

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 79

[MM Docket No. 99–339; FCC 01–7]

Video Description

AGENCY: Federal Communications Commission.

ACTION: Final rule; petition for reconsideration.

SUMMARY: This document concerns rules and policies designed to make television programming more accessible to the many Americans who have visual disabilities by bringing video description to the commercial video marketplace. The intended effect of this action is to clarify and resolve issues raised in petitions for reconsideration pertaining to the application of the Commission's video description rules.

DATES: Effective April 1, 2002.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington DC 20554.

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SUPPLEMENTARY INFORMATION: This is a summary of the *Memorandum Opinion and Order on Reconsideration* ("MO&O") in MM Docket No. 99–339, FCC 01–7, adopted on January 4, 2001, and released on January 18, 2001. The full text of this decision is available for inspection and copying during regular business hours in the FCC Reference Center, 445 Twelfth Street, SW, Room CY–A257, Washington DC, and also may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 445 Twelfth Street, SW, Room CY–B402, Washington DC. The complete text is also available under the file name fcc01007.doc on the Commission's Internet site at www.fcc.gov.

Synopsis of Memorandum Opinion and Order on Reconsideration

1. On August 7, 2000, the Commission adopted rules requiring broadcasters and other video programming distributors to provide video description and to make emergency information more accessible to visually impaired viewers. In this *Order*, the Commission grants in part and denies in part eight petitions seeking reconsideration of the *Report and Order* ("R&O") (65 FR 54805, September 11, 2000). The Commission also provides clarification on certain issues related to the video description rules.

2. The rules adopted in the *R&O* require affiliates of ABC, CBS, Fox, and NBC in the top 25 Designated Market Areas (DMAs) to provide 50 hours per calendar quarter of prime time or children's programming with video description. Multichannel video programming distributors (MVPDs) with 50,000 or more subscribers must provide 50 hours of video described programming each quarter on each of the top five national nonbroadcast networks they carry. All broadcast stations and MVPDs that have the technical capability to do so, regardless of market size or number of subscribers, must "pass through" any video description received from a programming provider. The *R&O* also adopted "undue burden" exemption procedures as well as enforcement procedures under which complaints alleging violations would be filed with the Commission. The video description rules become effective April 1, 2002. In addition, under new rules that become effective upon approval from the Office of Management and Budget broadcast stations and MVPDs that provide local emergency information must make the critical details of that information accessible to persons with visual disabilities through aural presentation or accompany a "crawl" or "scroll" with an aural tone to alert persons with disabilities to an emergency situation.

3. The Commission amends its rules to define the top five nonbroadcast networks as those that are ranked in the top five as defined by national audience share and that also reach 50 percent or more of MVPD households. The Commission amends the rules to allow broadcast stations and MVPDs to count previously aired programming one time toward quarterly requirements. The Commission clarifies that once a broadcast station or MVPD that is required under the rules to provide video description has aired a particular program with video description, all subsequent airings of that program by that broadcast station or MVPD on the same network or channel must contain the video description. The Commission further clarifies that broadcast stations and MVPDs may use the SAP channel to provide services other than video description when subsequently airing a video described program, as long as those services, such as foreign language translations, are program-related. Similarly, the Commission establishes an exception to the pass-through requirements, allowing broadcast stations and MVPDs to use the SAP channel to provide program-related services other than video description

when airing a program that contains video description. The Commission amends its rules to allow programming providers, in addition to programming distributors, to file waivers for exemptions. The Commission will allow consumers to bring informal complaints to the Commission at any time. The Commission amends its rules, however, to require consumers to certify in any formal complaint to the Commission, and distributors to certify in their answers, that they have attempted to resolve the dispute prior to filing the complaint with the Commission. The Commission adopts a definition of "prime time" and clarifies the definition of "technical error" for purposes of determining compliance with the rules. The Commission believes that these modifications promote its goal of not imposing an undue burden on programming producers or distributors, while enhancing the availability of video description to the visually impaired segment of our society.

A. Entities To Provide Programming With Video Description

1. Distributors and Programmers

4. In the *R&O*, the Commission adopted a rule that requires broadcast stations in the top 25 DMAs affiliated with the top four commercial broadcast networks, ABC, CBS, Fox, and NBC, as well as "larger" MVPDs, MVPDs that serve 50,000 or more subscribers, to provide programming with video description. The Commission further explained that implicit in the rules is the decision to hold programming distributors, rather than programming producers, responsible for compliance with the rules.

5. One petitioner contends that the Commission's rules hold "the wrong party" responsible for providing video described programming, arguing that the Commission should hold programmers responsible for compliance with the video description rules because distributors have no ability to do so. If a programmer violates the rules, the petitioner asserts that MVPDs will be subject to costly litigation seeking indemnification for any liability incurred. As the Commission acknowledged and explained in the *Notice of Proposed Rulemaking* ("NPRM") (64 FR 67236, December 1, 1999), while it expects that programming networks, and not broadcast stations or MVPDs, will describe the programming, the Commission should hold distributors responsible for compliance for ease of enforcement and monitoring of compliance with the rules. The

petitioner presents no new arguments or evidence that would lead the Commission to change its conclusion. Consistent with its findings in adopting closed captioning rules, while the Commission is placing the ultimate responsibility on program distributors, it expects that distributors will incorporate video description requirements into their contracts with program producers and owners, and that parties will negotiate for an efficient allocation of video description responsibilities. The Commission therefore denies the request to hold programming producers, rather than programming distributors, responsible for compliance with its rules.

2. DBS Operators

6. The video description rules require MVPDs that serve 50,000 or more subscribers to provide video description during prime time or on children's programming. The Commission recognized in the *R&O* that this standard would include within the scope of the rules two DBS systems that together reach 12 million subscribers: DIRECTV, Inc. (DIRECTV) and EchoStar Satellite Corporation (EchoStar). The Commission determined that while DIRECTV indicated that modifying its network to support three audio channels would cost "tens of millions of dollars," those costs appeared to be more than offset by revenues. Specifically, the Commission found that DIRECTV had more than 8.5 million customers as of May 2000, and based on the DBS average programming price of \$30 per month, it expects that DIRECTV subscriber revenues would be over \$3 billion per year. Similarly, based on EchoStar's more than 4 million subscribers as of May 2000, the Commission expects that EchoStar's subscriber revenues would appear to be nearly \$1.5 billion per year.

7. DIRECTV and EchoStar argue in their petitions that the Commission failed to adequately address the costs that the video description rules impose on DBS operators. DIRECTV asserts that the Commission based its decision "on a fictitious revenue figure" and that "gross revenues are an inappropriate measure" of its ability to bear the expenses associated with the new rules. Both petitioners claim that neither company is currently profitable. DIRECTV explains that, in addition to the costs needed to upgrade its system, the rules create staffing costs and missed opportunity costs, and impose costs for video describing programs "estimated at \$4,000 per hour." EchoStar asserts that "[a] requirement supporting SAP feeds for all the

hundreds of broadcast stations retransmitted by EchoStar would constitute a significant additional expenditure of bandwidth * * * approximately 6.25% of a channel of incremental bandwidth * * * comparable to, or even greater than, the 4% set-aside for public interest programming." Neither petitioner, however, explains how this information would lead the Commission to change its finding that MVPDs serving 50,000 or more subscribers should provide programming with video description. The Commission recognizes that the video description rules impose costs on DIRECTV and EchoStar, as they do on other MVPDs, as well as broadcast stations. DIRECTV and EchoStar have not provided information to convince the Commission, however, that direct broadcast satellite (DBS) providers should be categorically exempt from the rules. Neither petitioner explains how the rules impose an undue financial burden or an undue burden on available bandwidth sufficient for the Commission to determine that either should be exempt from the video description rules. While the Commission finds no reason at this time to change its standard for MVPDs, DIRECTV and EchoStar have the option of seeking individual exemptions by providing sufficiently detailed information under the rules demonstrating that compliance would result in an undue burden.

3. Premium Networks

8. MVPDs that fall within the scope of the video description rules must provide 50 hours of described programming quarterly on each of any of the top five nonbroadcast networks they carry, as defined by prime time national audience share. In the *NPRM*, the Commission proposed to require larger MVPDs to provide programming with video description on nonbroadcast networks that reach 50 percent or more of MVPD households. Noting, however, that, as one commenter pointed out, more than 40 cable networks serve 50 percent or more of MVPD households and that it might be burdensome for cable systems to retransmit video described programming on so many nonbroadcast networks, the Commission decided to limit the number of nonbroadcast networks to the top five. In the *R&O*, the Commission also stated that it believed its decision to require 50 hours per quarter would avoid any conflicts between competing uses of the SAP channel. In particular, the Commission noted that it did not expect certain premium networks, including the Home Box Office (HBO), to be

among the top five nonbroadcast networks subject to the rules. The rule, as currently written, however, would require HBO to provide video description.

9. HBO asserts that the Commission never intended to include networks like HBO within the scope of the video description rules. In its petition, HBO contends that by modifying the standard from MVPDs that reach 50 percent of the MVPD households to the top five nonbroadcast networks, the Commission did not intend to expand the scope of the rule to include networks that would not have been subject to the rules originally proposed in the *NPRM*. HBO suggests several options to remedy this issue: change the definition of nonbroadcast networks covered by the rule to be either the top five national *non-premium* nonbroadcast networks, based on Nielsen Media Research, Inc. (Nielsen) national prime time audience share, or those national nonbroadcast networks that reach 50 percent or more of MVPD households and are ranked in the top five, based on Nielsen national prime time audience share; or exempting from the rules those networks that currently transmit a high percentage (such as 65 percent or more) of their prime time schedules with Spanish language audio using the SAP channel.

10. All parties that filed pleadings in response to its petition support HBO's request. Two parties urge the Commission to adopt one of HBO's options because they believe networks, like HBO, that provide substantial amounts of Spanish language programming should not be forced to eliminate or disrupt that programming. Other parties do not object to a rule modification based on an audience reach criterion, but urge the Commission to reject HBO's argument that the Commission could create an exemption based on use of the SAP channel for Spanish programming. They assert that Spanish language translations and video descriptions can be offered on alternate feeds to provide multiple broadcasts or cablecasts of the same programs.

11. The Commission did not intend, in adopting the video description rules, to include networks within the scope of those rules that would not have fallen within the scope of its proposal in the *NPRM*. Accordingly, the Commission amends § 79.3(b)(3) to clarify that the 50-hour requirement applies to the top five national nonbroadcast networks, based on Nielsen national prime time audience share, that reach 50 percent or more of MVPD households. This result is consistent with the Commission's

goal of enhancing the widespread availability of video description. The programming of each of the several nonbroadcast, non-premium networks with the highest ratings is available to more than 75 million subscribers. By contrast, while HBO is among the nonbroadcast networks with the highest ratings during prime time, only 27 million subscribers subscribe to its service. The Commission thus believes that limiting the top nonbroadcast networks to those that are ranked in the top five as defined by national audience share and that reach 50 percent or more of MVPD households best fulfills its goal of ensuring the widest availability of video description. The Commission also believes that this result reconciles its proposal in the *NPRM* and its intent to limit the number of nonbroadcast networks required to provide video described programming for the reasons set forth in the *R&O*.

4. "Pass-Through" of Video Description

12. In the *R&O*, the Commission adopted pass-through requirements for programming that contains video description. Broadcast stations, including NCE stations, that have the technical capability to do so, must pass through any second audio program containing video description that they receive from their affiliated networks. Similarly, MVPDs that have the technical capability to do so must pass through any second audio program containing video description that they receive from a broadcast station or nonbroadcast network.

13. One petitioner asks the Commission not to apply the pass-through requirement where a top 25 market broadcast station has already met its 50-hour quarterly requirement, if the station wants to provide Spanish language or any other SAP service for that particular program. Similarly, the petitioner asks the Commission not to apply the rule to a small market station not subject to any quarterly minimum, if the station wants to provide any other SAP service for that particular program. One party opposes the request, arguing that there is no reason to deprive the visually impaired community of described programming where the station already has the equipment in place and is receiving the programming in described format. Another party agrees that stations should be able to serve their non-English speaking viewers, but both parties express concern that allowing local stations to use their SAP channel to provide any other services would allow a local broadcaster to use its SAP channel for

information or services that are not related to any programming, including radio feeds or farm reports.

14. The Commission agrees that it should provide some additional flexibility under the rule. Because the SAP channel cannot be used to provide two services simultaneously, broadcast stations and MVPDs should be able to provide another service on a SAP channel when airing a program that contains video description, as long as that service is related to the program. Accordingly, the Commission amends §§ 79.3(b)(2) and (4) to require broadcast stations and MVPDs that have the technical capability to do so to pass through video description, unless a program-related use of the SAP channel would cause a conflict with the video description. This holds true even if an entity subject to the video description rules has met the 50-hour requirement. The Commission believes this approach affords broadcast stations and MVPDs reasonable flexibility to meet the needs of visually impaired viewers and other viewers that might benefit from program-related use of the SAP channel.

5. Analog and Digital Television

15. In the *R&O*, the Commission stated that the newly adopted video description rules do not apply to digital broadcasts, but that it expects ultimately to require digital television broadcasts to contain video description. One petitioner argues that the Commission should not mandate video description in an analog environment because the costs for providing video description represent "orphan" investments in analog systems that are scheduled to be abandoned. Other parties, on the other hand, argue that video description rules should apply to both analog and digital broadcasts. The Commission rejects the argument that because it did not "impose expenditures" on the cable industry for new analog equipment in the navigation devices proceeding, the Commission should similarly not require broadcasters to provide video description with analog broadcasts. The purpose of the navigation devices proceeding was to make equipment, including cable television set-top boxes or direct broadcast satellite receivers previously available only from MVPDs, available for commercial retail purchase. The statutory authority underlying the proceeding is premised on the belief that consumers would benefit from competition in the manufacturing and sale of this equipment. The Commission determined, however, that there would not be a market demand for analog-only

services, that analog devices would "soon be obsolete," and that requiring the development of analog equipment would interfere with the development of competition in the digital marketplace.

16. The Commission found that these reasons are inapplicable here. One of the ways in which video description may be transmitted with digital broadcasts is by using an additional audio channel like the SAP channel. The petitioner simply presents no evidence supporting its contention that technical upgrades made to analog systems cannot be used after the transition to digital television (DTV). The Commission thus has no reason to believe that requiring video description with analog broadcasts will result in significant orphaned investments. As the Commission has previously stated and as several parties argue, the need for video description exists now and given that broadcasters will likely continue transmitting in analog format until at least December 2006, the Commission does not wish to wait for the transition to be complete before adopting video description requirements.

17. Certain parties argue that "the Commission should make clear now that its mandate will extend to transmission and reception of video description in digital television." Both parties argue the Commission should implement rules that require manufacturers of digital consumer reception equipment to support the ancillary audio channel that video description can use in DTV, and provide a schedule for implementing video description on digital programming. One party warns that "unless the Commission signals now that description will need to be supported in DTV, expensive retrofitting or substantial delays will occur down the road." As the Commission has stated throughout this proceeding, it expects ultimately to require DTV broadcasts to contain video description, but the Commission believes that the decision on how and when to develop those requirements should come after there has been further experience with both digital broadcasting and video description. The Commission fully intends to address the issues raised in a future periodic DTV review proceeding. Given its intent to require video description of digital programming at a later time, however, the Commission urges equipment manufacturers to design their products with video description in mind.

B. Programming to Contain Video Description

1. Amount of Programming

a. Counting Repeats of Video

Described Programming. 18. In the *R&O*, the Commission clarified that, once the rules go into effect, broadcast stations and MVPDs may not count toward their 50-hour quarterly requirement programming that they have previously aired with video description. The Commission further explained in the *R&O* that broadcast stations and MVPDs may, however, count any programming they air in excess of their quarterly requirements, if and when they repeat the programming later. In addition, a broadcast station or MVPD may count any video described programming that they air before the effective date of the rule, if they repeat it after the effective date of the rule.

19. All parties that filed petitions or responses to petitions on this issue support flexibility in counting programming previously aired with video description toward the 50-hour quarterly requirement. Three petitioners argue that broadcast stations and MVPDs do not have enough programming each quarter to meet the 50-hour requirement and not counting repeats of video described programming will force broadcast stations and MVPDs to change regularly scheduled programming or describe programming, such as sports programming, to meet the requirement. Two petitioners also contend that the restriction will force cable program networks to pay to video describe licensed programming, programming that they do not own. Petitioners argue that there is no reason for counting repeat showings of captioned programming toward quarterly closed captioning requirements, but not repeats of video described programming toward video description requirements.

20. One party agrees with the petitioners that broadcast stations and MVPDs should be allowed to count previously described programming toward their quarterly requirement, whether the programming is distributed on the same channel for which it was originally described or on another channel. That party states that the blind and visually impaired audience is not interested in the description of programming such as sports. Similarly, two other parties believe some flexibility is warranted. One suggests that a maximum number of repeats in any one quarter could be established or broadcasters and MVPDs could be credited with the first repeat of a described program. Both parties,

however, disagree with the petitioners that repeats for closed captioning can be compared with video description because the majority of television programs are now captioned, but the rules only require a few hours of video described programming per quarter. Certain parties believe that program distributors and producers can provide for description as part of licensing arrangements and, therefore, oppose any recommendation to exempt programming that is licensed, but not owned, from the rules.

21. The Commission agrees that some flexibility is warranted and will allow broadcast stations and MVPDs to count a repeat of a described program once toward their 50-hour requirement. Broadcast stations and MVPDs can count a repeat of a previously aired program in the same quarter or in a later quarter, but only once altogether. Based on the information provided in the petitions, the Commission recognizes that some entities may not have enough new programming each quarter that is appropriate for video description. For example, one petitioner explains that the four major networks do not produce new prime time programming during the summer rerun season and another asserts that program networks already have little flexibility because the rules are limited to children's and prime time programming. While the Commission is unwilling to allow broadcast stations and MVPDs to count all previously aired programming that contains video description toward quarterly requirements, it believes that allowing a limited number of repeats will provide broadcast stations and MVPDs reasonable flexibility to make programming more accessible to the blind or visually impaired without intruding unnecessarily into program production and distribution.

22. The Commission rejects the implicit argument that cable program networks should not have to pay to video describe licensed programming. The Commission agrees with several parties that programming distributors and producers can provide for video description as part of a licensing agreement. MVPDs may file waiver requests if the cost of providing video description for licensed programming creates an undue burden.

23. As noted, some parties argue that they do not have enough programming each quarter to enable them to meet the 50-hour requirement without counting repeats, unless they change their regularly scheduled programming to describe programming, such as sports programming, to meet the requirement. In the *R&O*, the Commission declined to

exempt categories of programming, including sports programming, from the video description requirement. The Commission believed it was unnecessary to create these types of exemptions because of the limited nature of its initial requirement. That is, the Commission believed that the top networks subject to its rules would be able to select 50 hours per quarter without having to describe programming such as sports programming. If any entities subject to the Commission's rules find that they do not have enough prime time or children's programming to enable them to meet their requirement without describing sports programming or repeats, they may seek an undue burden exemption on that basis.

b. *Subsequent Airings.* 24. In addition to outlining rules on how to count repeats of video described programming, the Commission adopted rules in the *R&O* pertaining to when a station must provide the video description contained in a previously aired program. Specifically, the Commission stated that "once a broadcast station or MVPD has aired a particular program with video description, all of that broadcast station's or MVPD's subsequent airings of that program should contain video description, unless another use is being made of the SAP channel." The Commission further explained that this requirement should not impose any burden because the cost of both describing programming and upgrading equipment and infrastructure to distribute it should be a one-time fixed cost.

25. A petitioner asks the Commission to modify this "subsequent airing" requirement as it applies to MVPDs. According to the petitioner, the assumption that the cost of both describing programming, and upgrading equipment and infrastructure should be a one-time fixed cost "does not hold true if this obligation applies to cable operators." The petitioner argues that if, for example, "a broadcast station carried by a cable operator airs a video-described program, and a cable program network later airs that same program, that cable network would have to create the entire infrastructure necessary to provide that one program with video description—even if that network would not be otherwise subject to the video description rules." One party agrees that the rule should be clarified and asserts that the Commission's rule on subsequent airing of video described programming refers to the particular programming network, not the MVPD.

26. The Commission clarifies that once an MVPD that must provide video description under the rules has aired a particular program with video description on a particular network, every subsequent time that MVPD transmits that program *on the same network*, it must include the video description, unless another program-related use is being made of the SAP channel. Applying this requirement only to the network that initially aired the video-described program is consistent with the finding in the *R&O* that the cost of describing programming and upgrading facilities should be a one-time cost. In addition, consistent with its earlier decision regarding the obligation to pass through video described programming, the Commission amends § 79.3(c)(3) to clarify that a broadcast station or MVPD may elect not to provide video description in subsequent airings of a program if the network is using the SAP channel to provide another program-related service.

27. The Commission does not agree, however, that this "subsequent airing" rule should apply to networks that are not subject to the quarterly requirement, but have the technical capability to provide video description. The Commission believes that imposing a "subsequent airing" requirement on networks not otherwise required to provide any video description might discourage those networks from voluntarily providing video description in the first place.

2. Clarification of the Definition of "Prime-Time" Programming

28. Broadcast stations and MVPDs must provide described programming either during prime time or in children's programming. The Commission explained in the *R&O* that prime time programming is the most watched programming, and so programming provided during this time will reach more people than programming provided at any other time.

29. While none of the petitioners challenged the requirement that video programming be described during prime time, one petitioner asked that the Commission clarify the definition of prime time. The petitioner notes that "the predominant definition of 'prime time' in the industry is 8:00–11:00 p.m. local time in the Eastern and Pacific time zones Monday–Saturday, and 7:00–11:00 p.m. on Sunday. Under this definition, prime time in the Central time zone coincides with the Eastern time zone (an hour earlier local time) and prime time in the Mountain zone is divided between prime time in the

Pacific time zone and prime time in the Central time zone." Other parties agree that clarification is needed and support the definition that the petitioner provides. The petitioner also asks the Commission to clarify that for TBS Superstation, a single-transponder nonbroadcast network, "prime time" nationwide will be considered prime time in the Eastern time zone. The other parties stated that they had no objection to this request.

30. The Commission adopts the industry definition of "prime time" for purposes of video description. Accordingly, the Commission amends § 79.3(a)(6) to define "prime time" as the period from 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday local time, except that in the central time zone the relevant period shall be between the hours of 7 and 10:00 p.m. Monday through Saturday, and 6 and 10:00 p.m. on Sunday, and in the mountain time zone each station shall elect whether the period shall be 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday, or 7 to 10:00 p.m. Monday through Saturday, and 6 to 10:00 p.m. on Sunday. While part 76 of its rules provides a five-hour time period to define prime time, the Commission notes that the repealed prime-time access rules limited presentations of programs from national networks to a three-hour period during prime time. The Commission also notes that Nielsen uses a three-hour time period from Monday through Saturday, and the four-hour time period on Sunday to collect audience prime time viewing data. The Commission finds that using Nielsen's time periods is consistent with its decision to define the top five nonbroadcast networks based on the audience share during prime time as determined by Nielsen. The Commission notes that the parties are in agreement on this definition. The Commission also agrees that prime time for TBS Superstation, a single-transponder system, should be defined as prime time in the Eastern time zone. Again, as the petitioner points out, this definition coincides with Nielsen's standard practice and none of the parties object to this definition.

3. Text Information

31. In the *R&O*, the Commission recognized that making text information accessible to the blind and visually impaired is important, but that it believed a secondary audio program may not be the appropriate vehicle to provide text-based information. The Commission therefore encouraged programming producers with text

information to provide that information aurally, by announcing, for example, the names of speakers. The Commission also adopted rules for providing emergency information to visually impaired viewers. All broadcast stations and MVPDs that provide emergency information intended to further life, health, safety, and property through regularly scheduled newscasts and newscasts that are sufficiently urgent to interrupt regular programming, must make the critical details of that information accessible to persons with visual disabilities through aural presentation. A broadcast station or MVPD that provides emergency information using a "crawl" or "scroll" must accompany the message with an aural tone to alert persons with visual disabilities to turn on a radio, the SAP channel, or a designated digital channel.

32. One petitioner contends that the Commission's final video description rules are fundamentally flawed because they give priority to describing programming over making printed information on the screen accessible. The petitioner argues that the Commission should rescind the final rules and begin an entirely new proceeding because "[b]y the time anyone gets around to thinking about accessible information * * * the available resources will already be committed elsewhere." Several parties support the petitioner's concerns about providing described text information, but oppose its request, in effect, to "start all over again." Instead, the parties encourage the Commission to initiate a separate proceeding to address the issue of video descriptions for text information. They also explain that while the technology and production outlets for delivering video description for television programs has been in place for years, the technology for described information is still being developed. Another petitioner likewise encourages programming producers with text information to provide that information aurally, but argues that the petitioner does not explain "how any broader requirement to verbalize textual information could be accomplished without unduly disrupting the viewing experiences of many customers."

33. The Commission emphasizes that it fully recognizes the importance of described text information. As certain parties explain, the industry has begun to examine the use of "synthetic voice" and the Commission encourages further development of this or any other technology that would address the issue of described information. The Commission agrees, however, that video description of programming should not

be delayed until the issues of describing text information are addressed. The petitioner has not presented any new arguments that would lead the Commission to change its finding that video described programming and video described text information are not mutually exclusive services. The Commission therefore denies the request to rescind the video description rules while recognizing the importance of addressing the issue of described information in a separate proceeding.

C. Use of SAP Channels

34. In the *R&O*, the Commission stated that it believed its decision to require 50 hours per quarter, or roughly 4 hours per week, of programming with video description would avoid any conflicts between competing uses of the SAP channel. One petitioner argues that mandatory requirements to use the SAP channel for video description will confuse customers and that consumer education will not alleviate the problem. The petitioner contends that it will be required to dedicate staff and resources to address these consumer issues on a permanent basis because "one-time consumer education measures will not alleviate the problem." In response, another party states that "both Spanish speaking and blind people can figure out program schedules and learn to adjust their viewing habits accordingly."

35. The Commission recognized in the *R&O* that no technical solution to allow two uses of the SAP channel simultaneously is currently available, but that most networks that use the SAP channel to provide Spanish language audio do so on a limited basis. The Commission concluded that in the majority of cases its rules would not create conflicts between Spanish language audio and video description for use of the SAP channel and that any confusion could be corrected through viewer education. The petitioner presents no new arguments or evidence in its petition for reconsideration that would lead the Commission to change that conclusion. Any change in programming, whether voluntary or mandatory, requires some measure of consumer education and associated costs to provide that education. The petitioner fails to present any information that the cost of providing that education would outweigh the benefits of the rules. The Commission also believes that the minimal amount of programming required under its rules does not overly burden use of the SAP channel. Rather, the roughly 4-hour per week requirement reasonably accommodates competing uses of the

SAP channel, such as providing programming that is accessible to Spanish-speaking viewers.

D. Waivers and Exemptions

36. In the *R&O*, the Commission adopted the "undue burden" exemption procedures and standards that it uses in the closed captioning context. The Commission will exempt any affected broadcast station or MVPD that can demonstrate through sufficient evidence that compliance would result in an "undue burden," which means significant difficulty or expense. The Commission declined, however, to exempt any particular category of programming or class of programming providers, given the limited nature of the initial video description rules. The Commission stated that it would consider these issues when it considers expanding the scope of entities that must provide video described programming, and the amount of video description those entities must provide.

37. Several parties urge the Commission to amend the video description rules to permit program networks and producers, in addition to distributors, to file requests for waivers for undue burden as they are permitted to do under the closed captioning rules. Noting that cable program networks and program owners are not included within the definition of "video programming distributor" under part 79 of the Commission's rules, one petitioner asserts that these entities, rather than the cable operator, would be the appropriate entities to file for undue burden waivers in most cases. Another petitioner argues that while the rules place substantial burdens on networks, those networks have no opportunity to petition for an exemption from the requirements of the rules, leaving them no recourse. One party agrees, noting that program networks and producers must be involved and supportive partners with MVPDs to achieve successful provision of described programming. That party asserts that both networks and producers should have rights similar to distributors to request undue burden exemptions.

38. The Commission agrees that video programming providers should be allowed to file waivers for exemptions under the undue burden standard, as they are allowed under the Commission's closed captioning rules. Accordingly, the Commission amends § 79.3(d) to permit video programming providers, as defined under part 79 of its rules, to petition the Commission for a full or partial exemption from the video description requirements. As it similarly stated in the closed captioning

proceeding, the undue burden exemption is intended to be "sufficiently flexible to accommodate a wide variety of circumstances" for which compliance with the video description requirements would pose a significant financial or technical burden. As the Commission has previously recognized, video description is most likely to be added to programming at the production stage prior to distribution, where it is most economically and technically efficient. To the extent a broadcast station's or MVPD's inability to comply with its rules stems from problems at, for example, the programming producer end, the Commission believes it should allow the programming producer to plead its hardship directly to the Commission. Otherwise, the programming producer would have to submit information to its local distribution outlets around the country, which would then file numerous separate waiver requests with the Commission. To avoid this inefficiency, therefore, the Commission will allow programming providers to seek exemptions under the undue burden standard. The Commission emphasizes, however, that while it will allow other programming providers to seek exemptions from its rules, it holds programming distributors responsible for compliance.

E. Enforcement

1. Initial Complaints

39. In the *R&O*, the Commission adopted procedures to enforce its initial video description rules. Under these procedures, complaints are not required to be submitted to a programming distributor before being filed with the Commission. A complainant may allege a violation of the video description rules by sending a complaint to the Consumer Information Bureau (CIB) at the Commission by any reasonable means, such as a letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, audio-cassette, Braille, or some other method that would best accommodate a complainant's disability. CIB will forward formal complaints to the Commission's Enforcement Bureau.

40. Petitioners note that the Commission has established enforcement procedures for its video description rules that differ from the enforcement procedures for the Commission's closed captioning rules. They contend that complaints should be submitted to a programming distributor before being filed with the Commission. According to one petitioner, "requiring

the complainant to go to the video programming distributor first will allow the parties to more quickly and satisfactorily resolve the dispute.” Another petitioner argues that there is no basis on which to adopt a different complaint procedure for the enforcement of video description rules than for closed captioning because “the record does not indicate that the existing closed captioning rules have been ineffective or inadequate.” Certain parties oppose the petitioners’ request, arguing that obtaining information to contact programming distributors is too difficult for blind and visually impaired viewers. One party contends that “[i]t would be simpler and far more efficient for visually impaired viewers to have a single point of contact.”

41. The Commission believes that viewers should try to resolve disputes with video programming distributors prior to filing a formal complaint with the Commission. The Commission therefore amends its rules to require complainants to certify in formal complaints to the Commission, and distributors to certify in their answers, that they have attempted in good faith to settle disputes prior to filing formal complaints and answers with the Commission. The Commission notes that this result is consistent with its recently revised rules for filing formal complaints against common carriers. The Commission also followed these rules when it adopted rules to implement section 255 of the Act, which requires manufacturers of telecommunications equipment, and providers of telecommunications services, to make such equipment and provide such services in a manner that is accessible to persons with disabilities. Prior to or instead of filing a formal complaint, however, viewers may contact CIB either to attempt to resolve disputes by filing an informal complaint, or to obtain information about how to contact the programming distributor. The Commission believes that these procedures will provide parties the opportunity to resolve disputes quickly and efficiently.

2. Clarification of “Technical Errors”

42. The video description rules provide that, in evaluating whether a video programming distributor has complied with the requirement to provide video programming with video description, the Commission will consider a showing that any lack of video description was *de minimis* and reasonable under the circumstances. One petitioner asks the Commission to clarify that technical errors beyond an individual station’s control will fall

under the “reasonable circumstances” provision. The petitioner explains, for example, that “if a station is ready and able to pass through to viewers described programming received from its network, but, due to technical difficulties beyond the station’s control, the described programming is not properly received, then that ‘lack of video description’ should be deemed ‘reasonable under the circumstances.’” Stating that the Commission rarely faults a broadcaster or cablecaster for a temporary rule violation, one party argues that a technical error should not be construed to include the lack of equipment to provide video descriptions, but that a technical error is “a temporary difficulty” that is “a short-term failure of equipment.”

43. The Commission clarifies that to be classified as a technical error, the problem must be beyond a station’s control. In addition, the problem must be *de minimis* and reasonable under the circumstances. The Commission will examine carefully, however, any showings ascribed to technical error to ensure that those instances are only a temporary difficulty, such as that caused by short-term failure of equipment, and not by a station unreasonably failing to pass-through the described programming supplied by its network.

F. Jurisdiction

44. In the *R&O*, the Commission held that it has the authority to adopt video description rules. The Commission explained that Sections 1, 2(a), 4(i), and 303(r) of the Act, taken together, direct and empower the Commission to make available to all Americans a radio and wire communication service, and to make regulations to carry out this mandate, that are consistent with the public interest and not inconsistent with other provisions of the Act or other law. In reaching this decision, the Commission considered but rejected the arguments of commenters that video description rules would be inconsistent with other law, namely Sections 624(f) and 713(f) of the Act, as well as the First Amendment, and might also interfere with the rights of copyright holders.

45. Petitioners raise the same arguments raised before in this proceeding. For example, petitioners suggest that analysis of the issue of the Commission’s authority to adopt video description rules begins and ends with Section 713(f) of the Act, which instructed the Commission to “commence an inquiry * * * and report to Congress” on video description, but not to make rules. Against the backdrop of Section 713, petitioners contend that

the Commission cannot rely on other provisions of the Act to make rules. Petitioners also suggest that the rules are content-based, violating the First Amendment and, as applied to cable operators, Section 624(f) of the Act, which does not permit the government to “impose requirements regarding the provision or content of cable services, except as expressly provided in [Title VI of the Act.]” Petitioners further suggest that the rules interfere with the rights of copyright holders.

46. The Commission addressed most of the statutory arguments petitioners raised at the *R&O* stage, and they have offered no reason for the Commission to reconsider its conclusion. As discussed in detail in the *R&O*, Sections 1, 2(a), 4(i), and 303(r) make clear that the Commission’s fundamental purpose is to make available so far as possible to all Americans a radio and wire communication service, and it has the power to make rules to carry out this mandate that are consistent with the public interest, and not inconsistent with other law. The video description rules further the public interest because they are designed to enhance the accessibility of video programming to persons with visual disabilities, but at the same time not impose an undue burden on the video programming production and distribution industries. The video description rules are not inconsistent with Sections 624(f) and 713(f) of the Act, the First Amendment, or copyright law. The rules are not inconsistent with Section 713(f), because that section neither authorizes nor prohibits a rulemaking on video description. The rules are not inconsistent with Section 624(f), because they do not require cable operators to carry any particular programming. The rules are not inconsistent with the First Amendment, because they are content-neutral regulations, and satisfy the applicable test of serving an important government interest without burdening substantially more speech than necessary. The rules are not inconsistent with copyright law because they do not violate any copyright holder’s rights.

47. The Commission also rejects one petitioner’s new argument that the rules are inconsistent with Section 255 of the Act. Section 255 requires manufacturers of telecommunications equipment, and providers of telecommunications services, to make such equipment and services accessible to persons with disabilities, but only “if readily achievable.” The petitioner suggests that the video description rules do not have a similar contingency. The petitioner also argues that the discrepancy

between the “readily achievable” standard and the video description rules further suggests that the Commission does not have authority to adopt such rules—Congress did not qualify the provision of video description because there was no access obligation to qualify in the first place. The petitioner overlooks, however, the fact that the video description rules contain procedures for waiver if compliance would create an undue burden. In sum, as the Commission explained in greater detail in the *R&O*, the Commission believes that the video description rules further the very purpose for which the Commission was created—“to make available, so far as possible, to all the people of the United States * * * a rapid, efficient, Nation-wide, and world-wide wire and radio communication service”—and are within its power to adopt because they are “not inconsistent with [the] Act” and serve the “public convenience, interest, and necessity” and are “not inconsistent with law.”

Procedural Matters

48. Authority for issuance of this *MO&O* is contained in sections 4(i), 303(r), 403, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), 403, and 405.

49. *Supplemental Final Regulatory Flexibility Analysis*. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared a Supplemental Final Certification of the possible impact on small entities of the rules adopted in this *MO&O*. The Supplemental Final Certification is set forth in the *MO&O*.

Supplemental Final Regulatory Flexibility Analysis Certification

50. The Regulatory Flexibility Act (RFA) requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemaking proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” The *NPRM* in this proceeding proposed rules to provide video description on video programming to ensure the accessibility of video programming to persons with visual impairments. The *R&O* adopted rules requiring broadcasters and other video programming distributors to provide video description and to make emergency information more accessible to visually impaired viewers.

51. In an abundance of caution, the Commission published an Initial Regulatory Flexibility Analysis (IRFA) in the *NPRM*, even though the

Commission was reasonably confident that the proposed rules would not have the requisite “significant economic impact” on a “substantial number of small entities.” The IRFA sought written public comment on the proposed rules. No written comments were received on the IRFA, nor were any general comments received that raised concerns about the impact of the proposed rules on small entities. Because the Commission believed the rules adopted in the *R&O* would have a negligible effect on small businesses, the Commission published a Final Certification that the rules adopted in that order would not have a significant economic impact on a substantial number of small entities.

52. The *MO&O* amends certain rules adopted in the *R&O*. The Commission amends its rules to define the top five nonbroadcast networks as those that are ranked in the top five as defined by national audience share and that also reach 50 percent or more of MVPD households. The amended rules allow broadcast stations and MVPDs to count previously aired programming one time toward quarterly requirements. Once a broadcast station or MVPD subject to the video description rules has aired a particular program with video description, only subsequent airings of that program by that broadcast station or MVPD on the *same* network or channel must contain the video description. Under both this “subsequent airing” rule and the “pass-through” rule, broadcast stations and MVPDs may now use the SAP channel to provide services other than video description, as long as those services, such as foreign language translations, are program-related. The rule amendments allow programming providers, in addition to programming distributors, to file waivers for exemptions. The rule amendments adopt a definition of “prime time” and clarify the definition of “technical error” for purposes of determining compliance with the rules. These amendments only affect large entities as discussed in the Final Certification included in the *R&O*. No small entities will experience an economic impact as a result of these amendments.

53. Under the rule amendments, consumers may bring informal complaints to the Commission at any time, but must include in a formal complaint to the Commission a certification that they have tried to resolve a dispute with the distributor prior to filing the complaint. In addition, distributors are required to make similar certifications in their answers. These amendments to the rules are created to attempt to resolve issues

prior to filing a formal complaint. The Commission believes that requiring these certifications is necessary to assure a smooth process to address outstanding issues in a timely and efficient manner. The burden imposed by the inclusion of these certifications is nominal for both consumers and distributors because it will require no more than a single statement to be added to the initial formal complaint and its answer. These amendments will not have a significant economic impact on a substantial number of small entities.

54. The Commission therefore certifies, pursuant to the RFA, that the rule amendments adopted in the present *MO&O* will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *MO&O*, including a copy of this Supplemental Final Certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act. In addition, the Commission will send a copy of the *MO&O*, including a copy of this Supplemental Final Certification, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, a copy of the *MO&O* and this Supplemental Final Certification will be published in the **Federal Register**.

Ordering Clauses

55. The petitions for reconsideration or clarification are granted to the extent provided herein and otherwise are denied pursuant to sections 1, 2(a), 4(i), 303(r), 307, 309, 310, 403, 405, and 713 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i), 303(r), 307, 309, 310, 403, 405, 613, and § 1.429(i) of the Commission’s rules, 47 CFR 1.429(i).

56. Pursuant to sections 4(i) & (j), 303(r), 307, 308 and 309 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) & (j), 303(r), 307, 308, 309, part 79 of the Commission’s rules, 47 CFR Part 79, is amended as set forth in the *MO&O*.

57. The rule amendments set forth in the *MO&O* that revise § 79.3 of the Commission’s rules, 47 CFR 79.3, shall become effective on April 1, 2002.

58. The Commission’s Consumer Information Bureau, Reference Information Center, shall send a copy of this *MO&O* in MM Docket No. 99–339, including the Supplemental Final Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

59. This proceeding is hereby terminated.

List of Subjects in 47 CFR Part 79

Cable television, Closed captioning and video description of video programming.

Federal Communications Commission.

Magalie Roman Salas,
Secretary.

Rule Changes

For the reasons set forth in the preamble, part 79 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 79—CLOSED CAPTIONING AND VIDEO DESCRIPTION OF VIDEO PROGRAMMING

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

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

2. Section 79.3 is amended by
- (a) adding paragraph (a)(6);
 - (b) revising paragraphs (b)(2), (b)(3), (b)(4)(i), (b)(4)(ii);
 - (c) revising paragraphs (c)(2) and (c)(3);
 - (d) redesignating paragraph (c)(4) as paragraph (c)(5);
 - (e) adding new paragraph (c)(4);
 - (f) revising paragraph (d)(1);
 - (g) revising paragraphs (e)(1)(iv) and (e)(1)(v);
 - (h) adding paragraph (e)(1)(vi); and
 - (i) revising paragraph (e)(2).

The revisions and additions read as follows:

§ 79.3 Video description of video programming.

* * * * *

(a) * * *

(6) *Prime time.* The period from 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday local time, except that in the central time zone the relevant period shall be between the hours of 7 and 10:00 p.m. Monday through Saturday, and 6 and 10:00 p.m. on Sunday, and in the mountain time zone each station shall elect whether the period shall be 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday, or 7 to 10:00 p.m. Monday through Saturday, and 6 to 10:00 p.m. on Sunday.

(b) * * *

(2) Television broadcast stations that are affiliated or otherwise associated with any television network, must pass through video description when the network provides video description and the broadcast station has the technical capability necessary to pass through the video description, unless using the technology for providing video description in connection with the

program for another purpose that is related to the programming would conflict with providing the video description;

(3) Multichannel video programming distributors (MVPDs) that serve 50,000 or more subscribers, as of September 30, 2000, must provide 50 hours of video description per calendar quarter during prime time or on children's programming, on each channel on which they carry one of the top five national nonbroadcast networks, as defined by an average of the national audience share during prime time of nonbroadcast networks, as determined by Nielsen Media Research, Inc., for the time period October 1999–September 2000, that reach 50 percent or more of MVPD households; and

(4) * * *

(i) must pass through video description on each broadcast station they carry, when the broadcast station provides video description, and the channel on which the MVPD distributes the programming of the broadcast station has the technical capability necessary to pass through the video description, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description; and

(ii) must pass through video description on each nonbroadcast network they carry, when the network provides video description, and the channel on which the MVPD distributes the programming of the network has the technical capability necessary to pass through the video description, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description.

(c) * * *

(2) Programming with video description that has been previously counted by a broadcaster or MVPD toward its minimum requirement for any quarter may be counted one additional time toward that broadcaster's or MVPD's minimum requirement for the same or any one subsequent quarter.

(3) Once a commercial television broadcast station as defined under paragraph (b)(1) of this section has aired a particular program with video description, it is required to include video description with all subsequent airings of that program on that same broadcast station, unless using the technology for providing video description in connection with the

program for another purpose that is related to the programming would conflict with providing the video description.

(4) Once an MVPD as defined under paragraph (b)(3) of this section:

(i) has aired a particular program with video description on a broadcast station they carry, it is required to include video description with all subsequent airings of that program on that same broadcast station, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description; or

(ii) has aired a particular program with video description on a nonbroadcast station they carry, it is required to include video description with all subsequent airings of that program on that same nonbroadcast station, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description.

* * * * *

(d) * * *

(1) A video programming provider may petition the Commission for a full or partial exemption from the video description requirements of this section, which the Commission may grant upon a finding that the requirements will result in an undue burden.

* * * * *

(e) * * *

(1) * * *

(iv) the specific relief or satisfaction sought by the complainant;

(v) the complainant's preferred format or method of response to the complaint (such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, or some other method that would best accommodate the complainant's disability); and

(vi) a certification that the complainant attempted in good faith to resolve the dispute with the broadcast station or MVPD against whom the complaint is alleged.

(2) The Commission will promptly forward complaints satisfying the above requirements to the video programming distributor involved. The video programming distributor must respond to the complaint within a specified time, generally within 30 days. The Commission may authorize Commission staff either to shorten or lengthen the time required for responding to complaints in particular cases. The

answer to a complaint must include a certification that the video programming distributor attempted in good faith to resolve the dispute with the complainant.

* * * * *

[FR Doc. 01-2754 Filed 1-31-01; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AG29

Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Mexican Spotted Owl

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat under the Endangered Species Act of 1973, as amended (Act), for the Mexican spotted owl (*Strix occidentalis lucida*) (owl). The owl inhabits canyon and montane forest habitats across a range that extends from southern Utah and Colorado, through Arizona, New Mexico, and west Texas, to the mountains of central Mexico. We designate approximately 1.9 million hectares (ha) (4.6 million acres (ac)) of critical habitat in Arizona, Colorado, New Mexico, and Utah, on Federal lands. Section 7 of the Act requires Federal agencies to ensure that actions they authorize, fund, or carry out are not likely to destroy or adversely modify designated critical habitat. As required by section 4 of the Act, we considered economic and other relevant impacts prior to making a final decision on what areas to designate as critical habitat.

DATES: This final rule is effective March 5, 2001.

ADDRESSES: The complete administrative record for this rule is on file at the New Mexico Ecological Services Field Office, 2105 Osuna Road NE, Albuquerque, New Mexico 87113. You may view the complete file for this rule, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Joy Nicholopoulos, Field Supervisor, New Mexico Ecological Services Field Office, at the above address; telephone 505/346-2525, facsimile 505/346-2542.

SUPPLEMENTARY INFORMATION:

Background

The Mexican spotted owl (*Strix occidentalis lucida*) is one of three subspecies of spotted owl occurring in the United States; the other two are the northern spotted owl (*S. o. caurina*) and the California spotted owl (*S. o. occidentalis*). The Mexican spotted owl is distinguished from the California and northern subspecies chiefly by geographic distribution and plumage. The Mexican spotted owl is mottled in appearance with irregular white and brown spots on its abdomen, back, and head. The spots of the Mexican spotted owl are larger and more numerous than in the other two subspecies, giving it a lighter appearance.

The Mexican spotted owl has the largest geographic range of the three subspecies. The range extends north from Aguascalientes, Mexico, through the mountains of Arizona, New Mexico, and western Texas, to the canyons of Utah and Colorado, and the Front Range of central Colorado. Much remains unknown about the species' distribution in Mexico, where much of the owl's range has not been surveyed. The owl occupies a fragmented distribution throughout its United States range, corresponding to the availability of forested mountains and canyons, and in some cases, rocky canyonlands. Although there are no estimates of the owl's historical population size, its historical range and present distribution are thought to be similar.

According to the Recovery Plan for the Mexican Spotted Owl (United States Department of the Interior 1995) (Recovery Plan), 91 percent of owls known to exist in the United States between 1990 and 1993 occurred on land administered by the U.S. Forest Service (FS); therefore, the primary administrator of lands supporting owls in the United States is the FS. These numbers are based upon preliminary surveys that were focused on National Forests in the southwest. Nevertheless, most owls have been found within Region 3 of the FS, which includes 11 National Forests in New Mexico and Arizona. FS Regions 2 and 4, including two National Forests in Colorado and three in Utah, support fewer owls. The range of the owl is divided into 11 Recovery Units (RU), 5 in Mexico and 6 in the United States, as identified in the Recovery Plan. The Recovery Plan also identifies recovery criteria and provides distribution, abundance, and density estimates by RU. Of the RUs in the United States, the Upper Gila Mountains RU, located in the central portion of the species' U.S. range in central Arizona and west-central New

Mexico, contains over half of known owl sites. Owls here use a wide variety of habitat types, but are most commonly found inhabiting mature mixed-conifer and ponderosa pine-Gambel oak forests. The Basin and Range-East RU encompasses central and southern New Mexico, and includes numerous parallel mountain ranges separated by alluvial valleys and broad, flat basins.

Most breeding spotted owls occur in mature mixed-conifer forest. The Basin and Range-West RU contains mountain ranges separated by non-forested habitat. These "sky island" mountains of southern Arizona and far-western New Mexico contain mid-elevation mixed-conifer forest and lower elevation Madrean pine-oak woodlands that support spotted owls. The Colorado Plateau RU includes northern Arizona, southern Utah, southwestern Colorado, and northwestern New Mexico, with owls generally confined to deeply incised canyon systems and wooded areas of isolated mountain ranges. The Southern Rocky Mountains-New Mexico RU consists of the mountain ranges of northern New Mexico. Owls in this unit typically inhabit mature mixed-conifer forest in steep canyons. The smallest number of spotted owls occurs in the Southern Rocky Mountains-Colorado RU. This unit includes the southern Rocky Mountains in Colorado, where spotted owls are largely confined to steep canyons, generally with significant rock faces and various amounts of mature coniferous forest. The critical habitat units identified in this designation are all within these RUs.

A reliable estimate of the numbers of owls throughout its entire range is not currently available. Using information gathered by Region 3 of the FS, Fletcher (1990) calculated that 2,074 owls existed in Arizona and New Mexico in 1990. Based on more up-to-date information, we subsequently modified Fletcher's calculations and estimated a total of 2,160 owls throughout the United States (USDI 1991). However, these numbers are not considered reliable estimates of current population size for a variety of statistical reasons, and a pilot study (Ganey *et al.* 1999) conducted in 1999, estimated the number of owls for the upper Gila Mountains Recovery Unit (exclusive of tribal lands) as 2,950 (95 percent confidence interval 717-5,183).

Mexican spotted owls nest, roost, forage, and disperse in a diverse array of biotic communities. Nesting habitat is typically in areas with complex forest structure or rocky canyons, and contains uneven-aged, multi-storied mature or old-growth stands that have high