visually impaired heard only an aural tone alerting them of an impending weather emergency, but they had no access to the information displayed in the on-screen crawl, which detailed the timeframe, location, and nature of the weather emergency, as well as locations to seek shelter.² Because this information was not aurally accessible, consumers who are visually impaired were forced to turn to other media sources to access these essential details, delaying their emergency response and compromising their safety.

The road to creating television programming accessible to people with disabilities has been a long one, but consumers who are visually

¹ 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, Final Rule; Announcement of Effective Date, 79 Fed. Reg. 21,399 (Apr. 16, 2014) (codified at 47 C.F.R. pt. 79) (announcing that the obligation to make emergency information audibly accessible takes effect on April 16, 2014).

² Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description, Emergency Information Order or April 2013 FNPRM, MB Docket No. 12-107, Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd. 45 (2013) at ¶¶ 11–12.

impaired faced significantly more legal and regulatory setbacks than their hearing-impaired counterparts. While the Federal Communications Commission (FCC or Commission) has taken significant strides toward making television programming accessible to vision- and hearing-impaired individuals by passing and implementing closed captioning—and more recently, video description standards³—one crucial aspect of enabling accessibility is still a work in progress: the text of emergency information crawls is not yet widely available in an aural format across all viewing devices, leaving visually impaired consumers “in the dark” when their safety matters most—during inclement weather emergencies.⁴

Section 79.2 of the Commission’s rules took effect on April 16, 2014, creating the requirement that video programming providers and distributors make visual emergency information accessible in an aural format.⁵ Based on a consensus among consumer groups⁶ and industry,⁷ the FCC has mandated use of the secondary audio stream⁸ for passing through an aural recitation of the on-screen emergency information text because it is the most effective and efficient way to accomplish this

³ See *Video Description*, FCC.GOV, <http://www.fcc.gov/encyclopedia/video-description> (last visited Dec. 5, 2015) (Video description is the audio-narrated description of a television program's key visual elements, inserted into natural pauses in the program's dialogue and makes TV programming more accessible to visually impaired consumers). See also 47 C.F.R. § 79.1 for the FCC’s closed captioning regulations and 47 C.F.R. § 79.3 for the video description regulations.

⁴ See 47 C.F.R. § 79.2(a)(2). The rules in the FCC’s Emergency Information Order apply to other emergencies besides just inclement weather emergencies, including, but not limited to chemical spills, discharge of toxic gases, widespread power failures, and fires. This Issue Brief refers only to weather emergencies for stylistic, not substantive, reasons.

⁵ 47 C.F.R. § 79.2(b).

⁶ Some consumer groups in this proceeding include the American Council of the Blind, National Association of the Deaf, Telecommunications for the Deaf and Hard of Hearing, Inc., Deaf and Hard of Hearing Consumer Advocacy Network, and the Technology Access Program Gallaudet University.

⁷ Industries that submitted comments in this proceeding include cable, broadcast, media companies, device manufacturers, and various trade associations.

⁸ When viewers tune to a channel, they ordinarily hear the primary audio stream. Using remote or on-screen controls, users can switch to the secondary audio stream, which is used to provide alternative audio such as emergency information, foreign language translations of the programming, or video description.

goal.⁹ The new rules maintain the requirement that all emergency information announcements must be preceded by an aural tone—usually three shrill beeps.¹⁰ However, the Commission is still working to resolve several issues—including whether this requirement should extend to Internet Protocol (IP) delivered¹¹ linear programming¹² on mobile devices viewed inside the home,¹³ and how best to prioritize vital emergency information.¹⁴ Linear programming can best be understood as pre-scheduled programming viewed, in this context, on a second screen simultaneously with the television stream. For example, watching a live sporting event on Watch ESPN is linear programming, but streaming House of Cards on Netflix is not—it is video on demand.

The Commission’s current accessible emergency information regulations apply to multichannel video programming distributors

⁹ See Emergency Information Order, *supra* note 2, ¶¶ 11–13 (selecting the secondary audio stream as the preferred method for achieving accessibility because “many covered entities already provide or have the capability to pass through secondary audio streams, and because individuals who are blind or visually impaired have familiarity with accessing this stream for video description services”).

¹⁰ See *id.* ¶ 1.

¹¹ Internet protocol is a format of delivering data across the Internet and other networks.

¹² See *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, Notice of Proposed Rulemaking, 14 FCC Rcd. 210, ¶ 13 n.26 (2014) [hereinafter MVPD Definition NPRM] (defining linear programming as “programming [available] at a scheduled time. Non-linear programming, such as video-on-demand (‘VOD’) and online video content, is available at a time of the viewer’s choosing”). In this context, “IP-delivered linear programming” is programming watched online or on a mobile device instead of on TV, but at the same time that program is offered on TV. *Id.* ¶ 18 (proposing a definition of “linear video” as a “stream of video programing [sic] that is prescheduled by the programmer” and seeking comment on this interpretation).

¹³ April 2013 FNPRM, *supra* note 3, ¶¶ 80–84; see also MVPD Definition NPRM, *supra* note 12, ¶ 56 (seeking comment on a proposed Rulemaking on redefining an MVPD and possible amendments to the emergency information accessibility rules if the FCC adopts the Linear Programming Interpretation).

¹⁴ See Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description, MB Docket No. 12-107, Second Report and Order and Second Notice of Proposed Rulemaking, 15 FCC Rcd. 56, ¶¶ 40–45 (2015) (seeking comment on whether the FCC should reconsider its requirement that school closings and bus schedule changes be relayed in full over the secondary audio stream).

(MVPDs), and the reach of these regulations depends, in part, on what services this category includes. Thus, understanding what constitutes an MVPD is crucial. The Communications Act of 1934, as amended in 1992, defines an MVPD as “a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.”¹⁵ To clarify the definition, the Act defines a “channel” as “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel,”¹⁶ and “video programming” is defined as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”¹⁷ This definition is somewhat dated,¹⁸ however, and makes no mention of video content delivered via the Internet. The Commission considered, but seems to have put on the backburner, a rulemaking that would make this definition “technology-neutral”¹⁹—expanding it to cover programming provided over the Internet.²⁰ This proposal will be analyzed further in Part II of the Brief, but its effect would be to extend the emergency information requirements to programming *regardless of* the delivery method used by the content provider—whether it be the MVPD’s own network, IP, public Wi-Fi, et cetera.

This Issue Brief will outline the recent history and developments of the FCC’s accessibility regulations in order to place emergency information regulations in context, examine the FCC’s newly affected accessibility regulations, and analyze the arguments for and against expanding emergency information requirements. Finally, this Brief will

¹⁵ 47 U.S.C. § 522(13) (2012); *see also* 47 C.F.R. §§ 76.64(d), 76.71(a), 76.905(d), 76.1000(e), 76.1200(b), 76.1300(d) (2015).

¹⁶ 47 U.S.C. § 522(4) (2012).

¹⁷ 47 U.S.C. § 522(20) (2012).

¹⁸ 47 U.S.C. § 522(13) (2012). The above definition of an MVPD was adopted in 1992, when the Internet was in its infancy and the myriad of program-viewing options available today were no more than a flicker in the imaginations of America’s brightest engineers.

¹⁹ MVPD Definition NPRM, *supra* note 12, ¶ 23, n.55 (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172 (1968); then citing ABC/CBS/NBC Affiliates Comments at 4–5) (“It is well settled . . . that statutory language is not frozen in time as of its enactment but can and should, consistent with legislative purpose, take account of technological developments.”).

²⁰ *See* MVPD Definition NPRM, *supra* note 12, ¶ 23.

recommend that the FCC should move forward with broader emergency information regulations both for television sets and second screens used to stream linear programming inside the home, and explore where these regulations could go next. Specifically, the Commission should 1) not implement rigid prioritization rules, 2) eliminate the requirement to transmit schools closures and bus schedule changes via the secondary audio stream, and 3) adopt the technology-neutral definition of an MVPD, extending the emergency accessibility regulations to all linear programming viewed on second screens, regardless of the delivery method. These suggestions would supplement the most recent Notice of Proposed Rulemaking (NPRM) adopted on April 1, 2016, which increases the video description requirements on major networks, but does nothing to address emergency information.²¹

I. BACKGROUND

A. Accommodations for the Deaf

The FCC passed its first major closed captioning regulation in 1993,²² taking the initial step toward enabling consumers with hearing impairments to enjoy their favorite programs. The FCC has since strengthened and broadened these regulations, and now closed captioning is available for all television programming, online full-length programming that was previously shown on TV with captions, and, as of July 2014, even for online video clips that were previously televised as part of captioned programs.²³ Closed captioning is now available on laptops and nearly all mobile devices,²⁴ establishing near parity of access between the hearing and hearing-impaired. In *Nat'l Ass'n of the Deaf v. Netflix, Inc.*,²⁵ the U.S. District Court for the District of Massachusetts even extended the closed captioning requirement to Netflix, finding that

²¹ See Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, MB Docket No. 11-43, Notice of Proposed Rulemaking, 16 FCC Rec. 37 (2016) [hereinafter April 2016 NPRM].

²² See *Closed Captioning on Television*, FCC.GOV, <http://www.fcc.gov/guides/closed-captioning> (last visited Dec. 5, 2015).

²³ Press Release, FCC, FCC Moves to Ensure Online Video Clips are Accessible to Americans Who are Deaf or Hard of Hearing (July 11, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DOC-328173A1.pdf.

²⁴ See *Device Comparison Chart*, NAT'L CTR. FOR ACCESSIBLE MEDIA, http://ncam.wgbh.org/invent_build/web_multimedia/mobile-devices/devices (last visited Dec. 5, 2015).

²⁵ 869 F. Supp. 2d 196, 199 (D. Mass. 2012).

it was a place of public accommodation subject to requirements under the Americans with Disabilities Act.²⁶

B. Accommodations for the Blind

The first major accommodations for individuals with visual impairments, however, were not proposed until the passage of the Telecommunications Act of 1996 (1996 Act).²⁷ The 1996 Act amended the Telecommunications Act of 1934, addressing several challenges facing vision- and hearing-impaired consumers. The Act also broadened FCC authority over closed captioning, and granted it some authority over video description.²⁸ These amendments, however, did not translate to actual reform.

The 1996 Act described the FCC's powers over closed captioning in detail—expressly giving the FCC authority to make and implement closed captioning regulations.²⁹ However, with respect to video description authority, it merely defined video description and directed the FCC to report to Congress on the topic.³⁰ Despite this textual difference in authority in section 713 over closed captioning and video description,³¹ the congressional record sent a mixed message that the FCC interpreted as granting broad authority to create both accommodations, and based on the purpose expressed in the Congressional record—“to ensure that *all* Americans ultimately have

²⁶ See generally *id.*; but see *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1024 (N.D. Cal. 2012) (reaching the opposite holding).

²⁷ Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat 56 (Feb. 8, 1996).

²⁸ *Id.* § 713(a)–(g); see also *Video Description*, *supra* note 3 (explaining video description).

²⁹ Telecommunications Act of 1996 § 713(a)–(d) (providing broadly for closed captioning that “the Commission shall prescribe such regulations as are necessary to implement this section” and directing video programming providers to “maximize the accessibility of video programming . . . through the provision of closed captions”).

³⁰ *Id.* § 713(f)–(g) (distinguishing video description from closed captioning; the Act’s only video description directive was that “the Commission shall commence an inquiry to examine the use of video descriptions . . . and report to Congress on its findings”); see also 47 U.S.C. § 613(f)(g) (1996).

³¹ Telecommunications Act of 1996 § 713.

access to video services”³²—the FCC proceeded as if it had equal statutory authority to regulate video description and closed captioning.³³

After the passage of the 1996 Act directing it to take action, the FCC created regulations requiring MVPDs to caption their programming, and created a transition schedule, gradually increasing the amount of programming that needed to be captioned.³⁴ Believing it had equally strong statutory authority to regulate video description,³⁵ the FCC created similar timetables for video description, mandating that major broadcast network affiliates provide video description for a minimum of fifty hours per calendar quarter of children’s or prime time programming.³⁶ The Commission adopted an NPRM on April 1, 2016 that increased that number to no less than 87.5 hours per quarter for covered networks.³⁷

C. Motion Picture Ass'n of Am., Inc. v. FCC and Starting Over

The FCC itself was divided as to whether it had the authority to promulgate the video description regulations, with the Commission voting in favor of the regulations in a close three-to-two vote.³⁸ The minority’s worry was confirmed when the D.C. Court of Appeals ruled in *Motion Picture Ass'n of Am., Inc. v. FCC*³⁹ (MPAA) that the FCC had overstepped its regulatory authority in promulgating the video description regulations.⁴⁰ The court ruled that because the text of section 713 of the 1996 Act furnished significantly more authority to regulate

³² H.R. Rep. No. 104-458 (Jan. 31, 1996) (stating that “[i]t is the goal of the House to ensure that *all* Americans ultimately have access to video services and programs, particularly as video programming becomes an increasingly important part of the home, school and workplace”) (emphasis added).

³³ *Id.*

³⁴ Closed Captioning on Television, *supra* note 22.

³⁵ *See Video Description, supra* note 3 (providing an explanation of video description).

³⁶ Implementation of Video Description of Video Programming, Report and Order, MM Docket No. 99-339, 15 F.C.C. Rcd. 15230 (2000).

³⁷ *See* April 2016 NPRM, *supra* note 21, ¶ 18.

³⁸ Jill Carroll, *FCC Requires TV Broadcasters to Offer Video Description for Visually Impaired*, WALL ST. J. (July 24, 2000, 12:01 AM), <http://www.wsj.com/articles/SB96439020930314962>; *see also* Motion Picture Ass'n of Am., Inc. v. FCC, 309 F.3d 796, 800 (D.C. Cir. 2002).

³⁹ 309 F.3d 796 (D.C. Cir. 2002).

⁴⁰ *Id.* at 803.

closed captioning than video description, the FCC did not have authority to issue its video description regulations.⁴¹

The court ruled this way for several reasons. First, video description necessitated the production of entirely new content, which required an additional script to be read aloud; on the other hand, closed captioning was simply the written transcription of an existing script.⁴² Another rationale for the differing treatment was that video description regulations would prove to be a far greater financial burden on programming providers than closed captioning regulations because they required the use of a secondary audio channel, a technological development which not many television providers and streaming devices supported at the time, but is ubiquitous in television sets and laptops today.⁴³ The court specified that if Congress wanted the FCC to have equal regulatory authority over video description and closed captioning, it could grant the FCC that authority by passing such legislation.⁴⁴ This ruling tied the FCC's hands when it came to helping visually-impaired customers enjoy television programming.

D. Congressional Response and the 21st Century Communications and Video Accessibility Act of 2010

During the next few years, Congress made several attempts—none of which passed into law—to respond to the court's holding in *MPAA* by introducing legislation that would reinstate the FCC's video description rules. Most notable among these was the Television Information-Enhancement for the Visually Impaired Act of 2005, or

⁴¹ *Id.* at 806–07 (holding that “the FCC can point to no statutory provision that gives the agency authority to mandate visual description rules”); *see also supra* notes 16–17.

⁴² *Motion Picture Ass'n of Am., Inc.*, 309 F.3d at 803.

⁴³ *See* Joshua S. Robare, *Television for All: Increasing Television Accessibility for the Visually Impaired Through the FCC's Ability to Regulate Video Description Technology*, 63 *FED. COMM. L.J.* 553, 568, 573 (2011).

⁴⁴ *Motion Picture Ass'n of Am., Inc.*, 309 F.3d at 799 (“The conference committee adopted the Senate version, abandoning the House language providing the FCC with discretionary authority. Congress passed this version of the bill and the President signed it into law.”); *see also* Sarah M. Preis, *To Regulate or Not to Regulate: The FCC's Authority to Regulate Online Copyright Infringement Under the Communications Act*, 2008 *U. CHI. LEGAL F.* 535, 546–47 (2008).

TIVI Act, and its companion legislation in the House.⁴⁵ On October 8, 2010, Congress finally succeeded in passing the 21st Century Communications and Video Accessibility Act of 2010 (CVAA) in order to address the growing need to update our nation's telecommunications protections for people with disabilities.⁴⁶ Sections 202 and 203 in Title II of the CVAA expanded and unambiguously clarified the FCC's authority to regulate both closed captioning and video description to an equal degree.⁴⁷ Additionally, section 201 mandated the creation of the Video Programming and Emergency Access Advisory Committee (VPAAC) and authorized it to explore and eventually recommend what protocols, technical capabilities, and user interfaces would best allow vision-impaired consumers to access aural emergency information.⁴⁸ The section empowered the FCC with broad authority to follow the recommendations of VPAAC and promulgate emergency information regulations. When Congress passed the CVAA, it meant for it to resolve the issue addressed by the court in *MPAA*; but as technology has evolved further, it has become unclear how far the FCC's authority to regulate closed captioning, video description, and emergency information reaches.

Today, the technical hurdles that existed when *MPAA* was decided in 2002 are no longer an issue. Secondary audio streams, the

⁴⁵ Television Information-Enhancement for the Visually Impaired Act, S. 900, 109th Cong. (2005); *see also* Video Description Restoration Act of 2005, H.R. 951, 109th Cong. (2005).

⁴⁶ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, Oct. 8, 2010; *see also* *Advanced Communication Services*, FCC, www.fcc.gov, <https://www.fcc.gov/general/advanced-communications-services-ac> (articulating the goal of the CVAA as “updat[ing] the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming”).

⁴⁷ Twenty-First Century Communications and Video Accessibility Act of 2010 §§ 202–03 (granting the Commission authority to “identify methods to convey emergency information . . . in a manner accessible to individuals who are blind or visually impaired”).

⁴⁸ *Id.* § 201; *see also* 47 U.S.C. § 613(g)(1) (2012) (making it the responsibility of the Advisory Committee to “identify methods to convey emergency information . . . in a manner accessible to individuals who are blind or visually impaired” and “promulgate regulations that require video programming providers and video programming distributors . . . and program owners to convey such emergency information in a manner accessible to individuals who are blind or visually impaired”).

technology used to deliver aural emergency information,⁴⁹ are available on most televisions and laptops, and MVPDs are able to support their use.⁵⁰ The digital transition has increased the number of secondary audio streams available to broadcast foreign language programming, video description, and aural emergency information from one or two to six.⁵¹ Thus, both the capacity and regulatory infrastructure now exist to pass emergency information through an existing secondary audio stream.

E. The Emergency Information Order and April FNPRM

The FCC acted on its CVAA authority to resolve the accessible emergency information issue when it released the Emergency Information Order and its accompanying April FNPRM, on April 9, 2013. The Order adopted rules requiring that emergency information provided visually during regularly-scheduled non-news-cast programming be made accessible to individuals who are blind or visually impaired, and that certain apparatuses be capable of delivering video description and emergency information.⁵² The final rules, in accordance with section 79.2 of the Commission's rules, became effective on April 16, 2014.⁵³

In order to ensure unimpeded access for emergency information on the secondary audio stream, the rules require emergency information to be conveyed at least twice, and it must supersede video description, foreign language programming, or any other content provided on the secondary audio stream.⁵⁴ While the rules do not require a verbatim aural translation of the on-screen crawl, the audio must accurately convey all critical details and provide consumers with information about how to respond to the emergency to the same extent as the on-screen text.⁵⁵ In its Public Notice, the Commission also stressed that section 79.2 may apply even *outside* the immediate geographic area affected by the weather

⁴⁹ In addition to emergency information, secondary audio streams are also used to deliver foreign language narration and video description—all of these are collectively referred to as programming over the secondary audio stream. Today, the secondary audio stream is somewhat of a misnomer since the secondary audio stream can actually support six audio streams.

⁵⁰ Robare, *supra* note 43.

⁵¹ *See id.* at 570; *see also Video Descriptions and the Digital Television Transition*, FCC.GOV, <http://www.fcc.gov/guides/video-descriptions-and-digital-television-transition> (last updated Nov. 7, 2015).

⁵² *See* April 2013 FNPRM, *supra* note 2.

⁵³ Final Rule, *supra* note 1; codified at 47 C.F.R. § 79.2.

⁵⁴ April 2013 FNPRM, *supra* note 2, ¶ 26.

⁵⁵ *Id.* ¶¶ 23–24.

emergency because critical details such as relocation information may need to reach individuals outside that area.⁵⁶

In the April FNPRM, the Commission sought comment on several issues, most importantly 1) whether the accessible emergency information requirements should be extended to mobile devices; 2) if so, whether the requirements should apply to linear mobile programming viewed outside the home; 3) whether the requirements should apply to both programming delivered over the MVPD's network and over IP; and 4) whether the Commission should impose any specific customer service requirements on MVPDs to help customers address accessibility questions.⁵⁷ On May 21, 2015, the Commission adopted the Second Report and Order and Second Further Notice of Proposed Rulemaking (May 2015 Report and Order and May 2015 FNPRM respectively), addressing some of these issues and leaving others open for additional comments.⁵⁸

F. Where We Are Today: The Second Report and Order

Most commenters agree that a regulation requiring the provision of aural emergency information in some way is vital—the debate lies in how, when, and to which devices that requirement should apply. On May 28, 2015, the Commission issued the Second Report and Order, which announced a new rule requiring MVPDs to pass through a secondary audio stream containing audible emergency information when they permit consumers to access linear programming on mobile devices and other second screens.⁵⁹ While this was an important step forward from the status quo where MVPDs had no such obligation, it fell far short of the FCC's articulated goals when it began this rulemaking.⁶⁰ This rule extended the requirement to linear programming viewed *inside the home*

⁵⁶ Public Notice, FCC, Reminder Regarding Video Programming Distributors' Obligation to Make Emergency Information Accessible to Persons who are Deaf, Hard of Hearing, Blind, or Visually Impaired (Sept. 10, 2014) https://apps.fcc.gov/edocs_public/attachmatch/DA-14-1312A1.pdf.

⁵⁷ April 2013 FNPRM, *supra* note 2, ¶¶ 80, 86.

⁵⁸ See May 2015 R&O and May 2015 FNPRM, *supra* note 14.

⁵⁹ See 47 C.F.R. § 79.2(b)(6). The compliance deadline for this requirement is July 10, 2017.

⁶⁰ See April 2013 FNPRM *supra* note 2, ¶ 80 (“We recognize that some MVPDs currently enable subscribers to access linear video programming inside the home as well as outside the home (e.g., TV Everywhere offerings). Should our rules apply to both situations – irrespective of where the subscriber may physically be when accessing the programming? Does it matter whether the emergency content is being delivered over the MVPD's IP network or over the Internet?”).

over the MVPD's network, but it did not reach the same programming viewed outside the home or over the Internet.⁶¹ This decision severely limited the impact this rulemaking would have on the accessibility of emergency information for individuals with vision impairments.

This limitation is significant because cable operators are increasingly providing applications (apps) that enable their customers to view linear programming inside and outside the home, delivered through the MVPD's network or over IP, on a variety of second screens. Recent studies show that forty-two percent of Americans watch mobile TV,⁶² yet only a small fraction of these viewers will have the benefit of audible emergency information. Furthermore, consumers have no control over which delivery method an MVPD uses to deliver its content, and the methods are indistinguishable to the consumer—yet under the Second Report and Order, only one of them would require an audible emergency information stream.

Understanding the distinction between programming delivered through the MVPD's network and programming delivered over IP is crucial. In its April FNPRM, The Commission indicated that it wished to extend the aural emergency information requirement to MVPDs *regardless* of whether users were viewing linear programming through the MVPD's network or via IP, and sought comment on this proposal.⁶³ After vehement opposition from industry groups, however, the Commission in its Second Report and Order chose to confine this requirement to linear programming viewed over the MVPD's network.⁶⁴ As a result, audible emergency information requirements do not currently apply to linear programming viewed on second screens over IP.⁶⁵ The impact of this decision on accessibility for consumers who are visually impaired is discussed in Part II below.

Several examples can help elucidate this fine technological distinction. If you are a Comcast Xfinity subscriber using the Xfinity app to watch linear programming at home on your iPad rather than on your

⁶¹ See May 2015 R&O, *supra* note 14, ¶ 14 (“Our emergency information rules do not apply, at this time, to an MVPD's linear programming that is accessed via the Internet, such as TV Everywhere offerings.”).

⁶² *42 Percent of North American Consumers Watch Mobile TV*, CTIA (July 28, 2015), <http://www.ctia.org/resource-library/facts-and-infographics/archive/north-american-consumers-watch-mobile-tv>.

⁶³ April 2016 FNPRM, *supra* note 2, ¶ 80.

⁶⁴ See May 2015 R&O *supra* note 14, ¶¶ 9, 14.

⁶⁵ *Id.*

TV, you are covered. You can sip your hot chocolate in peace, knowing that if a sudden storm hits, you will be informed. So which viewing experiences are not covered by the aural emergency information requirement in the Second Report and Order? If you are watching a linear programming app that is provided by anyone other than your current home Internet provider, you are not covered.⁶⁶ If you live in a place with public Wifi or covered by a hotspot, and your linear program is delivered to your second screen using one of those methods, you are also not covered. If you are watching your favorite program using a mobile app—such as the new and wildly popular TV Everywhere—in a bookstore, a public library, or anywhere outside the home, you are definitely not covered.⁶⁷

Because of the increase in mobile media consumption, the Commission sought to pass a regulation that would protect individuals with visual impairments *regardless* of which screen they chose to watch their favorite programming and where they were watching it. However, MVPDs currently pass through only a single audio stream to apps; thus, a requirement to provide emergency information or video description would require app operators to create and enable a second audio stream in order to comply.⁶⁸ For this reason, additional requirements were met with strong opposition from industry groups.

1. Industry Arguments for Limited Regulation

In the Second Report and Order, the FCC took a position siding with the industry. In response to the April FNPRM, many industry groups including AT&T, DIRECTV, the Consumer Electronics Association (CEA), and the Entertainment Software Association (ESA) argued vigorously that the FCC should not extend CVAA video description and emergency information requirements beyond traditional broadcast and MVPD services—delivering linear programming to an in-

⁶⁶ This scenario warrants an explanation: a college student may have Internet provided by Time Warner, but may use her family's Xfinity log-in to watch linear programming using the Xfinity app. This is particularly common for young adults who "cut the cord" and do not purchase cable, electing instead to watch programming using mobile apps, but may not have the same ISP that provides their family's cable subscription available in their area.

⁶⁷ See May 2015 R&O, *supra* note 14.

⁶⁸ Notice of Ex Parte of the National Cable & Telecommunications Association, FCC MB Docket No. 12-107 (rel. Apr. 4, 2014).

home TV set *over the MVPD's network*.⁶⁹ This meant that emergency information and video description requirements would not apply to IP-delivered video on mobile devices and other second screens, even when the linear programming is viewed inside the home. They argued that such a move would create confusion and technical problems because it is difficult to tie the emergency information presented with the geographical area in which the consumer is using her mobile device.⁷⁰ DIRECTV also stated that the “technological ecosystem” for including a secondary audio stream on mobile devices does not currently exist, and creating it would be a massive undertaking.⁷¹

2. Consumer Groups Arguments for Stronger Regulation

Consumer groups and the Wireless Rehabilitation Engineering Research Center (Wireless RERC) disagreed, maintaining that the CVAA requirements should apply regardless of whether the programming is delivered through the MVPD's network or over IP, as long as the programming is watched inside the home.⁷² Television viewing via mobile devices is becoming increasingly popular, especially with the younger generation,⁷³ and not extending the rules to this growing market will create a gulf in accessibility that will only grow with time.

Additionally, it is simply not true that MVPDs currently have only limited capability to include a secondary audio stream for linear programming delivered via IP. Several MVPDs are making major progress toward this goal. Cablevision, for example, is currently developing, testing, and upgrading its software to support access to the secondary audio stream for consumers using its Optimum App to view programming on mobile devices.⁷⁴ Once the updates are developed, this app will be able to pass video description and emergency information

⁶⁹ Reply to Comments of the Entertainment Software Association, FCC MB Docket No. 12-107 (rel. Aug. 22, 2013) at 4.

⁷⁰ *Id.*

⁷¹ Comments of DIRECTV, FCC MB Docket No. 12-107 (rel. July 24, 2013) at 7.

⁷² See Reply to Comments of Wireless RERC, FCC MB Docket No. 12-107 (rel. Aug. 22, 2013) at 4–6.

⁷³ Jon Lafayette, *Viewers Show Interest in TV on Mobile Devices*, BROAD. & CABLE (June 26, 2012 5:00 PM), http://www.broadcastingcable.com/article/486420-Viewers_Show_Interest_in_TV_on_Mobile_Devices.php?rssid=20065.

⁷⁴ See Notice of Ex Parte of Cablevision, FCC MB Docket No. 12-107 (rel. June 26, 2014).

through its secondary audio stream.⁷⁵ Customers using the Cablevision App to view programming on a laptop or PC already have access to the secondary audio stream.⁷⁶ Companies such as Cablevision are working toward making all aspects of their consumers' experience more accessible to individuals who are visually impaired—they only request that the Commission allow them sufficient time to complete the process.⁷⁷

Likewise, Comcast is working to create infrastructure that allows it to pass through emergency information and video description provided by broadcasters over the secondary audio stream on IP platforms, specifically for the Xfinity app.⁷⁸ Comcast has also initiated training for product development teams to consider accessibility issues as early in the product development cycle as possible.⁷⁹ Comcast currently supports access to secondary audio in set-top boxes and passes through the secondary audio stream for all of its cable services.⁸⁰ These examples cut both ways, showing that making programming more accessible is technically feasible—but also demonstrating that stricter regulations may not be totally necessary to push companies in the direction of accessibility, as market forces alone may suffice.

II. ANALYSIS

Part I explained the current state of the FCC's audible emergency information regulations, and the arguments that informed those regulations. For reasons explained above, these regulations stopped short of achieving the FCC's initially stated goal—extending the audible emergency information requirement to all linear, non-newscast programming viewed on second screens, regardless of the content's delivery method.⁸¹ This section will explore how to move forward in

⁷⁵ *Id.*

⁷⁶ *Optimum App on Laptop: Settings*, OPTIMUM, http://optimum.custhelp.com/app/answers/detail/a_id/2847/~/optimum-app-on-laptop%3A-settings (last visited May 10, 2016) (listing instructions for turning on SAP).

⁷⁷ *See* Notice of Ex Parte of Cablevision, FCC MB Docket No. 12-107 (rel. June 26, 2014) (explaining that Cablevision “emphasized the need for the Commission to give it sufficient time to complete this complicated process”).

⁷⁸ Notice of Ex Parte of Comcast, FCC MB Docket 12-107 (rel. May 27, 2014) (detailing Comcast's use of SAP through its Xfinity app).

⁷⁹ *Id.* at 1.

⁸⁰ *Id.* at n.1.

⁸¹ *See* Emergency Information Order, *supra* note 3 (Final Rules at Appendix B), April 2013 FNPRM ¶ 80 (inquiring whether to extend emergency information requirements to linear programming on mobile devices).

filling the resulting gaps in the most efficient way possible. It will also present an analysis of some of the questions the Commission posed in its Second Report and Order.

A. The Second Report and Order and Second FNPRM

After implementing the rule that extends aural emergency information requirements to linear programming provided over the MVPD's network for in-home viewing, the Commission posed several additional questions in the accompanying FNPRM. It sought comments on 1) whether navigation devices provided for accessibility should be required to include a "simple and easy to use activation mechanism for accessing audible emergency information on the secondary audio stream," 2) the prioritization of emergency information on the secondary audio stream, and 3) whether the Commission should reconsider its requirement that school closings and bus schedule changes be conveyed as part of the aural emergency alert announcement.⁸² While the first issue is outside the scope of this Brief, I will briefly comment on how the Commission should best address the second and third.

1. Prioritization of Information

While a TV screen can display multiple sources of emergency information in the event of several concurrent disasters, the secondary audio stream has no comparable capability—we cannot hear and understand multiple messages at once. Additionally, no technology currently exists that allows broadcasters to automatically prioritize information within the audio crawl. In light of this limitation, the Commission sought comment on whether it should implement prioritization rules.⁸³

The Commission should refrain from enacting a one-size-fits-all requirement. Weather emergencies necessitate flexibility, and local broadcasters are in a position to better understand the needs and priorities

⁸² See May 2015 FNPRM, *supra* note 14, ¶ 4.

⁸³ See April R&O, *supra* note 2, ¶ 26 (determining that emergency information should be prioritized over all other content in the secondary audio stream); see also May 2015 FNPRM, *supra* note 14, ¶ 4 (seeking comment on a different but related question, "whether [the Commission] should adopt rules regarding how covered entities should prioritize emergency information conveyed aurally on the secondary audio stream when more than one source of visual emergency information is presented on-screen at the same time").

of their own communities than the FCC is.⁸⁴ Broadcasters have no incentive to prioritize in bad faith, and such prioritization constitutes an editorial decision that the FCC should be very hesitant to regulate.⁸⁵

Given the inability to automatically prioritize audible emergency information, it is particularly important that the information relayed be only the most crucial and time-sensitive information regarding an impending emergency. The audible crawl narration should provide only information aimed at the protection of life, health, safety, and property. Any other information would block the vital information, due to the limited nature of the audio stream. For this reason, the secondary audio stream should not be used to transmit lists of school closures.

2. School Closures

When sighted individuals read the emergency alert scroll at the bottom of the screen, they first see a brief summary of the nature of the weather emergency and its time span, followed by an often very lengthy list of local school closures or bus schedule changes. If sighted individuals tune in during the middle of the crawl, they often miss the initial critical details and are forced to wait for all of the school closures to ribbon through. Individuals who are vision-impaired would face similar but magnified obstacles on the secondary audio stream.

Wading through irrelevant information would take more time for vision-impaired customers. Most people read faster than they speak; thus, the recitation of the emergency information would likely take longer than the amount of time in which a visual scroll completes a cycle. Additionally, since school closures are shown on the scroll in alphabetical order, sighted individuals know when to pay attention to their relevant school, and can spend the rest of the time watching their regularly scheduled programming. For customers tuned into the secondary audio stream for their emergency information, however, the lengthy recitation of local school closures supplants the regular audio stream entirely. Since the regulation requires the emergency information to be repeated at least twice, a particularly long list of school closures could render blind individuals completely unable to listen to any video description provided for a particular program. In fact, a study cited by the

⁸⁴ Comment of the Nat. Ass'n of Broads., FCC MB Docket No. 12-107 at 2-4 (rel. Aug. 10, 2015).

⁸⁵ Motion Picture Ass'n of Am., Inc. v. FCC, 309 F.3d 796, 807 (D.C. Cir. 2002) (finding that FCC lacked authority to adopt challenged regulations because they "implicate[d] program content").

National Association of Broadcasters (NAB) found that audibly describing a complete list of school closings may, in some cases, take over an hour for a single recitation.⁸⁶

The lengthy audio recitation of school closings would also supplant more crucial information about a pending weather disaster, such as what geographic areas it affects, evacuation routes, and where to seek shelter. While a TV screen can be divided into several boxes, or show multiple current information scrolls to accommodate more information, such increased capacity is not available on the secondary audio stream, which obviously cannot play concurrent audio relaying several messages at once. Though this limitation is practical and not technical, it still limits the capacity of a secondary audio stream in a very real sense.

While many individuals with vision impairments are parents to whom learning information about school closings is of utmost importance, there are more efficient ways for these people to access such information without delaying access to the critical, basic information about the weather emergency. Stating in the audio weather alert that some schools in the area may be impacted should be sufficient to direct parents with vision impairments to other easily accessible sources of information.

First, many schools already use a system where parents can call and learn about a school's closure status from an automated receptionist.⁸⁷ Second, towns may elect to set up inclement weather hotlines to assist with questions about developments, safety measures, proper evacuation procedures, or school closings. Many towns across the nation have already instituted such hotlines.⁸⁸ Additionally, a national consulting firm has suggested that the FCC work with FEMA to develop a national twenty-four-hour hotline that people could call to confirm that

⁸⁶ See Comment of the Nat. Ass'n of Broads., FCC MB Docket No. 12-107 at 7 (rel. Aug. 10, 2015) (explaining that broadcasters' tests in 2015 found that audibly describing a full list of school closings "often took considerable time—in some cases, over an hour").

⁸⁷ Comment of Effective Altruism Policy Analytics, FCC MB Docket No. 12-107 at 2 (rel. Aug. 11, 2015).

⁸⁸ See, e.g., *Weather Line*, TOWN OF WAKE FOREST, <http://www.wakeforestnc.gov/weatherline.aspx> (last visited May 10, 2016) (stating that, "in cases of inclement weather," Wake Forest residents may call a hotline for updates on changes to the town's schedule).

certain weather alerts were legitimate.⁸⁹ In order to be a useful source of weather-related school closures, this plan would need to be developed further—perhaps by allowing the consumer to enter her zip code via touch-tone telephone and then be connected to a representative that can confirm and answer questions about local weather emergencies. This plan was initially proposed as a way to counteract cyber security vulnerabilities that could lead to hacks resulting in false alerts, such as the 2013 Michigan zombie alert hoax.⁹⁰ Schools also use various targeted methods including robocalls,⁹¹ phone trees,⁹² texts, emails, Twitter, Facebook, school websites, radio, and specific smartphone applications to notify parents.⁹³

While there is no denying that this policy would treat consumers with vision impairments unequally—depriving them of information that their sighted counterparts would receive via the emergency information crawl, this inequity is the best way to deal with the innate, finite capacity of the secondary audio stream. The NAB supports this solution because school closures may block the transmission of more important and time-sensitive emergency information.⁹⁴ In fact, the NAB favors eliminating this requirement entirely, even when there is no competing emergency information being broadcast over the secondary audio stream, because “broadcasters will likely run the crawls out of an abundance of caution to avoid running afoul of the rules. The end result could be that the

⁸⁹ Jacob Fischler, *FCC Urged To Put In Emergency Alert Verification Hotline*, LAW360 (Sept. 14, 2015, 1:53 PM) <http://www.law360.com/articles/702252/fcc-urged-to-put-in-emergency-alert-verification-hotline>.

⁹⁰ *Id.*; see also *Zombie Warning Shown On Michigan TV Stations After Emergency Alert Systems Hacked*, HUFFINGTON POST DETROIT (Dec. 12, 2013, 3:58 PM) http://www.huffingtonpost.com/2013/02/12/zombie-warning-michigan-tv-alert-video_n_2671044.html (reporting that hackers inserted a false scrolling alert of a zombie apocalypse into two stations’ Emergency Alert Systems).

⁹¹ *Robocalls*, FCC (Nov. 7, 2015 4:00 PM), <https://www.fcc.gov/consumers/guides/robocalls>.

⁹² Deborah Swerdlow, *How to Build a Phone Tree*, AM. ASS’N OF U. WOMEN, <http://www.aauw.org/resource/how-to-build-a-phone-tree/> (explaining how phone trees work and how to set them up).

⁹³ Comment of the Nat. Ass’n of Broads., FCC MB Docket No. 12-107 at 8 (rel. Aug. 10, 2015).

⁹⁴ See Comment of the Nat. Ass’n of Broads., FCC MB Docket No. 12-107 at 2 (rel. Aug. 10, 2015) (requesting that the FCC “ensure that critical emergency information is not preempted by long school closing announcement audible crawls”).

[secondary audio stream] becomes a de facto school closing announcement channel in the winter,”⁹⁵ depriving consumers with vision impairments of video description.

Based on these considerations, the Commission should modify its audible emergency information rules by removing “school closings and changes in school bus schedules” from the list of emergencies covered by section 79.2(a)(2).

B. Redefining MVPDs

Given the fact that the FCC stopped short of its original intentions in this rulemaking, it appears likely that the Commission will punt the resolution of this issue to another rulemaking, which has even broader repercussions. Prompted at least in part by the digital transition and the recent controversies in *Sky Angel U.S., LLC v. Discovery Commc’ns, LLC*⁹⁶ and *Am. Broad. Cos. v. Aereo, Inc.*⁹⁷ over what video services qualify as MVPDs, the FCC released an NPRM on December 19, 2014 and sought public comment on the proposal to modernize its interpretation of an MVPD “by including within its scope services that make available for purchase, by subscribers or customers, multiple linear streams of video programming, *regardless of the technology used to distribute the programming.*”⁹⁸ The NPRM specifically proposes to include Internet-based services within the definition of an MVPD, and tentatively concludes that this is a reasonable interpretation of the 1934 Act.⁹⁹ As methods of video delivery converge onto the Internet, this

⁹⁵ *Id.* at 8–9.

⁹⁶ *Sky Angel U.S., LLC v. Discovery Commc’ns, LLC*, 2013 U.S. Dist. LEXIS 95158 (D. Md. July 9, 2013); *see also* April 2013 FNPRM *supra* note 2, ¶¶ 10–11 (holding that *Sky Angel* was not an MVPD, and therefore not entitled to relief under the program access rules, because the definition required a “transmission path”).

⁹⁷ *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S.Ct. 2498 (2014); *see also* MVPD Definition NPRM *supra* note 12 at fn. 20 citing Letter from Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, U.S. Copyright Off., to Matthew Calabro, Director of Financial Planning & Analysis and Revenue, Aereo, Inc. (July 16, 2014) (indicating that the Copyright Office rejected Aereo’s argument that it is a cable operator under the Copyright Act but indicated that it might revisit that conclusion if the FCC should find Aereo to be an MVPD under the Communications Act); *see also* Notice of Ex Parte of FilmOn X, LLC, FCC MB Docket No. 14-1261 at 2, 4 (rel. Oct. 9, 2015) (presenting a similar case following the *Aereo* ruling).

⁹⁸ MVPD Definition NPRM, *supra* note 12, ¶¶ 1, 13 (emphasis added).

⁹⁹ *Id.* ¶¶ 6, 13.

proposal would level the playing field—subjecting smaller, online video programming providers to consumer-focused regulation, but also giving them the tools necessary to compete with established providers.¹⁰⁰ An MVPD would have the same rights and responsibilities despite changes in technology.¹⁰¹ This revised, technology-neutral definition has a variety of possible impacts,¹⁰² but the one relevant to this Issue Brief is that it “defines away” the delivery method-based distinctions and gaps that exist in the current emergency accessibility regulations. Specifically, one of the responsibilities of an MVPD is to comply with emergency information requirements, which now include providing an aural version of the on-screen crawl using the secondary audio stream.¹⁰³ If Internet-based MVPDs become part of the definition, it follows that they will become subject to this requirement.

If this rulemaking proposal is adopted by the Commission, an MVPD would no longer be able to escape the requirements of the Emergency Information Order by routing its content through IP rather than its own network—both methods of content delivery would fall squarely into the revised definition of an MVPD. An entity that meets the definition of an MVPD is subject to all of an MVPD’s obligations, including video description and access to emergency information.¹⁰⁴

The Commission seeks comment on how this rule would affect emergency information obligations, if adopted;¹⁰⁵ however, its impact would be fairly clear cut in this context—all linear video programming delivered through the Internet will need to follow the emergency information rules set forth in section 79.2. The FCC also seeks comment on “an alternative interpretation that would require a programming distributor to have control over a transmission path to qualify as an MVPD.”¹⁰⁶ If this interpretation were adopted, the reach of emergency

¹⁰⁰ *Id.* ¶ 1.

¹⁰¹ *Id.* ¶ 2.

¹⁰² See MVPD Definition NPRM, *supra* note 12, ¶¶ 36–64 (providing a detailed explanation of the privileges and legal obligations associated with MVPD status).

¹⁰³ See 47 C.F.R. § 79.2(b)(1)(ii)–(iii) (requiring emergency information on video broadcasts to be “accessible” to those with visual disabilities); see also Reply Comments of Am. Found. for the Blind, FCC MB Docket No. 14-1261 at 1–2 (rel. Apr. 1, 2015) (discussing the expansion of the definition of MVPDs to new formats).

¹⁰⁴ MVPD Definition NPRM, *supra* note 12, ¶¶ 36, 56.

¹⁰⁵ *Id.* ¶ 56.

¹⁰⁶ *Id.* ¶ 6.

information regulations would *not* be extended to programming delivered over IP, because an MVPD providing programming over IP or public Wi-Fi does not have control over the transmission path.

Redefinition of what constitutes an MVPD is crucial because the original definition added to the Communications Act of 1934 in 1992,¹⁰⁷ unsurprisingly, does not consider Internet delivery to be a viable transmission path for video programming or channel for MVPDs. It defines an MVPD as an entity that “makes available for purchase, by subscribers or customers, *multiple channels of video programming*.”¹⁰⁸ Internet programming has already been held to be “video programming.”¹⁰⁹ Thus, the single remaining definitional hurdle is the fact that the Act defines “channel” as “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel”¹¹⁰—language that upon its adoption clearly failed to contemplate the present capabilities of the Internet.

1. Redefining a “Channel”: The Best Option

The Commission is considering several possible redefinitions of a “channel” in order to bring online video programming providers within the scope of an MVPD. Because MVPDs are obligated to pass through emergency information, how the Commission chooses to define “channel” will determine, among other things, what type of content the emergency information regulations apply to.

The clearest way to interpret “channels of video programming” is to say that the phrase means “streams of linear video programming.”¹¹¹ The Commission calls this the “Linear Programming Interpretation” and has tentatively concluded that this is the best possible definition.¹¹² This definition would encompass prescheduled programming viewed on a mobile device at the same time it is available on the corresponding TV channel, regardless of the technological path used to deliver the programming to the viewer. The Commission should adopt this

¹⁰⁷ See *supra* text accompanying note 18.

¹⁰⁸ 47 U.S.C. § 522(13) (emphasis added).

¹⁰⁹ *Verizon v. FCC*, 740 F.3d 623 (DC Cir. 2014) (“intervening improvements in streaming technology and broadband availability enable such programming to be ‘comparable to programming provided by . . . a television broadcast station’”) (quoting definition of “video programming” in 47 U.S.C. § 522(20)).

¹¹⁰ 47 U.S.C. § 522(4).

¹¹¹ MVPD Definition NPRM, *supra* note 12, ¶ 17.

¹¹² *Id.*

interpretation because it is consistent with consumer expectations and Congressional intent.

The Linear Programming Interpretation is consistent with consumer expectations because it applies the phrase “channels of video programming” to the types of services that consumers colloquially consider channels, and no others. Adopting this technology-neutral definition of an MVPD would allow the Commission to regulate no more content providers and business models than necessary, aiming to cover only Internet-based subscription linear programming providers, such as Aereo, Sky Angel,¹¹³ and other linear video programming networks that consumers think of as channels—such as ESPN and the Weather Channel.¹¹⁴ Other types of Internet-based programming, such as On-Demand programming—Hulu, Netflix, Amazon Prime Instant Watch, etc.—will not be covered, and thus, the emergency information requirement would not extend to such services were this NPRM adopted. Additionally, more than ever before, consumers are using second screens as a substitute for their home TV sets, to watch the same linear programming on the go.¹¹⁵ Content providers are tuned into this trend, providing apps that allow users to log in to their cable subscription and watch shows at the same time they could at home. Since consumers expect the same content in their pockets as on their home TVs, this expectation has come to encompass other aspects of that programming—such as emergency information—as well.

This definition is consistent with the statutory text, and arguably with Congressional intent, because the statutory definition of an MVPD uses open-ended language, stating “*such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor.*”¹¹⁶ Congress adopted the term “MVPD” in 1992, before it could anticipate the wide distribution of Internet-programming. However, legislators contemplated changes and developments in technology, and thus, wisely chose open-ended language to maintain regulation over new technologies that operate as an MVPD, not just

¹¹³ *Id.* ¶¶ 13–14 (Aereo and Sky Angel were both forced to declare bankruptcy or change their programming delivery model after they were not given program access rights because they did not fit the definition of an MVP since they did not control a transmission path).

¹¹⁴ *Id.* ¶ 17.

¹¹⁵ See CTIA, *supra* note 62.

¹¹⁶ 47 U.S.C. § 522(13) (emphasis added).

“cable-specific” channels.¹¹⁷ Furthermore, all of the listed examples have in common the fact that they provide multiple streams of prescheduled programming, *not* that they control the physical distribution networks for the programming.¹¹⁸

Opponents of the Linear Programming Interpretation argue that it cannot possibly be consistent with Congressional intent because the text is clear when it defines a channel as “a portion of the *electromagnetic frequency spectrum which is used in a cable system* and which is capable of delivering a television channel,”¹¹⁹ and the MVPD definition must incorporate this definition of a channel. They argue, then, that a channel must include a transmission path—the referenced portion of spectrum. Although this criticism poses an obvious challenge, it is not fatal to the Commission’s proposed interpretation.

This definition of channel is arguably ambiguous because a channel is only defined in the context of cable systems—only one member of the MVPD class, which came into existence in 1992. The channel definition is from the Cable Communications Policy Act of 1984, and does not contemplate the future creation of an entire MVPD class in the 1992 Cable Act, of which cable systems are only one member. The 1992 Cable Act does not indicate that it incorporates the channel definition from 1984, neither does it reference any technological components that MVPDs must possess, such as a transmission path.¹²⁰ In fact, the definition of an MVPD begins with the broad, open-ended language, “such as, but not limited to,”¹²¹ indicating that Congress did not intend to limit the class of MVPDs strictly to previous technological constructs.

At the very least, this creates an ambiguity.¹²² In its comments to the Commission, Public Knowledge suggested that “channel” should mean different things in the Cable Communications Policy Act of 1984 and the 1992 Cable Act based on their respective purposes.¹²³ The

¹¹⁷ MVPD Definition NPRM, *supra* note 12, ¶ 21–22.

¹¹⁸ *Id.* ¶ 19.

¹¹⁹ 47 U.S.C. § 522(4) (emphasis added).

¹²⁰ Comments of Verizon, FCC MB Docket No. 14-261 at 3–4 (filed Mar. 3, 2015); *see also* 47 U.S.C. § 522(13) (2013).

¹²¹ 47 U.S.C. § 522(13).

¹²² MVPD Definition NPRM, *supra* note 12, ¶¶ 21–22.

¹²³ Comments of Public Knowledge, MB Docket. No. 14-261 at 3–18 (filed Mar. 3, 2015).

purpose of the 1984 Act was primarily to regulate cable.¹²⁴ Because the purpose of the 1992 Act is to promote competition, however, the most inclusive definition—a stream of programming—should apply.¹²⁵ This is the interpretation the Commission proposes to adopt, and the definition that would, in turn, extend emergency accessibility regulation to second screens. In support of this interpretation, Public Knowledge offers the Oxford English Dictionary, which defines “channel” as both a streaming of linear programming and a transmission path.¹²⁶ Thus, the Commission’s Linear Programming Interpretation can stand.

2. Redefining a “Channel”: Some Alternative Definitions

A second possible approach is to require an MVPD to make available not just content, but also provide the transmission path for that content.¹²⁷ This definition would exclude Internet-based programming providers unless they control some part of the physical infrastructure (which some indeed do), and would thus preclude emergency information regulations from applying to those providers. This is the worst possible interpretation for the Commission to adopt because it maintains a dated construct from 1992 of how programming is delivered to consumers. It provides insufficient flexibility to account for the rapid spread of online and mobile content, does not adhere to consumer expectations, and fails to provide regulatory certainty for programming providers because the regulations that apply to them would change based on where, and over what technical infrastructure, a consumer is currently watching their programming.¹²⁸

For example, consider a subscriber who views video at her home on a tablet over broadband infrastructure that the video distributor owns, and then visits a local coffee shop and views video on that same tablet via the Internet using broadband infrastructure that the video distributor does not own. In that case, the video provider would be an MVPD at the subscriber’s home, but not at the coffee shop.¹²⁹

¹²⁴ MVPD Definition NPRM, *supra* note 12, ¶ 21.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ MVPD Definition NPRM, *supra* note 12, ¶ 19.

¹²⁸ *Id.* ¶ 31.

¹²⁹ *Id.*

This distinction is invisible to consumers, yet it is precisely the one on which the requirement to provide audibly accessible emergency information would hinge if this interpretation were adopted.

A third option is to apply a “functional equivalency standard,” where an entity is considered an MVPD if it looks and acts like an MVPD from the consumer’s perspective.¹³⁰ Yet a fourth option is to allow Internet-based content distributors to choose if they want MVPD status, which includes both the benefits of such status—such as program access and retransmission consent rules—as well as the regulatory obligations.¹³¹ This would allow companies like Aereo and Sky Angel to elect MVPD status, and thus gain access to programs that would allow them to compete with established MVPDs.¹³² This “opt-in approach” provides flexibility for entities to choose whether the regulatory burdens of MVPD status are worth the benefits to them, and has the added benefit of not regulating entities that do not wish to be regulated. This policy also ensures that the Commission will not stifle innovation by burdening new entrants into the market. If this option were adopted, however, there would need to be some process implemented for warning consumers that they are viewing programming from an entity not required to provide emergency information, to alert them of the need to find alternative information sources. The third and fourth options are also improvements to the current definition, but they are less clear than the linear programming interpretation, and thus would require inefficient case-by-case analyses.

Whichever definition the Commission eventually adopts, it should take care to not apply it retroactively, because it will, in some cases, bring about a significant change in the rights and responsibilities of various entities.¹³³ This will, of course, not affect emergency information responsibilities, as weather alerts are forward-looking.

¹³⁰ *Id.* ¶ 19.

¹³¹ *Id.*; see also Notice of Ex Parte of the Telletopia Found., FCC MB Docket No. 14-1261 at 2 (rel. Dec. 8, 2015) (suggesting that “[i]f . . . an OVD-MVPD seeks to invoke either the retransmission consent or program access rules, then that OVD-MVPD should be subject to the obligations of the MVPD rules. If an OVD-MVPD does not . . . then the obligations of the MVPD rules should not be triggered”).

¹³² See Notice of Ex Parte of Sky Angel U.S., LLC, FCC MB Docket No. 14-1261 at 1–2 (rel. July 30, 2015) (noting that Sky Angel has requested MVPD status from the FCC).

¹³³ Notice of Ex Parte of Discovery Commc’ns Inc., FCC MB Docket No. 14-1261 at 2 (rel. Aug. 11, 2015).

3. *Eliminating Regulatory Arbitrage*

Setting aside other possible implications of this proposal seeking to redefine an MVPD,¹³⁴ it should be adopted for its benefits in the emergency information context. This proposal will eliminate the possibility for regulatory arbitrage—a process in which content providers purposely choose to provide their content through a transmission path that does not require them to comply with the emergency accessibility regulations, specifically for the purpose of avoiding regulation. Regulatory arbitrage in this context is particularly dangerous because transmission paths are indistinguishable to the consumer, who would not know that the programming they are watching is not subject to regulation, and would assume that a lack of emergency notification necessarily means that there is no looming weather emergency. In fact, this would not be the case, because the content provider was simply not subject to the regulation; thus, there could be an emergency that the viewer has no idea about. Regulatory arbitrage has the potentially devastating effect of leaving millions of consumers with vision impairment without vital emergency information. This proposal resolves a major issue by redefining an MVPD to eliminate what is, at least to consumers, an antiquated “distinction without a difference.” Adopting this proposal will solve one of the major issues facing widely accessible emergency information without the need for additional rulemakings.

CONCLUSION

Consumers with vision and hearing impairments have long struggled to attain equal access to media and communications technologies. While now widely accepted closed captioning regulations have helped place consumers who are deaf on equal footing, regulations to help blind consumers enjoy their favorite shows through the use of technologies such as video description, and, more recently, audible emergency information, have hit significant legal and regulatory road blocks.

Few situations require fast responses akin to weather emergencies, and any communications technology that denies viewers with visual impairments the ability to save their lives by responding swiftly to such emergency situations cannot accurately claim to provide full benefits to these consumers. Following its congressional directive in the CVAA to “update the communications laws to help ensure that

¹³⁴ See MVPD Definition NPRM, *supra* note 12 (text accompanying note 102 on rights and responsibilities of MVPDs).

individuals with disabilities are able to fully utilize communications services and equipment and better access video programming,”¹³⁵ the Commission released the Emergency Information Order, requiring that video programming providers make emergency information that is provided visually during regularly-scheduled programming accessible to people who are blind or visually impaired through the secondary audio stream.¹³⁶ The regulation took effect on April 16, 2014.¹³⁷

This requirement, along with those articulated in the Second Report and Order, however, stopped short of creating a parity of experience for those with visual impairments because it extended aural emergency information requirement only to linear programming watched inside the home over the MVPD’s network. One way to fill this gap is by adopting the linear programming definition proposed in the MVPD Definition NPRM—reclassifying MVPD’s to include online linear programming providers, regardless of whether they control the transmission path. Adopting this definition would have the effect of applying the emergency information regulations to IP-delivered linear programming. Specifically, the Commission should expand the scope of entities covered by the MVPD regulations, but reduce the rigidity of the regulations by not imposing prioritization or school closing requirements in the secondary audio stream.

These regulations will help ensure that the Commission truly effectuates the purpose of the CVAA—envisioning communications services that serve people who are blind and deaf equally. The technological infrastructure exists, the public benefits are immense, and failing to expand these regulations would allow regulatory arbitrage that is inconsistent with the purpose of the CVAA. Only by expanding these regulations can we break the silence after the beep.

¹³⁵ H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 19 (2010); S. Rep. No. 111-386, 111th Cong., 2d Sess. at 1 (2010).

¹³⁶ Emergency Information Order and April 2013 FNPRM, *supra* note 2.

¹³⁷ Public Notice, FCC, Notice of Effective Date of Accessible Emergency Information Rules and Emergency Information/Video Description Apparatus Rules Requiring OMB Approval (Apr. 22, 2014) https://apps.fcc.gov/edocs_public/attachmatch/DA-14-531A1_Rcd.pdf.