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

In the Matter of	)	
	)	
Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act	)	MB Docket No. 11-93
	)	

REPORT AND ORDER

Adopted: December 13, 2011 **Released: December 13, 2011**

By the Commission: Chairman Genachowski and Commissioners Copps, McDowell, and Clyburn issuing separate statements.

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I. INTRODUCTION

1. With this Report & Order (*R&O*), we adopt rules to implement the Commercial Advertisement Loudness Mitigation ("CALM") Act.[1] Among other things, the CALM Act directs the Commission to incorporate into its rules by reference and make mandatory a technical standard, developed by an industry standards development body, that is designed to prevent digital television commercial advertisements from being transmitted at louder volumes than the program material they accompany.[2] As mandated by the statute, the rules apply to digital TV broadcasters, digital cable operators, and other digital multichannel video programming distributors ("MVPDs").[3] Also per the statute, the rules will take effect one year after adoption, and will therefore be effective as of December 13, 2012.[4] The rules we adopt today are designed to protect viewers from excessively loud commercials and, at the same time, permit broadcasters and MVPDs to implement their obligations in a minimally burdensome manner. As described below, we will require broadcast stations and MVPDs to ensure that all commercials are transmitted to consumers at the appropriate loudness level in accordance with the industry standard. In the event of a pattern or trend of complaints, stations and MVPDs will be deemed in compliance with regard to their locally inserted commercials if they demonstrate that they use certain equipment in the ordinary course of business.[5] For the embedded commercials that stations and MVPDs pass through from programmers, we also establish a "safe harbor" to demonstrate compliance through

[1] Pub. L. No. 111-311, 124 Stat. 3294 (2010) (codified at 47 U.S.C. § 621). The CALM Act was enacted on December 15, 2010 (S. 2847, 111th Cong.). The relevant legislative history includes the Senate and House Committee Reports to bills S. 2847 and H.R. 1084, respectively, as well as the Senate and House Floor Consideration of these bills. *See* Senate Commerce, Science, and Transportation Committee Report dated Sept. 29, 2010, accompanying Senate Bill, S. 2847, 111th Cong. (2010), S. REP. 111-340 ("*Senate Committee Report to S. 2847*"); House Energy and Commerce Committee Report dated Dec. 14, 2009, accompanying House Bill, H.R. 1084, 111th Cong. (2009), H.R. REP. 111-374 ("*House Committee Report to H.R. 1084*"); Senate Floor Consideration of S. 2847, 156 Cong. Rec. S7763 (daily ed. Sept. 29, 2010) (bill passed) ("*Senate Floor Debate*"); House Floor Consideration of S. 2847, 156 Cong. Rec. H7720 (daily ed. Nov. 30, 2010) ("*House Floor Debate of S. 2847*") and H7899 (daily ed. Dec. 2, 2010) (bill passed); House Floor Consideration of H.R. 1084, 155 Cong. Rec. H14907 (daily ed. Dec. 15, 2009). The Senate and House Committee Reports were prepared before the bill was amended to add Section 2(c) of the CALM Act (the compliance provision). *See Senate Floor Debate* at S7763-S7764 (approving "amendment No. 4687"). *See also House Floor Debate of S. 2847* at H7720 (Rep. Eshoo stating that "[w]ith the passage of this legislation, we will end the practice of consumers being subjected to advertisements that are ridiculously loud, and we can protect people from needlessly loud noise spikes that can actually harm their hearing. This technical fix is long overdue, and under the CALM Act, as amended by the Senate, consumers will be in the driver's seat."). We note that our action herein satisfies the statutory mandate that the Commission adopt final rules in this proceeding on or before December 15, 2011.

[2] *See* Advanced Television Systems Committee ("ATSC") A/85: "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," (July 25, 2011) ("RP" or "the RP"). *See infra* note 23 regarding the ATSC. To obtain a copy of the RP, visit the ATSC website: http://www.atsc.org/cms/standards/a_85-2011a.pdf. *See also* CALM Act § 2(a); *Senate Committee Report to S. 2847* at 1; *House Committee Report to H.R. 1084* at 1.

[3] *See* CALM Act § 2(a).

[4] *See* CALM Act § 2(b)(1). *See also, infra,* discussion of waivers to delay the effective date for individual stations and MVPDs based on financial hardship, paras. 49-58.

[5] "Locally inserted" commercials are commercials added to a programming stream by a station or MVPD prior to or at the time of transmission to viewers. In contrast, commercials that are placed into the programming stream by a third party (i.e., programmer) and passed through by the station or MVPD to viewers are referred to herein as "embedded" commercials. As discussed below, the RP recommends different practices for stations and MVPDs to control the loudness of commercials depending on whether the commercials are locally inserted or embedded. *See infra*, para. 11.

certifications and periodic testing.[6] This regime will make compliance less burdensome for the industry while ensuring appropriate loudness for all commercials.

II. BACKGROUND

2. The CALM Act was enacted into law on December 15, 2010 in response to consumer complaints about "loud commercials."[7] The Commission has received complaints about loud commercials virtually since the inception of commercial television more than 50 years ago.[8] Indeed, loud commercials have been a leading source of complaints to the Commission since the FCC Consumer Call Center began reporting the top consumer complaints in 2002.[9] One common complaint is that a commercial is markedly louder than adjacent programming.[10] The problem occurs in over-the-air broadcast television programming, as well as in cable, Direct Broadcast Satellite ("DBS") and other video programming. The text of the CALM Act provides in relevant part as follows:[11]

> (2) (a) Rulemaking required. Within 1 year after the date of enactment of this Act, the Federal Communications Commission shall prescribe pursuant to the Communications Act of 1934 (47 U.S.C. 151 *et seq*.) a regulation that is limited to incorporating by reference and making mandatory (subject to any waivers the Commission may grant) the "Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television" (A/85), and any successor thereto, approved by the Advanced Television Systems Committee, only insofar as such recommended practice concerns the transmission of commercial advertisements by a television broadcast station, cable operator, or other multichannel video programming distributor.[[12]]
>
> (b) Implementation

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[6] *See supra* note 5.

[7] *See supra* note 1. *See also House Floor Debate of S. 2847* at H 7721 (Rep. Eshoo stating that the law is in response to "the complaints that the American people have registered with the FCC over the last 50 years").

[8] *See Amendment of the Commission's Rules To Eliminate Objectionable Loudness of Commercial Announcements and Commercial Continuity Over AM, FM, and Television Broadcast Stations*, BC Docket No. 79-168, Memorandum Opinion and Order, 56 Rad. Reg. 2d (P & F) 390, 391, para. 2 (1984) ("*1984 Order*") (observing in 1984 that "the Commission has received complaints of loud commercials for at least the last 30 years"). *See also* 47 C.F.R. § 73.4075.; Public Notice, "Statement of Policy Concerning Loud Commercials," 1 FCC 2d 10, para. 20(a) (1965) ("*1965 Policy Statement*") (concluding that "complaints of loud commercials are numerous enough to require corrective action by the industry and regulatory measures by the Commission").

[9] To view the FCC's Quarterly Inquiries and Complaints Reports, visit http://www.fcc.gov/cgb/quarter/. According to the FCC Consumer Call Center, since January 2008, the Commission has received approximately 1,000 complaints and 5,000 inquiries from consumers about "loud commercials." The average number of monthly complaints has dropped by 50% since 2009.

[10] *See Senate Committee Report to S. 2847* at 1-2. *See also* Public Notice, "Statement of Policy Concerning Loud Commercials," 1 FCC 2d 10, para. 15 (1965) ("*1965 Policy Statement*") (stating that a "common source of complaint is the contrast between loudness of commercials as compared to the volume of preceding program material – *e.g.*, soft music or dialogue immediately followed by a rapid-fire, strident commercial").

[11] *See* 47 U.S.C. § 621 (2010). *See also* 47 U.S.C. § 609 (2010).

[12] *Id*. § 621(a).

> (1) Effective Date. The Federal Communications Commission shall prescribe that the regulation adopted pursuant to subsection (a) shall become effective 1 year after the date of its adoption.[13]
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> (2) Waiver. For any television broadcast station, cable operator, or other multichannel video programming distributor that demonstrates that obtaining the equipment to comply with the regulation adopted pursuant to subsection (a) would result in financial hardship, the Federal Communications Commission may grant a waiver of the effective date set forth in paragraph (1) for 1 year and may renew such waiver for 1 additional year.[14]
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> (3) Waiver Authority. Nothing in this section affects the Commission's authority under section 1.3 of its rules (47 C.F.R. 1.3) to waive any rule required by this Act, or the application of any such rule, for good cause shown to a television broadcast station, cable operator, or other multichannel video programming distributor, or to a class of such stations, operators, or distributors.[15]

(c) Compliance. Any broadcast television operator, cable operator, or other multichannel video programming distributor that installs, utilizes, and maintains in a commercially reasonable manner the equipment and associated software in compliance with the regulations issued by the Federal Communications Commission in accordance with subsection (a) shall be deemed to be in compliance with such regulations.[16]

(d) Definitions. For purposes of this section—

> (1) the term "television broadcast station" has the meaning given such term in section 325 of the Communications Act of 1934 (47 U.S.C. 325);[17] and
>
> (2) the terms "cable operator" and "multi-channel video programming distributor" have the meanings given such terms in section 602 of Communications Act of 1934 (47 U.S.C. 522).[18]

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[13] *Id*. § 621(b)(1).

[14] *Id*. § 621(b)(2).

[15] *Id*. § 621(b)(3).

[16] *Id*. § 621(c).

[17] *Id*. § 621(d)(1). Section 325 of the Communications Act defines the term "television broadcast station" as "an over-the-air commercial or non-commercial television broadcast station licensed by the Commission under subpart E of part 73 of title 47, Code of Federal Regulations, except that such term does not include a low-power or translator television station." 47 U.S.C. § 325(b)(7)(B).

[18] *Id*. § 621(d)(2). Section 602 of Communications Act defines the term "cable operator" as "any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system." 47 U.S.C. § 522(5). Section 602 of Communications Act defines the term "multichannel video programming distributor" as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a

(continued….)

3. The Commission has not regulated the "loudness" of commercials in the past, primarily because of the difficulty of crafting effective rules due to both "the subjective nature" of loudness and the technical limitations of the NTSC standard used in analog television.[19] The Commission has incorporated by reference into its rules various industry standards on digital television, but these standards alone have not described a consistent method for industry to measure and control audio loudness.[20] The loud commercial problem seems to have been exacerbated by the transition to digital television, perhaps because DTV's expanded aural dynamic range allows for greater variations in loudness for cinema-like

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television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(13).

[19] *1984 Order* at para. 14. In 1965, the Commission issued a policy statement, stating that broadcast licensees "have an affirmative obligation to see that objectionably loud commercials are not broadcast" and must make a "good faith effort" to "prevent the presentation of commercials which are too loud." *See 1965 Policy Statement*, 1 FCC 2d at paras. 16-17 (1965); *republished in* Public Notice, "Objectionably Loud Commercials," 54 FCC 2d 1214 (1975). As noted by H&E's comments, the Commission has imposed forfeitures for airing objectionably loud commercials. *See* H&E Comments at 1-2. However, in 1984, the Commission terminated a proceeding initiated in 1979 that considered whether to adopt rules to eliminate loud commercials, finding that new regulations were not warranted because of the advent of new technology, such as the mute button on remote controls, and noting the difficulty in crafting effective rules "due to the subjective nature of many of the factors that contribute to loudness." *See 1984 Order* at para. 14. *See also Amendment to Part 73 of the Commission's Rules and Regulations to Eliminate Objectionable Loudness of Commercial Announcements and Commercial Continuity over AM, FM and Television Broadcast Stations*, BC Docket No. 79-168, Notice of Inquiry, 72 FCC 2d 677 (1979) ("*1979 NOI*"). The NTSC analog television system uses conventional audio dynamic range processing at various stages of the signal path to manage audio loudness for broadcasts, a practice which compensates for limitations in the dynamic range of analog equipment. However, this practice modifies the characteristics of the original sound, altering it from what the program provider intended. *See* RP § 1.1.

[20] 47 C.F.R. § 73.682(d) incorporates by reference and requires compliance with most of the ATSC A/53 Digital Television Standard (2007 version) relating to digital broadcast television and 47 C.F.R. § 76.640(b)(1)(iii) incorporates by reference the American National Standards Institute/ Society of Cable Telecommunications Engineers ("ANSI/SCTE") Standard 54 (2003 version) relating to digital cable television. The rules do not currently incorporate by reference a standard that applies to satellite TV ("DBS") providers. Part 5 of the ATSC Standard A/53, which includes the Dolby AC-3 DTV audio standard (a method of formatting and encoding digital multi-channel audio, used by TV broadcast stations and many traditional cable operators), has recently been updated by ATSC: in our *Video Description Order*, we updated our DTV transmission standard in Section 73.682(d) of our rules to incorporate by reference the 2010 version of Part 5 of the ATSC A/53 Digital Television Standard (relating to audio systems). *See Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43, Report and Order, 76 FR 55585, para. 52 (2011) ("*Video Description Order*"). *See also* ATSC A/53, Part 5: 2010 "ATSC Digital Television Standard, Part 5 – AC-3 Audio System Characteristics" (July 6, 2010) ("2010 ATSC A/53 Standard, Part 5"). We note that this rule change is consistent with the final rules adopted herein because the RP references and requires compliance with the same testing methodology adopted in the 2010 ATSC A/53 Standard, Part 5. *See*, *e.g.*, RP §§ 2.1 (referencing A/53) and 7.1 (stating that the RP "identifies methods to ensure consistent digital television loudness through the proper use of dialnorm metadata for all content, and thus comply with A/53"). *See infra* at para. 4. The previous version of the ATSC A/53 Standard, Part 5, which is incorporated by reference in Section 73.682(d), includes an outdated audio loudness measurement method. *See* ATSC A/53, Part 5: 2007 "ATSC Digital Television Standard, Part 5 – AC-3 Audio System Characteristics" § 5.5 at 9 (Dialogue Level) (Jan. 3, 2007) ("2007 ATSC A/53 Standard, Part 5"). The 2010 ATSC A/53 Standard, Part 5, contains the new methods to measure and control audio loudness reflected in the RP. *See* 2010 ATSC A/53 Standard, Part 5 at § 2.1 at 5 (referencing the RP) and § 5.5 at 9 (Dialogue Level). Although important, the update to A/53 alone was insufficient to fully address the commercial loudness issue, because like most of the ATSC standard it deals directly with only broadcast signals. The CALM Act and the RP are broader, explicitly covering MVPDs, and ensuring that the benefits of commercial loudness mitigation will be available to all television viewers.

sound quality. As a result, when content providers and/or stations/MVPDs do not properly manage DTV loudness, the resulting wide variations in loudness are more noticeable to consumers.[21] However, DTV technology also offers industry the opportunity to more easily manage loudness. We note that, because the Recommended Practice we are instructed to incorporate by reference and make mandatory is directed only at digital programming, the rules we adopt in this *R&O* deal only with commercials transmitted digitally, and do not apply to analog broadcasts or analog MVPD service.[22]

4. The television broadcast industry has recognized the importance of measuring and controlling volume in television programming, particularly in the context of the transition to digital television. In November 2009, the Advanced Television Systems Committee ("ATSC")[23] completed and published the first version of its A/85 Recommended Practice ("the RP"),[24] which was developed to offer guidance to the digital TV industry – from content providers to distributors – regarding loudness control.[25] The RP provides detailed guidance on loudness measurement methods for different types of content (*i.e.*, short form, long form, or file-based) at different stages of distribution (*i.e.*, production, post-production and real time production).[26] It specifically provides effective loudness management solutions for "operators"[27] to avoid large loudness variations during transitions between different types of content.[28] If all stations/MVPDs ensure that, *inter alia*, the loudness of all content is measured using the algorithm required by the RP and transmitted correctly, then consumers will be able to set their volume controls to their preferred listening (loudness) level and will not have to adjust the volume between programs and commercials.[29] The RP, like most ATSC documents, was initially intended for over-the-air TV

[21] *See* ATSC Letter by Mark Richer, ATSC President, and attached "Executive Summary of the ATSC DTV Loudness Tutorial Presented on February 1, 2011" (dated Apr. 8, 2011) ("*ATSC Letter* and *DTV Loudness Tutorial Summary*") (stating "[t]he ATSC AC-3 Digital Television Audio System has 32 times the perceived dynamic range (ratio of soft to loud sounds) than the previous NTSC analog audio system. Although this increase in dynamic range makes cinema-like sound a reality for DTV, greater loudness variation is now an unintentional consequence when loudness is not managed correctly").

[22] 47 U.S.C. § 621(a); RP § 1. *See* ACA Comments at 9 ("ATSC A/85 does not apply to analog transmissions").

[23] ATSC is an international, non-profit organization developing voluntary standards for digital television. The ATSC member organizations represent the broadcast, broadcast equipment, motion picture, consumer electronics, computer, cable, satellite, and semiconductor industries. ATSC creates and fosters implementation of voluntary Standards and Recommended Practices to advance digital television broadcasting and to facilitate interoperability with other media. *See* http://www.atsc.org/aboutatsc.html.

[24] *See* ATSC A/85: "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," (Nov. 4, 2009). As noted above, the most current version of the RP, released July 25, 2011, is available at the ATSC website: http://www.atsc.org/cms/standards/a_85-2011a.pdf.

[25] *See* RP § 1. A key goal of the RP was to develop a system that would enable industry to control the variations in loudness of digital programming, while retaining the improved sound quality and dynamic range of such programming. *Id*.

[26] *See* RP § 5.

[27] The RP defines an "operator" as "[a] television network, broadcast station, DBS service, local cable system, cable multiple system operator (MSO), or other multichannel video program distributor (MVPD)." Thus, the definition includes stations and MVPDs, as well as broadcast networks and cable network programmers. *See* RP §3.4.

[28] *See* RP § 8.

[29] *See* RP § 4. If the operators use the RP properly, the loudness will also be consistent across channels. *Id*. We note that the RP does not intend to eliminate all loudness variations, but only prevent excessive loudness variations during content transitions. The RP also contains advice for systems without metadata to achieve the same result. *See* RP at Annex K.

broadcasters, in particular for AC-3[30] digital audio systems. However, the RP also sets forth the recommended approach that cable and DBS operators and other MVPDs that use AC-3 and non-AC-3 audio systems should employ.[31]

5. Compliance with the RP requires industry to use the International Telecommunication Union[32] Radiocommunication Sector ("ITU-R")[33] Recommendation BS.1770 measurement algorithm.[34] The ITU-R BS.1770 measurement algorithm provides a numerical value that indicates the perceived loudness[35] of the content measured in units of "LKFS"[36] by averaging the loudness of audio signals in all channels over the duration of the content.[37] In the RP, that value is called "dialnorm" (short for "Dialog Normalization")[38] and is to be encoded as metadata[39] into the audio stream required for digital broadcast television.[40] Stations/MVPDs transmit the dialnorm to the consumer's reception equipment.[41]

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[30] AC-3 is one method of formatting and encoding digital multi-channel audio, used by TV broadcast stations and many traditional cable operators. The AC-3 audio system is defined in the ATSC Digital Audio Compression Standard (A/52B), which is incorporated into the ATSC Digital Television Standard (A/53). *See* ATSC A/52B: "Digital Audio Compression (AC-3, E-AC-3) Standard, Revision B" (June 14, 2005).

[31] *See* RP at Annex H. *See also, infra* paras. 7, 9-17 (discussing Annex K, which added recommended practices for MVPDs that do not use AC-3 audio systems, and the mandatory nature of the RP as a result of the CALM Act).

[32] The International Telecommunication Union ("ITU") is a specialized agency of the United Nations whose goal is to promote international cooperation in the efficient use of telecommunications, including the use of the radio frequency spectrum. The ITU publishes technical recommendations concerning various aspects of radiocommunication technology. These recommendations are subject to an international peer review and approval process in which the Commission participates.

[33] The ITU Radiocommunication Sector ("ITU-R") plays a vital role in the global management of the radio-frequency spectrum and satellite orbits – limited natural resources which are increasingly in demand from a large and growing number of services such as fixed, mobile, broadcasting, amateur, space research, emergency telecommunications, meteorology, global positioning systems, environmental monitoring and communication services – that ensure safety of life on land, at sea and in the skies.

[34] *See* RP § 5 ("[t]he specified measurement techniques are based on the loudness and true peak measurements defined by ITU-R Recommendation BS.1770 – 'Algorithms to measure audio programme [*sic*] loudness and true-peak audio level'").

[35] *See* RP § 3.4 (defining ITU-R BS.1770). "Loudness" is a subjective measure based on human perception of sound waves that can be difficult to quantify and thus to measure. The ITU utilized very extensive human testing to produce an algorithm that provides a good approximation of human loudness perception of program audio to measure the loudness of programs. "Volume," in contrast to loudness, is an objective measure based on the amplitude of sound waves. *Id* (defining loudness as "[a] perceptual quantity; the magnitude of the physiological effect produced when a sound stimulates the ear").

[36] The measured value is presented in units of loudness K-weighted, relative to full scale ("LKFS"). LKFS units are equivalent to decibels. *See* RP §3.3 and § 5.1 .

[37] Loudness is measured by integrating the weighted power of the audio signals in all stereo audio channels (plus any surround-sound audio channels) over the duration of the content. *See* RP § 5.1

[38] *See* RP § 1.1.

[39] Metadata or "data about the (audio) data" is instructional information that is transmitted to the home (separately, but in the same bit stream) along with the digital audio content it describes. *See* RP § 1.1. The dialnorm and other metadata parameters are integral to the AC-3 audio bit stream.

[40] Use of AC-3 audio systems is required for TV stations as a result of the Commission's incorporation by reference into its rules of the ATSC digital TV standard, A/53, but not for cable operators or MVPDs. *See* RP § 7.1. *See also supra*, note 20. The RP addresses non-AC-3 audio systems only in new Annex K, which the ATSC approved after the CALM Act's enactment. *See id.* at Annex K.

Specifically, the RP provides operators with three metadata management modes for ensuring that the consumer's equipment receives the correct loudness value.[42]

6. The "golden rule" of the RP is that the dialnorm value must correctly identify the loudness of the content it accompanies in order to prevent excessive loudness variation during content transitions on a channel (*e.g.*, TV program to commercial) or when changing channels.[43] If the dialnorm value is correctly encoded—if it matches the loudness of the content, which depends in turn on accurate loudness measurements—the consumer's receiver will adjust the volume automatically to avoid spikes in loudness.[44]

7. In addition to requiring the Commission to incorporate the RP by reference, the CALM Act requires the Commission to incorporate by reference "any successor thereto."[45] After the CALM Act's enactment, the ATSC approved several relevant changes to the RP. The ATSC approved a first successor document to the RP on May 25, 2011 and approved a second on July 25, 2011.[46] The first successor added Annex J which provides guidance with respect to local insertions for operators using AC-3 audio systems.[47] The second successor added Annex K[48] which in turn provides instructions for operators using non-AC-3 audio systems.[49] The RP states that Annexes J and K "contain all the courses of action necessary to perform effective loudness control of digital television commercial advertising."[50]

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[41] From the consumer's perspective, the dialnorm metadata parameter defines the volume level at which the sound needs to be reproduced so that the consumer will end up with a uniform loudness level across programs and commercials without a need to adjust it again. *See* RP § 1.1. *See also ATSC DTV Loudness Tutorial Summary* at 1 ("When content is measured with the ITU-R BS.1770 measurement algorithm and dialnorm metadata is transmitted that correctly identifies the loudness of the content it accompanies, the ATSC AC-audio system presents DTV sound capable of cinema's range but without loudness variations that a viewer may find annoying."). We note, however, that compliance with the RP does not guarantee that a commercial will not seem loud to a viewer. A commercial could, for example, include loud sounds in part and softer sounds in part and overall comply with the RP. In addition, the loudness measurement algorithm does not account for all of the perceptual qualities of sound which could make a commercial seem louder to a listener.

[42] *See* RP §7.2

[43] *See ATSC DTV Loudness Tutorial Summary* at 1 ("An essential requirement (the golden rule) for management of loudness in an ATSC audio system is to ensure that the average content loudness in units of LKFS matches the metadata's dialnorm value in the AC-3 bit stream. If these two values do not match, the metadata cannot correctly ensure that the consumer's DTV sound level is consistently reproduced"). *See also* RP § 5. Following the golden rule can be accomplished in multiple ways under the RP, including using a real-time processor to ensure consistent loudness that matches the dialnorm value. We recognize, however, that this solution can be less desirable for industry and consumers in some cases, precisely because it reduces the dynamic range of the audio content. *See* RP § 8.1.1 (c), § 8.1.2 (c), and § 9.1.

[44] *See* RP § 1.1 and § 4.

[45] *See* CALM Act § 2(a).

[46] This document is available at http://www.atsc.org/cms/standards/a_85-2011a.pdf.

[47] *See* RP at Annex J.

[48] *See* RP at Annex K.

[49] The second successor document added Annex K for use by non-AC-3 digital audio systems, which includes many MVPDs. Non-AC-3 audio systems use different compression and coding techniques from AC-3, such as MPEG-1 Layer 2 (MP2) or Advanced Audio Coding (AAC). *See* RP at Annex K.

[50] *See* RP § J.1 and § K.1. Stating that it "contains the courses of action necessary to perform effective loudness control …" In the NPRM we asked how to apply the RP, through our rules, to non-AC-3 MVPD systems, since the (continued….)

Both Annexes state that "[i]t is vital that, when loudness of short form content (*e.g.*, commercial advertising) is measured, it be measured in units of LKFS including all audio channels and all elements of the soundtrack over the duration of the content."[51] Since there is no dialnorm metadata in non-AC-3 audio systems, the operator must ensure that the loudness of content measured in LKFS matches the Target Loudness[52] of the delivery channel.[53] In the context of the Annexes, the term "vital" indicates a course of action to be followed strictly (no deviation is permitted).[54] Throughout the RP, the term "should" indicates that a certain course of action is preferred but not necessarily required,[55] and the term "should not" means a certain possibility or course of action is undesirable but not prohibited.[56]

III. DISCUSSION

8. We initiated this proceeding on May 27, 2011 by issuing a Notice of Proposed Rulemaking ("NPRM").[57] We sought comment on proposals regarding compliance, waivers, and other implementation issues. As discussed below, after reviewing the concerns expressed in the record, we seek to adopt rules that recognize the distinct role played by stations and MVPDs in the transmission of commercials under the RP. Accordingly, our rules incorporate the RP and make commercial volume management mandatory, as required by the CALM Act,[58] reduce the burden associated with demonstrating compliance in the event of complaints,[59] and reflect the practical concerns described in the rulemaking record.[60]

A. Section 2(a) and Scope

9. We hereby adopt our proposal to incorporate the RP by reference into our rules,[61] as well as our tentative conclusion that the Commission may not modify the RP or adopt other actions

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RP was written with that technology as its focus. *NPRM* at para. 12. Because Annex K expressly extends the RP to non-AC-3 systems, this issue is moot, although as some commenters correctly note, these rules apply only to digital transmissions.

[51] *Id.* at J.4. The only difference between Annex J.4, quoted above, and Annex K.4 is the phrase "short form" before "content" at the end of the sentence. *Id.* at K.4.

[52] Target Loudness is a specified value, established to facilitate content exchange from a content provider to a station/MVPD. *See* RP §3.4.

[53] *See* RP § K.5.

[54] *See* RP § 3.1.

[55] *Id*.

[56] *Id*. As discussed below, because the CALM Act makes the RP mandatory with respect to commercials transmitted by stations/MVPD, we interpret the statute to require courses of action by stations/MVPDs that are recommended but not strictly required by the RP. *See infra,* discussion in para. 14.

[57] *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*; MB Docket No. 11-93, Notice of Proposed Rulemaking, 26 FCC Rcd 8281 (2010) ("*NPRM*").

[58] CALM Act at § 2(a).

[59] CALM Act at § 2(c).

[60] Issues raised by commenters include the difficulties of performing real-time corrections on embedded commercials (*see infra* para. 30), and the use of spot checks by large stations and MVPDs to assure compliant programming on all stations and MVPDs (*see infra* paras. 35-37).

[61] Appendix A, *Final Rules* (47 C.F.R. § 73.8000(b)(3), § 76.602(b)(10)).

inconsistent with the statute's express limitations.[62] In addition, we adopt our tentative conclusion that "*all* stations/MVPDs and not only those using AC-3 audio systems" are subject to our rules.[63] We also tentatively concluded in the NPRM that "stations/MVPDs are responsible for *all* commercials 'transmitted' by them."[64] We conclude that the statute makes each station/MVPD responsible for compliance with the RP as incorporated by reference in our rules with regard to all commercials it transmits to consumers, including both those it inserts and those that are "embedded" in programming it receives from program suppliers. As set forth below, this conclusion is consistent with the statutory language, the legislative history, and the RP.[65]

10. Our conclusion rests on our reading of the CALM Act and the RP. As set forth above, the CALM Act directs the Commission to "incorporat[e] by reference and mak[e] mandatory" the RP "only insofar as" it "concerns the transmission of commercial advertisements by a television broadcast station, cable operator, or other multichannel video programming distributor."[66] As one commenter accurately observes, the RP "relies not on a single entity to control the audio loudness, but rather on an entire 'ecosystem' of all participants to ensure that correct audio levels are maintained—ranging from when an advertisement is created through display in a consumer's home."[67] Consistent with the statute, however, the rules we adopt today are limited to station/MVPD responsibilities under the RP.[68] Our rules are also limited to the RP's methods for controlling the loudness of commercial advertisements – as opposed to regular programming – transmitted by stations/MVPDs to consumers.[69]

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[62] *See NPRM*, 26 FCC Rcd at 8288, para. 8.

[63] *See id.* at 8290 para. 12 (reasoning that "[t]he statute … expressly applies to all stations/MVPDs regardless of the audio system they currently use. Nothing in the statutory language or legislative history suggests an intent to make an exception for MVPDs that do not use AC-3 audio systems."). *See also* RP at Annex K (providing "recommendations … based on other sections of this" RP as to "courses of action necessary to perform effective loudness control … when using non-AC-3 audio codecs").

[64] *Id.* at 8289 para. 10.

[65] Our interpretation is also bolstered by a series of letters from Members of Congress who have written in support of the approach described in the NPRM. *See, e.g.*, Reply of Rep. Anna G. Eshoo (July 29, 2011) ("Eshoo Reply"); Ex Parte Comments of Sens. Sheldon Whitehouse, Sherrod Brown, Tim Johnson, Claire McCaskill, and Charles E. Schumer (September 14, 2011) ("Whitehouse Letter"); and Ex Parte Comments of Sen. John D. Rockefeller, IV, Chairman, Committee on Commerce, Science, and Transportation (October 3, 2011) ("Rockefeller Letter").

[66] 47 U.S.C. § 621(a). The RP defines an "operator" more broadly, as "[a] television network, broadcast station, DBS service, local cable system, cable multiple system operator (MSO), or other multichannel video program distributor (MVPD).

[67] NCTA Comments at 4. *See, e.g.,* RP § 7.3.2 ("Cooperation between the content supplier and recipient is necessary to achieve successful loudness management.").

[68] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(1), § 76.607(a)(1)). This statutory focus is consistent with other contexts, such as commercial limits in children's programming, where Congress imposed responsibility on stations/MVPDs which, in turn, required their providers to comply through contracts. *See Policies And Rules Concerning Children's Television Programming*, MM Docket No. 90-570; *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, MM Docket No. 83-670; Report and Order, 6 FCC Rcd 2111, 2113, para. 11 (1991) ("*1991 Children's TV Order*") (stating an MVPD remains liable for violations of the commercial limits on cable network children's programs they carry).

[69] CALM at § 2(a) (requiring that the Commission make the RP mandatory "only insofar as such recommended practice concerns the transmission of commercial advertisements"). *See also* RP § 7 and § 8.

11. The RP recommends different courses of action for stations/MVPDs to control the audio loudness of commercials depending on whether they are "inserted" or "embedded." Appendices J and K of the RP summarize station/MVPD responsibilities with regard to the former.[70] With regard to "embedded" content, the RP recommends "[c]ooperation between the content supplier and recipient" in "fixed" dialnorm systems in order to "achieve successful loudness management" and also requires that stations and MVPDs "ensur[e] dialnorm [value] properly reflects the Dialog Level of all content."[71] The CALM Act requires that our rules "mak[e] mandatory" the RP with regard to commercials transmitted by stations/MVPDs.[72] We conclude, therefore, that the cooperative course of action the RP recommends as to embedded content "concerns the transmission of commercial advertisements" by stations/MVPDs and, therefore, that the CALM Act requires stations/MVPDs to take such actions.[73] As examination of the record reveals, the RP relies on such cooperation for effective loudness control; without it, transmission of "embedded" commercials that comport with the RP would be impractical at best.[74]

12. Our conclusion that stations/MVPDs are responsible for compliance with regard to "embedded" as well as "inserted" commercials is consistent with Congressional intent as well as the language of the statute and the RP. Examination of the legislative history reflects that Congress's purpose in regulating the volume of audio on commercials was to "make the volume of commercials and regular programming uniform so consumers can control sound levels."[75] Our reading of the statute and the RP carries out this purpose by requiring that all commercials transmitted by stations/MVPDs comport with the RP, regardless of whether they are "inserted" or "embedded." The record reflects that most commercials are not inserted in programming by stations/MVPDs, but rather upstream by broadcast or

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[70] *See* RP at Annex J and Annex K. *See id.* § 8.4 ("In the case of TV station or MVPD insertion of local commercials or segments, the operator should ensure that the Dialog Level of the local insertion matches the dialnorm setting of the inserted audio stream.").

[71] See RP §7.3.2 ("Cooperation between content supplier and recipient is necessary to achieve successful loudness management when implementing [fixed dialnorm]"); § 7.3.4 ("To ensure the proper match between dialnorm value and loudness, the operator should make use of loudness metering during quality control, and when necessary make compensating adjustments to ensure the loudness meets the target value."); § 8.1.1 ("Ensure that all content meets the Target Loudness"); § 8.1.2 ("Ensure that … content is measured (see Section 5.2) and labeled with the correct dialnorm"); § 8.3 ("1) Ensure proper targeted average loudness of content in a fixed metadata system, or 2) Ensure proper dialnorm authoring matching the measured content loudness in an agile metadata system"); § H.8 ("Key Idea: Ensure that all program and commercial audio content matches the dialnorm value"); and § K.2 ("The Operator's goal is to present to the audience consistent audio loudness").

[72] 47 U.S.C. § 621(a).

[73] *Id.*

[74] *See, e.g.*, Verizon Comments at 8; NAB Comments at 8; NCTA Comments at note 5. *C.f. infra* para. 30 and note 140 (explaining that a station or MVPD can be deemed in compliance under the statute for embedded commercials by using real-time processing, but that this approach is disfavored by program producers and many viewers).

[75] *See*, *e.g.*, *House Floor Debate of S. 2847* at H7720 (Rep. Eshoo stating that the bill would "make the volume of commercials and regular programming uniform so consumers can control sound levels."); *Senate* Committee *Report to S. 2847* at 1 (stating Congress' expectation that the RP will "moderat[e] the loudness of commercials in comparison to accompanying video programming"); *House Committee Report to H.R. 1084* at 1 (stating goal of statute is "to preclude commercials from being broadcast at louder volumes than the program material they accompany"); *House Floor Debate of S. 2847* at H7720 (Rep. Eshoo stating that "[w]ith the passage of this legislation, we will end the practice of consumers being subjected to advertisements that are ridiculously loud, and we can protect people from needlessly loud noise spikes that can actually harm their hearing. This technical fix is long overdue, and under the CALM Act, as amended by the Senate, consumers will be in the driver's seat."). *See also* Eshoo Reply at 1 ("The law's intent is simple – to make the volume of commercials and programming uniform so that spikes in volume do not affect the consumer's ability to control sound.").

cable networks; in some cases, more than 95% of the commercials transmitted are embedded within programming when it is sent to stations/MVPDs.[76] Our interpretation carries out Congress's purpose by requiring compliance with the RP's provisions uniformly for all commercials transmitted by stations/MVPDs, not just the minority they happen to insert.

13. We find unpersuasive the arguments of some industry commenters that the responsibility of stations/MVPDS under the CALM Act and the RP is limited to ensuring that those commercials they insert are set to the correct dialnorm value or meet the Target Loudness.[77] Several commenters argue that imposing responsibility on stations/MVPDs for a task the RP "assigns" to others would exceed our statutory authority.[78] We do not disagree. As described above, however, the "practices" described in the RP include actions that stations and MVPDs must take to cooperate with their content providers[79] to ensure that all of the programming they transmit conforms with the RP, including commercials that they pass through in real time.[80] Thus, our interpretation is consistent with the responsibilities set forth in the RP, as well as with the statutory focus on stations and MVPDs, and does not shift responsibilities under the RP from third parties to stations/MVPDs.

14. Some commenters also argue that stations/MVPDs can only be held responsible under the Commission's regulations for actions that the RP identifies as "vital."[81] We disagree. The Annexes to the RP set forth a variety of "practices," referred to variously as "vital," "preferred," ("should" be followed), and "critical," which apply to various industry participants.[82] Some of those industry participants are subject to the CALM Act and some are not. The statute, in turn, directs us to make the RP mandatory insofar as it "concerns the transmission of commercial advertisements" by stations/MVPDs.[83] The statute makes no distinction among these types of actions or between commercials "inserted" by stations/MVPDs and others.[84] In light of the fact that the RP covers parties and practices that are outside the scope of the

[76] *See*, *e.g.*, ACA Comments at 32 (member cable systems insert fewer than 4% of transmitted commercials; *cf.* DIRECTV Comments at 19 (generally inserts 1/7 of transmitted commercials in non-broadcast programming, but no commercials in broadcast programming).

[77] *See*, *e.g.*, Verizon Comments at 13, NCTA Comments at 9-10, AT&T Comments at 4, ACA Comments at 6, TWC Reply at 2-3, DIRECTV Comments at 12, Comcast Ex Parte at 1 (October 6, 2011) (Comcast Ex Parte). We note that none of the comments filed in response to the NPRM disputed the responsibility of stations/MVPDs under the RP to pass through the metadata inserted into programming by third parties.

[78] *See*, *e.g.*, NCTA Comments at 6 (stating that "the Commission would exceed its very specific mandate to incorporate the ATSC A/85 Recommended Practice if it were to impose responsibilities on cable operators not included in that Recommended Practice."); Ex Parte Presentation of the American Cable Association (October 20, 2011) ("ACA 10/20 Ex Parte")(arguing that the Commission "lacks discretion to …alter the balance of responsibilities concerning loudness moderation assigned in the" RP.)

[79] *See* RP § 7.3.2.

[80] *See* RP § 8.1 and § 8.3.

[81] *See, e.g.*, NAB Comments at 3; ACA Comments at 11; Reply of CenturyLink at 5 ("CenturyLink Reply").

[82] The term "vital" (used only in the Annexes) indicates a course of action to be followed strictly (no deviation is permitted). The term "should" indicates that a certain course of action is preferred but not necessarily required. "Critical" elements of compliance are identified throughout the item, but the term is not defined. *See* RP § 3.1.

[83] 47 U.S.C. § 621(a). *See NPRM*, 26 FCC Rcd at 8288, para. 10.

[84] 47 U.S.C. § 621(a) (directing the FCC to "incorporat[e] by reference and mak[e] mandatory" the RP "insofar as [it] concerns the transmission of commercial advertisements" by stations/MVPDs). *See NPRM*, 26 FCC Rcd at 8288, para. 10. We note that, as the time of the CALM Act's adoption, the RP made no distinction between "vital" and "preferred" actions. We also note that the RP does not address "transmission" separately from other aspects of the program distribution process.

statute, we must exercise considerable care in implementing the statutory directive to incorporate the RP by reference to the extent that it concerns transmission of commercials by stations/MVPDs. Based on our examination of the record, we believe that the most reasonable reading of the statutory language, together with the RP itself, is to make stations/MVPDs responsible for all of the commercials that they transmit, but to recognize that their responsibilities under the RP vary for inserted and embedded content.

15. We also reject the argument that station/MVPD responsibilities under the RP as incorporated into the Commission's rules should be limited to those set forth in Annexes J and K to the RP, adopted after passage of the CALM Act.[85] These Annexes do not purport to describe all practices that concern the transmission of commercials by a station/MVPD, nor do they do so. Rather, we read them as addressing only the actions required when entities insert commercials into programming. They do not override the RP as a whole.[86] Sections 8.1 and 8.3 of the RP, directing stations and MVPDs to themselves take various actions to "ensure" the proper loudness level of all the content they transmit, not just the commercials they insert, provide that such actions are "critical" for compliance with the RP.[87] Moreover, as set forth above, the RP as a whole depends on stations' and MVPDs' cooperation with their programming providers to ensure proper loudness control for the commercials that they transmit. Neither Annex, nor any other amendment to the RP, changes the critical nature of such cooperation.

16. We believe that our reading fulfills the statutory purpose better than the narrow one advocated by some industry commenters. Interpreting the statute such that stations'/MVPDs' responsibility to ensure that they do not transmit loud commercials applies only to those commercials that they insert would render the statute largely meaningless because consistent loudness cannot be achieved without applying the RP to all commercials. That is, commercials cannot be "present[ed] to viewers at a consistent loudness" if only *some* – and not all – of the commercials conform to the engineering solutions developed in the RP. Simply put, inserting properly modulated commercials next to improperly modulated ones will not solve the loudness problem, and as a practical matter, consumers neither know nor care which entity inserts commercials into the programming stream. Congress did not intend to adopt only part of the industry's technical solution or to exclude from the solution essential elements for its success. To the contrary, Congress intended the Commission to implement the engineering solution with respect to all commercials and to make stations/MVPDs responsible for achieving that solution.[88]

17. Some commenters contend that the legislative history of the CALM Act demonstrates that Congress' intent was narrow, aiming at some but not all commercials. These commenters point to earlier, unsuccessful versions of the legislation that would have granted the Commission broad authority to establish loudness standards.[89] We disagree. The "more circumscribed language" of the CALM Act as it was ultimately adopted does not absolve stations/MVPDs of responsibility for the vast majority of commercials they transmit.[90] The legislative history reflects a Congressional decision to require regulation in accordance with the RP in lieu of a broad grant of authority for the Commission to establish technical standards.[91] As indicated above, however, nothing in the statutory language or legislative

[85] *See, e.g.*, NAB Comments at 3; ACA Comments at 11; Reply of CenturyLink at 5 ("CenturyLink Reply").

[86] *See* RP § J.1 ("The recommendations in this Annex are based on other sections of this Recommended Practice.").

[87] *Id*. at §§ 8.1 and 8.3.

[88] *See*, *e.g.*, CU Reply at 3 ("It now appears that some in the industry are trying to renegotiate the intent and language of the Act."); *see also* Eshoo Reply; Whitehouse Letter; Rockefeller Letter.

[89] *See, e.g.*, Verizon Comments at 5-6, TWC Comments at 6-7.

[90] Verizon Comments at 6, 8.

[91] *See supra* note 78.

history reflects that Congress did not intend that the RP be applied to all commercials.[92]

1. "Commercial Advertisements"

18. We affirm the NPRM's tentative conclusion that non-commercial broadcast stations would be largely unaffected by this proceeding because Section 399B of the Communications Act, as amended, prohibits them from broadcasting "advertisements."[93] The Commission has previously concluded that the prohibition in Section 399B does not apply to ancillary and supplementary services provided by non-commercial stations, such as subscription services provided on their DTV channels.[94] Accordingly, we find that non-commercial broadcast stations are excluded from the statute except to the extent they transmit commercial advertisements as part of an "ancillary or supplementary service."[95]

19. In the NPRM, we also asked whether political advertisements were "commercial advertisements,"[96] and some commenters argued for their exclusion.[97] We find no basis in the statute to exclude political advertisements from the coverage of the CALM Act. The station or MVPD transmitting the political advertisement receives consideration for airing these advertisements,[98] and we are merely requiring a candidate's advertisement to comply with a technical standard applicable to all advertisements.[99] Complying with such a technical standard with respect to a political advertisement does not constitute an editorial change that would conflict with a licensee's obligations to accept political advertisements under Section 315 of the Communications Act. Based on the current record, we also find no policy or legal reason to exempt program-length commercials or commercial advertisements promoting television programming ("promos") from the scope of the rules.[100] First, we find no basis in

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[92] *See, e.g.*, *House Floor Debate of S. 2847* at H7720 (Rep. Eshoo stating that the bill would "eliminate the earsplitting levels of television advertisements and return control of television sound modulation to the American consumer"); *Senate Committee Report to S. 2847* at 1 (stating purpose of law); NAB Comments at 3-4; RP § H.4 ("**Key Idea**: Goal is to present to the viewer consistent audio loudness across commercials, programs, and channel changes.")(*emph. in original*). *See also supra* note 75.

[93] *NPRM* at para. 11.

[94] *Id*.

[95] *Id.*

[96] *Id*.

[97] *See*, *e.g.*, HBI Comments at 4-5; AT&T Comments at 6; ACA Reply at 5, n.19; NCTA Comments at 13.

[98] This is consistent with the definition of an "advertisement" in Section 399B of the Act. Section 399B of the Communications Act defines the term "advertisement" as "any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended— (1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit; (2) to express the views of any person with respect to any matter of public importance or interest; or (3) to support or oppose any candidate for political office." *See* 47 U.S.C. § 399b(a). It is also consistent with the definition of "commercial matter" in the children's television commercial limits rules. In the context of commercial limits during children's programming, the Commission defines "commercial matter" as "airtime sold for purposes of selling a product or service and promotions of television programs or video programming services other than children's or other age-appropriate programming appearing on the same channel or promotions for children's educational and informational programming on any channel." *See* 47 C.F.R. § 73.670 Note 1; 47 C.F.R. § 76.225 Note. 1.

[99] *C.f. Codification of the Commission's Political Programming Policies*, MM Docket No. 91-168, Memorandum Opinion and Order, 7 FCC Rcd 1616 (1992).

[100] We note that, although the Commission specifically asked about this issue in the *NPRM*, 26 FCC Rcd at 8281, para. 11, it was not addressed at all in the comments or replies. Some ex parte filers did object to treating promotional announcements, particularly those made on premium networks, as "commercials" for purposes of the CALM Act. *See, e.g.*, Time Warner, Inc. Ex Parte (October 26, 2011), Verizon Ex Parte (December 6, 2011),

(continued….)

the statute, the legislative history, or the RP for exempting promos from the definition of commercial advertisements for the purpose of the CALM Act. Specifically, the statute does not distinguish between commercials promoting the products or services of third parties and those promoting the station's or MVPD's own commercial television programming, whether shown on the same or a different channel. The RP, which the statute directs us to incorporate by reference into our rules, likewise makes no such distinction. Instead, it distinguishes between "short form" or "interstitial" content and "long form" content, treating "promotional" material as "short form" content equivalent to advertisements.[101] Moreover, we do not believe that exempting promos would serve the statutory purpose of preventing commercials from being transmitted at louder volumes than the programming they accompany. From a consumer perspective, we believe that there is no difference between promos and other commercials. Were we to exclude promos, television programmers could advertise their own programming at a higher volume than surrounding programming or other commercial advertisements. Accordingly, we find that it is most consistent with the statutory language and purpose to require that the loudness of promos comply with the RP.[102] We emphasize that our determination that promos are covered by the definition of commercial advertisements is limited to the use of that term in the CALM Act and that this determination does not change how promos are categorized for any other purpose or Commission rule. We will address any other definitional issues surrounding "commercial advertisements" on a case-by-case basis as they arise.

2. Successor Documents

20. We observed in the NPRM that Section 2(a) mandates that the required regulation incorporate by reference and make mandatory "any successor" to the RP, affording the Commission no discretion in this regard.[103] Accordingly, we tentatively concluded that notice and comment would be unnecessary to incorporate successor documents into our rules.[104] On further reflection, we now conclude that, although the "good cause" exception excuses compliance with notice and comment requirements under these circumstances, the public interest will be better served by an opportunity for comment in most cases. Examination of the record reflects that interpretation may be required to determine how the RP successors apply to the transmission of commercial advertisements by stations/MVPDs pursuant to the CALM Act, and that interpretive work can only benefit from public input.[105] If, however, a successor is not sufficiently substantive to require interpretation or public comment, we will simply adopt the successor by Public Notice. As proposed in the *NPRM*, for the present we will incorporate by reference into our rules the current successor to the RP, adopted by ATSC prior to the adoption of this Report and Order.[106]

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NCTA Ex Parte (December 6, 2011). These ex partes, however, provide no justification or rational basis for such a distinction, simply stating without support that "promotion" has alternative meanings in other contexts. We reiterate that non-commercial broadcast stations are excluded from the statute except to the extent they transmit commercial advertisements as part of an "ancillary or supplementary service." *See supra* para. 18.

[101] RP § 3.4.

[102] In this regard, we note that there is no evidence in the record that bringing "promos" into compliance will require any effort beyond that necessary to bring all other commercial advertisements into compliance.

[103] *NPRM*, 26 FCC Rcd at 8290, para. 13, quoting 47 U.S.C. § 621(a).

[104] *Id.*, citing 5 U.S.C. § 552(b)(B) (providing that Administrative Procedure Act's notice and comment requirements do not apply when the agency for good cause finds, and incorporates the finding and a brief statement of reasons therefor in the rules issued, that notice and public procedure thereon are unnecessary).

[105] *See* ACA Comments at 17 ("By eschewing a notice and comment process, the Commission will fail to fully and properly analyze and interpret the obligations placed by any 'successor' [RP] on MVPDs and programmers.").

[106] *See NPRM*, 26 FCC Rcd at 8290, para. 13. As the *NPRM* indicated, we ask that the ATSC notify us whenever it
(continued….)

21. The ACA argues that the foregoing statutory mandate constitutes an improper delegation of legislative authority because it ties the Commission's hands and provides no guidance for the ATSC as to the content of successor standards.[107] The Commission, however, "may not ignore the dictates of the legislative branch."[108] Our obligation to incorporate by reference into our rules successor RPs is clear and, therefore, we do not address ACA's argument that we cannot incorporate the current version of the RP.[109] We note, however, that we disagree with ACA's unsupported contention that if the successor clause were held to be an improper delegation, it would render the entire CALM Act null and void "since Congress clearly considered this clause an essential part of the statute."[110] The salient question for a court would be: "'[w]ould Congress still have passed the valid sections had it known about the constitutional invalidity of the other portions of the statute?'"[111] The CALM Act as a whole does not appear to us to be so dependent, conditional, or connected to the statutory clause "and any successor thereto" as to warrant a conclusion that Congress would not have passed the CALM Act without that clause. In any event, the severability issue makes no difference here, because the current RP is consistent with the preexisting one,[112] and our rules implement the RP both as it existed at the time of the CALM Act's enactment and in its current form. In other words, our action herein would be the same in material respects in the absence of the ATSC's post-CALM Act amendments. Thus, if a court were to conclude that the successor provision in the CALM Act was an invalid but severable delegation, it would affect only incorporation of future successor RP documents.

B. Compliance and Enforcement

22. Below, we discuss procedures stations and MVPDs may follow with regard to locally inserted commercials in order to be "deemed in compliance" with the rules in the event of an FCC

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approves a successor to the RP, submit a copy of it into the record of this proceeding, and send a courtesy copy to the Chief Engineer of the Media Bureau. *Id.*

[107] *See* ACA Comments at 17-20, citing, *inter alia*, *Mistretta v. United States,* 488 U.S. 361, 422 (1989) ("If rulemaking can be entirely unrelated to the exercise of judicial or executive powers, I foresee all manner of "expert" bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility… This is an undemocratic precedent that we set-not because of the scope of the delegated power, but because its recipient is not one of the three Branches of Government."); (Scalia, J., dissenting); *Carter v. Carter Coal,* 298 U.S. 238, 311 (1936) (in concluding that delegation of authority to a subset of the mining industry to set minimum wages and maximum hours of labor violated due process).

[108] *Action for Children's Television v. FCC*, 932 F.2d 1504, 1509 (D.C. Cir. 1991) (recognizing "the Commission's constraints in responding to [an] appropriations rider" that required it to ban all radio and television broadcasts of indecent material, despite the Commission's prior view that such a ban would be unconstitutional, but explaining that the court has an "independent duty to check the constitutional excesses of Congress."). *See Branch v. FCC*, 824 F.2d 37, 47 (D.C. Cir. 1987) ("although an administrative agency may be influenced by constitutional considerations in the way it interprets or applies statutes, it does not have jurisdiction to declare statutes unconstitutional."). *See also Hettinga v. United States*, 560 F.3d 498, 506 (D.C. Cir. 2009) ("As the Supreme Court has observed, it would make little sense to require exhaustion where an agency 'lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute'"), quoting *McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992).

[109] *See* ACA Comments at 19-20.

[110] *Id.* at 19.

[111] *Basardh v. Gates*, 545 F.3d 1068, 1070 (D.C. Cir. 2008), quoting *U.S. v. Booker*, 543 U.S. 220 (2005)(internal quotation marks omitted).

[112] For example, Appendices J and K state that they "are based on other sections of this Recommended Practice." *See* RP § J.1 and §K.1. *See also supra* para. 15.

investigation or inquiry. We then establish a "safe harbor," based on a proposal by NCTA, for stations and MVPDs to demonstrate compliance with regard to embedded commercials through certifications and periodic testing. We intend to initiate an investigation when we receive a pattern or trend of consumer complaints indicating possible noncompliance.[113] Stations or MVPDs that seek to be "deemed in compliance" or in the "safe harbor" need not demonstrate, in response to an FCC enforcement inquiry, that they complied with the RP with regard to the complained-of commercial or commercials, and they will not be held liable for noncompliant commercials that they previously transmitted.[114] The procedures we adopt, however, are optional, and any station or MVPD may instead choose to demonstrate actual compliance, in response to an FCC enforcement inquiry prompted by a pattern or trend of complaints, with the requirements of the RP with regard to the commercial(s) in question, as well as certifying to the Commission that its own transmission equipment is not at fault.[115] If unable to do so, the station or MVPD may be liable for penalties or forfeitures.[116] If we find that our approach ("deemed in compliance," "safe harbor," complaint-driven enforcement, *etc.*) does not appear to be effective in ensuring widespread compliance with the RP, we will revisit it to the extent necessary.

1. Deemed in Compliance/Safe Harbor

23. The CALM Act states that "[a]ny broadcast television operator, cable operator, or other multichannel video programming distributor that installs, utilizes, and maintains in a commercially reasonable manner the equipment and associated software in compliance with the regulations issued by the Federal Communications Commission in accordance with subsection (a) shall be deemed to be in compliance with such regulations."[117] As described in the NPRM and discussed in detail below, we conclude that the scope of this provision is limited to situations in which the station or MVPD itself installs, utilizes, and maintains the equipment required to comply with the RP.[118] Stations and MVPDs use such equipment for locally inserted commercials, and could similarly be deemed in compliance under

[113] As proposed by, *e.g.*, NCTA and ACA. NCTA Comments at 15, ACA Reply at 12. Consumers Union (CU) proposed that the Commission conduct audits of programming to verify compliance. Consumers Union Reply at 5. CU argued that this would be a "low-cost, efficient mechanism to ensure compliance," but since the goal of the statute is to improve the viewer experience, we find that responding directly to viewer concerns will be a more efficient and effective use of Commission resources.

[114] The record suggests that it is very difficult for stations or MVPDs to prove that an embedded commercial transmitted in the past actually complied with the RP. *See, e.g.*, NAB Comments at 6 ("Broadcast television stations currently do not measure every commercial that is transmitted, and such an approach would not be practical from a technical, administrative, or financial standpoint"). It becomes more difficult with the passage of time, although it is possible that some stations or MVPDs are capable of demonstrating past compliance based on their own records (*see, e.g.*, DIRECTV Ex Parte (September 16, 2011)) or by working with programmers (potentially by seeking records to compare to complaints)(*see, e.g.*, Comcast Ex Parte (October 6, 2011)).

[115] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(6), § 76.607(a)(6)). As NCTA notes, analog transmissions are exempt from the coverage of these rules in all cases, and do not need the protection of a safe harbor. NCTA Comments at 18. If an entity can demonstrate that a pattern or trend of complaints relates to an analog transmission, it need take no further action under these rules. *See supra* para. 3.

[116] 47 U.S.C. § 503. *See also* 47 U.S.C. § 503(b)(1)(B) and 47 C.F.R. § 1.80(a)(2) (stating that any person who willfully or repeatedly fails to comply with the provisions of the Communications Act or the Commission's rules shall be liable for a forfeiture penalty).

[117] CALM Act at § 2(c).

[118] *See infra* paras. 28-29, note 140; *NPRM* at para. 16. Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(2), § 76.607(a)(2)).

the statute for embedded commercials by performing real-time processing.[119] However, we believe that stations, MVPDs, content providers, and consumers disfavor real-time processing due to its harm to overall audio quality.[120] Based on the information in the record submitted in response to the NPRM, we will establish a safe harbor for stations and MVPDs with respect to embedded commercials that does not require real-time processing.[121] The safe harbor is derived from the RP's reliance on cooperation by stations and MVPDs with upstream program providers to ensure proper loudness control of the content that is passed through to viewers in real time without additional processing by the station or MVPD.[122] Under these circumstances, the station or MVPD itself does not use the equipment necessary to encode dialnorm value into a commercial and thus does not ensure compliance through those means.[123] This safe harbor provides a simple way for stations and MVPDs to respond to an enforcement inquiry regarding embedded commercials so as to reduce their burden of demonstrating compliance without forcing them to use equipment that distorts the audio they transmit.

24. First, it is essential that stations and MVPDs have the proper equipment to pass-through RP-compliant programming. Therefore, we conclude that all stations and MVPDs must have the equipment necessary to pass through programming compliant with the RP, and be able to demonstrate that the equipment has been properly installed, maintained, and utilized. We note that the necessary equipment will vary depending on whether a station or MVPD uses an AC-3 audio system or not, whether it needs to encode incoming program streams, and other factors.[124] MVPDs will be considered compliant with this requirement so long as the processes used for transmitting to subscribers the information contained in the transmissions of digital program networks correctly maintains the relative loudness of network commercials and long-form content consistent with the RP. This equipment is required in many cases for the provision of any audio at all, and is therefore necessary but not sufficient for parties to be "deemed in compliance" under Section 2(c) of the CALM Act, to enter the "safe harbor" we establish for embedded content, or to demonstrate actual compliance with the RP. In the context of an enforcement inquiry, any station or MVPD must be prepared to certify to the Commission that its own transmission equipment is not at fault for any pattern or trend of complaints.[125]

25. Second, we have considered proposals in the record describing how stations and MVPDs may be "deemed in compliance" under the statute and the Commission's rules, and, as discussed below, we have adopted or adapted many of these suggestions in crafting our rules. We note that our approach

[119] A station or MVPD can install, utilize, and maintain, in a commercially reasonable manner, a real-time or "conventional" processor to ensure consistent loudness by limiting dynamic range, rather than by setting the dialnorm or meeting the Target Loudness. Conventional processing "modifies the dynamic range of the decoded content by reducing the level of very loud portions of the content to avoid annoying the viewer and by raising the level of very quiet portions of the content so that they are better adapted to the listening environment."

[120] Such processing can be undesirable for industry and consumers precisely because it reduces the dynamic range of the audio content. *See infra* note 140.

[121] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3), § 76.607(a)(3)).

[122] *See* RP § 7.3.2. *But see* para. 30 and note 140 (stations and MVPDs can comply with the RP by ensuring the loudness of embedded commercials is controlled by real-time processing, rather than through cooperation with program providers, but rarely do so).

[123] *See infra*, para. 30.

[124] *See* DIRECTV and DISH Network Ex Parte (October 27, 2011).

[125] *See* 47 C.F.R. § 1.17. Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(2)(iv), § 76.607(a)(2)(iv); § 73.682(e)(3), § 76.607(a)(3); 47 C.F.R. § 73.682(e)(5)(ii), § 76.607(a)(5)(ii); 47 C.F.R. § 73.682(e)(6), § 76.607(a)(6)). As discussed above, stations and MVPDs not deemed in compliance must also demonstrate actual compliance with the RP. *See supra* para. 22.

regarding embedded commercials is based in large part on an MVPD-focused proposal offered by NCTA, which NCTA described as having the support of other industry participants.[126]

26. Consistent with our conclusion above with respect to the scope of Section 2(c) of the CALM Act,[127] the measures set forth below for safe harbor protection with regard to embedded content fall outside of the statutory "deemed in compliance" section because they need not involve installation, use, or maintenance of "equipment and associated software" by a station/MVPD.[128] Our interpretation harmonizes Section 621(c) with the statutory command to "mak[e] mandatory" *all* of the RP's recommendations concerning the transmission of commercials by stations/MVPDs, not just those that they insert locally.[129] In contrast, interpreting Section 2(c) more broadly, as some industry commenters urge,[130] such that stations and MVPDs would not have to take any actions beyond those prescribed in Section 2(c) even with respect to embedded commercials, would place the majority of commercials that they transmit beyond the Commission's enforcement authority, thereby undermining the statutory purpose.[131]

27. In the discussion below, we describe our conclusion to establish two approaches for stations and MVPDs: (1) "deemed in compliance" (with regard to locally inserted commercials or with regard to all commercials where real-time processing is employed) and (2) "safe harbor" (with regard to embedded commercials). We emphasize, however, that following these approaches does not relieve these entities of their obligations under the CALM Act. We reiterate that all stations and MVPDs are required to comply with the RP. In response to questions raised in the NPRM,[132] the record reflects that compliance can be difficult to demonstrate retroactively.[133] Therefore, the "deemed in compliance" and "safe harbor" approaches offer alternative methods by which stations and MVPDs may demonstrate ongoing compliance with the RP in the event of a pattern or trend of complaints that leads to a Commission inquiry. If they prefer, parties may choose to demonstrate actual compliance with the RP in response to an FCC enforcement inquiry.

a. Local Insertions

28. As noted above, the CALM Act states that "[a]ny broadcast television operator, cable operator, or other multichannel video programming distributor that installs, utilizes, and maintains in a commercially reasonable manner the equipment and associated software in compliance with the regulations issued by the Federal Communications Commission in accordance with subsection (a) shall be deemed to be in compliance with such regulations."[134] Application of this standard is fairly straightforward with respect to commercial advertisements inserted into the program stream by stations or MVPDs, and we agree with NAB's argument that a station or MVPD should be deemed in compliance for these inserted commercials when it

> uses the equipment in the ordinary course of business to properly measure the loudness of

[126] NCTA Ex Parte Comment (October 18, 2011).

[127] *See supra* para. 23.

[128] 47 U.S.C. § 621(c).

[129] *See supra* paras. 9-17.

[130] *See* AT&T Comments at 10, NAB Comments at 4, NCTA Comments at 9-10, Verizon Comments at 15-16.

[131] *See supra* paras. 12, 16.

[132] *See, e.g.*, *NPRM* at para. 28.

[133] *See supra* note 114.

[134] CALM Act at § 2(c). Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(2)(i), § 76.607(a)(2)(i)).

> the content and to ensure that the dialnorm metadata value correctly matches the loudness of the content when encoding the audio into AC-3 for transmitting the content to the consumer.[135]

As a practical matter, and as indicated by NAB, the equipment would be used by the station or MVPD prior to the insertion of each commercial to ensure that it complies with the RP.[136]

29. In response to an enforcement inquiry concerning local insertions, a station or MVPD must provide records showing the consistent and ongoing use of this equipment in the regular course of business and demonstrating that the equipment has undergone commercially reasonable periodic maintenance and testing to ensure its continued proper operation.[137] In addition, in response to such an inquiry, the station or MVPD must certify that it either has no actual knowledge of a violation of the RP, or that any such violation of which it has become aware has been corrected promptly upon becoming aware of such a violation.[138] Upon receipt of this information and certification, the station or MVPD will be deemed in compliance with the RP with respect to commercials it inserted. We note here, as guidance for stations and MVPDs, that we do not believe that a station or MVPD that has actual knowledge of a violation but fails to correct the problem has utilized the equipment used to encode the commercials in a "commercially reasonable manner." Therefore, it is not entitled to "deemed in compliance" treatment under the statute.

b. Embedded Commercials

30. For embedded commercials, which a station or MVPD receives from an upstream programmer, we conclude that there are two options: (1) use a real-time processor to be deemed in compliance, or (2) follow the components of the "safe harbor" we describe herein.[139] Stations and

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[135] NAB Comments at 7. This general approach will remain valid even in non-AC-3 systems that will be encoding to meet the Target Loudness of the delivery channel. *See* RP § K.5. *See also, e.g.*, AT&T Comments at 9 ("'installs, utilizes, and maintains in a commercially reasonable manner' audio management systems and equipment that perform the essential functions of measuring content loudness consistent with ITU[-R] BS.1770 and transmitting normalized audio content (i.e., normalized based on the dialnorm parameter) downstream to consumers, regardless of which specific equipment and systems that station/MVPD has deployed or where in the distribution stream those functions are performed."). Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(2)(i), § 76.607(a)(2)(i)).

[136] *See* RP at § 8.4 (explaining that locally inserted commercials must have their loudness level matched to the dialnorm of the stream into which they are to be inserted prior to insertion). For non-AC-3 systems, *see* RP § K.5. In practice, program providers may inform stations and MVPDs ahead of time of the dialnorm/Target Loudness at which their programming will be provided, and local inserters, when they encode, set the loudness of the commercials they plan to insert according to this information. Cooperation between the program provider and the stations and MVPDs is necessary to achieve successful loudness management when implementing this practice. *See* RP § 7.3.2.

[137] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(2)(ii), § 76.607(a)(2)(ii)).

[138] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(2)(iii), § 76.607(a)(2)(iii)).

[139] We remind stations and MVPDs that they must always utilize their audio pass-through equipment so that it does not harm the RP-compliant programming they receive and transmit to their viewers. *See supra* para 24. We note that this safe harbor is an important but severable element of our compliance and enforcement scheme. We are establishing it to simplify our enforcement process for the benefit of stations and MVPDs, but it is not so fundamental to the scheme as a whole that the CALM Act regulations adopted in the item would be unenforceable in its absence. If the safe harbor is declared invalid or unenforceable for any reason, it is our intent that the remaining CALM Act regulations shall remain in full force and effect. As mentioned above, the safe harbor does not replace the basic obligation of all stations and MVPDs to comply with the requirements of the RP. *See supra* para. 26. As is typical in many other areas of Commission regulation, regulated entities still could seek to demonstrate on a case-by-case basis that they have done all that is required in response to an investigation.

MVPDs are not able to modify the embedded commercials they transmit to viewers except by use of real-time processing equipment that distorts the audio.[140] Commenters report, and our engineering analysis confirms, that no equipment is currently available that stations or MVPDs can use to set the dialnorm value or meet the Target Loudness[141] in real time for embedded commercials they transmit to viewers.[142] Nor are they in direct control of the production or encoding of these commercials such that they could use their equipment to bring them into compliance with the RP prior to transmission (even if they have access to the commercials prior to transmission). Nonetheless, as explained above, the CALM Act requires stations and MVPDs to ensure the compliance of these commercials with the statute and our rules.[143]

31. Given the limitations in their options for controlling embedded commercials onsite, stations and MVPDs are likewise limited in their ability to rely exclusively on equipment to be deemed in compliance. Therefore, relying on the record and the RP, we establish a regulatory safe harbor, in which stations and MVPDs can take the steps discussed below to, first, significantly reduce the likelihood of any noncompliance with the RP, and, second, quickly resolve any problems that do arise. The safe harbor is based on a proposal filed by NCTA.[144] We largely adopt the framework of NCTA's proposal and, at the same time, modify several components in order to ensure that the goals of the statute are fully achieved.

32. To use the safe harbor, stations and MVPDs must undertake certain activities: obtain widely available certifications of compliance from programmers; conduct annual spot checks of non-certified programming to ensure compliance with the RP (for larger stations and MVPDs);[145] and conduct spot checks of specific channels in the event the Commission notifies the station or MVPD of a pattern or trend of complaints. Not all MVPDs or stations must perform an annual spot check in order to use the safe harbor. Following NCTA's proposal, we rely on the largest MVPDs and stations to perform spot checks in the specific situations discussed below. Because we anticipate that the need for annual spot checks will diminish after the first two years, due in part to the likely increase in the number of programmers that certify compliance, we terminate the requirement for annual spot checks after two years on an individual channel or program stream basis, provided no problems are found and certifications

[140] A station or MVPD can be deemed in compliance if it "installs, utilizes, and maintains in a commercially reasonable manner" a real-time or "conventional" processor to ensure consistent loudness by limiting dynamic range, rather than by setting the dialnorm or meeting the Target Loudness. A station or MVPD relying on real-time processing must provide records showing the consistent and ongoing use of this equipment in the regular course of business and demonstrating that the equipment has undergone commercially reasonable periodic maintenance and testing to ensure its continued proper operation; certify that it either has no actual knowledge of a violation of the ATSC A/85 RP, or that any violation of which it has become aware has been corrected promptly upon becoming aware of such a violation; and certify that its own transmission equipment is not at fault for any pattern or trend of complaints. Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(4), § 76.607(a)(4)). As discussed above, conventional processing "modifies the dynamic range of the decoded content by reducing the level of very loud portions of the content to avoid annoying the viewer and by raising the level of very quiet portions of the content so that they are better adapted to the listening environment." We recognize, however, that such processing can be less desirable for industry and consumers in some cases, precisely because it reduces the dynamic range of the audio content. *See supra* note 120, *see* RP § 9.1.

[141] Target Loudness is a specified value established to facilitate content exchange from a content supplier to station/MVPDs. *See* RP § 3.3.

[142] NCTA Comments at 8; DIRECTV Comments at 10; ACA Comments at i; Reply of Time Warner Cable, Inc. at 6 ("TWC Reply"); *see also*, NAB Comments at 6. *See also infra* note 119.

[143] *Id*.

[144] NCTA Ex Parte (October 18, 2011).

[145] If necessary, MVPDs and stations can contract to have third parties perform the spot checks.

remain in force.[146]

33. In formulating the safe harbor, we began with the proposal in the NPRM to consider contractual arrangements and quality control monitoring as a practical means to address embedded commercials.[147] For example, we asked in the NPRM whether parties should rely on contracts with programmers to ensure compliance, and if that approach had downsides for small stations and MVPDs.[148] Commenters responded with concerns about a purely contractual approach, particularly for smaller entities.[149] As a result, we have moved away from a contractual approach and adopt instead the requirement that certifications be widely available.[150] We also asked in the NPRM "what, if any, quality control measures [stations and MVPDs] should take to monitor the content delivered to them for transmission to consumers."[151] Commenters objected to a requirement for constant monitoring, and the safe harbor instead requires spot checks in some cases.[152] The following paragraphs describe these and other requirements for using the safe harbor.

(i) Certified Programming

34. A station or MVPD will be eligible for the safe harbor with regard to the embedded commercials in particular programming if the supplier of the programming has provided a certification that its programming is compliant with the RP, and the station or MVPD has no reason to believe the certification is false.[153] A programmer's certification must be available to all stations and MVPDs in order to count as a "certification" for purposes of being in the safe harbor.[154] Virtually all MVPDs receive the same programming feed of a given channel.[155] Consequently, if the programmer provides RP-compliant programming and commercials to one station or MVPD, then it should be similarly compliant for all stations and MVPDs receiving that same programming. NCTA proposed use of a widely available certification (available through a website, for instance) as an alternative to the NPRM proposal for contractual terms that would promise compliant commercials.[156] NCTA expressed concern about possible delays and expense to open and re-negotiate numerous individual contracts, and proposed that widely available certifications avoid these problems.[157] ACA raised similar concerns regarding the difficulty

[146] *See infra* para. 40.

[147] *NPRM* at paras. 23-24.

[148] *NPRM* at paras. 24-25.

[149] *See, e.g.*, ACA Comments at 26-27.

[150] *See infra* para. 34.

[151] *NPRM* at para. 24.

[152] *See infra* paras. 35-37, 41-42; *see also, e.g.*, NCTA Comments at 8, NAB Reply at 5.

[153] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(i)(B), § 76.607(a)(3)(i)(B)). *See also, infra,* para. 41-42 (a station or MVPD must perform a spot check in response to a Commission inquiry arising from a pattern or trend of complaints concerning commercials in certified programming in order to remain deemed in compliance).

[154] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(i)(A), § 76.607(a)(3)(i)(A)). NCTA has suggested that these certifications could be available on websites, perhaps accessible only to distributors of the programming in questions. NCTA Ex Parte (October 18, 2011). We express no opinion on the appropriate way to make certifications widely available, so long as they are available to all stations and MVPDs that distribute the programming.

[155] NCTA Ex Parte at 1 (October 18, 2011).

[156] NCTA Ex Parte (October 18, 2011).

[157] NCTA Ex Parte at 4 (October 18, 2011).

smaller operators face in getting modifications to their programming contracts, even when, as here, the changes would be costless to the programmer.[158] In addition, many programmers have corporate or financial relationships with particular MVPDs, raising the possibility that certifications might be offered only to an affiliated MVPD or provided on more favorable terms to certain MVPDs. Widely available certifications, as proposed by NCTA, solve all of these problems by obviating the need for individual contractual certifications. Because, as discussed above, the same program feed goes to all distributors, as a practical matter an individual certification would provide the same assurance as a widely available certification. Not all parties, however, would know of the existence of the certification, placing some at an unfair disadvantage because they would be unaware of something that would allow them to avoid the need for spot checks. Therefore, we require that a certification be widely available in order to qualify as a certification for purposes of being in the safe harbor.[159] We express no opinion on the appropriate duration of certifications, but in order for a station or MVPD to rely on a certification, that certification must be in effect. If a programmer terminates a certification, stations and MVPDs that are required to perform annual spot checks must begin to perform annual spot checks of the programmer's channel (as discussed immediately below) in order to continue to be in the safe harbor regarding commercials on that channel. This will be the case even if they are performing no other annual spot checks because those spot checks have "phased-out," as discussed in paragraph 40, below. We encourage programmers to provide initial widely available certifications before December 13, 2012, when the rules take effect, to reduce the number of annual spot checks that stations and MVPDs would need to do to be in the safe harbor.

(ii) Non-Certified Programming: Annual Spot Checks

35. In order to be in the safe harbor regarding commercial channels and programming for which there is no programmer certification, larger MVPDs and stations must perform annual spot-checks of the non-certified commercial programming they carry.[160] Specifically, large television stations[161] and very large MVPDs[162] must annually spot check 100 percent of noncertified programming carried by the station, or by any system operated by the MVPD.[163] Large (but not "very large") MVPDs[164] must

[158] ACA Ex Parte at 3 (September 19, 2011).

[159] We note that stations and MVPDs will have a year to work with their programmers before the CALM Act rules take effect. CALM Act at § 2(B)(1).

[160] Stations and MVPDs have told us that they cannot distinguish between programming and embedded commercials. *See, e.g.*, Verizon Comments at 6. As a result, the entirety of a programming stream must be monitored in order to find any noncompliant embedded commercials. We may revisit this matter in the future if technological developments warrant, given the statute's limitation to commercials.

[161] "Large" television stations, for these purposes, are those not considered "small television stations" under the Small Business Act definition – that is, those that have more than $14.0 million in annual receipts. 13 C.F.R. § 121.201, NAICS Code 515120 (2007). To provide certainty and clarity to stations, we will consider "large" those stations with more than $14.0 million in annual receipts in calendar year 2011. *See, e.g.*, BIA Kelsey Inc. Media Access Pro Television Database, showing the annual receipts for 2010. We will rely on the version of this list that is based on data available as of December, 31 2011 for purposes of the rules implementing the CALM Act.

[162] "Very large MVPDs" are defined, for these purposes, as those with more than 10 million subscribers nationwide. To provide certainty and clarity to MVPDs, we will consider "very large" those MVPDs with more than 10 million subscribers as of December 31, 2011. Per NCTA, this would include the four largest MVPDs. *See* http://www.ncta.com/Stats/TopMSOs.aspx (visited November 16, 2011) showing the numbers of subscribers for the top 25 MVPDs based on 2010 data. We will rely on the version of this list that is based on data available as of December, 31 2011 for purposes of the rules implementing the CALM Act.

[163] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(ii), § 76.607(a)(3)(ii)(A)).

[164] "Large MVPDs," for these purposes, are those serving more than 400,000 subscribers nationwide. This definition is derived from the Commission's definition of "small" cable in 47 C.F.R. § 76.901(e). To provide

(continued….)

annually spot check 50 percent (chosen at random) of the noncertified channels carried by any system operated by the MVPD.[165] Stations and MVPDs should not count (and do not need to spot check) duplicating channels or streams unless there is some reason to believe that the audio on, for instance, an SD stream might be different (for the purposes of the RP) from the HD stream of the same programming.[166] Small stations and small MVPDs need not perform any annual spot checks to be in the safe harbor.[167] The first set of annual spot checks must be completed by December 13, 2013 – that is, one year after the effective date of these rules.

36. Because small stations and MVPDs are not required to perform annual spot checks, there is no requirement that they purchase (or seek access to) loudness measurement equipment prior to a Commission inquiry. In the event of an inquiry, stations and MVPDs will have 30 days to complete a spot check.[168] This will allow small entities to preserve their financial flexibility while still being in a position to address a pattern or trend of complaints brought to their attention by the Commission. We note, however, that small stations and MVPDs, just like larger ones, are required by the CALM Act and our rules to comply with the requirements of the RP. And, in the event of an enforcement inquiry, these small entities must be able to demonstrate that they have the equipment necessary to pass through programming compliant with the RP, demonstrate that the equipment has been properly installed, maintained, and utilized, and show that the equipment was not the source of any problem.[169]

37. Under our approach, we place differing obligations depending on the size of the entity. These distinctions are based on both the valid NCTA argument that, if the larger companies take care of performing spot checks and obtaining certifications, the same programming carried by smaller companies is likely to comply with the CALM Act, and on our interest in reducing burdens on small entities.[170] Each very large MVPD is required to spot check each non-certified channel on only one of its systems that carry that programming.[171] Given that all programmers, including each regional sports network, may

(...continued from previous page)
certainty and clarity to MVPDs, we will consider "large" those MVPDs with more than 400,000 but fewer than 10 million subscribers as of December 31, 2011. Per NCTA, this would include 11 MVPDs. *See* http://www.ncta.com/Stats/TopMSOs.aspx (visited November 16, 2011) showing the numbers of subscribers for the top 25 MVPDs based on 2010 data. We will rely on the the version of this list that is based on data available as of December, 31 2011 for purposes of the rules implementing the CALM Act.

[165] Appendix A, *Final Rules* (47 C.F.R. § 76.607(a)(3)(ii)(B)).

[166] This avoidance of duplication largely addresses the concerns raised by DIRECTV and DISH Network in their November 16, 2011 ex parte filing, about the number of channels they could potentially be required to spot check in the absence of certifications.

[167] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iii), § 76.607(a)(3)(iii)).

[168] An inquiry is unlikely to be directed to a small station or MVPD even in the event of a pattern or trend of complaints, unless the complaints have come largely or solely from viewers of the small entity in question. *See infra* para. 48 ("If we receive complaints that indicate a pattern or trend affecting multiple MVPDs or stations, we will be conscious of the greater resources available to large entities when determining where to address our initial inquiries.").

[169] This equipment, fundamental to the provision of audio, is distinct from the loudness measurement equipment discussed below.

[170] NCTA Ex Parte (October 18, 2011).

[171] We recognize that very large MVPDs carry different programmers on different systems. They need not spot check the same programmer on more than one system, but they must utilize as many systems as necessary to be sure they spot check 100% of the non-certified commercial programmers. This may require running tests on more than one system, if not all non-certified channels offered by an MVPD are carried on any one system.

not be carried by the top four MVPDs, we also require the middle group of MVPDs (those with more than 400,000 but fewer than 10 million subscribers) to conduct a more limited number of spot checks. We do this to increase the likelihood that all programmers will be checked and that programming provided to all geographic areas, including regional programming, will be tested. As the parties explain, requiring annual spot checks by smaller stations and MVPDs is both unnecessary and more burdensome than asking the same of larger parties.[172] Unlike larger stations and MVPDs, many smaller entities lack the necessary loudness measurement equipment, and, while it is appropriate to require smaller entities to obtain the use of such equipment in the case of complaints, there is little benefit to requiring small entities to do so simply in order to check a programming stream that is already being checked by others. Under our approach, small entities would be freed from the need to purchase loudness monitoring equipment, an additional expense that would provide insufficient countervailing benefit if mandated. As noted above, even the burden on larger entities of conducting annual spot checks is limited because the timeframe for conducting the annual spot checks is limited to the two years after the rules take effect for the MVPD or station, assuming no noncompliance is found.

38. *Definition of Spot Checks*. A "spot check" requires monitoring 24 uninterrupted hours of programming with an audio loudness meter employing the measurement technique specified in the RP, and reviewing the records from that monitoring to detect any commercials transmitted in violation of the RP.[173] To promote the reliability of the spot check, the station or MVPD must not provide prior notice to the programmer of the timing of the spot check. This requirement applies with respect to all spot checks (annual or in response to a Commission inquiry) on all programming, and for all stations and MVPDs – large and small. Stations (and occasionally MVPDs) may have multiple program suppliers for a single channel/stream of programming. In these cases, there may be no single 24-hour period in which all program suppliers are represented. In such cases, an annual spot check could consist of a series of loudness measurements over the course of a 7-day period, totaling no fewer than 24 hours, that measure at least one program, in its entirety, provided by each non-certified programmer that supplies programming for that channel or stream of programming.[174] To verify that the operator's system is properly passing through loudness metadata, spot checking must be conducted after the signal has passed through the operator's processing equipment (*e.g.*, at the output of a set-top box or television receiver).[175] If a problem is found, a station or MVPD may check multiple points in its reception and transmission process to determine the source of the noncompliance. For a spot check to be considered valid, a station or MVPD must be able to demonstrate appropriate maintenance records for the audio loudness meter,[176] and to demonstrate, at the time of any enforcement inquiry, that appropriate spot checks had been ongoing.[177]

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[172] NAB Ex Parte (November 9, 2011); ACA Ex Parte at 3-4 (November 9, 2011); NCTA Ex Parte (October 18, 2011).

[173] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iv), § 76.607(a)(3)(iv)). We do not anticipate that a spot-check would require a person to monitor a channel in real-time. A possible procedure could be: 1) connect a loudness meter conforming to the RP to the output of a set-top box, measure the long-term loudness of all the elements of the soundtrack and log the loudness of content in 1 second intervals over a 24-hour period; 2) review the logs (which could be done with an automated process) to identify any potential violations of the RP (*i.e.*, the average measured loudness exceeds the target loudness by more than 2 dB for the duration of a commercial); and 3) ascertain whether those potential violations occurred during a commercial (*e.g.*, by reviewing a recording of the monitored content or obtaining from the programmer a log of the commercials for the day that was monitored).

[174] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iv)(C)(II), § 76.607(a)(3)(iv)(C)(II)).

[175] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iv)(A), § 76.607(a)(3)(iv)(A)).

[176] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iv)(B), § 76.607(a)(3)(iv)(B)).

[177] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iv)(C)(I), § 76.607(a)(3)(iv)(C)(I)).

39. *Exclusion of Broadcast Programming from Spot Checks*. We will not require MVPDs to include broadcast television programming in their annual spot checks. Unlike the non-broadcast programming carried by MVPDs, which is provided by third parties totally outside the scope of these rules, a significant amount of broadcast programming will already be annually spot checked by large broadcast stations pursuant to these rules. More to the point, we have explicit jurisdiction over broadcast stations themselves under the Act, and any problems arising as a result of the loudness of their commercials can be more effectively dealt with by addressing them directly with broadcast stations. This is particularly important with must-carry broadcast signals, which MVPDs are prohibited from either modifying or dropping.[178] All MVPDs are responsible for not harming the broadcast signal, however, and must properly use the necessary equipment to pass through programming compliant with the RP, such that the broadcast programming is transmitted without altering its compliance with the RP. We note that, if the Commission becomes aware of a pattern or trend of complaints about broadcast programming carried on an MVPD, while over-the-air viewers of the same programming have not filed similar complaints, that may indicate that there is a problem with the MVPD's transmission equipment, for which the MVPD will be liable.

40. *Phase-Out of Annual Spot Check Obligation*. Once a given station or MVPD has performed two consecutive annual spot checks on a given channel or program stream and encountered no evidence of noncompliance, it may cease to perform annual spot checks of that programming but continue to be in the safe harbor with respect to that programming.[179] Because this phase-out applies to individual channels or program streams, any new, non-certified channel or programming must undergo the full two years of spot checks before the requirement phases out with respect to that programming.[180] Although "large" MVPDs (between 400,000 and 10,000,000 subscribers) will be spot checking only 50 percent of their non-certified programming, they are also excused from continued checks after two years, except that if any annual spot check shows noncompliance, the two-year requirement for that channel or programming will be reset (that is, the two-year period will begin anew for that channel or programming until there is no noncompliance for a full two years).[181] Similarly, if a spot check undertaken in response to an enforcement inquiry in the context of a pattern or trend of complaints (discussed below) reveals noncompliance, the two-year requirement will be reset for that channel or programming even if it has been previously phased out.[182]

(iii) Pattern or Trend of Complaints: Spot Checks

41. If the Commission becomes aware of a pattern or trend of sufficiently specific complaints, it may open an enforcement inquiry with the station or MVPD in question.[183] Whether relying on a certification or not, and irrespective of size, if a station or MVPD is notified by the

[178] NCTA Comments at 13.

[179] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iv)(C)(III), § 76.607(a)(3)(iv)(C)(III)). The two years runs from the effective date of the rules as to the given station or MVPD. This phase-out of annual spot checks does not affect the obligation to perform spot checks in response to an enforcement inquiry in the context of a pattern or trend of complaints, as discussed below.

[180] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iv)(C)(IV), § 76.607(a)(3)(iv)(C)(IV)). We expect and encourage MVPDs to seek certification from new programmers as part of their carriage negotiations.

[181] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iv)(C)(V), § 76.607(a)(3)(iv)(C)(V)).

[182] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iv)(C)(V), § 76.607(a)(3)(iv)(C)(V)).

[183] By a "pattern or trend" we mean complaints sufficiently numerous and specific to justify focused review by the station/MVPD and the Commission. We decline to define what number of complaints is sufficient to constitute a pattern or trend, as this judgment will be fact-specific, based on such matters as the ratio of complaints to subscribers.

Commission of a pattern or trend of sufficiently specific complaints about a given channel or programming, and seeks to be or remain in the safe harbor, it must utilize its equipment to verify actual compliance with the RP by performing a spot check on that channel or programming on a going forward basis[184] within 30 days of receiving notification from the Commission.[185] Although we do not require stations and MVPDs to perform spot checks in response to complaints they receive directly, we encourage them to do so if they become aware of a pattern or trend even absent Commission action. If a Commission inquiry is opened and a station or MVPD can demonstrate that it has already performed a spot check in response to the same pattern or trend that led to the inquiry, no additional spot check will be required. We note that, as ACA explained, a pattern or trend of complaints from viewers of a single station or MVPD about programming that is being transmitted on other stations or MVPDs without triggering complaints on those other stations or MVPDs may be an indication that the problem lies with the station's or MVPD's equipment, rather than with the programming itself.[186]

42. *Financial Inability to Perform Spot Checks.* Small MVPDs and stations, as discussed above, are not required to conduct annual spot checks, and will be in the safe harbor for embedded commercials transmitted in all programming they carry, even if that programming is not certified.[187] As with larger stations and MVPDs, however, stations and MVPDs that are treated as "small" for purposes of the CALM Act must have the equipment necessary to pass through programming compliant with the RP, and be able to demonstrate that the equipment has been properly installed, maintained, and utilized. In the context of an enforcement inquiry, small stations and MVPDs must be prepared to certify to the Commission that their own transmission equipment is not at fault for any such pattern or trend. They must also be prepared to conduct spot checks, or contract to have spot checks done, in response to a Commission inquiry triggered by a pattern or trend of complaints. We do not require a station or MVPD to purchase the necessary equipment to conduct spot checks in response to a Commission inquiry; it may borrow or contract for use of the equipment.[188] Stations and MVPDs may seek to delay the effective date of the rules for up to two years through a financial hardship waiver and may seek general waivers (also discussed below) for non-financial reasons, as discussed below.[189]

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[184] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(i)(C), § 76.607(a)(3)(i)(C); 47 C.F.R. § 73.682(e)(3)(ii), § 76.607(a)(3)(ii)(A) and (B) ; 47 C.F.R. § 73.682(e)(3)(iii), § 76.607(a)(3)(ii)).

[185] The rule allows the Enforcement Bureau to specify a time other than 30 days, when appropriate. Appendix A, *Final Rules*, (47 C.F.R. 73.682(e)(3)(iv)(D)(I), 76.607(a)(3)(iv)(D)(I)). A station or MVPD that is in the safe harbor need not verify whether the complained of programming was in compliance, although it may do so if it wishes (and obviate the need for a prospective spot check) by providing the necessary information to demonstrate past compliance. As noted above (*see supra* note 145), a station or MVPD can contract with a third party to perform the spot check if necessary. A spot check performed in response to an FCC inquiry may not be counted toward any annual spot check obligations of a station or MVPD. A station or MVPD that opts not to conduct the prospective spot checks is no longer in the safe harbor and must respond to a Commission enforcement inquiry by demonstrating actual compliance with respect to the complaints referenced in the Letter of Inquiry and provide other information requested therein.

[186] ACA Oral Ex Parte (October 24, 2011).

[187] If they insert commercials, they must comply with the requirements for "Local Insertions" or "Third Party Local Insertions," as appropriate, in order to be deemed in compliance for those commercials. *See supra* paras. 28-29, *infra* para. 45.

[188] For example, based on a staff review of the Commission's online filing system (COALS), we know that smaller operators will often contract for technical analysis of their systems, for instance the performance of signal leakage tests.

[189] *See infra,* paras. 49-58.

(iv) Outcome of Spot Checks

43. Whether performed as part of an annual audit of non-certified programming, or in response to an FCC Letter of Inquiry, spot checks will require further action only if they indicate noncompliance on the part of a programmer with respect to embedded commercials. If the spot check reveals actual compliance with the RP, then the station or MVPD continues to be in the safe harbor and need take no further action (except, where appropriate, to notify the Commission in response to the letter of inquiry).[190] If the spot check indicates noncompliance, however, then the station or MVPD has actual knowledge that the channel or programming does not comply with the RP. Within seven business days, the station or MVPD must inform the Commission and the programmer in question of the noncompliance indicated by the spot check, and direct the programmer's attention to any relevant complaints.[191] We note that noncompliance can be the result of deficiencies in the equipment the station or MVPD uses to pass through programming, rather than any problem with the commercials as provided by a programmer. Stations and MVPDs should be mindful of this possibility in their review of the spot check data and check their own equipment as appropriate.[192] The station or MVPD must then re-check the noncompliant commercial programming with a follow-up spot check within 30 days of notifying the Commission and the programmer, and inform both of the result of the re-check.[193] If the station or MVPD finds no further noncompliance with the RP, then the station or MVPD will continue to be in the safe harbor.[194]

44. If, however, the re-check reveals noncompliance with the RP, then the station or MVPD, going forward, is no longer in the safe harbor for that channel or programming.[195] The station's or MVPD's actual knowledge that the commercials in the programming are not compliant with the RP means that station or MVPD is liable for future commercial loudness violations in that programming, notwithstanding any certification or previous spot check of that programming.[196]

c. Third Party Local Insertions

45. The rulemaking record evidences that some stations and MVPDs contract with a third party to handle sales of its available commercial time and encode/insert local commercials into program streams, rather than the station or MVPD handling this process itself.[197] For the reasons discussed above, if a station or MVPD does not itself install, utilize and maintain the equipment used to encode the loudness of a commercial either before or at the time of its transmission, it cannot be "deemed in compliance" pursuant to the CALM Act.[198] Furthermore, these third-party local insertions are unlike commercials embedded in nationally distributed programming. Third-party inserters of local commercials provide a service to stations and MVPDs and place their equipment at the station or MVPD's facilities. The third-party inserter sells commercial time to advertisers and shares the payment

[190] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iv)(D)(II), § 76.607(a)(3)(iv)(D)(II)).

[191] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iv)(E), § 76.607(a)(3)(iv)(E)).

[192] *See, supra* para. 24.

[193] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iv)(E), § 76.607(a)(3)(iv)(E)).

[194] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iv)(E)(I), § 76.607(a)(3)(iv)(E)(I)).

[195] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iv)(E)(II), § 76.607(a)(3)(iv)(E)(II)).

[196] In the context of an enforcement action the Commission can consider the specific facts and circumstances of the alleged violation, including any mitigating factors.

[197] *See, e.g.*, ACA Comments at iv; ACA Ex Parte at 3 (October 26, 2011)

[198] *See supra* para. 23; CALM Act at § 2(c).

with the station or MVPD, thus functioning as the agent of the station or MVPD in that process.[199] The NPRM sought comment on circumstances that might pose practical problems for compliance and means of demonstrating compliance.[200] Given that the record presents this situation, which does not fall neatly into one of the situations we have described above (that is, local insertion or embedded commercial), we adopt a hybrid approach for such stations and MVPDs utilizing the same components presented in the NPRM and addressed in the comments.[201] Specifically, we find that, in order to be in the safe harbor for the commercials inserted by these third parties, the station or MVPD, regardless of size, must acquire a certification from the third party that all commercials it is inserting comply with the RP, and that it is inserting those commercials into the programming transmitted by the station or MVPD such that they comply with the RP.[202] Just as with embedded commercials,[203] in response to a FCC Letter of Inquiry, a station or MVPD must have no reason to believe that the certification is false, and perform a spot check of the inserted commercials without providing notice to the third-party inserter to determine, going forward, whether the inserted commercials in fact comply, and take steps to ensure that any discovered noncompliance is remedied.[204] This spot check will follow the same format as discussed above for other embedded programming.[205] The record supports the conclusion that stations or MVPDs that use third party inserters have the ability to insist on such certifications as part of their business relationships.[206]

d. Complaints

46. As discussed above, we will rely on consumers to bring any potential noncompliance to our attention. We believe that a consumer-complaint-driven procedure, rather than an audit-driven one, is the most practical means to monitor industry compliance with our rules. In order for us to detect whether a pattern or trend of noncompliance exists and for stations and MVPDs to investigate them, it is essential that consumer complaints be specific in describing the commercials complained of, as well as identifying the station or MVPD and programming network on which the commercials appeared.[207] As a general matter, non-specific complaints will not be actionable. In addition, we note that while it may seem to some consumers that a commercial is loud, the commercial may, nevertheless, comply with the RP. As noted above, commercials, like the programming they accompany, include content covering a range of audio levels, some of which may seem loud without violating the RP.[208]

47. *Filing a Complaint*. Consumers may file a complaint alleging a loud commercial electronically using the Commission's online complaint form (specifically Form 2000e) found at http://esupport.fcc.gov/complaints.htm. We have added "loud commercials" as a complaint category.

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[199] ACA Ex Parte (October 26, 2011).

[200] *NPRM* at paras. 26-32.

[201] *See supra* para. 33.

[202] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(5), § 76.607(a)(5)).

[203] *See supra*, para. 41-42.

[204] Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(5)(i), (iii), § 76.607(a)(5)(i), (iii)).

[205] *See supra*, para. 38.

[206] ACA Ex Parte at 3 (October 26, 2011).

[207] We note that a television broadcast station must retain in its local public inspection file a copy of a complaint filed with the Commission about a loud commercial under the Commission's existing rules. *See* 47 C.F.R. § 73.3526(e)(10) (requiring commercial TV stations to retain in its local public inspection file material relating to a Commission investigation or complaint to the Commission). The rule requires a station to retain the complaint in its public file until it is notified in writing that the complaint may be discarded.

[208] *See supra* note 35.

Consumers may also file complaints by fax to 1-866-418-0232 or by letter mailed to Federal Communications Commission, Consumer & Governmental Affairs Bureau, Consumer Inquiries & Complaints Division, 445 12th Street, SW, Washington, DC 20554, although we reiterate the need for detailed information. Consumers who want assistance filing their complaint may contact the Commission's Consumer Call Center by calling 1-888-CALL-FCC (1-888-225-5322) (voice) or 1-888-TELL-FCC (1-888-835-5322) (tty).[209] There is no fee for filing a consumer complaint.

48. *Complaint Details*. The only way the Commission will be in a position to detect a pattern or trend of commercial loudness complaints is if consumers include detailed information allowing us to identify the specific distributor, program at issue, and commercial. Therefore, as proposed in the *NPRM*, we will require complaints to contain detailed information, which will enable us to take appropriate action.[210] Form 2000e is designed to elicit the information that is needed for this purpose.[211] To ensure that the Commission is able to take appropriate action on a complaint, the complaint should clearly indicate that it is a "loud commercial" complaint and include the following information: (1) the complainant's contact information, including name, mailing address, daytime phone number, and e-mail address if available; (2) the name and call sign of the broadcast station or the name and type of the MVPD against whom the complaint is directed; (3) the date and time the loud commercial problem occurred; (4) the channel and/or network involved; (5) the name of the television program during which the commercial was viewed; (6) the name of the commercial's advertiser/sponsor or product involved; and (7) a description of the loudness problem. We will evaluate the individual complaints we receive and track them to determine if there are patterns or trends that suggest a need for enforcement action. If we receive complaints that indicate a pattern or trend affecting multiple MVPDs or stations, we will be conscious of the greater resources available to large entities when determining where to address our initial inquiries.

C. Waivers

49. The CALM Act includes two waiver provisions: a waiver of the effective date for up to two years based on financial hardship[212] and a reservation of the Commission's general authority to grant a waiver for good cause.[213] While our goal is to provide for waivers where appropriate, this objective must be balanced against the interests of consumers in realizing the benefit of the CALM Act without undue delay. Thus, as described below, we establish standards for stations/MVPDs that face true financial hardship to seek waivers, using a streamlined process for small entities and requiring a four-part showing for larger entities. We acknowledge that a waiver for good cause may be warranted in other circumstances, and, per the CVAA, stations and MVPDs may seek waivers of these statutory

[209] We also encourage consumers to visit the Consumer & Governmental Affairs Bureau website at http://www.fcc.gov/cgb/ or to visit our online Consumer Help Center at http://reboot.fcc.gov/consumers/.

[210] *NPRM* at para. 35.

[211] Available at https://esupport.fcc.gov/ccmsforms/form2000.action.

[212] Section 2(b)(2) of the CALM Act provides as follows: "WAIVER.- For any television broadcast station, cable operator, or other multichannel video programming distributor that demonstrates that obtaining the equipment to comply with the regulation adopted pursuant to subsection (a) would result in financial hardship, the Federal Communications Commission may grant a waiver of the effective date set forth in paragraph (1) for 1 year and may renew such waiver for 1 additional year." CALM Act § 2(b)(2).

[213] Section 2(b)(3) of the CALM Act provides as follows: "WAIVER AUTHORITY.- Nothing in this section affects the Commission's authority under section 1.3 of its rules (47 C.F.R. 1.3) to waive any rule required by this Act, or the application of any such rule, for good cause shown to a television broadcast station, cable operator, or other multichannel video programming distributor, or to a class of such stations, operators, or distributors." CALM Act § 2(b)(3).

requirements for good cause under Section 1.3 of our rules.[214] We conclude that the waiver process we adopt is responsive to ACA's concerns that the equipment to monitor programming is expensive and the costs are disproportionately large for MVPDs with small systems.[215] We also note that we have adopted a safe harbor approach, as discussed above,[216] that does not require smaller MVPDs to audit programming or negotiate with contractors for certifications, thereby reducing the burden for these entities to demonstrate their compliance.

50. *Financial Hardship Waiver*. Section 2(b)(2) of the CALM Act provides that the Commission may grant a one-year waiver of the effective date of the rules implementing the statute to any station or MVPD that shows it would be a "financial hardship" to obtain the necessary equipment to comply with the rules, and may renew such waiver for one additional year.[217] As we stated in the *NPRM*, the legislative history indicates that Congress intended us to interpret "financial hardship" broadly and, in particular, recognizes "that television broadcast stations in smaller markets and smaller cable systems may face greater challenges budgeting for the purchase of equipment to comply with the bill than television broadcast stations in larger markets or larger cable systems."[218]

51. We adopt the four-part test we proposed in the *NPRM* for larger stations/MVPDs[219] seeking a waiver on the grounds of financial hardship based on their need to obtain equipment to comply with the loudness requirements in the RP.[220] Specifically, to request a financial hardship waiver pursuant to Section 2(b)(2), the station/MVPD must provide: (1) evidence of its financial condition, such as financial statements;[221] (2) a cost estimate for obtaining the necessary equipment to comply with the required regulation; (3) a detailed statement explaining why its financial condition justifies postponing compliance; and (4) an estimate of how long it will take to comply, along with supporting information. Consistent with the legislative history, we do not require waiver applicants to show negative cash flow but, instead, require only that the station or MVPD's assertion of financial hardship be reasonable under the circumstances.[222] We believe this test for a financial hardship waiver appropriately balances

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[214] *See* 47 C.F.R. § 1.3. The Media Bureau has delegated authority to act on both such waiver requests. *See* 47 C.F.R. § 0.61(h).

[215] *See* ACA Reply at 6, note 25. ACA also argued that smaller MVPDs are unable to effectively negotiate with programmers to ensure they comply with the RP. *Id. See also*, ACA Comments at note 4.

[216] *See*, *supra*, paras. 34-37.

[217] *See* 47 U.S.C. § 621(b)(2) (codifying CALM Act § 2(b)(2)). *See also*, *infra*, para. 64 for the effective date of the rules adopted herein.

[218] *See NPRM*, 26 FCC Rcd at 8302, para. 38. (citing Senate *Committee Report to S. 2847* at 4). The legislative history, in particular, states that the Commission "should not require stations or MVPDs to demonstrate that they have negative cash flow or are in receivership for bankruptcy to be eligible for a waiver based on financial hardship." This appears to be a reference to the strict financial hardship standard established in 2008 for DTV station build-out extensions given the short time remaining before the DTV transition deadline. *See Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 07-91, Report and Order, 23 FCC Rcd 2994, 3031-32, para. 74 (2007) ("*Third DTV Periodic Report and Order*") (requiring a station to either (1) submit proof that they have filed for bankruptcy or that a receiver has been appointed, or (2) submit an audited financial statement for the previous three years showing negative cash flow).

[219] *See*, *infra*, paras. 53-54 (defining "small broadcast station" and "small MVPD"). Smaller entities are eligible to seek a waiver under the streamlined waiver process we adopt herein. *See*, *infra*, para. 52.

[220] *See NPRM*, 26 FCC Rcd at 8300, para. 39.

[221] Financial statements should be compiled according to generally accepted accounting practices ("GAAP"). Stations/MVPDs may request confidential treatment for this financial information pursuant to 47 C.F.R. § 0.459.

[222] *See NPRM*, 26 FCC Rcd at 8299-8300, para. 38.

Congress' intent in adopting the Section 2(b)(2) waiver provision and our goal to ensure that the benefits of the CALM Act not be delayed unless financial circumstances truly warrant a waiver.[223]

52. For small stations and MVPDs, we adopt a more streamlined financial hardship waiver approach.[224] We agree with the commenters who argued that smaller stations and MVPDs may find it particularly burdensome to comply with our rules by the effective date.[225] We also agree that, because smaller entities are more likely to face financial hardship in complying with our rules, the process for smaller entities to obtain a waiver should not itself be burdensome. Accordingly, we adopt a streamlined waiver process for smaller entities that face a financial challenge in obtaining the equipment needed to comply with our rules. Specifically, a small station or MVPD (as we define below) that seeks a waiver must file with the Commission a certification that it: (1) meets our definition of small for this purpose, and (2) needs a delay of one year to obtain specified equipment in order to avoid the financial hardship that would be imposed if it were required to obtain the equipment sooner.[226] The station or MVPD is not required to submit any proof of financial condition. Small broadcast stations and small MVPDs may consider the waiver granted when they file this information online and receive an automatic "acknowledgement of request," unless the Media Bureau notifies them of a problem or question concerning the adequacy of the certification.[227]

53. The streamlined financial hardship waiver is available to "small broadcast stations" and "small MVPD systems" that request a one-year delay in the effective date based on their need to obtain equipment to comply with the rules adopted to implement the CALM Act, including the RP incorporated by reference.[228] We define a "small broadcast station" for purposes of the streamlined waiver as either a station with no more than $14.0 million in annual receipts[229] or that is located in television markets 150 to 210.[230] Although we proposed in the *NPRM* to limit small market stations that would be eligible for the streamlined waiver process to those not affiliated with a top-four network (*i.e.*, ABC, CBS, Fox and NBC),[231] we are persuaded by NAB that the waiver should be available to all stations in markets 150

[223] As directed by Section 2(b)(2), stations/MVPDs may request a waiver for one year under our waiver standard. Entities granted a waiver may request a renewal of the waiver for one additional year if they can demonstrate that circumstances continue to prevent them from obtaining the necessary equipment to comply with the CALM Act requirements.

[224] As noted above, the legislative history recognizes that obtaining the necessary equipment to comply with the rules may be a financial hardship for small broadcast stations and small cable/MVPD systems *See* Senate Committee Report to S. 2847 at 4.

[225] *See* Comments of NAB at 9-10, ACA at 31-32, NCTA at 19-20, and OPATSCO-NCTA-WTA at 2. *See also* Reply Comments of ACA at 13-15 and Letter from Jonathan Friedman, Counsel for Comcast Corporation, to Marlene Dortch, Secretary, FCC, dated October 6, 2011, at 2.

[226] The certifying entity must identify or provide a description of the kind of equipment it intends to obtain; however, it need not specify the model number.

[227] *See infra*, paras. 57-58 (waiver filing deadlines and requirements).

[228] Entities granted a waiver may request a renewal of the waiver for one additional year if they certify that (1) they meet our definition of small, and (2) financial circumstances continue to prevent them from obtaining the necessary and specified equipment to comply with the CALM Act requirements. The filing requirements to request a waiver for a second year are the same as those for the initial waiver request. *See*, sup*ra*, paras. 51-52.

[229] This definition is consistent with the SBA's small business definition for a television broadcast station. *See also* 13 C.F.R. § 121.201, NAICS Code 515120 (2007). NAB proposed that we use this definition as one criterion to identify stations that qualify as "small" for purposes of the waiver. *See* NAB Comments at 9.

[230] *See* NAB Comments at 9.

[231] S*ee NPRM*, 26 FCC Rcd at 8301, para. 40.

through 210. We agree with NAB that a station's network affiliation is not necessarily determinative of its financial ability to purchase new equipment, and even stations affiliated with a top-four network in smaller markets may be struggling as advertising revenue in those markets is more limited than in larger markets.[232] For simplicity, we combine the definition of a small station, regardless of the market size, with the definition of a small market station, and treat them both as a "small broadcast station" for purposes of the CALM Act financial waiver.

54. Consistent with our proposal in the *NPRM*,[233] we will define a "small MVPD system" eligible for the streamlined waiver process as one with fewer than 15,000 subscribers (as of December 31, 2011) that is not affiliated with a larger operator serving more than 10 percent of all MVPD subscribers.[234] We note that our definition of "small MVPD system" for purposes of the streamlined waiver is different from our definition of smaller MVPDs for purposes of being in the safe harbor.[235] We are using a small MVPD system definition for purposes of the streamlined waiver because we believe that this waiver should be available only to those systems that are most likely to face financial hardships in complying with the RP. We note that stations and MVPDs that want a waiver and do not qualify under the streamlined waiver provision can apply for a waiver under the four-part waiver test described above. We disagree with ACA's proposal to use an MSO-based definition as we did in the "bargaining agent" condition in the Comcast-NBC Universal proceeding, which set the threshold at 1,500,000 subscribers.[236] As discussed above, we have adopted a regulatory scheme that does not require small MVPDs to audit programming and relieves them of the need to negotiate with programmers for contractual certifications.[237] We conclude that, combined, the approach we have taken with respect to MVPD compliance with the Act, the streamlined waiver provisions we are adopting for small MVPD systems, and the four-part waiver test for larger MVPD systems, appropriately address the concerns raised by ACA.

55. We decline to adopt a "blanket" waiver for financial hardship, as proposed by some commenters.[238] We believe a blanket approach, which would automatically grant a waiver to all small

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[232] *See* NAB Comments at 9-10.

[233] *See NPRM*, 26 FCC Rcd at 8301, para. 40.

[234] *See* NCTA Comments at 19. This definition is consistent with Section 76.901(c) of our rules (defining a "small system" as a cable system serving 15,000 or fewer subscribers). *See* 47 C.F.R. § 76.901(c). The affiliation exclusion is consistent with our definition of a small MVPD operator in the cable carriage context, which excludes an MVPD system that was affiliated with an MVPD operator serving more than 10 percent of all MVPD subscribers. *See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Fourth Report and Order, 23 FCC Rcd 13618, para. 2 (2008) (holding that "cable systems that either have 2,500 or fewer subscribers and are not affiliated with a large cable operator serving more than 10 percent of all MVPD customers … are exempt from the requirement to carry high definition versions of broadcast signals for three years following the [DTV] Transition").

[235] *See supra*, notes 161, 162, and 164.

[236] *See* ACA Reply Comments at 6, note 25 (citing In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses, Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011), Appendix A.

[237] *See supra,* para. 35-37.

[238] *See* Comments of ACA at 32 (supporting a blanket financial hardship waiver for small MVPDs) and NAB at 9-10 (supporting a blanket waiver for stations that are "small businesses"). *See also* Comments of NCTA at 19-20 (supporting waiver of the rules for small MVPD systems "as a class") and OPATSCO-NCTA-WTA at 4-5 (supporting a streamlined waiver provision for small MVPDs, MVPDs using older equipment or alternative technologies, and rural LEC-affiliated MVPDs).

entities without requiring an individual showing of financial hardship, would be over-inclusive of stations and MVPDs that do not actually need the additional time to obtain equipment and would unnecessarily delay the benefits of the CALM Act for their viewers. We also are not persuaded that a blanket approach would be consistent with the statute, which contemplates grant of waivers based on individual showings of financial hardship.[239] The streamlined waiver approach we are implementing is simple and straightforward and is, in fact, less burdensome than the approach suggested by some commenters.[240] Moreover, we note that stations and MVPDs seeking to be in the safe harbor are not expected to enter into contracts with program suppliers as we anticipated in the *NPRM*,[241] but instead can rely on a less burdensome certification and spot check approach, thus mooting the argument that stations/MVPDs need additional time to amend their contracts.[242] This certification and spot check procedure should prove less burdensome for all stations and MVPDs and should reduce the number of entities that need to request a waiver. We note that small stations and MVPDs are not required to perform annual spot checks, and therefore would only need equipment to perform a spot check if the FCC initiates an inquiry.[243]

56. *General Waiver.* Section 2(b)(3) of the CALM Act provides that the statute does not affect the Commission's authority to waive any rule required by the CALM Act, or the application of any such rule, for good cause shown with regard to any station/MVPD or class of stations/MVPDs under Section 1.3 of the Commission's rules.[244] We will use our general waiver authority, consistent with Section 2(b)(3), for waivers necessitated by unforeseen circumstances as well as for MVPDs that demonstrate they cannot implement the RP because of the technology they use.[245] Several commenters noted that some entities might face particular difficulty complying with the RP because of the outdated or

[239] *See* 47 U.S.C. § 621(b)(2) ("For any television broadcast station, cable operator, or other multichannel video programming distributor that demonstrates that obtaining the equipment to comply with the regulation adopted pursuant to subsection (a) would result in financial hardship, the [FCC] may grant a waiver of the effective date set forth in paragraph (1) for 1 year and may renew such waiver for 1 additional year.").

[240] For example, OPATSCO-NCTA-WTA would have required small MVPDs to describe the equipment purchases needed to comply with the RP and an estimate of the costs associated with the purchase, installation, and maintenance of that equipment. *See* OPATSCO-NCTA-WTA Comments at 4. We also note that, while we do not adopt the blanket financial hardship waiver proposed by ACA, our streamlined waiver approach is less burdensome than the approach ACA recommended as an alternative to a blanket waiver. *See* ACA Comments at 32 and ACA Reply Comments at 14.

[241] *See NPRM*, 26 FCC Rcd at 8294-5, para. 23.

[242] *See*, *supra* paras. 30-44. *See also* Comments of NAB at 9 (noting that it can take up to a year and a half or more for a station to take the steps necessary to comply, including negotiating contracts with third-party programming providers and noting that this process will be particularly burdensome for small businesses and small stations in small markets); Comments of AT&T at 11-13 (noting that it will take up to eight years to add indemnification provisions to all existing contracts assuming they are added to agreements as they come up for renewal).

[243] *See*, *supra* para. 36. For small MVPD systems, most of the steps they must take to comply with the RP may be taken on their behalf by a third-party programmer providing embedded commercials or third-party contractors providing local insertions. *See, supra* paras. 30-45. Consequently, we expect that small MVPDs will be less likely to need to obtain equipment, and, therefore, less likely to need a waiver to delay the effective date of the rule. In the event they are going to obtain monitoring equipment to conduct spot checks, or equipment to insert local commercials themselves, they may need the additional time afforded by the waiver, and we intend to grant waivers to small MVPDs in these circumstances.

[244] *See* 47 U.S.C. § 621(b)(3) (codifying CALM Act § 2(b)(3)). *See* 47 C.F.R. § 1.3 (the Commission's rules "may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission" and "[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefore is shown.").

[245] *See NPRM*, 26 FCC Rcd at 8301, para. 41.

alternative technology they employ.[246] Grant of a waiver under such circumstances would be more likely to be in the public interest if the waiver recipient can demonstrate that it, by some other means, will be able to prevent the transmission of loud commercials, as intended by the CALM Act.

57. *Filing Deadline*. Absent extraordinary circumstances, the deadline for filing a waiver request pursuant to either Section 2(b)(2) of the CALM Act or Section 1.3 of the Commission's rules will be 60 days before the effective date of the rules. While we proposed a deadline of 180 days before the effective date in the *NPRM*,[247] we agree with NAB that a 60-day deadline is more practical and will still afford the Media Bureau enough time to consider these requests before our rules take effect.[248] Requests for waiver renewals must be filed at least 60 days before the waiver expires.

58. *Filing Requirements*. A station or MVPD must file a financial hardship or general waiver request electronically into this docket through the Commission's Electronic Comment Filing System ("ECFS") using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/. The filing must be clearly designated as a "financial hardship" or "general" waiver request and must clearly reference this proceeding and docket number. Requests for "general" waiver must comply with Section 1.3 of our rules.[249] All filers will receive a confirmation online after their waiver has been successfully submitted through ECFS. It is recommended that applicants for a streamlined waiver retain this confirmation for their records. We will not impose a filing fee for waiver requests pursuant to the waiver provisions of the CALM Act.[250]

IV. CONCLUSION

59. The CALM Act directs us to incorporate by reference into our rules and make mandatory the RP to "make the volume of commercials and regular programming uniform so consumers can control sound levels." To achieve this directive, we incorporate the RP into our rules, establish a consumer-complaint-driven process to identify genuine instances of noncompliance, and specify the means by which all regulated parties may be "deemed in compliance" with our regulations or enter the safe harbor depending on the content involved. These rules implement the statute as Congress intended for the benefit of consumers while limiting the compliance burden on stations and MVPDs.

[246] *See*, *e.g.*, Comments of OPASTCO-NCTA-WTA at 2-5 (stating that it is expensive for MVPDs that provide service via coaxial cable systems or Internet protocol television ("IPTV"), and that often utilize older equipment, to upgrade to comply with the RP).

[247] *See NPRM*, 26 FCC Rcd at 8302, para. 43.

[248] *See* NAB Comments at 10-11. The 60 day requirement provides the Media Bureau with adequate time to contact the waiver applicant in the event of a question regarding its certification.

[249] *See* 47 C.F.R. § 1.3.

[250] "Financial hardship" or "general" waiver requests filed by cable operators pursuant to CALM Act §§ 2(b)(2) and 2(b)(3) and 47 C.F.R. § 1.3 are not "Cable Special Relief Petitions" under section 76.7 of the Commission's rules, and are therefore not subject to a statutory filing fee. *See* 47 U.S.C. § 158(g). Section 76.7(a)(1) of the rules provides, *inter alia*, that the Commission may waive "any provision of this part 76" in response to a petition by a cable operator. Requests by cable operators for CALM Act relief pursuant to CALM Act §§ 2(b)(2) and (2)(b)(3) and section 1.3 of the Commission's rules would not involve waiver of any Part 76 provisions, so the general procedures in section 76.7 would be inapplicable.

V. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Act Analysis

60. As required by the Regulatory Flexibility Act of 1980 ("RFA"),[251] the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this Report and Order. The FRFA is attached to this Report and Order as Appendix C.

B. Final Paperwork Reduction Act of 1995 Analysis

61. We analyzed this Report and Order with respect to the Paperwork Reduction Act of 1995 ("PRA")[252] and it contains new and modified information collection requirements.[253] It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA.[254] The Commission, as part of its continuing effort to reduce paperwork burdens, invites OMB, the general public, and other interested parties to comment on the information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002,[255] we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.[256]

C. Additional Information

62. For additional information on this proceeding, contact Evan Baranoff, Evan.Baranoff@fcc.gov, or Lyle Elder, Lyle.Elder@fcc.gov, of the Media Bureau, Policy Division, at (202) 418-2120; or Shabnam Javid, Shabnam.Javid@fcc.gov, of the Media Bureau, Engineering Division, at (202) 418-2672.

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[251] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 et. seq., has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 ("CWAAA").

[252] The Paperwork Reduction Act of 1995 ("PRA"), Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

[253] We propose to modify existing information collection requirements relating to the Commission's online complaint form (the Form 2000 series). *See* OMB Control No. 3060-0874. We also propose to create a new information collection requirement to cover the filing of financial hardship and general waiver requests pursuant to Sections 2(b)(2) and 2(b)(3) of the CALM Act.

[254] 44 U.S.C. § 3507(d).

[255] The Small Business Paperwork Relief Act of 2002 ("SBPRA"), Pub. L. No. 107-198, 116 Stat 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); *see* 44 U.S.C. § 3506(c)(4).

[256] *NPRM* at para. 48.

VI. ORDERING CLAUSES

63. Accordingly, IT IS ORDERED that pursuant to the Commercial Advertisement Loudness Mitigation Act of 2010, Pub. L. No. 111-311, 124 Stat. 3294, and Sections 1, 2(a), 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i) and (j), 303(r), and 621, this Report and Order IS ADOPTED.

64. IT IS FURTHER ORDERED that the rules adopted herein WILL BECOME EFFECTIVE December 13, 2012, except for 47 C.F.R. §§ 73.682(e)(2)(ii), (iii), and (iv); (3)(iv); (4); (5)(ii); and (6) and §§ 76.607(a)(2)(ii), (iii), and (iv); (3)(iv); (4); (5)(ii); and (6), which contain new or modified information collection requirements. Those rules will become effective on the date specified in a Commission notice published in the Federal Register announcing their approval under the Paperwork Reduction Act by the Office of Management and Budget, which date shall be no earlier than December 13, 2012.

65. IT IS FURTHER ORDERED that we delegate authority to the Media Bureau to consider waiver requests filed under these rules and pursuant to Sections 2(b)(2) and 2(b)(3) of the CALM Act.

66. IT IS FURTHER ORDERED that, pursuant to the Congressional Review Act, 5 U.S.C. § 801(a)(1)(A), the Commission WILL SEND a copy of this Report and Order in a report to Congress and the General Accounting Office.

67. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, WILL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

The Federal Communications Commission amends Parts 73 and 76 of Title 47 of the Code of Federal Regulations (CFR) as set forth below:

PART 73– Radio Broadcast Services

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

2. Amend §73.682 by adding paragraph (e) to read as follows:

§ 73.682 TV transmission standards.

* * * * *

(e) Transmission of commercial advertisements by television broadcast station.

(1) Mandatory compliance with ATSC A/85. Effective December 13, 2012, television broadcast stations must comply with the Advanced Television Systems Committee (ATSC) A/85: "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television" (July 25, 2011) ("ATSC A/85 RP") (incorporated by reference, see §73.8000), insofar as it concerns the transmission of commercial advertisements. ATSC A/85 RP is available from ATSC, 1750 K Street, N.W., Suite 1200, Washington, DC 20006, or at the ATSC Web site: http://www.atsc.org/standards.html.

(2) Commercials inserted by station. A television broadcast station that installs, utilizes, and maintains in a commercially reasonable manner the equipment and associated software to comply with ATSC A/85 shall be deemed in compliance with respect to locally inserted commercials, which for the purposes of this provision are commercial advertisements added to a programming stream by a station prior to or at the time of transmission to viewers. In order to be considered to have installed, utilized and maintained the equipment and associated software in a commercially reasonable manner, a television broadcast station must

(i) install, maintain and utilize equipment to properly measure the loudness of the content and to ensure that the dialnorm metadata value correctly matches the loudness of the content when encoding the audio into AC-3 for transmitting the content to the consumer;
(ii) provide records showing the consistent and ongoing use of this equipment in the regular course of business and demonstrating that the equipment has undergone commercially reasonable periodic maintenance and testing to ensure its continued proper operation;
(iii) certify that it either has no actual knowledge of a violation of the ATSC A/85 RP, or that any violation of which it has become aware has been corrected promptly upon becoming aware of such a violation; and
(iv) certify that its own transmission equipment is not at fault for any pattern or trend of complaints.

(3) Embedded commercials – safe harbor. With respect to embedded commercials, which, for the purposes of this provision, are those commercial advertisements placed into the programming stream by a third party (i.e., programmer) and passed through by the station to viewers, a television broadcast station

must certify that its own transmission equipment is not at fault for any pattern or trend of complaints, and may demonstrate compliance with the ATSC A/85 RP through one of the following methods:

(i) relying on a network's or other programmer's certification of compliance with the ATSC A/85 RP with respect to commercial programming, provided that:

(A) the certification is widely available by website or other means to any television broadcast station, cable operator, or multichannel video programming distributor that transmits that programming; and

(B) the television broadcast station has no reason to believe that the certification is false; and

(C) the television broadcast station performs a spot check, as defined in 73.682(e)(3)(iv)(A), (B), (D), and (E), on programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming.

(ii) if transmitting any programming that is not certified as described in 73.682(e)(3)(i), a television broadcast station that had more than $14,000,000 in annual receipts for the calendar year 2011 must perform annual spot checks, as defined in 73.682(e)(3)(iv)(A), (B), (C), and (E), of all the non-certified commercial programming it receives from a network or other programmer and perform a spot check, as defined in 73.682(e)(3)(iv)(A), (B), (D), and (E), on programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming;

(iii) a television broadcast station that had $14,000,000 or less in annual receipts for the year 2011 need not perform annual spot checks but must perform a spot check, as defined in 73.682(e)(3)(iv)(A), (B), (D), and (E), on programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming.

(iv) For purposes of this section, a "spot check" of embedded commercials requires monitoring 24 uninterrupted hours of programming with an audio loudness meter employing the measurement technique specified in the ATSC A/85 RP, and reviewing the records from that monitoring to detect any commercials transmitted in violation of the RP. The television broadcast station must not inform the network or programmer of the spot check prior to performing it.

(A) Spot-checking must be conducted after the signal has passed through the television broadcast station's processing equipment (*e.g.*, at the output of a television receiver). If a problem is found, the television broadcast station must determine the source of the noncompliance.

(B) To be considered valid, the television broadcast station must demonstrate appropriate maintenance records for the audio loudness meter.

(C) With reference to the annual "safe harbor" spot check in 73.682(e)(3)(ii):

(I) To be considered valid, the television broadcast station must demonstrate, at the time of any enforcement inquiry, that appropriate spot checks had been ongoing.

(II) If there is no single 24 hour period in which all programmers of a given program stream are represented, an annual spot check may consist of a series of loudness measurements over the course of a 7 day period, totaling no fewer than 24 hours, that measure at least one program, in its entirety, provided by each non-certified programmer that supplies programming for that program stream.

(III) If annual spot checks are performed for two consecutive years without finding evidence of noncompliance with the ATSC A/85 RP, no further annual spot checks are required to remain in the safe harbor for existing programming.

(IV) Non-certified program streams must be spot-checked annually using the approach described in this section. If annual spot checks of the program stream

are performed for two consecutive years without finding evidence of noncompliance with the ATSC A/85 RP, no further annual spot checks are required to remain in the safe harbor for that program stream.

(V) Even after the two year period for annual spot checks, if a spot check shows noncompliance on a non-certified program stream, the station must once again perform annual spot checks of that program stream to be in the safe harbor for that programming. If these renewed annual spot checks are performed for two consecutive years without finding additional evidence of noncompliance with the ATSC A/85 RP, no further annual spot checks are required to remain in the safe harbor for that program stream.

(D) With reference to the spot checks in response to an enforcement inquiry pursuant to 73.682(e)(3)(i)(C), (ii), or (iii):

(I) If notified of a pattern or trend of complaints, the television broadcast station must perform the 24-hour spot check of the program stream at issue within 30 days or as otherwise specified by the Enforcement Bureau; and

(II) If the spot check reveals actual compliance, the television broadcast station must notify the Commission in its response to the enforcement inquiry.

(E) If any spot check shows noncompliance with the ATSC A/85 RP, the television station must notify the Commission and the network or programmer within 7 days, direct the programmer's attention to any relevant complaints, and must perform a follow-up spot check within 30 days of providing such notice. The station must notify the Commission and the network or programmer of the results of the follow-up spot check. Notice to the Federal Communications Commission must be provided to the Chief, Investigations and Hearings Division, Enforcement Bureau, or as otherwise directed in a Letter of Inquiry to which the station is responding.

(I) If the follow-up spot check shows compliance with the ATSC A/85 RP, the station remains in the safe harbor for that program stream.

(II) If the follow-up spot check shows noncompliance with the ATSC A/85 RP, the station will not be in the safe harbor with respect to commercials contained in the program stream for which the spot check showed noncompliance until a subsequent spot check shows that the program stream is in compliance.

(4) Use of a real-time processor. A television broadcast station that installs, maintains and utilizes a real-time processor in a commercially reasonable manner will be deemed in compliance with A/85 with regard to any commercial advertisements on which it uses such a processor, so long as it also:

(i) provides records showing the consistent and ongoing use of this equipment in the regular course of business and demonstrating that the equipment has undergone commercially reasonable periodic maintenance and testing to ensure its continued proper operation;

(ii) certifies that it either has no actual knowledge of a violation of the ATSC A/85 RP, or that any violation of which it has become aware has been corrected promptly upon becoming aware of such a violation; and

(iii) certifies that its own transmission equipment is not at fault for any pattern or trend of complaints.

(5) Commercials locally inserted by a station's agent – safe harbor. With respect to commercials locally inserted, which for the purposes of this provision are commercial advertisements added to a programming stream for the television broadcast station by a third party after it has been received from the programmer but prior to or at the time of transmission to viewers, a station may demonstrate compliance with the ATSC A/85 RP by relying on the third party local inserter's certification of compliance with the ATSC A/85 RP, provided that:

(i) the television broadcast station has no reason to believe that the certification is false;

(ii) the television broadcast station certifies that its own transmission equipment is not at fault for any pattern or trend of complaints; and
(iii) the television broadcast station performs a spot check, as defined in 73.682(e)(3)(iv)(A), (B), (D), and (E), on the programming at issue in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials inserted by that third party.

(6) Instead of demonstrating compliance pursuant to subparagraphs (e)(2) through (5) above, a station may demonstrate compliance with subparagraph (e)(1) above in response to an enforcement inquiry prompted by a pattern or trend of complaints by demonstrating actual compliance with ATSC A/85 with regard to the commercial advertisements that are the subject of the inquiry, and certifying that its own transmission equipment is not at fault for any such pattern or trend of complaints.

Note: For additional information regarding this requirement see Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act, [Insert Fed Reg cite].

3. Amend §73.8000 by revising paragraph (b)(3) to read as follows:

§ 73.8000 Incorporation by reference.

(b)* * * * *

* * * * *

(3) ATSC A/85: "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," (July 25, 2011), IBR approved for §73.682.

* * * * *

PART 76 – Multichannel Video and Cable Television Service.

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Part 76, Subpart K, is revised by adding new Section 76.607 to read as follows:

§ 76.607 Transmission of commercial advertisements.

(a) Transmission of commercial advertisements by cable operator or other multichannel video programming distributor

(1) Mandatory compliance with ATSC A/85. Effective December 13, 2012, cable operators and other multichannel video programming distributors (MVPDs), as defined in 47 U.S.C. § 522, must comply with the Advanced Television Systems Committee (ATSC) A/85: "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," (July 25, 2011) ("ATSC A/85 RP") (incorporated by reference, see §76.602), insofar as it concerns the transmission of commercial

advertisements. ATSC A/85 RP is available from ATSC, 1750 K Street, N.W., Suite 1200, Washington, DC 20006, or at the ATSC Web site: http://www.atsc.org/standards.html.

(2) Commercials inserted by cable operator or other MVPD. A cable operator or other multichannel video programming distributor that installs, utilizes, and maintains in a commercially reasonable manner the equipment and associated software to comply with ATSC A/85 shall be deemed in compliance with respect to locally inserted commercials, which for the purposes of this provision are commercial advertisements added to a programming stream by a cable operator or other MVPD prior to or at the time of transmission to viewers. In order to be considered to have installed, utilized and maintained the equipment and associated software in a commercially reasonable manner, a cable operator or other MVPD must:

(i) install, maintain and utilize equipment to properly measure the loudness of the content and to ensure that the dialnorm metadata value correctly matches the loudness of the content when encoding the audio into AC-3 for transmitting the content to the consumer;
(ii) provide records showing the consistent and ongoing use of this equipment in the regular course of business and demonstrating that the equipment has undergone commercially reasonable periodic maintenance and testing to ensure its continued proper operation;
(iii) certify that it either has no actual knowledge of a violation of the ATSC A/85 RP, or that any violation of which it has become aware has been corrected promptly upon becoming aware of such a violation; and
(iv) certify that its own transmission equipment is not at fault for any pattern or trend of complaints.

(3) Embedded commercials – safe harbor. With respect to embedded commercials, which, for the purposes of this provision, are those commercial advertisements placed into the programming stream by a third party (i.e., programmer) and passed through by the cable operator or other MVPD to viewers, a cable operator or other MVPD must certify that its own transmission equipment is not at fault for any pattern or trend of complaints, and may demonstrate compliance with the ATSC A/85 RP through one of the following methods:

(i) relying on a network's or other programmer's certification of compliance with the ATSC A/85 RP with respect to commercial programming, provided that:
(A) the certification is widely available by website or other means to any television broadcast station, cable operator, or multichannel video programming distributor that transmits that programming; and
(B) the cable operator or other MVPD has no reason to believe that the certification is false; and
(C) the cable operator or other MVPD performs a spot check, as defined in 76.607(a)(3)(iv)(A), (B), (D), and (E), on the programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming;

(ii) if transmitting any programming that is not certified as described in 76.607(a)(3)(i):
(A)a cable operator or other MVPD that had 10,000,000 subscribers or more as of December 31, 2011 must perform annual spot checks, as defined in 76.607(a)(3)(iv)(A), (B), (C), and (E), of all the non-certified commercial programming it receives from a network or other programmer that is carried by any system operated by the cable operator or other MVPD, and perform a spot check, as defined in 76.607(a)(3)(iv)(A), (B), (D), and (E), on programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming; and
(B) a cable operator or other MVPD that had fewer than 10,000,000 but more than 400,000 subscribers as of December 31, 2011, must perform annual spot checks, as

defined in 76.607(a)(3)(iv)(A), (B), (C), and (E), of a randomly chosen 50 percent of the non-certified commercial programming it receives from a network or other programmer that is carried by any system operated by the cable operator or other MVPD, and perform a spot check, as defined in 76.607(a)(3)(iv)(A), (B), (D), and (E), on programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming; or

(iii) a cable operator or other MVPD that had fewer than 400,000 subscribers as of December 31, 2011, need not perform annual spot checks but must perform a spot check, as defined in 76.607(a)(3)(iv)(A), (B), (D), and (E), on programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming.

(iv) For the purposes of this section, a "spot check" of embedded commercials requires monitoring 24 uninterrupted hours of programming with an audio loudness meter compliant with the ATSC A/85 RP's measurement technique, and reviewing the records from that monitoring to detect any commercials transmitted in violation of the RP. The cable operator or other MVPD must not inform the network or programmer of the spot check prior to performing it.

(A) Spot-checking must be conducted after the signal has passed through the cable operator or other MVPD's processing equipment (*e.g.*, at the output of a set-top box). If a problem is found, the cable operator or other MVPD must determine the source of the noncompliance.

(B) To be considered valid, the cable operator or other MVPD must demonstrate appropriate maintenance records for the audio loudness meter.

(C) With reference to the annual "safe harbor" spot check in 76.607(a)(3)(ii):

(I) To be considered valid, the cable operator or other MVPD must demonstrate, at the time of any enforcement inquiry, that appropriate spot checks had been ongoing.

(II) If there is no single 24 hour period in which all programmers of a given channel are represented, an annual spot check could consist of a series of loudness measurements over the course of a 7 day period, totaling no fewer than 24 hours, that measure at least one program, in its entirety, provided by each non-certified programmer that supplies programming for that channel.

(III) If annual spot checks are performed for two consecutive years without finding evidence of noncompliance with the ATSC A/85 RP, no further annual spot checks are required to remain in the safe harbor for existing programming.

(IV) Newly-added (or newly de-certified) non-certified channels must be spot-checked annually using the approach described in this section. If annual spot checks of the channel are performed for two consecutive years without finding evidence of noncompliance with the ATSC A/85 RP, no further annual spot checks are required to remain in the safe harbor for that channel.

(V) Even after the two year period, if a spot check shows noncompliance on a non-certified channel, the cable operator or other MVPD must once again perform annual spot checks of that channel to be in the safe harbor for that programming. If these renewed annual spot checks are performed for two consecutive years without finding additional evidence of noncompliance with the ATSC A/85 RP, no further annual spot checks are required to remain in the safe harbor for that channel.

(D) With reference to the spot checks in response to an enforcement inquiry pursuant to 76.607(a)(3)(i)(C), (ii), or (iii):

(I) If notified of a pattern or trend of complaints, the cable operator or other MVPD must perform the 24-hour spot check of the channel or programming at issue within 30 days or as otherwise specified by the Enforcement Bureau; and

(II) If the spot check reveals actual compliance, the cable operator or other MVPD must notify the Commission in its response to the enforcement inquiry.

(E) If any spot check shows noncompliance with the ATSC A/85 RP, the cable operator or other MVPD must notify the Commission and the network or programmer within 7 days, direct the programmer's attention to any relevant complaints, and must perform a follow-up spot check within 30 days of providing such notice. The cable operator or other MVPD must notify the Commission and the network or programmer of the results of the follow-up spot check. Notice to the Federal Communications Commission must be provided to the Chief, Investigations and Hearings Division, Enforcement Bureau, or as otherwise directed in a Letter of Inquiry to which the cable operator or other MVPD is responding.

(I) If the follow-up spot check shows compliance with the ATSC A/85 RP, the cable operator or other MVPD remains in the safe harbor for that channel or programming.

(II) If the follow-up spot check shows noncompliance with the ATSC A/85 RP, the cable operator or other MVPD will not be in the safe harbor with respect to commercials contained in programming for which the spot check showed noncompliance until a subsequent spot check shows that the programming is in compliance.

(4) Use of a real-time processor. A cable operator or other MVPD that installs, maintains and utilizes a real-time processor in a commercially reasonable manner will be deemed in compliance with A/85 with regard to any commercial advertisements on which it uses such a processor, so long as it also:

(i) provides records showing the consistent and ongoing use of this equipment in the regular course of business and demonstrating that the equipment has undergone commercially reasonable periodic maintenance and testing to ensure its continued proper operation;

(ii) certifies that it either has no actual knowledge of a violation of the ATSC A/85 RP, or that any violation of which it has become aware has been corrected promptly upon becoming aware of such a violation; and

(iii) certifies that its own transmission equipment is not at fault for any pattern or trend of complaints.

(5) Commercials locally inserted by a cable operator or other MVPD's agent – safe harbor. With respect to commercials locally inserted, which for the purposes of this provision are commercial advertisements added to a programming stream for the cable operator or other MVPD by a third party after it has been received from the programmer but prior to or at the time of transmission to viewers, a cable operator or other MVPD may demonstrate compliance with the ATSC A/85 RP by relying on the third party local inserter's certification of compliance with the ATSC A/85 RP, provided that:

(i) the cable operator or other MVPD has no reason to believe that the certification is false;

(ii) the cable operator or other MVPD certifies that its own transmission equipment is not at fault for any pattern or trend of complaints; and

(iii) the cable operator or other MVPD performs a spot check, as defined in 76.607(a)(3)(iv)(A), (B), (D), and (E), on the programming at issue in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials inserted by that third party.

(6) Instead of demonstrating compliance pursuant to subparagraphs (a)(2) through (5) above, a cable operator or other MVPD may demonstrate compliance with subparagraph (a)(1) above in response to an enforcement inquiry prompted by a pattern or trend of complaints by demonstrating actual compliance with ATSC A/85 with regard to the commercial advertisements that are the subject of the inquiry, and certifying that its own transmission equipment is not at fault for any such pattern or trend of complaints.

Note: For additional information regarding this requirement see Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act, [Insert Fed Reg cite].

3. Amend §76.602 by adding paragraph (b)(10) to read as follows:

§ 76.602 Incorporation by reference.

(b)* * * * *

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(10) ATSC A/85: "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," (July 25, 2011), IBR approved for §76.607.

APPENDIX B

Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice of Proposed Rule Making* in this proceeding.[2] The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[3]

A. Need for, and Objectives of, the Report and Order

2. This Report and Order ("*R&O*") adopts rules to implement the Commercial Advertisement Loudness Mitigation (CALM) Act.[4] Among other things, the CALM Act directs the Commission to incorporate into its rules by reference and make mandatory a technical standard developed by an industry standard-setting body that is designed to prevent television commercial advertisements from being transmitted at louder volumes than the program material they accompany.[5] Specifically, the CALM Act requires the Commission to incorporate by reference the ATSC A/85 Recommended Practice ("the RP" or "RP")[6] and make it mandatory "insofar as such recommended practice concerns the transmission of commercial advertisements by a television broadcast station, cable operator, or other multichannel video programming distributor."[7] This *R&O* incorporates the RP by reference, and, pursuant to the statute, makes stations and MVPDs fully responsible for all commercial advertisements they transmit.

3. Commission enforcement actions will be based on a pattern or trend of complaints.[8] Stations and MVPDs may demonstrate actual compliance in response to such an inquiry by providing records of the audio levels of the complained-of programming.[9] However, the statute recognizes, and the rulemaking record confirms, that such demonstrations can be impractical and difficult.[10] Therefore, the R&O provides two methods by which entities may more easily demonstrate ongoing compliance. First, with respect to locally inserted commercials, stations and MVPDs may demonstrate that they install,

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

[2] *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*; MB Docket No. 11-93, Notice of Proposed Rulemaking, 26 FCC Rcd 8281 (2010) ("*NPRM*").

[3] *See* 5 U.S.C. § 604.

[4] The Commercial Advertisement Loudness Mitigation ("CALM") Act, Pub. L. No. 111-311, 124 Stat. 3294 (2010) (codified at 47 U.S.C. § 621).

[5] *See* CALM Act § 2(a); *Senate Committee Report to S. 2847* at 1; *House Committee Report to H.R. 1084* at 1.

[6] *See* ATSC A/85: "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," (May 25, 2011) ("RP" or "the RP"). To obtain a copy of the RP, visit the ATSC website: http://www.atsc.org/cms/standards/a_85-2011a.pdf.

[7] *See* CALM Act § 2(a).

[8] R&O at para. 41.

[9] R&O at para. 22.

[10] R&O at note 114.

utilize, and maintain, in a commercially reasonable manner, equipment and software to comply with the RP.[11] Second, for embedded commercials, the R&O provides an alternative "safe harbor" approach. Under this approach, stations and MVPDs can rely on widely-available certifications, or annual spot checks of non-certified programming by large entities, to enter the safe harbor,[12] and can remain there by conducting a spot check of programming containing commercials that are the subject of a pattern or trend of complaints, and thereby demonstrate ongoing compliance.[13] If any spot check demonstrates noncompliance, the station or MVPD must re-check the noncompliant commercial programming with a follow-up spot check. If the re-check reveals noncompliance with the RP, then the station or MVPD, going forward, is no longer in the safe harbor for that channel or programming.[14]

4. Based on statutory provisions, the R&O also provides for financial hardship waivers which will allow all stations or MVPDs, large or small, to delay the effective date of the rules. This waiver is easier for smaller stations and MVPD systems to obtain. The R&O also provides for general waivers for unforeseen circumstances, as well as for stations or MVPDs that demonstrate they cannot strictly implement the RP because of the technology they use and propose to use an alternative approach to achieving the same goals.[15] The CALM Act requires the Commission to adopt these rules on or before December 15, 2011,[16] and they will take effect one year after adoption.[17]

B. Legal Basis

5. The authority for the action taken in this rulemaking is contained in the Commercial Advertisement Loudness Mitigation Act of 2010, Pub. L. No. 111-311, 124 Stat. 3294, and Sections 1, 2(a), 4(i) and (j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i) and (j), 303 and 621.

C. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

6. No comments were filed in response to the IRFA.

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

7. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules if adopted.[18] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction"[19] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[20] A "small

[11] R&O at paras. 28-29.

[12] This process is simplified further for smaller entities. R&O at paras. 35, 36.

[13] R&O at paras. 30-40.

[14] R&O at paras. 43-44.

[15] R&O at paras. 49-58.

[16] *See* CALM Act § 2(a).

[17] *See* CALM Act § 2(b)(1).

[18] 5 U.S.C. § 603(b)(3).

[19] 5 U.S.C. § 601(b).

[20] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity

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business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[21] The rule changes proposed herein will directly affect small television broadcast stations and small MVPD systems, which include cable operators and satellite video providers. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

8. **Wired Telecommunications Carrier***s*. The 2007 North American Industry Classification System ("NAICS") defines "Wired Telecommunications Carriers" as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[22] The SBA has developed a small business size standard for wireline firms within the broad economic census category, "Wired Telecommunications Carriers."[23] Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census data for 2007, which supersede data from the 2002 Census, show that 3,188 firms operated in 2007 as Wired Telecommunications Carriers. 3,144 had 1,000 or fewer employees, while 44 operated with more than 1,000 employees.[24]

9. **Wireless Telecommunications Carriers (except Satellite).** Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.[25] Prior to that time, such firms were within the now-superseded categories of "Paging" and "Cellular and Other Wireless Telecommunications."[26] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[27] For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 shows that there were 1,383 firms that operated that year.[28] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees.

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for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[21] 15 U.S.C. § 632.

[22] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[23] 13 C.F.R. § 121.201 (NAICS code 517110).

[24] http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en .

[25] U.S. Census Bureau, 2007 NAICS Definitions, 517210 Wireless Telecommunications Categories (Except Satellite), http://www.census.gov/naics/2007/def/ND517210.HTM#N517210.

[26] U.S. Census Bureau, 2002 NAICS Definitions, 517211 Paging, http://www.census.gov/epcd/naics02/def/NDEF517.HTM.; U.S. Census Bureau, 2002 NAICS Definitions, "517212 Cellular and Other Wireless Telecommunications"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM.

[27] 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[28] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

(continued….)

Thus under this category and the associated small business size standard, the majority of firms can be considered small. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service ("PCS"), and Specialized Mobile Radio ("SMR") Telephony services.[29] Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.[30] Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

10. **Television Broadcasting**. The SBA defines a television broadcasting station as a small business if such station has no more than $14.0 million in annual receipts.[31] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[32] The Commission has estimated the number of licensed commercial television stations to be 1,390.[33] According to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) as of January 31, 2011, 1,006 (or about 78 percent) of an estimated 1,298 commercial television stations[34] in the United States have revenues of $14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational ("NCE") television stations to be 391.[35] We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[36] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

11. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the

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[29] *See Trends in Telephone Service,* at table 5.3.

[30] *Id.*

[31] *See* 13 C.F.R. § 121.201, NAICS Code 515120 (2007).

[32] *Id*. This category description continues, "These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in producing programming. *See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

[33] *See* News Release, "Broadcast Station Totals as of December 31, 2010," 2011 WL 484756 (F.C.C.) (dated Feb. 11, 2011) ("*Broadcast Station Totals*"); also available at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0211/DOC-304594A1.pdf.

[34] We recognize that this total differs slightly from that contained in *Broadcast Station Totals*, *supra*, note 33; however, we are using BIA's estimate for purposes of this revenue comparison.

[35] *See Broadcast Station Totals*, *supra*, note 33.

[36] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 121.103(a)(1).

estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

12. **Direct Broadcast Satellite ("DBS") Service**. DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[37] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[38] To gauge small business prevalence for the DBS service, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with more than 1,000 employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees. Based on this data, the majority of these firms can be considered small.[39] Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and EchoStar Communications Corporation ("EchoStar") (marketed as the DISH Network).[40] Each currently offers subscription services. DIRECTV[41] and EchoStar[42] each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

13. **Fixed Microwave Services**. Microwave services include common carrier,[43] private-operational fixed,[44] and broadcast auxiliary radio services.[45] At present, there are approximately 31,549

[37] *See* 13 C.F.R. § 121.201, NAICS code 517110 (2007). The 2007 NAICS definition of the category of "Wired Telecommunications Carriers" is in paragraph 7, above.

[38] 13 C.F.R. § 121.201, NAICS code 517110 (2007).

[39] *See* http://www.factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[40] S*ee Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report,, 24 FCC Rcd 542, 580, ¶ 74 (2009) ("*13th Annual Report*"). We note that, in 2007, EchoStar purchased the licenses of Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel). *See* Public Notice, "Policy Branch Information; Actions Taken," Report No. SAT-00474, 22 FCC Rcd 17776 (IB 2007).

[41] As of June 2006, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. *See 13th Annual Report*, 24 FCC Rcd at 687, Table B-3.

[42] As of June 2006, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. *Id*. As of June 2006, Dominion served fewer than 500,000 subscribers, which may now be receiving "Sky Angel" service from DISH Network. *See id*. at 581, ¶ 76.

[43] 47 C.F.R. Part 101 *et seq*. (formerly, part 21 of the Commission's Rules) for common carrier fixed microwave services (except MDS).

[44] Persons eligible under Parts 80 and 90 of the Commission's rules can use Private-Operational Fixed Microwave services. *See* 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[45] Auxiliary Microwave Service is governed by Part 74 and Part 78 of Title 47 of the Commission's Rules. Available to licensees of broadcast stations, cable operators, and to broadcast and cable network entities. Auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between

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common carrier fixed licensees and 89,633 private and public safety operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. Microwave services include common carrier,[46] private-operational fixed,[47] and broadcast auxiliary radio services.[48] They also include the Local Multipoint Distribution Service (LMDS),[49] the Digital Electronic Message Service (DEMS),[50] and the 24 GHz Service,[51] where licensees can choose between common carrier and non-common carrier status.[52] The Commission has not yet defined a small business with respect to microwave services. For purposes of the FRFA, the Commission will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—i.e., an entity with no more than 1,500 persons is considered small.[53] For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.[54] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the number of firms does not necessarily track the number of licensees. The Commission estimates that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

14. **Cable and Other Program Distribution.** Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."[55] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[56] According to Census Bureau data for 2007, there were a total of 955 firms in the

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two points such as a main studio and an auxiliary studio. The service also includes TV pickup and CARS pickup, which relay signals from a remote location back to the studio.

[46] *See* 47 C.F.R. Part 101, Subparts C and I.

[47] *See* 47 C.F.R. Part 101, Subparts C and H.

[48] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[49] *See* 47 C.F.R. Part 101, Subpart L.

[50] *See* 47 C.F.R. Part 101, Subpart G.

[51] *See id.*

[52] *See* 47 C.F.R. §§ 101.533, 101.1017.

[53] 13 C.F.R. § 121.201, NAICS code 517210.

[54] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

[55] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition), http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[56] 13 C.F.R. § 121.201, NAICS code 517110 (2007).

subcategory of Cable and Other Program Distribution that operated for the entire year.[57] Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.[58] Accordingly, The Commission believe that a majority of firms operating in this industry were small.

15. **Cable Companies and Systems**. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.[59] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[60] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[61] Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000-19,999 subscribers.[62] Thus, under this second size standard, most cable systems are small.

16. **Cable System Operators**. The Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[63] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[64] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[65] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[66] and therefore we are unable to estimate more accurately the number of cable system operators that would

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[57] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (located at http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en).

[58] *See id*.

[59] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[60] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

[61] 47 C.F.R. § 76.901(c).

[62] Warren Communications News, *Television & Cable Factbook 2008*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2007). The data do not include 851 systems for which classifying data were not available.

[63] 47 U.S.C. § 543(m)(2); *see also* 47 C.F.R. § 76.901(f) & nn.1–3.

[64] 47 C.F.R. § 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

[65] These data are derived from R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

[66] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules.

qualify as small under this size standard.

17. **Open Video Services**. Open Video Service (OVS) systems provide subscription services.[67] The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[68] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[69] OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."[70] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for the OVS service, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with more than 1,000 employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees. Based on this data, the majority of these firms can be considered small.[71] In addition, we note that the Commission has certified some OVS operators, with some now providing service.[72] Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.[73] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities. The Commission further notes that it has certified approximately 45 OVS operators to serve 75 areas, and some of these are currently providing service.[74] Affiliates of Residential Communications Network, Inc. ("RCN") received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 44 OVS operators (those remaining) might qualify as small businesses.

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

18. These rules impose new reporting, recordkeeping and/or other compliance requirements on small television broadcast stations and small MVPDs. Small stations and MVPDs must be prepared to demonstrate compliance with the RP in the event of an enforcement inquiry, including demonstrating in every circumstance that the equipment necessary to pass through programming compliant with the RP has

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[67] *See* 47 U.S.C. § 573.

[68] 47 U.S.C. § 571(a)(3)-(4). *See 13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

[69] *See* 47 U.S.C. § 573.

[70] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[71] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[72] A list of OVS certifications may be found at http://www.fcc.gov/mb/ovs/csovscer.html.

[73] *See 13th Annual Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

[74] *See* http://www.fcc.gov/mb/ovs/csovscer.html (current as of February 2007).

been properly installed, maintained, and utilized.[75] The R&O does not, however, mandate the method by which compliance is demonstrated. It does provide optional methods to demonstrate compliance by being "deemed in compliance" or in a "safe harbor." For locally inserted commercials, a small station or MVPD must provide records showing the consistent and ongoing use of equipment to properly measure the loudness of the content and to ensure that the dialnorm metadata value correctly matches the loudness of the content when encoding the audio into AC-3 for transmitting the content to the consumer in the regular course of business and demonstrating that the equipment has undergone commercially reasonable periodic maintenance and testing to ensure its continued proper operation. It must also certify that it either has no actual knowledge of a violation of the ATSC A/85 RP, or that any violation of which it has become aware has been corrected promptly upon becoming aware of such a violation.[76] For embedded commercials, a small station or MVPD must perform a 24-hour spot check on programming containing complained-of commercials, and report the results to the Commission, and, if they show noncompliance, to the programmer.[77] In the event of a failed spot check, the station or MVPD must re-check the noncompliant commercial programming, and if the re-check reveals noncompliance with the RP, then the station or MVPD has actual knowledge of noncompliance and, going forward, is no longer in the safe harbor for that channel or programming.[78]

F. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

19. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[79]

20. The express language of the statute requires that the RP be incorporated into the rules and made mandatory for all stations and MVPDs, regardless of size.[80] As a result, these rules may have a significant economic impact in some cases, and that impact may affect a substantial number of small entities, although, as discussed below, the streamlined waiver process for small entities will relieve much of this impact. Nonetheless, the R&O makes significant strides to minimize the economic impact of the rules on small entities. The "safe harbor" we adopt simplifies the process by which small stations and MVPDs may demonstrate compliance with the RP, by eliminating the need for retroactive demonstrations of compliance. Larger stations and MVPDs must either seek certifications that programming is compliant with the RP, or perform annual spot checks of programming that has not been certified.[81] Smaller entities, however, are required only to install, maintain, and utilize the equipment necessary to comply, and in the case of an enforcement inquiry triggered by a pattern or trend of complaints regarding embedded commercials, to demonstrate ongoing compliance via means of a spot check.[82] This gives

[75] R&O at para. 24.

[76] R&O at para 29.

[77] R&O at paras. 41-42.

[78] R&O at paras. 43-44.

[79] 5 U.S.C. § 603(c)(1) – (c)(4).

[80] *See* 47 U.S.C. § 621(a).

[81] R&O at para. 32.

[82] R&O at paras. 36-37, 41-42.

smaller entities the choice to demonstrate compliance via an approach which creates minimal economic impact on those entities.

21. The smaller entities eligible for this simplified process are broadcast stations with less than $14 Million in annual receipts, and MVPDs with 400,000 or fewer subscribers, as of December, 2011. The R&O adopts the SBA size standard for stations, under which, as discussed above, approximately 78 percent of television broadcast stations are small.[83] The MVPD size standard adopted by the R&O is based on the Commission's definition of a "small cable company,"[84] allowing us to apply a relevant and easily-measurable size standard to all MVPDs. SBA considers MVPDs to be either Wired or Wireless Telecommunications Carriers, both of which use a 1,500 employee size standard. That standard, however, is less relevant than a subscriber-based measure to the goal of ensuring that the channels most subscribers watch are either certified or annually spot-checked, because the number of people employed by an MVPD does not necessarily directly correlate to the number of subscribers it reaches. Although the rules adopted in this R&O will look to MVPD size as of December, 2011, we note that as of June, 2011 all but 15 MVPDs are small.[85] Because the same program streams are provided to smaller and larger entities, spot checks by even a small number of large entities should ensure compliance for all while reducing the burden on smaller stations and MVPDs.

22. Furthermore, the statute provides that the Commission may grant a one-year waiver of the effective date of the rules implementing the statute to any station/MVPD that shows it would be a "financial hardship" to obtain the necessary equipment to comply with the rules, and may renew such waiver for one additional year.[86] To request a financial hardship waiver, a larger station or MVPD must provide: (1) evidence of its financial condition, such as financial statements; (2) a cost estimate for obtaining the necessary equipment to comply with the required regulation; (3) a detailed statement explaining why its financial condition justifies postponing compliance; and (4) an estimate of how long it will take to comply, along with supporting information. We do not require waiver applicants to show negative cash flow but, instead, require only that the station/MVPD's assertion of financial hardship be reasonable under the circumstances.[87] For small stations/MVPDs that face a financial challenge in obtaining the equipment needed to comply with our rules, we adopt a particularly streamlined financial hardship waiver approach.[88] Specifically, a small station or MVPD that seeks a waiver must file with the Commission a certification that it: (1) meets our definition of small for this purpose, and (2) needs a delay of one year to obtain specified equipment in order to avoid the financial hardship that would be imposed if it were required to obtain the equipment sooner. The station or MVPD is not required to submit any proof of financial condition. Small broadcast stations and small MVPDs may consider the waiver granted when they file this information online and receive an automatic "acknowledgement of request," unless the Media Bureau notifies them of a problem or question concerning the adequacy of the certification.[89]

23. This streamlined process is available to stations with no more than $14.0 million in annual receipts or that are located in television markets 150 to 210. With respect to the latter, the

[83] *Supra* para. 10.

[84] *Supra* para. 15.

[85] These fifteen MVPDs include DIRECTV, DISH Network, AT&T, and Verizon, along with more traditional cable companies like Time Warner and Suddenlink. *See* http://www.ncta.com/Stats/TopMSOs.aspx (visited November 16, 2011).

[86] R&O at para. 50.

[87] R&O at para. 51.

[88] R&O at para. 52.

[89] *Id*.

legislative history of the CALM Act specifically expressed concern about the difficulties faced by broadcasters in smaller markets, where the advertising revenue base is much more limited than in larger markets. Unlike small MVPD systems, most of the steps small broadcasters must take to comply with the RP must be undertaken internally, rather than by a third party programmer providing embedded commercials or third party contractors providing local insertions. Consequently, we expect that small broadcast stations will be more likely to need to obtain equipment, and, therefore, more likely to need a waiver to delay the effective date of the rule. We will therefore allow all of these stations to use the streamlined process. The streamlined process is also available to MVPD systems with fewer than 15,000 subscribers (as of December 31, 2011) that are not affiliated with a larger operator serving more than 10 percent of all MVPD subscribers. Our definition of "small MVPD system" for purposes of the streamlined waiver is different from our definition of smaller MVPD operators for purposes of being in the safe harbor.[90] While the waiver is available to all systems likely to face financial hardships in complying with the RP, we believe that only the smallest need an expedited process, and as discussed above, many of the steps small MVPD systems must take to comply with the RP may be undertaken by a third party.

24. Finally, Section 2(b)(3) of the CALM Act provides that the statute does not affect the Commission's authority to waive any rule required by the CALM Act, or the application of any such rule, for good cause shown with regard to any station/MVPD or class of stations/MVPDs under Section 1.3 of the Commission's rules. We will use our general waiver authority, consistent with Section 2(b)(3), for waivers necessitated by unforeseen circumstances as well as for MVPDs that demonstrate they cannot implement the RP because of the technology they use.[91]

G. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule

25. None.

H. Report to Congress

26. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[92] In addition, the Commission will send a copy of the *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The *Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register.[93]

[90] R&O at paras. 35-36.

[91] R&O at para. 56.

[92] *See* 5 U.S.C. § 801(a)(1)(A).

[93] *See* 5 U.S.C. § 604(b).

STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI

Re: *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act;* MB Docket No. 11-93

For a very long time, viewers have experienced commercials that blare out louder than the programming they accompany. Most of us have either experienced this ourselves, or had friends and family who have experienced it. You're watching your favorite television program, or the news, and all of a sudden, a commercial comes on and it sounds like someone turned up the volume – but no one did.

Today I am pleased that the Commission implements the Commercial Advertisement Loudness Mitigation Act, or CALM Act, requiring broadcasters, cable, telecommunications companies, satellite, and other TV providers to prevent spikes in volume. Under our new rules, TV providers must ensure that the average loudness of commercials will be no higher than the average volume of the programming they accompany.

The bottom line? Today, the FCC is quieting a persistent problem of the television age – loud commercials.

I want to thank Congresswoman Anna Eshoo for her leadership on this issue. I also want to thank Chairman Rockefeller and Senator Sheldon Whitehouse for their work and leadership on this issue.

The Commission has received almost 6,000 complaints or inquiries about loud commercials since 2008. In fact, as Consumers Union notes, "[I]n the twenty five quarterly reports on consumer complaints that have been released since 2002, twenty one have listed complaints about the 'abrupt changes in volume during transition from regular programming to commercials,' as among the top consumer grievances regarding radio and television broadcasting."

As the Pittsburgh Post-Gazette observed earlier this year, one would think TV providers "wouldn't want to annoy people [they] are trying to attract as customers by making their TV watching miserable," but loud commercials continue to vex viewers.

So I'm pleased that we have crafted a process that will protect consumers from inappropriately loud commercials, while remaining sensitive to resource constraints of small broadcasters and subscription TV providers. As the CALM Act requires, these rules will go into effect no later than one year from today. This will provide stations and MVPDs ample opportunity to prepare for full compliance.

I urge the content creators who provide much of the programming that is transmitted by broadcasters and MVPDs to step up over the next year and certify that their programming complies with the industry practice.

With today's vote, I'm pleased that we are able to help eliminate this pervasive problem for millions of American television viewers.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act;* MB Docket No. 11-93

This is an important day for consumer protection. I cannot tell you how many hundreds of citizens have told me—personally, through e-mails and letters, at public hearings, even across the family dinner table—how obnoxiously intrusive they find loud commercials. So do I. I am therefore delighted that this proceeding made it onto our agenda before I depart the Commission.

Of course, we would not be here today without the leadership of Congresswoman Anna Eshoo who spearheaded this effort in Congress. Always an inspiration, Representative Eshoo introduced the legislation that made today possible and then shepherded it through to enactment. Once again, she delivers for American consumers. And her colleague on the other side of the Capitol, Senator Sheldon Whitehouse also did an excellent job of navigating this measure through the Senate.

I'm proud this agency has tackled so many consumer protection issues under Chairman Genachowski's leadership, and I am confident more are on the way. There is a definitive nexus between the actions taken in this room and in the bureaus with the everyday lives of Americans. This is at the heart of what the public interest is all about. And, one more time, I want us to remember that the term "public interest" appears by my count 112 times in our governing statute, the Communications Act.

I want to be sure the spirit and letter of the new law are fully implemented by this Commission. The purpose of the Act was to get rid of loud commercials, period. I realize that the program production chain is a long one and not every link in that chain is under FCC purview, but that just means we have to work all the harder to make sure consumers receive the protections envisioned in this law. I also realize that sometimes what people think is an easy fix doesn't turn out that way. For example, technical questions regarding locally-inserted commercials versus passing through commercials inserted upstream made for some very complicated discussions. But the Bureau worked assiduously, and in the spirit of the act, throughout the process. While I might not have made every single call the identical way, I do believe the item before us provides an appropriate balance—as required by statute—of giving some measure of flexibility to the smallest providers even while providing the necessary heft to drive all parties to workable and implementable solutions. And I am confident the Commission will be closely monitoring implementation each and every step of the way and will make any adjustments that are called for to ensure that consumers get what the legislation intended them to get.

I want to recognize and thank the numerous industry interests, such as NCTA, for stepping up to the plate and working with us to find workable solutions. And I thank everyone who lent a hand, contributed to the record, and put shoulder to the wheel to help fashion the item before us. As part of the implementation going forward, we are going to need consumers to provide the FCC with feedback and to inform us if they hear—and I literally mean "hear"—any problem. The complaint process puts heavy emphasis on consumer complaints to monitor where instances of overly-loud commercials still exist.

Above all, thanks to the Bureau for working through this very important, but also very demanding, proceeding. I appreciate the hard work of all, and I want especially to recognize the contribution of the ever-indefatigable Eloise Gore and her partner in this work, Lyle Elder. Thanks to my colleagues for their input and to the Chairman for making sure we got this done both in time and creditably. I am pleased to support it.

STATEMENT OF COMMISSIONER ROBERT M. McDOWELL

Re: *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act;* MB Docket No. 11-93

Today, we implement the CALM Act. From this point forward, TV commercials, such as those for OxiClean, ShamWow!, HeadOn and the like, will never be the same. Family rooms across America might be a little less noisy as the result of our implementation of Congress's will. The directly elected representatives of the American people have mandated that the FCC muffle the sudden volume increases of TV commercials and today we are giving that endeavor our best shot, absent reaching for our remote controls' volume or mute buttons.

Although I am generally supportive of our efforts today, I do have some reservations about a few of the rules we are adopting. I am concerned that Congress may not have given us the authority to take some of these actions[1] and, when addressing promotional announcements, we may not be faithfully executing the letter of the statute.[2] The legislative history of the CALM Act, however, stresses the overall objective of prohibiting disruptive and intrusive loud advertisements that are an annoyance to the consumer.[3] I am unsure whether we are getting the legislative intent right, but I remain hopeful.

[1] In making broadcasters and multichannel video programming distributors ("MVPDs") ultimately liable for passing through loud, embedded commercials by programmers – over which broadcasters and MVPDs have no control and we have no jurisdiction, we may be exceeding our statutory authority.

[2] It is possible to interpret the language of the CALM Act as providing the Commission authority to regulate the volume of commercials, but not promos. The CALM Act states that the Commission must prescribe rules to implement the ATSC standards moderating abrupt volume increases in advertising "*only insofar* as such recommended practice concerns the transmission of *commercial advertisements*. . . ." 47 U.S.C. § 621(a) (emphasis added). These standards differentiate between commercial and promotional content. *See* Advanced Television Systems Committee Inc., ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television, ATSC A/85:2011, at § 3.4–Terms, Annex I, 1.1–Introduction (rev. July 25, 2011) (stating that "[c]ontent includes commercials, promotional materials . . . , and programming . . . [and that] [t]he term 'interstitials'" applies to both commercials and promos"), *available at* http://www.atsc.org/cms/standards/a_85-2011a.pdf. The Commission itself also has recognized the content distinction between advertisements and promos and has treated them differently. *See* 47 C.F.R. § 79.1(a)(1), (d)(6) (providing different treatment of advertisements and promos in the context of or closed captioning rules); Closed Captioning and Video Description of Video Programming, MM Docket No. 97-279, *Report and Order*, 13 FCC Rcd 3272, 3345-46 ¶¶ 151-53 (1997) (same); *see also* Children's Television Obligations of Digital Television Broadcasters, MM Docket No. 00-167, *Second Order on Reconsideration and Second Report and Order*, 21 FCC Rcd 11065, 11083-84 ¶¶ 46-49 (2006) (explaining that "commercial matter" was traditionally defined to exclude promotions of upcoming programs and why, in the context of limitations on the amount of advertising inserted in children's programming, certain promos were included as part of a joint settlement). Promos are also not considered to be commercial advertisements under the statutory constraints governing noncommercial educational ("NCE") stations. *See* 47 U.S.C § 399b (an advertisement has to be broadcast or otherwise transmitted in exchange for consideration). We have excluded NCE stations from the rules adopted in this proceeding because they may not broadcast advertisements – and yet they remain free to air promos. In short, it is not readily apparent, based on the language of the statute alone, that it covers promos.

[3] *See, e.g.,* S. REP. NO. 11-340, at 1-2 (2010); 156 CONG. REC. H7720-21 (daily ed. Nov. 30, 2010) (statements of Reps. Anna Eshoo, Lee Terry and Gene Green); 155 CONG. REC S12710-11 (daily ed. Dec. 8, 2009) (statement of Sen. Sheldon Whitehouse).

Many thanks to my colleagues for taking specific measures to reduce the burden on stations and multichannel video programming distributors ("MVPDs"), such as adopting safe harbors, using programmer certifications to establish compliance for embedded commercials, providing for the sunset of the annual requirement to perform spot checks on non-certified programming, and lessening the effect on small operators by requiring them to monitor the volume of commercials only if there is a pattern of complaints specific to their particular station or system. I am also appreciative that Congress specifically provided the Commission with the ability to provide financial hardship waivers and recognized our general authority to waive our rules for good cause. I am hoping that such waivers will be reasonably provided to alleviate burdens on broadcast stations and MVPDs if our rules should cause unintended consequences.

I thank the Chairman and my colleagues for their willingness to incorporate some of my edits, and I applaud the Media and Enforcement Bureaus for their dedication and thoughtful work on a complicated matter. Thank you.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act;* MB Docket No. 11-93

I don't often quote my colleagues on the bench. But today, I proudly embrace the line that we've heard many times from the distinguished gentleman from Virginia in stating that as a commissioner, I don't tell Congress what to do. Congress tells me what to do.

And in that vein, we move forward with an Order which will greatly improve the parity of volume levels in commercials to that of the programs they accompany. For far too long, TV viewers either frantically reached for the remote to turn down the volume when television commercials began or endured what sometimes were frightening decibel levels that resulted in considerable alarm, anger, and spilled popcorn.

Congress heard the cries of the TV-watching public and saw fit to construct a bill that addressed this concern. Congresswoman Anna Eshoo, who notes that the issue of loud commercials has been a top consumer complaint for almost 50 years, constructed a bill that passed the House via voice vote, meaning a roll call vote was not even necessary. The Senate followed a similar path, passing the bill by unanimous consent.

Ms. Eshoo went on to proclaim that the CALM act "gives the control of sound back to the consumer, where it belongs", and I absolutely agree.

In crafting an item that adheres to the bill Congress passed, we had to try as best we could to achieve a balance and to not over-burden industry with new requirements that would adversely harm the bottom lines of smaller operators and add onerous new expenses. As I mentioned when I began speaking, we do as Congress instructs us, but hopefully with a glow stick and not a flamethrower.

Our Media Bureau's staff, including our engineers, worked tirelessly to guide us through this rulemaking while consulting with industry. We did all we could to minimize the burden on operators large and small while at the same time maintaining the broad coverage that Congress specified with regard to technology parameters. Further, we needed to put into place an enforcement mechanism to address future problems as they arise and to continue to field complaints from the public.

Congress chose the ATSC A/85 recommended practice, which the industry created and the Commission incorporated from this point forward. Making that mandatory will add certainty to the business planning of stations, cable operators, and other MVPDs nationwide, just as Congress intended. Safe harbor and compliance provisions, including certifications, spot checks, and waiver requests, will serve to maintain the balance sought by Congress and the FCC in not burdening industry.

This item demonstrates the deft handling of interests that could potentially collide when Congress, an agency, industry players, and consumers intersect. All four can be, and often are, filled with passion for their stake in what's being considered, and finding common ground can be elusive. I believe we've done that here, in a way that satisfies all of the parties involved. Consumers cried out, Congress heard them, and the FCC worked with affected industries as well as consumer representatives to address the issue. This is an example of government receptiveness and efficiency, and the American public should take great comfort in it.

I want to thank Lyle Elder, Evan Baranoff, Alison Neplokh, Shabnam Javid, and the often-imitated but never duplicated Eloise Gore. This item is the result of your hard work and dedication, and I thank you for it.