

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

In the Matter of)	
)	MM Docket No. 99-339
Implementation of Video Description of)	
Video Programming)	
)	

REPORT AND ORDER

Adopted: July 21, 2000

Released: August 7, 2000

By the Commission: Commissioner Ness issuing a statement; Commissioners Furchtgott-Roth and Powell concurring in part, dissenting in part, and issuing separate statements.

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I. INTRODUCTION

1. In this *Report and Order*, we adopt rules designed to bring the benefits of video description to the commercial video marketplace. Video description is the description of key visual elements in programming, inserted into natural pauses in the audio of the programming. It is designed to make television programming more accessible to the many Americans who have visual disabilities. As we have noted in this proceeding and elsewhere, television is the primary source of news and information for the majority of Americans, and provides hours of entertainment each week. The Commission has already adopted rules to make the important medium of television more accessible to persons with hearing disabilities.¹ Today we adopt initial video description rules to make television more accessible to persons with visual disabilities.

2. Public broadcasting has developed and refined the process of producing and distributing programming with video description over the last ten years, but virtually no commercial market has followed. Descriptive Video Service (DVS), associated with the noncommercial broadcast station WGBH, has described more than 2000 PBS programs, and more than 80 films for the Turner Classic Movies channel.² Currently, DVS provides “closed” video description – which runs on the Second Audio Program (SAP) channel and so can be heard at the discretion of the viewer – for four daily programs, several weekly programs, selected episodes of other series, and selected specials.³ Some commercial broadcasters also have the technical ability to provide “closed” video description but none have done so. Some cable systems have the capability to provide programming with video description, but do so only on very limited channels, such as the Turner Classic Movies channel, and little if any of this programming is available without the assistance of public funding.⁴ As a result, only a very small fraction of programming contains video description.

3. This *Report and Order* follows Commission review and study of video description for nearly five years, including three notices on the matter, and two reports to Congress. The Commission issued its first *Notice of Inquiry* on video description in 1995.⁵ Section 713(f) of the Communications Act,⁶ added by the Telecommunications Act of 1996, directed the Commission to commence an inquiry on video description, and report to Congress on its findings. Using the record developed in response to the *First NOI*, the

¹ See Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility, MM Docket No. 95-176, *Report and Order*, 13 FCC Rcd 3272 (1997), *recon. granted in part and denied in part*, 13 FCC Rcd 19973 (1998) (adopting closed captioning rules). See also *Second Report and Order*, FCC 00-136 (released April 14, 2000) (adopting rules to enhance the accessibility of emergency information for persons with hearing disabilities).

² WGBH at 2. The commenters and reply commenters in this proceeding, and the abbreviations by which they are referred to in this document, are set forth in Appendix A.

³ “PBS Schedule” (visited June 15, 2000) <www.wgbh.org/wgh/access/dvs/dvspbs.html>.

⁴ With financial assistance from the U.S. Department of Education, the Narrative Television Network also provides “open” video description (*i.e.*, as discussed below, the video description cannot be turned off) for the Good Life TV Network. In addition, Kaleidoscope Television, the cable programming network devoted to the lifestyles of persons with disabilities, provides “open” description of movies each week.

⁵ Closed Captioning and Video Description of Video Programming, MM Docket No. 95-176, *Notice of Inquiry*, 11 FCC Rcd 4912 (1995) (*First NOI*).

⁶ 47 U.S.C. § 613(f).

Commission issued the required report to Congress in 1996.⁷ The Commission then issued a second *Notice of Inquiry* in 1997,⁸ and submitted more information to Congress on video description in its 1997 annual report on competition in the markets for the delivery of video programming.⁹ Given the importance of enhancing the accessibility of video programming to persons with visual disabilities, and the fact that commercial broadcast stations and MVPDs had not developed video description further during our periods of review, we issued our *Notice of Proposed Rulemaking* last year in 1999.¹⁰

4. The record demonstrates the importance of video description to persons with visual disabilities, although support for our proposal was not unanimous among blind and low vision commenters.¹¹ Margaret Pfanstiehl, a pioneer in the field of video description and who herself has low vision, explains that “when plays, movies, films . . . are professionally described, a wealth of information becomes available. Blind children and adults are amazed at the prevalence and importance of body language in transmitting non-verbal messages.”¹² The comments of the American Council of the Blind contained more than 250 e-mails and letters of support for rules, which explained how video description enhances the understanding of blind and low vision people of television programming and cultural behavior such as body language, and gives them a feeling of independence.¹³ One commenter said that “[w]hether or not one still defines the medium as a ‘vast wasteland,’ there is no denying that TV is the mechanism we Americans turn to, to define ourselves and one another. Blind people have just as much need as any other Americans to experience this medium.”¹⁴ A user of WGBH’s DVS echoes similar views: “[w]hether entertaining, educational or cultural, television has become an integral part of American life. I, and other blind and visually impaired people, have always participated in television viewing, but with DVS, we are finally participating equally.”¹⁵ Helen Harris, founder of a description service, says that “[v]ideo description effectively bridges

⁷ Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility, MM Docket No. 95-176, *Report*, 11 FCC Rcd 19214 (1996) (*Video Accessibility Report*).

⁸ Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141, *Notice of Inquiry*, 12 FCC Rcd 7829 (1997).

⁹ Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141, *Fourth Annual Report*, 13 FCC Rcd 1034 (1998) (*Fourth Annual Report*).

¹⁰ Implementation of Video Description of Video Programming, MM Docket No. 99-339, *Notice of Proposed Rulemaking*, 14 FCC Rcd 19845 (1999) (*Notice*).

¹¹ The American Council of the Blind, the American Foundation of the Blind, and many persons with visual disabilities filed comments supporting the Commission requiring some programming to contain video description.

The National Federation of the Blind and a number of its members, however, filed comments asking the Commission to take steps to enhance the accessibility of text-based information in video programming (such as emergency information, the names of speakers, and contact information in advertisements), instead of requiring a limited amount of programming to contain video description. We address these requests below.

¹² Metropolitan Washington Ear at 7.

¹³ ACB at Appendix A.

¹⁴ ACB at Appendix A (e-mail of Penny Reeder).

¹⁵ “DVS Viewer Comments” (visited June 15, 2000), <www.wgbh.org/wgbh/access/dvs/dvscomments.html>.

the gap between the blind and mainstream society by creating a shared experience which leaves the blind with an increased sense of normalcy in their lives.”¹⁶

5. Government officials and industry members have supported video description as well. Several members of Congress have submitted letters to the Commission in support of our proposals, and at least one industry member has submitted a letter in support of video description.¹⁷

6. Today we adopt initial video description rules, designed to benefit persons with visual disabilities, but not impose an undue burden on the programming production and distribution industries. As explained below, we conclude that we have the authority to adopt video description rules, and require the top broadcast stations and multichannel video programming distributors (MVPDs) to provide programming with video description on the top programming networks. This will ensure that the broadcast stations and MVPDs that reach the most people will provide video description for the most watched programming. We also adopt rules to enhance the accessibility of emergency information for people with visual disabilities. Specifically, we adopt rules as follows:

- We require affiliates of the top four commercial broadcast TV networks in the top 25 TV markets to provide 50 hours per calendar quarter of prime time and/or children’s programming with video description.
- We also require MVPDs with 50,000 or more subscribers to provide 50 hours per calendar quarter of prime time and/or children’s programming with video description on each of the top five national nonbroadcast networks they carry.
- In addition, we require any broadcast station, regardless of its market size, to “pass through” any video description it receives from a programming provider, if the broadcast station has the technical capability necessary to do so, and we require any MVPD, regardless of its number of subscribers, to “pass through” any video description it receives from a programming provider, if the MVPD has the technical capability necessary to do so on the channel on which it distributes the programming of the programming provider.
- The first calendar quarter these rules will be effective will be April-June 2002.
- We also require broadcast stations and MVPDs that provide local emergency information through a regularly scheduled newscast, or an unscheduled newscast that interrupts regularly scheduled programming, to make the critical details of that information accessible to persons with visual disabilities in the affected local area. We also require broadcast stations and MVPDs that provide local emergency information through another manner, such as a “crawl” or “scroll,” to accompany that information with an aural tone to alert persons with visual disabilities that they are providing emergency information. These rules relating to emergency information will become effective upon approval by the Office of Management and Budget.

¹⁶ RPI at 2.

¹⁷ Letter from Rep. Wayne T. Gilchrest to William E. Kennard, Chairman, FCC (March 22, 2000); Letter from Rep. Gerald D. Kleczka to William E. Kennard, Chairman, FCC (March 22, 2000); Letter from Sen. John F. Kerry to William E. Kennard, Chairman, FCC (July 1, 1999); Letter from R.E. Turner, Vice Chairman, Time Warner, to William E. Kennard, Chairman, FCC (May 4, 1999).

7. The rules we adopt today mark a starting point for further development of video description, depending on the efficacy of, and consumer demand for, video description implemented as a result of this *Report and Order*. We expect the experience of the broadcast stations, MVPDs, and networks affected by our rules to guide the industry, the public, and the Commission on whether, how, and when we should phase in more broadcast stations and MVPDs, as well as more programming. Although the rules we adopt today do not apply to digital broadcasts, we expect ultimately to require digital television broadcasts to contain video description. We believe, however, 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.

II. BACKGROUND

A. Audience for Video Description

8. Video description is designed to make television programming more accessible to persons with visual disabilities, and enable them to “hear what they cannot see.”¹⁸ Thus, the primary audience for video description is persons with visual disabilities. Estimates of the number of persons with visual disabilities are as high as twelve million.¹⁹ This estimate includes persons with a problem seeing that cannot be corrected with ordinary glasses or contact lenses, with a range in severity.²⁰

9. A disproportionate number of persons with visual disabilities are seniors. The National Center for Health Statistics reports that eye problems are the third leading cause, after heart disease and arthritis, of restricting the normal daily activities of persons 65 years of age or older.²¹ While only 2-3% of the population under 45 years of age has visual disabilities, 9-14% of the population 75 years of age or older does.²² This means that as the population ages, more and more people will become visually disabled.²³

10. Secondary audiences for video description exist as well. For example, at least one and a half million children between the ages of 6 and 14 with learning disabilities²⁴ may benefit from video description. Because the medium has both audio description and visual appeal, it has significant potential

¹⁸ *First NOI*, 11 FCC Rcd at 4913, ¶ 1 (*NOI*) (citing Telecommunications Reform, Hearings on S. 1822 Before the Committee on Commerce, Science, and Transportation, 103rd Cong., 2d Sess. (1994) (statement of Margaret R. Pfanstiehl, President of the Metropolitan Washington Ear)).

¹⁹ *Notice*, 14 FCC Rcd at 19847, ¶ 5 (citing Letter from Larry Goldberg, Director, CPB-WGBH National Center for Accessible Media, to Meryl Icove, FCC 2 (Nov. 4, 1998) (*NCAM Letter*)). See also AFB at 1 (10 million “blind or visually”impaired Americans); U.S. Dept’ of Commerce, Economics & Statistics Admin., Bureau of the Census, Statistical Abstract of the U.S. 149 (1998) (8 million).

²⁰ *Notice*, 14 FCC Rcd at 19847, ¶ 5 (citing *NCAM Letter* at 5). NFB states that approximately one million people are legally blind. NFB at 1.

²¹ *Notice*, 14 FCC Rcd at 19847, ¶ 6 (citing *NCAM Letter* at 5-6).

²² 1998 Statistical Abstract of the U.S. at 149.

²³ Jaclyn Parker and Corrine Kirchner, *Who’s Watching? A Profile of the Blind and Visually Impaired Audience for Television and Video* at v (1997).

²⁴ 1998 Statistical Abstract of the U.S. at 150.

to capture the attention of learning disabled children and enhance their information processing skills. Described video programming capitalizes on the different perceptual strengths of learning-disabled children, pairing their more-developed modality with their less-developed modality to reinforce comprehension of information.²⁵

B. Process of Providing Video Description

11. WGBH's DVS states that its process of describing programming begins with a describer viewing a program, and writing a script to describe key visual elements. The describer times the placement and length of the description to fit within natural pauses in the dialogue. The narration is recorded and mixed with the original program audio to create a full audio track with video description. That audio track is then laid back to the master on a spare channel if the programming is intended for broadcast, and to a separate master if it is intended for distribution by home video.²⁶ When the audio track with video description is provided on a separate audio channel for broadcast, viewers decide whether they wish to hear the video description. Viewers who wish to hear the description must activate the Second Audio Program (SAP) channel on their TV sets or VCRs. "Closed" video description refers to the process of providing video description on the SAP channel.²⁷ SAP reception is a standard feature of most TV sets and VCRs built since 1990.²⁸ SAP-capable TV sets and VCRs can be relatively inexpensive – less than \$150 – and converter boxes are also available for use with TV sets and VCRs that are not SAP-capable.²⁹

12. WGBH describes programming for approximately \$4000 per hour, and the Narrative Television Network, which also currently describes programming, does so for approximately \$2000 per hour.³⁰ Given that PBS' programming budgets are around \$1.5 million per hour for dramas, and \$750,000 per hour for documentaries,³¹ WGBH's current cost of describing programming is less than 1% of the production budget of PBS documentaries and dramas. WGBH, as well as the Narrative Television Network, state that the production schedules for video description are similar to those for closed captioning, and that the process has been refined over the twenty years that closed captioning, and the ten years that video description, has been provided.³²

13. Programming providers that wish to distribute programming on the SAP channel typically need the capability to support three audio channels at all points in the distribution process. This is because two audio channels are used to support left and right stereo, so that a third audio channel is necessary to support a monaural mix of the main audio and the video description. The programming provider transmits

²⁵ Notice, 14 FCC Rcd at 19848, ¶ 7 (citing NCAM Letter at 6).

²⁶ "Frequently Asked Questions about Descriptive Video Service," (visited June 15, 2000) <www.wgbh.org/wgbh/access/dvs/dvsfaq.html>.

²⁷ By contrast, "open" video description refers to the process of providing video description as part of the main audio track.

²⁸ WGBH at 2.

²⁹ Notice, 14 FCC Rcd at 19849, ¶ 12 (citing NCAM Letter at 12).

³⁰ NTN at 2-3; WGBH at 17.

³¹ WGBH at 16.

³² NTN Reply at 2; WGBH Reply at 27.

both audio tracks as part of its main signal. Networks, broadcast stations, and MVPDs that do not have the capability to support three channels of audio generally need to upgrade equipment and plant wiring to do so. The cost depends on the amount and nature of the equipment that needs to be upgraded. According to WGBH, 169 public TV stations have installed the necessary equipment to provide programming with video description via SAP,³³ and the one-time routing and transmission costs of doing so ranged from \$5,000 to \$25,000.³⁴

14. A number of commercial broadcast and nonbroadcast networks have provided programming with Spanish language as a second audio program. Each of the top four commercial broadcast TV networks has provided a Spanish language soundtrack as a second audio program, on at least an occasional basis. At least thirty-three ABC affiliates have the capability to pass through a second soundtrack on the SAP channel; at least twenty-three Fox affiliates do; and approximately twenty NBC affiliates do.³⁵ Some nonbroadcast networks, such as HBO and Showtime, also have offered a Spanish language soundtrack as a separate audio program,³⁶ and, as noted above, Turner Classic Movies has provided a soundtrack with video description as a separate audio program. Some MVPDs that carry their programming provide the audio on the SAP channel. Information submitted by the NAB and NCTA suggest that the cost for any network that cannot currently support a third audio channel to upgrade its facilities to do so on a consistent basis ranges from \$100,000 to over \$1 million.³⁷

³³ WGBH at 15.

³⁴ *Notice*, 14 FCC Rcd at 19855, 26 (citing NCAM Letter at 10). In its formal comments, NAB also provided some information on costs: it stated that one major network estimated that it would cost its affiliated stations \$800,000 to upgrade their satellite receiver facilities, and that it would cost its owned and operated stations \$400,000 to upgrade their studios. NAB at 16-18. NAB does not identify the network, or the number of the network's affiliated and owned and operated stations that need to upgrade their facilities. Therefore, it is not possible to use the information to determine a per-station cost.

One week before the Commission issued the Sunshine Notice in this proceeding, the NAB submitted an *ex parte* presentation which indicated that it would cost stations on average \$160,000 per station to support video description. See Letter from Jack N. Goodman, NAB to Magalie R. Salas, FCC 1 & App. at 6 (July 7, 2000) (NAB July 7 *Ex Parte*). NAB still did not provide any detailed support for these cost figures. In evaluating the parties' cost data, we give WGBH's greater weight because they are represented to be based on the actual experience of noncommercial stations that have upgraded to support programming with video description.

³⁵ "Monday Night Football on SAP" (August 6, 1999) <www.abcmnf.go.com/news/news19990803.page.html> (identifying ABC affiliates in at least 33 markets where SAP is available); "FOX Sports to broadcast 70th All-Star Game" (visited June 1, 2000) <www.majorleag...1999/allstar/news/foxbroadcast.html> (noting that 23 Fox affiliates have the technical capability to carry SAP); Elizabeth Jensen, "Networks See Benefits of Becoming Bilingual" (August 9, 1999) <www.nabe.org/press/reprints/990809e.html> (stating that fewer than 20 NBC affiliates have SAP technology). Although Commission staff has not been able to locate any information identifying the number of CBS affiliates with SAP capability, the CBS network has provided Spanish language audio for the SAP channel. *Id.*

³⁶ HBO at 5; NCTA Reply at 9-10.

³⁷ NAB at 15-16; NCTA at 14-15. Although as noted each of the top four commercial networks already provides some Spanish language audio for the SAP channel, NAB states that an unidentified major network estimates that it would cost over \$1 million to upgrade its network origination center and satellite distribution system to support a third audio channel on a consistent basis. NAB at 15-16. NCTA estimates that it would cost between \$100,000 and \$200,000 for cable networks that cannot currently support a third audio channel to upgrade their facilities to do so. NCTA at 14-15.

C. Commission Activities

15. The Commission first considered video description when it issued a *Notice of Inquiry* on closed captioning and video description on December 4, 1995.³⁸ Several months later, the Telecommunications Act of 1996 became law. Section 305(f) of the 1996 Act added new section 713 to the Communications Act of 1934.³⁹ Section 713(f) directed the Commission to commence an inquiry on video description, and report to Congress on its findings, including an assessment of “appropriate methods and schedules for phasing video descriptions into the marketplace, technical and quality standards for video descriptions, a definition of programming for which video descriptions would apply, and other technical and legal issues that the Commission deems appropriate.”

16. On July 29, 1996, the Commission released the required report.⁴⁰ The Commission suggested that “[i]nitial requirements for video description should be applied to new programming that is widely available through national distribution services and attracts the largest audiences, such as prime time entertainment series. . . . Lower priority for video description should be given to programming that is primarily aural in nature, including newscasts and sports events.”⁴¹ The Commission concluded that it should monitor the service and seek more information in the context of its annual report on competition in the market for the delivery of video programming.⁴²

17. On January 13, 1998, we released our second report on video description, as part of our annual report to Congress on competition in the market for the delivery of video programming.⁴³ We stated that “any requirements for video description should begin with only the largest broadcast stations and programming networks that are better able to bear the costs involved. . . . For example, a minimal amount of video description could be required to be provided by the larger broadcast stations in the larger markets, and by the larger video programming networks.”⁴⁴ The Commission also suggested that “a period of trial and experimentation would be beneficial so that more specific information would be available as to the types of programming that would most benefit from description, the costs of providing video description, and other matters.”⁴⁵

18. In November of last year, we adopted a *Notice of Proposed Rulemaking* in this docket, given that video description had not become more widely available in the commercial video marketplace. As set forth in greater detail below, we outlined in the *Notice* a kind of proposal that we envisioned as a starting point for our initial video description rules. Consistent with our observations in the reports to Congress, we

³⁸ *First NOI*, 11 FCC Rcd 4912.

³⁹ 47 U.S.C. § 613.

⁴⁰ *Video Accessibility Report*, 11 FCC Rcd 19214.

⁴¹ 11 FCC Rcd at 19270, ¶ 140.

⁴² 11 FCC Rcd at 19271, ¶ 142.

⁴³ *Fourth Annual Report*, 13 FCC Rcd at 1034. The Commission had previously released a notice on video description, among other things, to develop a record for this report. See *Second NOI*, 12 FCC Rcd 7829.

⁴⁴ 11 FCC Rcd at 1170, ¶ 271.

⁴⁵ 11 FCC Rcd at 1170, ¶ 271.

proposed to require the larger broadcast stations and MVPDs to provide video description for the most-watched and widely distributed programming. We received more than 100 comments and reply comments in response to the *Notice*.⁴⁶

III. ENTITIES TO PROVIDE PROGRAMMING WITH VIDEO DESCRIPTION

A. Broadcast Stations in Top 25 DMAs

19. Background. In the *Notice*, we proposed to hold broadcast stations in the top 25 DMAs and affiliated with the four largest commercial broadcast networks responsible for providing programming with video description.⁴⁷ We sought comment on our proposal, and on the costs associated with both producing and distributing described programming.⁴⁸ Although NAB argued against any rules (suggesting among other things that it would be costly to provide video description), it supported our proposal to limit the rules to affiliates of the top four networks in the top 25 DMAs if we established rules.⁴⁹ Other commenters, however, asked that we require affiliates of other networks, such as PAX, UPN, and WB, to provide programming with video description.⁵⁰ Some commenters also asked that we require stations in DMAs beyond the top 25 to provide programming with video description now, and that we adopt a schedule to phase in stations in all DMAs.⁵¹

20. Discussion. We adopt our proposal to require broadcast stations in the top 25 DMAs affiliated with the top four commercial broadcast networks (ABC, CBS, Fox, and NBC) to provide programming with video description.⁵² Our goal in this proceeding is to adopt rules designed to enhance the availability of video description, but not impose an undue burden on programming producers and distributors. Broadcast stations in the top 25 DMAs reach approximately 50% of U.S. TV households.⁵³ Those affiliated with the top four broadcast networks provide the highest-rated programming, *i.e.*, the most-watched, and therefore the most-advertiser-supported, programming. Some affiliates of the top four networks in the top 25 DMAs already have the technical capability necessary to provide programming with video description. Those that do not are likely to have the resources to acquire that capability without being unduly burdened. Indeed, NAB survey data suggests that between one-third and one-half of the broadcast stations in the top 25

⁴⁶ The commenters and reply commenters, and the abbreviations by which they are referred to in this document, are set forth in Appendix A.

⁴⁷ 14 FCC Rcd at 19854, ¶ 25.

⁴⁸ 14 FCC Rcd at 19855, ¶ 26.

⁴⁹ NAB Reply at 7.

⁵⁰ ACB at 4-5; MATP at 2; NTVAC at 7; WGBH at 3.

⁵¹ Clive at 2 (top 35 markets initially); NTVAC at 5 (top 35 markets initially); WGBH at 3, 4-5, 9, 11 (top 33 DMAs initially).

⁵² Implicit in our decision to hold the largest broadcast stations (and larger MVPDs, as defined below) responsible for providing programming with video description is the decision to hold programming distributors, as opposed to programming producers, responsible for compliance with our rules.

⁵³ Nielsen Media Research, Inc., Media Research Services Group, "U.S. Television Household Estimates," (Sept. 1999).

DMAs already broadcast on the SAP channel.⁵⁴ Although we might require more broadcast stations to provide video description over time, depending on the efficacy of, and consumer demand for, video description implemented as a result of this *Report and Order*, we believe that we should postpone adopting a phase-in schedule until after the broadcast stations and MVPDs that are subject to our initial rules have gained some experience providing video description. This experience can provide the industry, the public, and the Commission with an informed basis upon which to propose such a schedule.

21. In order to help us determine which stations we should require to provide video description, we sought comment in the *Notice* on the number of broadcast stations that have SAP capability, and the cost to become so equipped.⁵⁵ No commenter provided data on the number of commercial broadcast stations that have the capability to broadcast on the SAP channel.⁵⁶ As noted above, however, each of the top four commercial broadcast TV networks has provided Spanish language audio on a second soundtrack, and a number of their affiliates have carried that soundtrack. ABC has advertised that it provides Spanish language for the entire season of Monday Night Football, and that affiliates in at least thirty-three markets transmit that audio on the SAP channel.⁵⁷ Many of these affiliates are in the top 25 DMAs. Fox has also provided Spanish language audio for several programs, and at least twenty-three affiliates have the capability to broadcast that audio on the SAP channel.⁵⁸ NBC has provided Spanish audio for several programs, and approximately twenty NBC affiliates have the capability to broadcast that audio on the SAP channel. CBS has also provided Spanish language audio on the SAP channel.⁵⁹ Other broadcast networks, such as PAX, UPN, and WB, however, do not appear currently to offer Spanish language audio on the SAP channel.

22. The NAB suggests that the networks and their affiliates that have offered Spanish language audio have employed *ad hoc*, only temporary solutions to do so, and that it is altogether different – and may cost one “major network” over \$1 million, and its affiliates (in the aggregate) hundreds of thousands of dollars – to support a third audio channel on a consistent basis.⁶⁰ Aside from the fact that NAB does not document or explain these costs in any detail, the simple fact that the networks and their affiliates have provided Spanish language as a second audio program – with one network providing several hours per week for an entire season – indicates that it can be done in a cost-effective manner. In addition, WGBH states that the PBS network did not spend anywhere near \$1 million to upgrade its origination center and satellite

⁵⁴ NAB submitted survey data that shows that: 45% of stations in DMAs 1-10 equipped to broadcast on the SAP channel in fact do so, and 35% in DMAs 11-25 do so. NAB App. at 6.

⁵⁵ 14 FCC Rcd at 19855, ¶ 26.

⁵⁶ NAB did not provide any information in its comments on the number of commercial broadcast stations that have the capability to broadcast on the SAP channel. As part of a later *ex parte* presentation, however, NAB indicated that approximately 70% of broadcast stations in the top 50 DMAs have the capability to broadcast on the SAP channel. NAB July 7 *Ex Parte* at App. at 2.

⁵⁷ “Monday Night Football on SAP” (Aug. 6, 1999) <abcnmf.go.com/news/news19990803.page.html>.

⁵⁸ “Fox Sports to broadcast 70th All-Star Game” (visited June 1, 2000) <www.majorleag...1999/allstar/news/foxbroadcast.html>.

⁵⁹ Elizabeth Jensen, “Networks See Benefits of Becoming Bilingual” (Aug. 9, 1999) <www.nabe.org./press.reprints/990809e.html>.

⁶⁰ NAB at 15-19.

distribution system to support video description.⁶¹ As we observed in the *Notice*, WGBH also points out that it cost PBS member stations only around \$5000-\$25,000 to upgrade their stations to acquire the technical capability to support video description.⁶² In addition, WGBH offers a variety of technical solutions at every point in the distribution process to suggest that the cost of supporting a third audio channel is far less than NAB claims.⁶³ WGBH further suggests that the revenues of the largest broadcast stations are more than sufficient to offset any costs associated with upgrading.⁶⁴ The annual advertising revenues of the primary affiliates of the top four commercial networks in the top 25 DMAs range from \$28 million to \$315 million.⁶⁵

23. NAB suggests that any equipment that is upgraded to support a third audio channel will become obsolete when the networks and the stations fully convert to DTV.⁶⁶ WGBH suggests, however, the equipment to support more audio channels will be necessary for DTV, such that any money spent now will not be wasted.⁶⁷ According to WGBH, our video description rules therefore will work in tandem with the transition to DTV.

B. Multichannel Video Programming Distributors with At Least 50,000 Subscribers

24. Background. In the *Notice*, we proposed to require the “larger MVPDs” to provide programming with video description on nonbroadcast networks that reach 50% or more MVPD households.⁶⁸ We sought comment on how to define larger MVPDs, and on our proposal.⁶⁹ NTVAC and WGBH both suggested that MVPDs that serve 500,000 or more subscribers should qualify as larger MVPDs, and WGBH

⁶¹ WGBH Reply at 17.

⁶² 14 FCC Rcd at 19855, ¶ 26. As noted above, NAB submitted an *ex parte* presentation one week before the Commission issued its “Sunshine Notice,” which suggested that it would cost stations on average \$160,000 to upgrade their facilities to support video description. NAB July 7 *Ex Parte* at 1 & App. 6. As explained above, we give WGBH’s cost figures greater weight.

⁶³ WGBH Reply at 18-22. WGBH describes possibilities and solutions for every point in the distribution process. WGBH explains that all major professional tape formats used by networks and studios support four channels of audio. It identifies common solutions for routing multiple channels of audio around a network or studio plant. It states that standard microwave technology (used by a network between its origination center and uplink facilities, or by the station between its studio and downlink facilities or transmitter) has supported multiple audio channels for years. It also states that a single satellite transponder can support many services, including multiple audio channels.

WGBH also describes an alternative, inexpensive solution, where additional audio is inserted into the vertical blanking interval (VBI), which renders rewiring and some other upgrading unnecessary. WGBH states that the necessary encoder costs \$2,150 and the necessary decoder costs \$1,700. WGBH at 21.

⁶⁴ WGBH Reply at 24.

⁶⁵ BIA Research Inc., Media Access Pro Database, July 11, 2000.

⁶⁶ NAB at 19.

⁶⁷ WGBH Reply at 28.

⁶⁸ 14 FCC Rcd at 19854-19855, ¶ 25.

⁶⁹ 14 FCC Rcd at 19854-19855, ¶ 25.

explained that eighteen multiple system operators (MSOs) would so qualify.⁷⁰ NCTA suggests, however, that any cut-off for larger cable operators should take into account the size of each system, since a large MSO may have systems around the country that vary greatly in size.⁷¹ NCTA also points out that more than 40 cable networks serve 50% or more of MVPD households,⁷² and that a cable system would need to associate SAP capability with each channel on which it seeks to provide programming with video description.⁷³ NCTA suggested that only 5-15% of the channels of a typical cable system currently have such equipment, and that it would cost several thousand dollars per channel to acquire it, and an additional several thousand dollars to upgrade satellite receiving equipment.⁷⁴ DirecTV suggests that DBS operators should not qualify as “larger MVPDs” because of the “unique burdens” that providing programming with video description would place on them, particularly in providing the programming of local broadcast stations.⁷⁵

25. Discussion. We require MVPDs that serve 50,000 or more subscribers to provide programming with video description on each of any of the top five nonbroadcast networks they carry, as defined by prime time audience share, as well as the programming of broadcast stations and other networks they carry, under certain circumstances, as described below. We believe this result is consistent with our goal of enhancing the availability of video description without imposing an undue burden on the programming production and distribution industries. The “larger MVPDs” as we define them include approximately 275 cable systems that serve approximately 50% of MVPD households,⁷⁶ and two DBS systems that serve 12 million customers. The top five nonbroadcast networks as we define them include those with the most-watched programming during prime time.

26. As NCTA explains,⁷⁷ cable systems and other MVPDs must have the capability to support a third audio channel for each channel on which they intend to provide programming with video description. This suggests that, while it might not be burdensome for many nonbroadcast networks to provide programming with video description, it might be burdensome for cable systems and other MVPDs to retransmit programming with video description on many nonbroadcast networks. We have therefore decided to limit the number of nonbroadcast networks for which “larger MVPDs” must provide video description to a smaller number than we proposed. We select the top five nonbroadcast networks. Given that we below require MVPDs to provide programming with video description during prime time,⁷⁸ we define the top five

⁷⁰ NTVAC at 7; WGBH at 10.

⁷¹ NCTA Reply at 14.

⁷² NCTA at 23.

⁷³ NCTA at 15-17.

⁷⁴ NCTA at 15-16.

⁷⁵ DirecTV at 5-6, 9. For example, DirecTV explains that it is a national service that carries the programming of many broadcast stations affiliated with the top four networks in the top 25 DMAs, with the result that a requirement to carry video description of these stations alone would require it to carry video description on 100 channels. DirecTV at 6.

⁷⁶ “Cable Industry at a Glance: Systems and Subscribers by Number of Subscribers in System” (visited May 23, 2000) <[ncta.cyberserv.com/qs/user_pages/dev\(num.ofsubs\).cfm](http://ncta.cyberserv.com/qs/user_pages/dev(num.ofsubs).cfm)>.

⁷⁷ NCTA at 23.

⁷⁸ MVPDs may instead provide video description for children’s programming if they prefer.

nonbroadcast networks in terms of prime time audience share, as determined by an average of Nielsen prime time ratings for the time period October 1, 1999-September 30, 2000. We recognize, of course, that the top five nonbroadcast networks, as measured by audience share, do not typically have as high an audience share as the top four broadcast networks, or even the broadcast networks that are not subject to our rules, as several commenters point out.⁷⁹ These nonbroadcast networks, however, have substantial resources, and our underlying goal in this proceeding is to enhance the availability of video description without imposing an undue burden on the television programming production and distribution industries.

27. The per-channel costs for MVPDs also suggests that the cut-off for “larger MVPDs” should be based on cable system size, not MSO size. No commenter, however, suggested a particular system size. We have decided to apply our rules to systems with more than 50,000 subscribers. These systems include approximately 275 cable systems that reach approximately 50% of cable subscribers, just as our rules affect broadcast stations that reach approximately 50% of U.S. TV households. NCTA suggests that the maximum costs for cable systems to upgrade equipment would be around \$3000 per channel (\$2000 per channel to add a stereo generator with SAP capability, and \$1200 per channel to add additional decoders or sound processing capabilities, or to upgrade satellite receivers).⁸⁰ These costs appear to be more than offset, however, by revenues. If each subscriber pays an average of approximately \$45/month for cable service⁸¹ provided by a system with 50,000 subscribers, the smallest cable system subject to our rules would appear to collect \$2.25 million per month, or \$27 million per year. These revenues do not include those from other sources.⁸²

28. Our decision to apply our rules to MVPDs that serve at least 50,000 subscribers will also include two DBS systems that together reach an additional 12 million subscribers. DirecTV indicates that it would need to modify its network in order to support three audio channels, and that it would cost “tens of millions of dollars” to do so even if it were required to provide programming with video description on just a few channels.⁸³ DirecTV, however, had more than 8.5 million customers as of May 2000,⁸⁴ and DBS’ average programming price was \$30 per month.⁸⁵ This means that DirecTV subscriber revenues appear to be over \$250 million per month, or over \$3 billion per year. Although EchoStar, the other major DBS carrier, did not file comments in this proceeding, we note that it had more than 4 million subscribers as of May 2000,⁸⁶ such that its subscriber revenues appear to be at least \$120 million per month, or nearly \$1.5 billion per year.

⁷⁹ A&E at 18-19; NCTA at 17-18.

⁸⁰ NCTA at 15-17.

⁸¹ Paul Kagan Assocs., Inc., “The Cable TV Financial Databook 1999” 11 (1999).

⁸² Cable operators also receive revenue from advertising, customer equipment, leased access fees, and non-video services, such as Internet and cable telephony. See In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Services, and Equipment, MM Docket No. 92-266, *Report on Cable Industry Practices*, FCC 00-214, ¶ 34 (released June 15, 2000).

⁸³ DirecTV at 6-7.

⁸⁴ “US DTH Subscribers,” (visited July 27, 2000), <www.skyreport.com/skyreport/dth_us.html>.

⁸⁵ In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 99-230, *Sixth Annual Report*, FCC 99-418, ¶¶ 70, 73 (released January 14, 2000).

⁸⁶ “US DTH Subscribers,” (visited July 27, 2000), <www.skyreport.com/skyreport/dth_us.html>.

C. Equipped Broadcast Stations and MVPDs

29. Background. In the *Notice*, we proposed to require larger MVPDs to “pass through” the SAP channel audio containing video description of any broadcast station they carried.⁸⁷ We also proposed *not* to require noncommercial educational (NCE) stations to provide programming with video description, based on the financial difficulties they face, particularly as they transition to DTV.⁸⁸ A number of commenters suggested that we should require broadcast stations, including NCE stations, and MVPDs that can “pass through” the SAP channel audio to do so.⁸⁹ Although APTS supported our proposal to exempt NCE stations,⁹⁰ several other commenters did not,⁹¹ with WGBH suggesting that NCE stations, supported by taxpayers, have a particular obligation to air programming that is accessible to all.⁹²

30. Discussion. We will require all broadcast stations, including NCE stations, that have the technical capability necessary to “pass through” any second audio program containing video description that they receive from their affiliated networks. Similarly, we will require all MVPDs that have the technical capability necessary to “pass through” any secondary audio program containing video description that they receive from a broadcast station or nonbroadcast network. We believe this requirement is consistent with our approach to enhance the availability of video description, but not impose an undue burden on programming producers and distributors. WGBH states that 169 PBS member stations already have SAP capability and currently provide video description,⁹³ and our rule should not impose any significant burden on them. In addition, since our requirement will only affect other broadcast stations and MVPDs that already have the technical capability necessary to support video description, we do not believe our rule will impose any burden on the affected stations and MVPDs. We will consider broadcast stations and MVPDs to have the technical capability necessary to support video description if they have virtually all necessary equipment and infrastructure to do so, except for items that would be of minimal cost. To the extent our rule imposes an undue burden on any particular broadcast station or MVPD, it is free to seek an exemption pursuant to the standards we develop and set forth below in section VI.

IV. PROGRAMMING TO CONTAIN VIDEO DESCRIPTION

A. Amount of Programming

31. Background. In the *Notice*, we proposed to require broadcast stations and MVPDs subject to our initial rules to provide at least fifty hours per quarter (roughly four hours per week) of programming with

⁸⁷ 14 FCC Rcd at 19852-19853, ¶ 20.

⁸⁸ 14 FCC Rcd at 19855, ¶ 25.

⁸⁹ NTN at 3-4; NTVAC at 6; WGBH at 3, 4-5, 9, 11.

⁹⁰ APTS at 3.

⁹¹ MATP at 2; NTVAC at 6; WGBH at 3-4, 15.

⁹² WGBH at 4, 15.

⁹³ WGBH at 15.

video description.⁹⁴ Several commenters supported our proposal.⁹⁵ Others supported more hours of programming initially, and/or a schedule to phase in more programming in later years.⁹⁶ In the *Notice*, we also noted that the Commission had previously observed that some networks provide Spanish language audio on the SAP channel. We sought comment on the extent to which other languages compete for use of the channel, the impact (if any) of our proposal on these uses, and how any conflicts could be avoided.⁹⁷

32. Discussion. We adopt our proposal to require the broadcast stations and MVPDs subject to quarterly compliance requirements to provide at least fifty hours per calendar quarter of programming with video description.⁹⁸ Our goal in this proceeding is to bring the benefits of video description to the commercial video marketplace, while at the same time not impose an undue burden on the broadcast stations and MVPDs subject to our initial rules. We believe that requiring these broadcast stations and MVPDs to provide fifty or more hours per calendar quarter of programming with video description satisfies this goal. Although we might require more broadcast stations and MVPDs to provide more programming with video description over time, depending on the efficacy of, and consumer demand for, video description implemented as a result of this *Report and Order*, we continue to believe that we should postpone adopting such a phase-in schedule until after the broadcast stations and MVPDs subject to our initial rules have gained some experience in providing video description. This experience can provide the industry, the public, and the Commission with an informed basis upon which to propose such a schedule.

33. We clarify, as suggested by several commenters,⁹⁹ that the broadcast stations and MVPDs may not count toward their 50-hour quarterly requirement programming that they have previously aired with video description, once the rules go into effect. In other words, a broadcast station or MVPD may not count toward its 50-hour quarterly requirement any programming it aired with video description after the effective date of the rules when that same broadcast station or MVPD repeats the same programming later. Broadcast stations and MVPDs may, however, count any programming they air after the effective date in excess of their quarterly requirements, and that they repeat later. In addition, they may count any programming with video description they air *before* the effective date of the rule, and that they later repeat after the effective date. We also clarify, as suggested by several commenters, 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. We impose this requirement because it should not impose any burden on any broadcast station or MVPD subject to our rules, or on their programming suppliers. This is because the cost of both describing programming, and upgrading equipment and infrastructure to distribute it, generally should be a

⁹⁴ 14 FCC Rcd at 19855, ¶ 29.

⁹⁵ Adaptive Environments at 1; NTVAC at 10 (for Year 1 in their proposed phase-in schedule); TDI at 4.

⁹⁶ See, e.g., ACB at 3, 5 (250 hours/quarter initially, followed by phasing in all children's programming within 3 years); AFB at 7 (20% of each network's series initially, followed by an additional 20% within 5 years); MATP (10 hours/week initially, phasing in more within 3-5 years); NTN at 4 (phase in all prime time programming within 7 years); NTVAC 10 (4 hours/week initially, followed by phasing in all prime time programming within 7 years, and all children's programming until 3 hours/week); RPI (50 hours/quarter inadequate); WGBH (phase in all prime time programming within 7 years, and all children's programming until 3 hours/week is reached).

⁹⁷ 14 FCC Rcd at 19856, ¶ 30.

⁹⁸ However, non-program minutes, such as advertisements and public service announcements, aired during a described program need not be described.

⁹⁹ NTN at 4; NTVAC at 11; WGBH at 14.

one-time fixed cost. At the same time, we will allow programming providers to repeat programming without video description, if they wish to make another use of the SAP channel, such as Spanish language audio.

34. We also believe that our decision to require that 50 hours per quarter, or roughly 4 hours per week, of programming with video description will avoid any conflicts between competing uses of the SAP channel. Some networks use the SAP channel to provide Spanish audio or other services.¹⁰⁰ Although as some commenters point out there is not a technical solution to allow two uses of the SAP channel simultaneously,¹⁰¹ as others point out most networks that use the SAP channel to provide Spanish language audio do so on a limited basis.¹⁰² Those few networks that provide more extensive Spanish language audio are not among the networks that will be affected by our rules.¹⁰³ Thus, we believe that our rules will not create conflicts between Spanish language audio and video description for use of the SAP channel. Although some commenters believe that occasional uses of the SAP channel for different purposes will create viewer confusion,¹⁰⁴ we believe any such confusion can be corrected through viewer education.

B. Prime Time vs. Other Types of Programming

35. Background. In the *Notice*, we proposed to require the broadcast stations and MVPDs subject to our initial rules to provide programming with video description during prime time, or to provide children's programming with video description. We sought comment on our proposal.¹⁰⁵ Several commenters supported our proposal.¹⁰⁶ Others suggested that we should not require certain types of programming to contain video description, or that we should require broadcast stations and MVPDs to provide both children's and prime time programming with video description.¹⁰⁷ In the *Notice*, we also sought comment

¹⁰⁰ HBO at 5; LULAC at 2; NAB at 21; NCTA at 12-13; NCTA Reply at 9-10. According to LULAC, some portion of the programming of the following networks contains Spanish: ABC, CBS, Fox, NBC, Bravo, Cartoon Network, Cinemax, Comedy Central, Encore, HBO, The Movie Channel, Romance Channel, Sci-Fi Channel, Showtime, Starz!, TNT, and USA. LULAC at 2.

In addition to providing Spanish audio, NCTA states that those cable networks that have the capability to support a third audio channel also use the channel to provide supplementary audio information, such as local weather or world news; enhanced TV commentary, such as commentary from a movie's director; and cue tones, or signals to alert head-end equipment to breaks in national programming for insertion of local advertisements. NCTA at 12-13.

¹⁰¹ NAB at 20.

¹⁰² WGBH at 18.

¹⁰³ Approximately 85% of the programming of HBO, The Movie Channel, and Showtime, and 50% of the programming of Encore, contain Spanish audio. HBO at 5; NCTA Reply at 9-10. We do not expect these networks to be among the top five nonbroadcast networks subject to our rules.

¹⁰⁴ DirecTV; HBO at 6; NCTA at 12-13.

¹⁰⁵ 14 FCC Rcd at 19855, ¶ 29.

¹⁰⁶ Adaptive Environments at 1; WGBH at 17.

¹⁰⁷ Clive at 3 (video programming distributors should do both children's and prime time programming); NTVAC at 10 (the ratio of prime programming to children's programming should be 3-to-1); RPI at 4,6 (FCC should not choose programming); TDI at 4 (75% of programming should be prime time).

on how people with visual disabilities will know when programming with video description is scheduled.¹⁰⁸

36. Discussion. We adopt our proposal to require that the described programming must either be shown during prime time or be children's programming. 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. In addition, as we noted in the *Notice*, the several thousand dollars per hour cost to describe programming is a very small portion of the production budget for the typical prime time program. At the same time, as we noted in the *Notice*, programming with video description may provide a benefit not only to children who are visually disabled, but also to those who are learning disabled.¹⁰⁹ Programming with video description has both audio description and visual appeal, and so has the potential to capture the attention of learning disabled children and enhance their information processing skills.¹¹⁰ Requiring broadcast stations and MVPDs to provide children's or prime time programming with video description thus ensures that the programming reaches the greatest portion of the audience it is intended to benefit the most. Permitting broadcast stations and MVPDs to select between the two provides them flexibility without compromising that goal.

37. In order to help the public identify the broadcast stations and MVPDs that are required to provide programming with video description, and the programming for which they are doing so, we encourage broadcast stations and MVPDs that provide programming with video description to take steps to educate and inform the public about the service. We encourage broadcast stations and MVPDs to promote the service in their programming and on their websites, and provide the relevant information to magazines and newspapers that follow their programming schedules, as some commenters suggest.¹¹¹

38. We note that the National Federation of the Blind and many of its individual members suggest that we should focus not on entertainment programming, but rather on the accessibility of text information aired on TV, such as emergency information, the identity of speakers on news and talk shows, and telephone numbers or other contact information in advertisements.¹¹² We agree with NFB that the accessibility of this type of information is important, and address the accessibility of emergency information in particular below in section VIII. We believe, however, that a secondary audio program may not be the appropriate vehicle to provide text-based information. However, we do encourage producers of programming with text information to provide that information aurally, by announcing the names of speakers. Advertisers should have a commercial incentive to provide contact information aurally.

V. EFFECTIVE DATE OF NEW RULES

39. Background. We proposed in the *Notice* to require broadcast stations and MVPDs subject to our rules to begin providing programming with video description starting eighteen months after the effective date of our rules. One commenter supported our proposal.¹¹³ Several commenters suggested that broadcast

¹⁰⁸ 14 FCC Rcd at 19855, ¶ 29.

¹⁰⁹ 14 FCC Rcd at 19848, ¶ 7.

¹¹⁰ 14 FCC Rcd at 19848, ¶ 7.

¹¹¹ Adaptive Environments at 2; MATP at 3; NTVAC at 13.

¹¹² NFB at 4-5.

¹¹³ Adaptive Environments at 1.

stations and MVPDs should begin providing described programming earlier, with many suggesting within twelve months.¹¹⁴ MPAA claimed that any requirement to begin providing programming with video description within twelve months would be inconsistent with the Commission's approach in closed captioning, and with existing programming contracts.¹¹⁵ NAB suggested that any requirement should coincide with the beginning of the first TV season eighteen months or more after the effective date of the rules.¹¹⁶

40. Discussion. We require the broadcast stations and MVPDs subject to our rules to begin providing programming with video description during the first calendar quarter that is eighteen months after the adoption date of this *Report and Order*, i.e., April-June 2002.¹¹⁷ Although we appreciate the desire of many to have programming with video description earlier, we wish to give the affected broadcast stations, MVPDs, and networks the time that may be necessary to make arrangements to describe the programming, and to upgrade their equipment and infrastructure. We believe that giving the affected parties until April 2002 is ample time. We decline to make our effective date coincide with the beginning of the TV season for broadcast networks because our rules also affect nonbroadcast networks, which may or may not use the same schedule to introduce new programs as broadcast networks do. We encourage parties that seek to make the beginning of their new programming seasons coincide with starting date of their providing video description to make the necessary arrangements to do so, within the time frame to meet their first quarterly compliance requirement in April-June 2002.

VI. EXEMPTIONS

41. Background. In the *Notice*, we proposed to adopt procedures to exempt parties from our video description rules, if compliance would result in an undue burden.¹¹⁸ We noted that, in the closed captioning context, Congress deemed certain factors relevant to showing that compliance would result in an undue burden, and sought comment on whether these procedures should be applied to our video description rules.¹¹⁹ Although not many parties commented on procedures or standards for waiver, WGBH supported adopting the procedures and standards we use for closed captioning for video description.¹²⁰

42. Discussion. We adopt the "undue burden" exemption procedures and standards that we use in the closed captioning context.¹²¹ We therefore will exempt any affected broadcast station or MVPD that can

¹¹⁴ American Council of the Blind at 3, 5; Clive at 2; MATP at 2; NTN at 4; NTVAC at 9; WGBH at 6, 16. One commenter suggested that we should require broadcast stations and MVPDs to begin providing programming with video description immediately. RPI at 2, 22, 27.

¹¹⁵ MPAA Reply at 19-21.

¹¹⁶ NAB at 25-26; WGBH Reply at 34-35.

¹¹⁷ As set forth below in section VIII, the effective date of our emergency rules will be earlier, upon approval by the Office of Management and Budget.

¹¹⁸ 14 FCC Rcd at 19857, ¶ 33.

¹¹⁹ 14 FCC Rcd at 19857, ¶ 33.

¹²⁰ WGBH at 19.

¹²¹ The procedures and standards we use to assess "undue burden" in the closed captioning context are set forth at 47 C.F.R. § 79.1(f).

demonstrate through sufficient evidence that compliance would result in an “undue burden,” which means significant difficulty or expense. We will consider the following factors: the nature and cost of providing video description of the programming; the impact on the operation of the broadcast station or MVPD; the financial resources of the broadcast station or MVPD; the type of operations of the broadcast station or MVPD; any other factors the petitioner deems relevant; and any available alternatives to video description.¹²²

43. We exempted categories of programming and providers from our closed captioning rules, and many commenters ask that we do the same for video description.¹²³ Given the limited nature of our initial video description rules, we decline to exempt any particular categories of programming or class of programming providers. We will consider these issues when we consider extending the entities that must provide programming with video description, and the amount they must provide.

VII. ENFORCEMENT

44. Background. In the *Notice*, we proposed to adopt procedures to enforce our initial video description rules. We noted that, in the closed captioning context, the Commission did not adopt reporting requirements, but rather simply adopted pleadings requirements and timetables.¹²⁴ We sought comment on the relevance of these procedures to our initial video description rules.¹²⁵ Those commenters that addressed the issue asked us to adopt an informal complaint procedure,¹²⁶ but one that is less onerous than the one we established for closed captioning, and does not involve quality standards.¹²⁷ Commenters suggested that any entity that violates our rules should be required to provide more programming with video description,¹²⁸ perhaps make a payment, or, in the case of a broadcast station, have their license revoked.¹²⁹

45. Discussion. We adopt enforcement procedures as follows. A complaint alleging a violation of this section may be transmitted to the Commission by any reasonable means, such as letter, facsimile

¹²² We also adopt the filing and other procedures we use to assess “undue burden” in the closed captioning context. Appendix B sets forth our initial video description rules, and therefore includes these procedures.

¹²³ For example, commenters asked that we exempt certain categories of programming, such as foreign language programming produced outside the United States (Grupo Televisa at 3-8; International Cable Channels Partnership at 3-7), game shows (GSN at 7-8), home shopping programming and infomercials (MPAA at 32; QVC at 4-11), live programming (MPAA at 32; NCTA at 17-20; Weather Channel at 3-5), music programming (MPAA at 32; NCTA at 17-20), news and public affairs programming (C-SPAN at 2-5; MPAA at 32; RTNDA at 2-4), and sports programming (MPAA at 32).

Commenters also asked that we exempt certain classes of programming providers, such as DBS operators (DirecTV Reply at 9), ITFS licensees (WCA at 2-3), and “wireless broadband MVPDs” (WCA at 4-5).

¹²⁴ 14 FCC Rcd at 19857, ¶ 33.

¹²⁵ 14 FCC Rcd at 19857, ¶ 33.

¹²⁶ ACB at 7-8.

¹²⁷ WGBH at 20; WGBH Reply at 16.

¹²⁸ WGBH at 20.

¹²⁹ AFB at 8.

transmission, telephone (voice/TRS/TTY), Internet e-mail, audio-cassette recording, and Braille, or some other method that would best accommodate a complainant's disability. A complaint shall include the name and address of the complainant. The complaint shall include the name of the broadcast station or MVPD against whom the complaint is alleged. A complaint against a broadcast station should include the name and address of the station, and its call letters and network affiliation. A complaint against an MVPD should include the name and address of the MVPD, and the name of the network that provides the programming that is the subject of the complaint. Complaints should include a statement of facts sufficient to show that the broadcast station or MVPD has violated or is violating the Commission's rules, and, if applicable, the date and time of the alleged violation; the specific relief or satisfaction sought by the complainant; and 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 a complainant's disability). Complaints should be sent to the Commission's Consumer Information Bureau. That bureau will forward formal complaints to the Commission's Enforcement Bureau, and we delegate authority to the Enforcement Bureau to act on and resolve any complaints in a manner consistent with this *Report and Order*.

46. Complaints satisfying the requirements described above will be promptly forwarded by Commission staff to the broadcast station or MVPD involved, which shall be called on to answer the complaint within a specified time, generally within 30 days. To ensure fair and meaningful enforcement of our video description requirements, we will authorize the staff to either shorten or lengthen the time required for responding to complaints in particular cases. For example, if a complaint alleges that the video description disappeared during a program, we believe that it is appropriate to require the broadcast station or MVPD to respond within 10 days after being notified of the complaint in order to minimize the risk of repeat or recurring problems. If, on the other hand, a complaint alleges that a broadcast station or MVPD has not met its quarterly requirements, it may not be appropriate to require the broadcast station or MVPD to respond until the end of the quarter that is the subject of the complaint. However, recurring complaints or a pattern of such complaints against a particular broadcast station or MVPD may warrant a more immediate response to ensure that quarterly requirements are being addressed by the broadcast station or MVPD in manner consistent with their intended purposes. Commission staff will manage our complaint processes to reflect these and other case specific differences. The burden of proof of compliance in response to a complaint is on the broadcast station or MVPD, and they must maintain records sufficient to show their compliance with our rules.

47. Commission staff will review all relevant information provided by the complainant and defendant broadcast station or MVPD and may request additional information from either or both parties when needed for a full resolution of the complaint. Certifications of compliance from programming suppliers, including programming producers, programming owners, networks, syndicators and other distributors, may be relied on by broadcast stations and MVPDs to defend against claims of noncompliance. As a general matter, distributors will not be held responsible for situations where a program source falsely certifies that programming delivered to the distributor meets our video description requirements and the distributor did not know and could not have reasonably ascertained that the certification was false. However, we expect broadcast stations and MVPDs to establish appropriate policies and procedures to safeguard against such false certifications. Commission staff will scrutinize complaints to ensure that broadcast stations and MVPDs vigilantly adhere to our video description requirements. If we determine that a violation has occurred, we will use our considerable discretion under the Act to tailor sanctions and remedies to the individual circumstances of a particular violation. For example, in egregious cases or cases demonstrating a pattern or practice of noncompliance, sanctions may include a requirement that the video programming distributor deliver video programming containing video description in excess of its requirements.

VIII. EMERGENCY INFORMATION

48. Background. In the *Notice*, we observed that public safety messages that scroll across the TV screen are not accessible to persons with visual disabilities, and sought comment on a proposal to require an aural tone to accompany the messages to alert such persons to turn on a radio, the SAP channel, or a designated digital channel.¹³⁰ We sought comment on the proposal, and any other effective approaches, such as whether these messages could be provided via “open” video description.¹³¹ The NFB and some of its members that filed comments supported the Commission taking steps to enhance the accessibility of emergency information.¹³² Some other commenters suggested that we consider this issue in a different proceeding.¹³³

49. Discussion. Consistent with our recent decision to require any broadcast station or MVPD that provides emergency information to make the critical details of that information accessible to persons with hearing disabilities,¹³⁴ we require any broadcast station or MVPD that provides local emergency information to make the critical details of that information accessible to persons with visual disabilities. Our rule applies to all broadcast stations and MVPDs that provide emergency information, as opposed to just those in the largest TV markets or with the largest number of subscribers. We believe this is appropriate both because of the importance of emergency information and because it does not involve the kinds of technical issues involved in using a SAP channel. We envision that affected broadcast stations and MVPDs will aurally describe the emergency information in the main audio as part of their ordinary operations. This would be similar to providing “open” video description. We define emergency information to be that which is intended to protect life, health, safety, and property, *i.e.*, critical details about an emergency and how to respond to the emergency. Examples of the types of emergencies covered include tornadoes, hurricanes, floods, tidal waves, earthquakes, icing conditions, heavy snows, widespread fires, discharge of toxic gases, widespread power failures, industrial explosions, civil disorders, school closings and changes in school bus schedules resulting from such conditions, and warnings and watches of impending changes in weather. These examples are intended to provide guidance as to what is covered by the rule and are not intended to be an exhaustive list. We do not believe an exhaustive list of examples is necessary to convey what is covered by the rule. Our definition of emergency information will include the provision of critical details in an accessible manner. Critical details could include, among other things, specific details regarding the areas that will be affected by the emergency, evacuation orders, detailed descriptions of areas to be evacuated, specific evacuation routes, approved shelters or the way to take shelter in one’s home, instructions on how to secure personal property, road closures, and how to obtain relief assistance.

50. The rule will require broadcast stations and MVPDs that provide local emergency information to make that information accessible to viewers who are blind or have visual disabilities in the affected local area through aural presentation whenever such information is provided during regularly scheduled

¹³⁰ 14 FCC Rcd at 19856-19857, ¶ 32.

¹³¹ 14 FCC Rcd at 19856-19857, ¶ 32.

¹³² NFB at 4-5. *See also* Dunnam, Sanders, Walker.

¹³³ NTVAC at 13; WGBH at 19.

¹³⁴ In the Matter of Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Accessibility of Emergency Programming, MM Docket No. 95-176, *Second Report and Order*, FCC 00-136 (released April 14, 2000).

newscasts, unscheduled newscasts that preempt regularly scheduled programming or during continuing coverage of a situation. As a result of our rule, persons with visual disabilities will have access to the same critical information to which other viewers have access. Under this rule, broadcast stations and MVPDs are not required to provide in an accessible format all of the information about an emergency situation that they are providing to viewers visually, only the visual information intended to further the protection of life, health, safety, and property. In determining whether particular details need to be made accessible, we will permit programmers to rely on their own good faith judgments.

51. We believe that our requirement that broadcast stations and MVPDs make the critical details of emergency information available during regularly scheduled newscasts and newscasts that are sufficiently urgent to interrupt regular programming will generally ensure that the critical details of emergency information will be accessible to persons with visual disabilities. This is because we expect that broadcast stations and MVPDs will provide emergency information of an extremely urgent nature by interrupting their regularly scheduled programming with a newsbreak, and we require them to make the critical details of this information accessible. To the extent, however, that a broadcast station or MVPD does not interrupt its regular programming to provide emergency information but rather does so through another manner, such as a “crawl” or “scroll,” during that programming, we require them to accompany that information with an aural tone, as referenced in the *Notice*.¹³⁵

52. The new rules regarding emergency information will be effective upon approval by the Office of Management and Budget. We adopt an earlier effective date for this rule because of the importance of emergency information, and because there should be little if any equipment and infrastructure costs associated with compliance.

IX. JURISDICTION

53. Background. In the *Notice*, we sought comment on whether we have the statutory authority to adopt video description rules.¹³⁶ We noted the general purpose of the Act in establishing the Commission, as well as the Commission’s general jurisdiction and rulemaking powers.¹³⁷ We also noted that Congress has expressed the goal of increasing the accessibility of communications services for persons with disabilities.¹³⁸ We further noted that Title III of the Act requires the Commission to find that the “public interest, convenience, and necessity” will be served by the grant, renewal, or transfer of a license authorized pursuant to that title.¹³⁹ Finally, we observed that Congress had directed the Commission to conduct an inquiry and issue a report on video description.¹⁴⁰

54. Discussion. We conclude that we have the authority to adopt video description rules. Section 1 of the Act (codified as 47 U.S.C. § 151) established the Commission “[f]or the purpose of regulating

¹³⁵ 14 FCC Rcd at 19856, ¶ 32.

¹³⁶ 14 FCC Rcd at 19857-19859, ¶¶ 34-39.

¹³⁷ 14 FCC Rcd at 19857, ¶ 35.

¹³⁸ 14 FCC Rcd at 19858, ¶ 36.

¹³⁹ 14 FCC Rcd at 19858, ¶ 37.

¹⁴⁰ 14 FCC Rcd at 19858, ¶ 38.

interstate and foreign commerce in communication by wire and radio so as 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. . . .” (emphasis added). Section 1 also established the Commission “for the purpose of promoting safety of life and property through the use of wire and radio communication.” Section 2(a) of the Act (codified as 47 U.S.C. § 152(a)) states that “[t]he provisions of this act shall apply to all interstate and foreign communication by wire or radio” and “all persons engaged within the United States in such communication.” Section 4(i) (codified as 47 U.S.C. § 154(i)) states that “[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions” and section 303(r) (codified as 47 U.S.C. § 303(r)) states that “the Commission from time to time, as public convenience, interest, or necessity requires shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. . . .”

55. Congress has thus authorized the Commission to make available to all Americans a radio and wire communication service, and to promote safety and life through such service, and to make such regulations to carry out that mandate, that are consistent with the public interest and not inconsistent with other provisions of the Act or other law. In other words, as the Commission has previously explained, “[t]he courts have consistently held that the Commission has broad discretion so long as its actions further the legislative purposes for which the Commission was created and are not contrary to the basic statutory scheme.”¹⁴¹ Thus, in considering the Commission’s power to create the universal service fund (for which at the time there was no explicit statutory authority), the U.S. Court of Appeals for the D.C. Circuit relied, solely, on sections 1 and 4(i) of the statute, holding: “As the Universal Service Fund was proposed in order to further the objective of making communication service available to all Americans at reasonable charges, the proposal was within the Commission’s statutory authority.”¹⁴²

56. We disagree with those parties that contend that video description rules would be inconsistent with other provisions in the Act or other law. Specifically, some parties contend that video description rules are inconsistent with sections 624 and 713 of the Act, and the First Amendment. Others suggest that the rules interfere with the rights of copyright holders. We address each of these below.

57. *Section 713.* Some commenters contend that section 713(f) of the Act, codified as 47 U.S.C. § 613(f), only authorizes the Commission to conduct an inquiry, and thus forecloses a rulemaking, on video description.¹⁴³ Section 713(f) of the Act states, in its entirety:

Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall commence an inquiry to examine the use of video descriptions on video programming in order to ensure the accessibility of video programming to persons with visual impairments, and report to Congress on its findings. The Commission’s report shall assess the appropriate methods and schedule for phasing video descriptions into the marketplace, technical and quality standards for video descriptions, a definition of programming for which video descriptions would apply, and other technical and legal issues that the Commission deems appropriate.

¹⁴¹ Amendment of Part 67 of the Commission’s Rules and Establishment of a Joint Board, CC Docket No. 80-286, *Decision and Order*, 96 FCC 2d 781, 787 n.15 (1984).

¹⁴² *Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1315 (1988).

¹⁴³ A&E at 6; DirecTV at 4; HBO at 1; Lifetime at 3; MPAA at 3; NAB at 2-4; NCTA at 4.

Section 713(f) is silent with respect to – and thus by itself neither authorizes nor precludes – a rulemaking. In other words, section 713(f) does not change the purpose for which the Commission was created, as expressed in section 1 of the Act, nor does it derogate the general rulemaking powers the Commission has, as expressed in sections 4(i) and 303(r) of the Act.

58. We recognize, as some commenters point out,¹⁴⁴ that the legislative history to section 713 indicates that Congress considered, but did not enact, language explicitly referencing a rulemaking proceeding. The Conference Report indicates that the House amendment to the Senate bill contained language explicitly referencing a rulemaking proceeding: “Following the completion of this inquiry the Commission may adopt regulations it deems necessary to promote the accessibility of video programming to persons with visual impairments.”¹⁴⁵ The conferees agreed, however, to remove such language: “The agreement deletes the House provision referencing a Commission rulemaking with respect to video description.”¹⁴⁶ While this history indicates that section 713 should not be construed to authorize a Commission rulemaking, the history does not indicate that section 713 should be construed to prohibit such a rulemaking, given our otherwise broad powers to make rules, as expressed in sections 4(i) and 303(r) of the Act. Had Congress intended to limit our general authority, it could have expressly done so, as it has elsewhere in the Act.¹⁴⁷

59. NAB suggests that a general canon of statutory construction – the “specific governs the general” – precludes our reliance on the general jurisdictional sources of sections 4(i) and 303(r) when the specific language and legislative history of section 713 do not authorize a Commission rulemaking.¹⁴⁸ We agree that if section 713 prohibited us from adopting video description rules we could not rely on our general rulemaking authority to do so. As discussed above, however, section 713 does not limit our authority. NAB’s argument, therefore, is misplaced. Congress did not enact section 713 as freestanding legislation, but rather as part of the Telecommunications Act of 1996, and in particular as part of the portion of that legislation that amended the Communications Act. Just last term, the Supreme Court made clear that the action of incorporating portions of the 1996 Act into the Communications Act means that those portions are subject to the Commission’s general rulemaking powers.¹⁴⁹ “[W]e think that what the later statute contemplates is best determined . . . by the clear fact that the 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence part of, an Act which said that ‘[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.’ [One] cannot plausibly assert that the 1996 Congress was unaware of the general grant of the rulemaking authority contained within the Communications Act. . . .”¹⁵⁰

¹⁴⁴ A&E at 7-8; HBO at 2; MPAA at 3-4; NAB at 4-6; NCTA at 4-5.

¹⁴⁵ H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 183 (1996).

¹⁴⁶ H.R. Conf. Rep. at 184.

¹⁴⁷ See, e.g., 47 U.S.C. § 152(b) (stating that “nothing in this Act shall be construed to apply to or give the Commission jurisdiction with respect to” certain items).

¹⁴⁸ NAB at 7-10.

¹⁴⁹ *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377-378 (1999).

¹⁵⁰ *Id.* at 378 n.5 (1999). The Supreme Court was interpreting the legal effect of general provision in section 201(b) of the Act on the more specific provisions in section 251 and 252, which the Telecommunications Act of 1996 added as amendments to the Communications Act. The language of section 201(b) (set forth in the text) is quite similar to the language in section 4(i) and 303(r).

60. A number of commenters suggest that the difference in treatment in section 713 between closed captioning and video description indicates that Congress did not intend the Commission to adopt video description rules,¹⁵¹ and that this difference precludes the Commission from adopting such rules.¹⁵² Subsections (a)-(e) of section 713 deal with closed captioning. Subsection (a) directs the Commission to conduct an inquiry on closed captioning, and submit a report to Congress, and subsections (b)-(e) include a requirement that the Commission adopt rules, and set forth certain parameters for those regulations. Subsection (f) deals with video description, and as stated above, only requires the Commission to conduct an inquiry and submit a report to Congress. However, as the Supreme Court recently held in resolving similar statutory issues elsewhere in the Communications Act: “There is undeniably a lack of parallelism here, but it seems to us adequately explained by the fact that [one provision] specifically requires the Commission to promulgate regulations implementing that provision, where [a subsection of another provision] does not. It seems to us not peculiar that the mandated regulations should be specifically referenced, where regulations permitted pursuant to the Commission’s [more general] authority are not. In any event, the mere lack of parallelism is surely not enough to displace that explicit authority.”¹⁵³ In other words, the difference in treatment between closed captioning and video description simply means that Congress intended the Commission not to have any discretion on whether to adopt closed captioning rules, but left it to the Commission to decide whether to adopt video description rules. The difference in treatment does not displace the Commission’s more general rulemaking powers, as expressed in sections 4(i) and 303(r). In sum, section 713 does not preclude the Commission from adopting video description rules.

61. *Section 624(f)*. Some commenters also contend that, absent express authority to conduct a rulemaking on video description elsewhere in the Act, section 624(f) of the Act precludes the Commission from adopting video description rules for cable operators.¹⁵⁴ Section 624(f) states that “[a]ny Federal agency . . . may not impose requirements regarding the provision or content of cable services, except as expressly provided in [Title VI].” The U.S. Court of Appeals for the D.C. Circuit has interpreted this section to forbid “rules requiring cable companies to carry particular programming.”¹⁵⁵ The video description rules we adopt today are not content-based, and as such, do not require cable companies (or any other distributor of video programming) to carry particular programming. Rather, our rules simply require that, if a distributor chooses to carry the programming of the largest networks, it must provide a small amount of programming with video description.

62. *First Amendment*. Some commenters argue that requiring video description is inconsistent with the First Amendment, because it compels speech, or otherwise is content-based regulation.¹⁵⁶ Other commenters, however, contend that our rules are content-neutral regulations, similar to time, place, and manner regulations, and under the applicable test, are consistent with the First Amendment.¹⁵⁷ The Supreme Court has held that “[t]he principal inquiry in determining content neutrality, in speech cases

¹⁵¹ A&E at 6-7; DirecTV at 4; MPAA at 3-4; NAB at 6-7; NCTA at 5.

¹⁵² A&E at 6-7; DirecTV at 4; MPAA at 4.

¹⁵³ *Iowa Utilities Bd.*, 525 U.S. at 384-385.

¹⁵⁴ A&E at 8-9; NCTA at 5-6.

¹⁵⁵ *United Video, Inc. v. FCC*, 890 F.2d 1173, 1188 (1989).

¹⁵⁶ C-SPAN at 5-8; Lifetime at 3; MPAA at 10-16; RTNDA at 5-6.

¹⁵⁷ AFB Reply at 2-4; NTVAC Reply at 11, 18-19; WGBH Reply at 10-12.

generally and in time, place or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to free expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."¹⁵⁸ The purpose of our video description rules is to enhance the accessibility of video programming to persons with disabilities, and is not related to content.

63. The fact that our rules will require, as opposed to restrict, speech does not change the analysis.¹⁵⁹ As a number of commenters explain, a mandate to provide video description does not require a programmer to express anything other than what the programmer has already chosen to express in the visual elements of the program.¹⁶⁰ Our rules simply require a programmer to express what it has already chosen to express in an alternative format to enhance the accessibility of the message. As such, our rules are comparable to a requirement to translate one's speech into another language in other contexts.¹⁶¹ A requirement to provide programming with video description is most similar to our existing requirements to provide programming with closed captioning, which, as several commenters point out,¹⁶² has not been challenged on First Amendment grounds. Indeed, the U.S. Court of Appeals for the D.C. Circuit concluded nearly twenty years ago that any requirement to provide programming with closed captioning would not violate the First Amendment.¹⁶³

64. Given that our video description rules are content-neutral regulations, the applicable test for reviewing their constitutionality is whether the regulations promote an important government purpose, and whether they do not burden substantially more speech than necessary.¹⁶⁴ As indicated above, our purpose in adopting our rules is to enhance the accessibility of television programming to persons with visual disabilities. As we observed in the *Notice*, television programming shapes American culture and public opinion in myriad ways, because it is our principal source of news and information, and provides hours of entertainment weekly.¹⁶⁵ Millions of Americans have visual disabilities and have difficulty following the visual elements in television programming, which can be overcome through video description. We believe this is an important government purpose in the context of the First Amendment, and believe that other legislation designed to enhance the accessibility of communications to persons with disabilities supports our conclusion.

¹⁵⁸ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations omitted).

¹⁵⁹ A number of commenters claim that our rules will compel or force speech. A&E at 12-13; C-SPAN at 5-8; Lifetime at 3; MPAA at 8-16; NAB at 10-13; NCTA at 6-7; RTNDA at 5-6.

¹⁶⁰ AFB Reply at 2-4; WGBH Reply at 11-12.

¹⁶¹ For example, NTVAC notes that the District of Columbia courts require eviction notices to be presented in both English and Spanish. NTVAC Reply at 19.

¹⁶² NTVAC Reply at 11; WGBH Reply at 11.

¹⁶³ *Gottfried v. FCC*, 655 F.2d 297, 311 n.54 (1981), *rev'd in part*, 459 U.S. 498 (1983). The Supreme Court decision did not disturb the dictum of the D.C. Circuit Court of Appeals regarding the constitutionality of closed captioning rules.

¹⁶⁴ *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997).

¹⁶⁵ *Notice*, 14 FCC Rcd at 19845, ¶ 1.

65. We also believe that video description will not burden any more speech than necessary. As described above, video description is in effect the translation of the visual elements of programming into another language to provide functional equivalency for the blind. Our rules will require only a limited amount of programming to contain video description. To the extent the video description is distracting to viewers who do not wish to hear it, they can simply listen to the main audio instead of the SAP channel.

66. *Copyright.* Some commenters also suggest that our video description rules are in tension with copyright law.¹⁶⁶ MPAA explains that the video description of a program requires the creation of a second script, which is a derivative work that itself enjoys copyright protection, and that video description could only be undertaken with the consent of the holder of the copyright to the program, for all stages of the production and distribution of the program.¹⁶⁷ WGBH, however, which actually describes programming, states that in more than ten years of doing so, no copyright issues have arisen that prevented it from describing programming.¹⁶⁸ WGBH explains that video description always occurs with the consent of the copyright holder (as does closed captioning), and that copyright holders are willing to permit the video description of their programs because they continue to hold the copyright and the video description adds value to their programs.¹⁶⁹ While MPAA points out that WGBH's apparent success in obtaining the necessary copyright clearances occurred in a voluntary environment,¹⁷⁰ we believe that the limited nature of our video description rules does not change this environment in such a dramatic fashion that copyright problems will become an obstacle for those responsible to provide video description to in fact do so. Rather, we envision copyright holders and distributors working as NTVAC suggests:¹⁷¹ just as a broadcast network, in negotiating the rights to air a movie, may request copyright holders to change a program in order to comply with indecency restrictions, so may it request copyright holders to provide video description of the program. Should the distributors that are subject to our rules be unable to obtain the necessary clearances from copyright holders, they are free to bring those difficulties to our attention, and seek appropriate relief.

X. CONCLUSION

67. Today we adopt rules to enhance the accessibility of the important medium of television to persons with visual disabilities. We do not impose an undue burden on the programming production and distribution industries. Our rules will require only the largest broadcast stations and MVPDs – which provide television programming to the majority of the public – to provide a limited amount of programming with video description. These broadcast stations and MVPDs will provide programming with video description on the largest networks they carry – which provide the most watched television programming. Our rules will thus create a benefit to the greatest number of persons with visual disabilities but at the same time impose a cost on the least number of broadcast stations and MVPDs. As the industry and the public gain greater experience with video description, we hope that more broadcast stations and MVPDs will

¹⁶⁶ Lifetime at 3-4; MPAA at 16-22; NAB at 23-24.

¹⁶⁷ MPAA at 16.

¹⁶⁸ WGBH at 18-19.

¹⁶⁹ WGBH at 19, 32-34.

¹⁷⁰ MPAA Reply at 25-26.

¹⁷¹ NTVAC at 15-16.

provide video description, and those that do so will provide more hours of programming with video description.

XI. ADMINISTRATIVE MATTERS

68. This document is available to individuals with disabilities requiring accessible formats (electronic ASCII text, Braille, large print, and audiocassette) by contacting Brian Millin at (202) 418-7426 (voice), (202) 418-7365 (TTY), or by sending an email to access@fcc.gov.

69. Final Paperwork Reduction Act Analysis. This *Report and Order* contains information collection requirements that the Commission is submitting to the Office of Management and Budget requesting clearance under the Paperwork Reduction Act of 1995.

70. Final Regulatory Flexibility Certification. Pursuant to the Regulatory Flexibility Act of 1980, as amended, 5 U.S.C. § 601 *et seq.*, the Commission's Final Regulatory Certification in this *Report and Order* is attached as Appendix C.

71. Additional Information. For additional information, please contact Eric J. Bash, Policy and Rules Division, Mass Media Bureau, (202) 418-2130 (voice), (202) 418-1169 (TTY), or ebash@fcc.gov, or Meryl S. Icove, Disabilities Rights Office, Consumer Information Bureau, (202) 418-2372 (voice), 418-0178 (TTY), or micove@fcc.gov.

XII. ORDERING CLAUSES

72. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, 310, and 713 of the Communications Act, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, 310, 613, Part 79 of the Commission's rules are amended as set forth in Appendices B and C.

73. IT IS FURTHER ORDERED that the rules set forth in Appendix B that revise section 79.2 of the Commission's rules, 47 C.F.R. § 79.2, SHALL BECOME EFFECTIVE upon approval from the Office of Management and Budget, and the rules set forth in Appendix B that add section 79.3 to the Commission's rules, 47 C.F.R. § 79.3, SHALL BECOME EFFECTIVE on April 1, 2002.

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

75. IT IS FURTHERED ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A**COMMENTS**

A&E Television Networks, Inc. (A&E)
Adaptive Environments
Akamine, Anthony (Akamine)
American Council of the Blind (ACB)
American Foundation for the Blind (AFB)
Association of America's Public Television Stations (APTS)
Braille Institute Library Services (BILS)
Brandt, Dorothy
C-SPAN and C-SPAN 2 (C-SPAN)
Clive, Alan (Clive)
Council of Organizational Representatives (COR)
DIRECTV, Inc. (DirecTV)
Enders, William H.
Feingenblatt, Dr. R.I.
Game Show Network, L.P. (GSN)
Grupo Televisa, S.A. (GT)
Indiana Protection and Advisory Services (IPAS)
International Cable Channels Partnership (ICCP)
Massachusetts Assistive Technology Partnership (MATP)
Metropolitan Washington Ear (MWE)
Motion Picture Association of America (MPAA)
Narrative Television Network (NTN)
National Association of Broadcasters (NAB)
National Cable Television Association (NCTA)
National Federation of the Blind (NFB)
National Television Video Access Coalition (NTVAC)
QVC, Inc. (QVC)
R.P. International (RPI)
Satellite Broadcasting and Communications Association (SBCA)
Short, Charles and Maureen
Short, Charles Jr.
Telecommunications for the Deaf, Inc. (TDI)
WGBH Educational Foundation (WGBH)
Wireless Communications Association International, Inc. (WCA)

REPLY COMMENTS

A&E Television Networks (AETN Reply)
Alabama Council of the Blind (Alabama Council)
Allen, Seville (Allen)
American Council of the Blind (ACB Reply)
American Foundation for the Blind (AFB Reply)
Baker, Rob (Baker)
Benson, Stephen (Benson)
Blinded Veterans Association (BVA)
Brandt, Dorothy (Brandt Reply)
Brown, Deborah (Brown)

Carcione, Tracy (Carcione)
Chong, Curtis (Chong)
Chorney, Marla (Chorney)
Cumings, Cheryl (C. Cumings)
Cumings, Thomas (T. Cumings)
DIRECTV, Inc. (DirecTV Reply)
Dunnam, Jennifer (Dunnam)
Elliott, Peggy Pinder (Elliott)
Freeman, Michael (Freeman)
Gardner, Ronald J. (Gardner)
Grupo Televisa, S.A. (Grupo Televisa Reply)
Home Box Office (HBO)
Jacobson, Shawn (Jacobson)
Koeng, Sheila (Koeng)
League of United Latin American Citizens and the National Council of La Raza (LULAC)
Lifetime Entertainment Services (Lifetime)
Maine Independent Living Services, Inc. (MILS)
Massachusetts Association for Parents of the Visually Impaired (MAVPI)
Mayo, Shawn (Mayo)
Motion Picture Association of America (MPAA Reply)
Narrative Television Network (NTN Reply)
National Association of Broadcasters (NAB Reply)
National Cable Television Association (NCTA Reply)
National Federation of the Blind of Colorado (NFB-CO)
National Federation of the Blind of Maryland (NFB-MD)
National Federation of the Blind of Ohio (NFB-OH)
National Television Video Access Coalition (NTVAC Reply)
Oliver, Philip (Oliver)
Pease, J.M. (Pease)
Pietrolungo, Al
QVC, Inc. (QVC Reply)
Radio-Television News Directors Association (RTNDA)
RPI International, Inc. (RPI Reply)
Sanders, Judy (Sanders)
Sanfilippo, John (Sanfilippo)
Scanlan, Joyce (Joyce Scanlan)
Scanlan, Thomas
Sutton, Jennifer
VIPs of Attleboro (VIPs)
WGBH Educational Foundation (WGBH Reply)
Wales, Nathanael (Wales)
Walhof, Ramona (Walhof)
Walker, Barbara (Walker)
Weather Channel, Inc. (Weather Channel)
West Virginia Department of Education and the Arts, Division of Rehabilitation Services (WV Dep't of Education and the Arts)
Zweifel, Clyde (Zweifel)

APPENDIX B**RULES**

Part 79 of Title 47 of the U.S. Code of Federal Regulations is amended by revising it to read as follows:

Part 79--CLOSED CAPTIONING OF VIDEO PROGRAMMING

1. The authority citation for Part 79 is revised to read as follows:

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

2. The title of Part 79 is revised to read as follows:

Part 79--CLOSED CAPTIONING AND VIDEO DESCRIPTION OF VIDEO PROGRAMMING

3. Section 79.2 is amended by revising paragraph (a) (1) and (b) (1) and (3) to read as follows:

§ 79.2 Accessibility of Programming Providing Emergency Information.

- (a) Definitions.

(1) For purposes of this section, the definitions in Sections 79.1 and 79.3 apply.

* * * * *

- (b) Requirements for accessibility of programming providing emergency information.

(1) Video programming distributors must make emergency information, as defined in paragraph (a) of this section, accessible as follows:

(i) Emergency information that is provided in the audio portion of the programming must be made accessible to persons with hearing disabilities by using a method of closed captioning or by using a method of visual presentation, as described in § 79.1 of this part;

(ii) Emergency information that is provided in the video portion of a regularly scheduled newscast, or newscast that interrupts regular programming, must be made accessible to persons with visual disabilities; and

(iii) Emergency information that is provided in the video portion of programming that is not a regularly scheduled newscast, or a newscast that interrupts regular programming, must be accompanied with an aural tone.

(2) * * *

- (3) Video programming distributors must ensure that:

(i) Emergency information should not block any closed captioning and any closed captioning should not block any emergency information provided by means other than closed captioning; and

(ii) Emergency information should not block any video description and any video description provided should not block any emergency information provided by means other than video description.

* * * * *

4. Part 79 is amended by adding new Section 79.3 to read as follows:

§ 79.3 Video description of video programming.

(a) Definitions. For purposes of this section the following definitions shall apply:

(1) Designated Market Areas (DMAs). Unique, county-based geographic areas designated by Nielsen Media Research, a television audience measurement service, based on television viewership in the counties that make up each DMA.

(2) Second Audio Program (SAP) channel. A channel containing the frequency-modulated second audio program subcarrier, as defined in, and subject to, the Commission's OET Bulletin No. 60, Revision A, "Multichannel Television Sound Transmission and Processing Requirements for the BTSC System," February 1986.

(3) Video description. The insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue.

(4) Video programming. Programming provided by, or generally considered comparable to programming provided by, a television broadcast station that is distributed and exhibited for residential use.

(5) Video programming distributor. Any television broadcast station licensed by the Commission and any multichannel video programming distributor (MVPD), and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission.

(b) The following video programming distributors must provide programming with video description as follows:

(1) Commercial television broadcast stations that are affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC), as of September 30, 2000, and that are licensed to a community located in the top 25 DMAs, as determined by Nielsen Media Research, Inc. for the year 2000, must provide 50 hours of video description per calendar quarter, either during prime time or on children's programming;

(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;

(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; and

(4) Multichannel video programming distributors (MVPDs) of any size:

(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; 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.

(c) Responsibility for and determination of compliance.

(1) The Commission will calculate compliance on a per channel, calendar quarter basis, beginning with the calendar quarter April 1--June 30, 2002.

(2) Programming with video description will count toward a broadcaster's or MVPD's minimum requirement for a particular quarter only if that programming has not previously been counted by that broadcaster or MVPD towards its minimum requirement for any quarter.

(3) Once an entity has aired a particular program with video description, it is required to include video description with all subsequent airings of that program, unless the entity uses the SAP channel in connection with the program for a purpose other than providing video description.

(4) In evaluating whether a video programming distributor has complied with the requirement to provide video programming with video description, the Commission will consider showings that any lack of video description was *de minimis* and reasonable under the circumstances.

(d) Procedures for exemptions based on undue burden.

(1) A video programming distributor 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.

(2) The petitioner must support a petition for exemption with sufficient evidence to demonstrate that compliance with the requirements to provide programming with video description would cause an undue burden. The term "undue burden" means significant difficulty or expense. The Commission will consider the following factors when determining whether the requirements for video description impose an undue burden:

(i) The nature and cost of providing video description of the programming;

(ii) The impact on the operation of the video programming distributor;

(iii) The financial resources of the video programming distributor; and

-
- (iv) The type of operations of the video programming distributor.
- (3) In addition to these factors, the petitioner must describe any other factors it deems relevant to the Commission's final determination and any available alternative that might constitute a reasonable substitute for the video description requirements. The Commission will evaluate undue burden with regard to the individual outlet.
- (4) The petitioner must file an original and two (2) copies of a petition requesting an exemption based on the undue burden standard, and all subsequent pleadings, in accordance with § 0.401(a) of this chapter.
- (5) The Commission will place the petition on public notice.
- (6) Any interested person may file comments or oppositions to the petition within 30 days of the public notice of the petition. Within 20 days of the close of the comment period, the petitioner may reply to any comments or oppositions filed.
- (7) Persons that file comments or oppositions to the petition must serve the petitioner with copies of those comments or oppositions and must include a certification that the petitioner was served with a copy. Parties filing replies to comments or oppositions must serve the commenting or opposing party with copies of such replies and shall include a certification that the party was served with a copy.
- (8) Upon a showing of good cause, the Commission may lengthen or shorten any comment period and waive or establish other procedural requirements.
- (9) Persons filing petitions and responsive pleadings must include a detailed, full showing, supported by affidavit, of any facts or considerations relied on.
- (10) The Commission may deny or approve, in whole or in part, a petition for an undue burden exemption from the video description requirements.
- (11) During the pendency of an undue burden determination, the Commission will consider the video programming subject to the request for exemption as exempt from the video description requirements.
- (e) Complaint procedures.
- (1) A complainant may file a complaint concerning an alleged violation of the video description requirements of this section by transmitting it to the Consumer Information Bureau at the Commission by any reasonable means, such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, audio-cassette recording, and Braille, or some other method that would best accommodate the complainant's disability. Complaints should be addressed to: Consumer Information Bureau, 445 12th Street, SW, Washington, DC 20554. A complaint must include:
- (i) the name and address of the complainant;
- (ii) the name and address of the broadcast station against whom the complaint is alleged and its

- call letters and network affiliation, or the name and address of the MVPD against whom the complaint is alleged and the name of the network that provides the programming that is the subject of the complaint;
- (iii) a statement of facts sufficient to show that the video programming distributor has violated or is violating the Commission's rules, and, if applicable, the date and time of the alleged violation;
- (iv) the specific relief or satisfaction sought by the complainant; and
- (v) the complainant's preferred format or method of response to the complaint (such as letter, facsimile transmission, telephone (voice/TRS/TYY), Internet e-mail, or some other method that would best accommodate the complaint's disability).
- (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 to either shorten or lengthen the time required for responding to complaints in particular cases.
- (3) The Commission will review all relevant information provided by the complainant and the video programming distributor and will request additional information from either or both parties when needed for a full resolution of the complaint.
- (i) The Commission may rely on certifications from programming suppliers, including programming producers, programming owners, networks, syndicators and other distributors, to demonstrate compliance. The Commission will not hold the video programming distributor responsible for situations where a program source falsely certifies that programming that it delivered to the video programming distributor meets our video description requirements if the video programming distributor is unaware that the certification is false. Appropriate action may be taken with respect to deliberate falsifications.
- (ii) If the Commission finds that a video programming distributor has violated the video description requirements of this section, it may impose penalties, including a requirement that the video programming distributor deliver video programming containing video description in excess of its requirements.
- (f) Private rights of action are prohibited. Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

APPENDIX C

FINAL REGULATORY FLEXIBILITY ACT CERTIFICATION

The Regulatory Flexibility Act (RFA)¹ 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."² The *Notice of Proposed Rulemaking (Notice)*³ published in this proceeding proposed rules to provide video description on video programming in order to ensure the accessibility of video programming to persons with visual impairments.

In an abundance of caution, the Commission published an Initial Regulatory Flexibility Analysis (IRFA) in the *Notice*,⁴ 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 general comments received that raised concerns about the impact of the proposed rules on small entities.

The rules adopted in this *Report and Order* requiring stations to provide video descriptions on video programming will affect at most five small broadcasters, which are affiliates of the top four networks in the top 25 Nielsen Designated Market Areas, in the amount of \$5,000 to \$25,000 each. We recognize that the upper end of the possible economic impact might constitute a significant impact for some small broadcasters, but, as noted, this impact will reach, at most, five entities, and we have provided an exemption (upon application) for those small entities for which the cost is burdensome. The pass through of programming will have no significant economic impact on small entities because they are required to pass through programming with video description only if they already have the technical capability necessary to do so. The Commission believes that the emergency notification requirement will have a negligible effect on small entities as well. In addition, if this requirement should prove burdensome to small entities, they may apply for an exemption.

The Commission therefore certifies, pursuant to the RFA, that the rules adopted in the present *Report and Order* will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Report and Order*, including a copy of this final certification, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Report and Order*, including a copy of this final certification, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, a copy of the *Report and Order* and this final certification will be published in the Federal Register. *See* 5 U.S.C. § 605(b).

SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS

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

² *See* 5 U.S.C. § 605(b).

³ *See Notice of Proposed Rule Making*, In the Matter of Implementation of Video Description of Video Programming, MM Docket No. 99-339, 14 FCC Rcd 19845 (1999) (*Notice*).

⁴ *See id.* at 19862-69.

In re: Report and Order, In the Matter of Implementation of Video Description of Video Programming, MM Doc. No. 99-339

All Americans – including those with visual disabilities – should have meaningful access to video programming. That is the noble goal of this Report and Order. In celebrating the tenth anniversary of the Americans with Disabilities Act, we all should strive to help those with disabilities participate fully in the cultural fabric of our society. Moreover, this Commission has a legal and moral responsibility to ensure that all Americans have access to emergency information, especially concerning their health and safety.

While I would have preferred more explicit delegation from Congress, I believe that Congress did not preclude us from taking the steps that we have adopted today to make programming available to those with visual disabilities. Also, while on balance I support this item, I have significant reservations regarding our implementation of these well-intentioned goals. The item reflects what was a spotty record in many respects, especially concerning the cost, technical feasibility, and demand for this service. But by limiting the application of our entertainment programming requirements to only the largest program providers and only the largest television stations and cable systems, and by requiring only a modest number of hours to be video described, we have an opportunity to gain valuable experience and answers to these questions before we undertake any expansion of these requirements.

Emergency Information

This Order requires broadcasters and multichannel video programming distributors (MVPDs) to make emergency information accessible to those who have visual disabilities -- an action I unequivocally support. The Commission's responsibility is to ensure accessibility to communications, "to all people of the United States" for the purpose of "promoting safety of life and property."¹ The Order we adopt today addresses this fundamental tenet of the Telecommunications Act by requiring that all broadcasters and MVPDs which provide emergency information make the critical details of that information accessible to those with visual disabilities. In contrast to the record on video entertainment description, the record reflects unanimous agreement that meaningful access to emergency information is vital. I am especially pleased that we have expedited the effective date of this requirement.

The Order begins but does not fully address the needs expressed by the visual disabilities community for access to emergency information. For example, consumers will still find it frustrating to hear a tone which precedes written weather, news, or sports information scrolled across the bottom of the television screen, but will not have oral access to that information. In addition, the National Federation of the Blind notes that many new Secondary Audio Programming (SAP)-equipped televisions require navigating menus to access the SAP channel but that such menus are visual and therefore inaccessible to those with visual disabilities.² The Commission should use its good offices to bring together representatives of the consumer electronics industry and advocates for those with visual disabilities to generate practical solutions to this problem.

¹ 47 U.S.C. § 151.

² See Letter from Bonnie J.K. Richardson, Vice President, Trade and Federal Affairs, Motion Picture Association of America, to Magalie Roman Salas, Secretary, Federal Communications Commission, MM Doc. No. 99-339, at 1 (July 13, 2000).

Video Programming Description

The issues raised by the video entertainment description requirements of the Order are more problematic. Commenters raised legitimate questions about the demand for, cost, and feasibility of video description. To what extent will visually impaired consumers avail themselves of video described prime time and children's programming? Do many even have access to SAP-enabled television receivers? Does it make sense to video describe all categories of programming? Will broadcasters and MVPDs be forced to supplant Spanish language programming on the SAP channel with video description? These questions are not fully answered.

Every regulation that government imposes has a cost associated with it. Inevitably, consumers pay that cost. We therefore must ensure that any requirements we impose are as narrowly tailored as are necessary to address the public need. The limited rollout of video description that we order today will enable us to assess the efficacy of, and consumer demand for, this service. We will carefully evaluate that experience before expanding upon the requirements adopted today.

Conclusion

We are all mindful of our responsibility to follow the law in carrying out our duties, including our efforts to ensure that all Americans have meaningful access to video programming. While I have concerns about the record in this proceeding, the limited scope of our rules will enable us to assess the efficacy and consumer demand for descriptive video service before we entertain further expansion.

**STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH,
CONCURRING IN PART AND DISSENTING IN PART**

**In the Matter of Implementation of Video Description of Video Programming,
MM Docket No. 99-339**

It is with regret that I dissent from the portion of this Order adopting rules requiring video description. I understand well the concerns of those who support this item, and it is more than apparent to me that their views are deeply and personally held. At the same time, however, such factors cannot trump the clear limits on our statutory authority. In short, as much as I might like to support this item in its entirety, I am unable to read the Communications Act as authorizing rules requiring video description.¹

I. Statutory Authority

In the Notice of Proposed Rulemaking in this matter, we specifically sought comment on the question whether the Commission possesses statutory authority to require broadcasters, cable operators, and satellite companies to provide video description. *See* 14 FCC Rcd. 19845 at para. 39 (1999). I have reviewed carefully the comments on this issue and had hoped there to find persuasive arguments for authority. I can only conclude that the legal arguments in favor of jurisdiction can be described as weak, at best.

The argument for authority here is grounded in the theory of ancillary jurisdiction under sections 1 and 4(i) of the Communications Act. *See Order* at paras. 54-55. While it is true that the Supreme Court and the D.C. Circuit have upheld the Commission's exercise of that type of jurisdiction, this case is distinguishable from those in one very important regard: in none of those cases had Congress expressly addressed the Commission's duties with respect to the regulated area at issue. For example, in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), there were no preexisting statutory provisions regarding the Commission's oversight of the cable industry. Similarly, in *Rural Telephone Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988), Title 47 was silent on the question of federal funding for universal service.

Here, by contrast, Congress has clearly delineated our duties with respect to video description. In section 713(f) of the Act, Congress directed the Commission to commence an inquiry and issue a report on the matter. This has been done; there is no more authority that can be wrung out of that section. Indeed, the fact that section 713(f) requires a report and no more suggests that Congress was not prepared to, and purposefully intended not to, go any further. Juxtaposition of this section with the contemporaneously enacted one concerning closed captioning, *see* section 713(b), only strengthens this inference of purposeful limitation. That section, which requires both a report *and* a rulemaking on closed captioning, makes clear that Congress understood the difference between a study and a rulemaking and that Congress knew how to take the additional step of mandating rules regarding television services for the disabled.²

¹ I concur, however, in the adoption of the emergency information rules. I do so on the theory of jurisdiction laid out in Part II of the separate statement of Commissioner Powell.

² If independent confirmation of these textual implications were necessary, one need only briefly review the legislative history of section 713(f). That history shows that Congress originally included and then, in conference, removed a rulemaking requirement from the section. *See Telecommunications Act of 1996*, S. Conf. Rep. 104-230 at 411 ("The [conference] agreement deletes the House provision referencing a Commission rulemaking with respect to video description."). This Commission today adopts rules that Congress consciously chose not to require.

(continued....)

To say that section 713(f) does not *prohibit* rules requiring video description, as the Order does, *see R&O* at para. 58, is not enough to *establish* jurisdiction here.³ As the item itself acknowledges, that the provision does not authorize such rules, and so can provide no affirmative support for this action. Further, as discussed above, the “negative pregnant” of its text is that anything more than the issuance of a report would be in excess of that authority.

The Commission is not long delayed by these statutory points. On its view of administrative law, Congress must expressly prohibit the Commission from going further than a particular provision authorizes it to go in order to make the textual limits of any provision stick. In an administrative scheme based on delegated powers -- where the Commission possesses only those powers granted by Congress, not all powers except those forbidden by Congress -- this approach to jurisdiction is clearly erroneous.

II. Comments Regarding the Rules

Notably, not all those in the blind community are supportive of these rules. Of course, as with all people grouped together on the basis of a common physical, immutable trait, blindness is no guarantor of monolithic thinking on matters of public policy. In fact, some of the philosophical divisions among the blind on questions such as education and assimilation are profound and have been so for many, many years.

Yet one would have to be particularly astute, even psychic, to glean this fact from the Order. *See R&O* at paras. 4 & n. 11, 38. While discussing extensively the comments from groups for the blind in support of video description, no mention is made of the express opposition of the National Federation of the Blind (NFB), the largest and most historically significant force of and for the blind.⁴ I fear that because NFB’s philosophy of blindness and of the way its members can best achieve their life goals differs from that held by other disability groups, as well as some people at the Commission, its views have not been given the respect they deserve. In other words, I am concerned about the possibility that because NFB does not believe what others think they should about what is best for its members, it has been marginalized in this discussion.⁵ I thus intend to air NFB’s opinions fully.

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³ With respect to cable operators, there may indeed be a provision of the Communications Act that prohibits video description rules. Section 624(f) states that no federal agency may “impose requirements regarding the provision or content of cable services, except as expressly provided in [Title VI].” Whether or not video description rules concern “content,” they surely regulate the “provision” of cable services. To be sure, *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989), contains some broad dictum regarding the overall effect of section 624(f). But that case did not squarely address, and no party appeared to argue, the meaning of the provision prong of the statutory language.

⁴ NFB was founded in 1940 and has over 50,000 members, with affiliates in all 50 fifty states and over 700 local chapters. *See* www.NFB.org. According to a web site dedicated to serving the blind, NFB “has become by far the most significant force in the affairs of the blind today.” <http://www.blind.net/bwholead.htm> (page entitled “Who Are the Blind, Who Lead the Blind”). Contrary to the suggestion of some in this proceeding, NFB is not some sort of outlier in the blind community, but rather the oldest and largest group composed of and for the blind.

⁵ Generally, NFB believes that with adequate education and opportunity, the blind can participate in society as well as any sighted person; in short, they wish to be treated like any other person, no better and no worse. Often, this philosophy results in NFB’s taking a position against what it perceives as (continued....)

In its comments, NFB states unequivocally: “We oppose the imposition of audio description as a federal mandate.” Comments of NFB at 1 (filed Feb. 23, 2000). As to the level of actual demand for this service among the blind, they remark: “Some like the service. . .; some dislike it; many are frankly indifferent.” *Id.* They further describe the blind population as “ambivalent” about video description. *Id.* This is so, they say, because of differences between those who are born blind and those who lose their vision later in life. For the congenitally blind, the description of events in essentially visual terms – *i.e.*, “the woman wore a red dress” – provides them no benefit whatsoever. And on a philosophical level, NFB argues that “undue emphasis on entertainment as an issue for the blind draws attention away from the real and cruel forms of economic discrimination and exclusion of blind people from normal integration into society.” *Id.* at 2.

This potential lack of demand for the service creates a mismatch between the means and ends of the regulations. As an initial matter, it is unclear whether these rules benefit the targeted population in general. And if the benefits of video description accrue largely to those who become blind later in life and those with diminished vision due to aging (not the congenitally blind), then it makes little sense to allow complete fulfillment of the video description requirement with children’s programming. *See R & O* at para. 36. The bulk of those with visual disabilities consist of an older population, not the audience for children’s television.

This means-ends misfit undermines the legitimacy of these rules under a potential First Amendment analysis. Even if one accepts as permissible the Commission’s content-based selection of children’s programming as a category for description, the regulations’ non-furtherance of the interests of the primary beneficiaries of the rules is a vexing problem. Furthermore, when a large segment of the very people that the Commission purports to help actively opposes these regulations, one wonders why the Commission is so insistent upon pushing the statutory envelope.

III. Conclusion

Video description may be a wonderful idea whose time has come; its current absence in programming may indeed represent the sort of true market failure that justifies government intervention;

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special or preferential policies for the blind. For instance, the NFB supported the Americans with Disabilities Act on the ground that it include what is now section 501 of that Act, which states that “[n]othing in this Act shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.” NFB’s theory was “that, although blind people should have help when needed, imposed help can be and is one of the most degrading parts of the discrimination we suffer as a group.” <http://www.blind.net/bg600010.htm> (page entitled “The Right to Refuse Help”). For a full exposition of NFB’s principles, *see* <http://NFB.org>.

and its benefits to society may outweigh its costs. But those assertions, even if true, cannot overcome the threshold question of statutory authority for this Commission to act in the area. Contrary to the assumption of this item – that Congress must prohibit a rulemaking before we lack authority to undertake it -- this Commission has only those powers affirmatively vested in it by Congress. However compelling the underlying subject matter, we may not transgress the larger scheme of laws that governs this agency's actions.

**SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL,
CONCURRING IN PART AND DISSENTING IN PART**

In The Matter of Implementation of Video Description of Video Programming, MM Docket No. 99-339,
Report and Order

This item represents another worthy effort by the Commission to improve the disability community's access to communications services. Proudly, this is an area that has received significant attention by both Congress and this Commission, remedying many years of neglect. I applaud the government's continuing focus on these issues.

The item is noteworthy, however, for another reason that I find much less laudable. Though for a very worthy purpose, the Commission yet again is extending its reach beyond a specific statutory provision by availing itself of ancillary jurisdiction under the broad provisions of sections 4(i) and 303(r) of the Communications Act.¹ While the Commission certainly may act on ancillary authority in the absence of a specific statutory provision, it cannot and should not do so where Congress has spoken specifically on an issue or where there is a clear contrary congressional intention. Because I find Congress spoke to video description in section 713(f) of the Act, and purposely limited the Commission to studying the issue and reporting to Congress, I dissent to the adoption of video description rules under ancillary jurisdiction. I do, however, support that portion of the *Order* that provides for emergency text information in audio form.

I. The Statute Does Not Allow For Video Description Rules

A. *The Text of the Statute Does Not Authorize Rules*

Congress comprehensively considered the issue of access to video programming by the blind and deaf communities in drafting the Telecommunications Act of 1996. The result was section 713, entitled "Video Programming Accessibility." 47 U.S.C. § 613. The provisions contained in section 713(a)-(e) deal with closed captioning for the deaf. They direct the Commission to "prescribe such regulations as are necessary" to implement closed captioning.²

Section 713(f) addresses video description for the visually impaired, a service that is roughly analogous to closed captioning.³ In stark contrast to closed captioning, Congress did not mandate video

¹ Section 4(i) reads, "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Section 303(r) of the Act provides, in pertinent part, "the Commission from time to time, as public convenience, interest, or necessity requires shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. . ." 47 U.S.C. § 303(r).

² The Commission did issue closed captioning rules in 1997. *See* In the Matter of Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Accessibility of Emergency Programming, MM Docket No. 95-17, *Report and Order*, 13 FCC Rcd 3272 (1997), *on recon.*, 13 FCC Rcd 19973 (1998).

³ Video description "means the insertion of audio narrated *descriptions* of a television program's key visual elements into natural pauses between the program's dialogue." 47 U.S.C. § 613(g) (emphasis added). Closed captioning is "[t]he visual *display* of the audio portion of video programming contained in line 21 of the (continued....)

description, nor did it direct the Commission to prescribe regulations.⁴ Congress only directed the Commission to conduct an inquiry on video description and to report its findings to Congress.⁵ When subsections (a) and (f) of section 713 are viewed together (one mandating rules and one not), it is fairly plain that by negative implication Congress did not wish to legally require video description, but instead it wished to consider the matter more fully, after receiving a report from the FCC.⁶ Indeed, in 1996, and again in 1998, the FCC did issue reports, but Congress elected not to take action. *See* n.5 *supra*.

Yet, as evidenced by its *Order* today, the majority is unfazed and undeterred by the negative implication of section 713(f) and the stark contrast with closed captioning. In its view, Congress may not have directed the FCC to draft rules, but it did not tell them they could not either. The majority insists that it can advance video description rules under section 4(i)'s general authorization to "make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i).⁷ This sweeping authority is invoked to carry out the equally broad purpose in section 1 of the Communications Act to "make available, so far as possible, to all the people of the United States . . . [a] world-wide wire and radio communication service." 47 U.S.C. § 151.

Unquestionably, Congress conferred very broad authority on the Commission under section 4(i), and the courts have sanctioned the exercise of that authority on occasion. *See, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *Rural Tel. Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988). But this broad residual authority is not unrestrained. *See United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). It surely can be supplanted by subsequent, more specific acts of Congress. If, as is the case here, Congress considers and speaks directly to an issue, the Commission should be bound to that specific judgment and not chart a different course that it prefers, riding section 4(i).

The majority would probably agree with this canon of statutory interpretation on its face.

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vertical blanking interval (VBI) pursuant to the technical specifications set forth in [the Commission's rules] or the equivalent thereof." 47 C.F.R. § 79.1(a)(4) (1999) (emphasis added).

⁴ The juxtaposition is quite telling. *See National Rifle Assoc. v. Reno*, 2000 WL 800830 (D.C. Cir. July 11, 2000), at *7 ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. U.S.*, 464 U.S. 16, 23 (1983)).

⁵ The Commission has in fact reported to Congress on two occasions. In both instances, Congress neither considered nor took action on video description. *See, e.g., In the Matter of Closed Captioning and Video Description of Video Programming*, MM Docket No. 95-176, *Report*, 11 FCC Rcd 19214, 19222, 19271 (1996) (report recommended "the best course is for the Commission to continue to monitor the deployment of video description and the development of standards for new video technologies that will afford greater accessibility of video description"); *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, *Fourth Annual Report*, 13 FCC Rcd 1034 (1998).

⁶ The specific criteria for the report suggests Congress wanted the Commission to study at a detailed level the issues surrounding video description, in order for it to have a more substantial record on which to consider the propriety of taking government action. The report had to include an assessment of the "appropriate methods and schedules for phasing video descriptions into the marketplace, technical and quality standards for video description, a definition of programming for which video descriptions would apply, and other technical and legal issues that the Commission deemed appropriate." 47 U.S.C. § 613(f).

⁷ The Commission also cites section 303(r), which is nearly identical to 4(i). *Compare* 47 U.S.C. § 303(r) *with* 47 U.S.C. § 154(i).

Nonetheless, it seems to think that even where Congress considers the very same issue and promulgates a statutory directive, it can exceed the scope of that directive if Congress fails to specifically prohibit the Commission from acting. Here, Congress comprehensively considered the issue of video description. It passed a law directing the Commission to conduct an inquiry and submit a report of its findings. It did not authorize the Commission to issue rules. But, because Congress did not specifically say the FCC could not issue rules, the majority feels free to do so under its general authority.

The majority's approach is breathtaking, for it suggests the Commission can favor its preferences over those of Congress (as long as its actions are within the expansive scope of section 1), if Congress fails to affirmatively prohibit it from acting. Apparently, in the majority's view, it is not enough for Congress to simply pass a law of limited scope. This view turns the notion of a delegated agency on its head. The Commission can act only where it is *authorized* to do so. It is not free to act unless expressly *prohibited* from doing so. See *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161 (4th Cir. 1998) ("We begin with the basic proposition that agency power is 'not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'") (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14) (1976)). I recognize that Congress granted the Commission its broad authority in section 4(i). But, in doing so it surely did not obligate itself in the future to the Herculean task of specifically prohibiting any possible action by the Commission when it crafts new laws in any area within the scope of section 1. Congress cannot possibly, nor should it be required to, proscribe FCC action every time a legislative enactment falls in the scope of "making available to all the people of the United States a wire and radio service."⁸ In section 713(f) Congress told the Commission to produce a report. The completion of that task should have ended the matter, unless and until Congress acted further.

B. *The Legislative History Squarely Shows Congress Rejected Giving The FCC Discretion to Promulgate Rules.*

I understand the impulse not to accept the negative inference of section 713(f)'s reporting requirement (though it is more troubling when compared to mandatory closed captioning rules). One might accept, as does the majority, that section 713(f) is insufficiently clear, or specific, to rob the Commission of section 4(i) authority. But, a review of the legislative history closes the door on any suggestion that Congress was not adverse to FCC mandated rules, though unwilling to mandate video description itself.

In the 103rd and 104th Congresses, both houses introduced telecommunications bills. In the House of Representatives, H.R. 3636, section 206, as reported out of the subcommittee, *mandated* video description.⁹ In full committee, Congressman Carlos Moorhead of California offered an amendment (which was adopted) that allowed the FCC to promulgate video description rules at its *discretion*, rather than statutorily requiring such rules. The amendment read:

Following the completion of such inquiry, the Commission *may adopt* regulation it deems necessary to promote the accessibility of video programming to persons with visual impairments.¹⁰

⁸ Section 1 of the Communications Act of 1934, as amended (paraphrased).

⁹ See H.R. 3636, § 206 (the Telecommunications and Finance subcommittee draft mandated that the Commission "*shall*, within 1 year after enactment of the [video programming accessibility] section, *prescribe* such regulations as are necessary to ensure that all video programming is fully accessible to individuals with disabilities through the provision of closed captioning service *and video description*." (emphases added).

¹⁰ Amendment no. 8, offered by Congressman Carlos Moorhead, to H.R. 3636 in March 16, 1994 Full (continued....)

The amended bill was reintroduced in the 104th Congress as H.R. 1555, and passed by the House of Representatives.¹¹ The Senate version of this bill, S. 652, directed the Commission only to submit a report to Congress and did not contain language mandating video description, or delegating discretion to the FCC to do so through a rulemaking.¹² Both versions of the bill, however, mandated closed captioning and specifically directed the Commission to implement the mandate by promulgating closed caption rules.

The Senate and House bills ultimately were sent to the conference committee to resolve conflicting provisions. One of which, of course, was the discrepancy on video description, with the House bill allowing the FCC to promulgate video description rules at its discretion and the Senate bill only authorizing a report. When the conference agreement was announced the committee had stricken the House language in favor of the Senate's reporting requirement:

The conference agreement adopts the House provision with modifications which are incorporated as new section 713 of the Communications Act. The agreement deletes the House provision referencing a Commission rulemaking with respect to video description.¹³

This version of the bill ultimately was passed by the Congress and signed into law by the President.¹⁴

By the chronology of the legislative drafting and the actions of the conference, it is abundantly clear that Congress specifically considered granting discretionary authority to the FCC to promulgate video description rules and elected not to do so. It is well-established that "[a] contrast in statutory language is 'particularly telling' when it represents a decision by a conference committee to resolve a dispute in two versions of a bill, and the committee's choice is then approved by both Houses of Congress." *See Goncalves v. Reno*, 144 F.3d 110, 132 (1st Cir. 1998) (citation omitted). *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199-200 (1974) (deletion of a provision by a Conference Committee "militates against a judgment that Congress intended a result that it expressly declined to enact"). I am at a complete loss to understand how the Commission can hold that section 713(f), though not mandating rules, nonetheless permits the Commission the discretion to put forth rules against this legislative backdrop. Congress squarely considered and rejected the very permissive adoption of rules the Commission now embarks upon.¹⁵

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Committee Mark-up was agreed to by a voice vote. The Moorhead amendment was subsequently incorporated the version passed by full committee. *See* H.R. 3636, § 206(f); H.R. Rep. No. 103-560 at 88 (1994).

¹¹ *See* H.R. 1555, § 204(f); H.R. Rep. No. 104-204, Part I at 140 (1995). *See also* H.R. Conf. Rep. No. 104-458 at 184 (1996).

¹² *See* H.R. Conf. Rep. No. 104-458 at 184 (1996).

¹³ *See id.*

¹⁴ *See* Pub. L. No. 104-104, 110 Stat. 56 (1996).

¹⁵ I cannot help noting that the FCC has been repeatedly and badly bruised by a Congress that believes this agency is disrespectful of its judgments and willing to ignore congressional intent in favor of its own favored policies. *See* Mark Wigfield, *Budget Cuts, Miscues Boost Tensions Between FCC, Congress*, Wall St. J., July 3, 2000, at B6. Actions such as this, ignoring congressional choice, and pushing ahead based on ancillary jurisdiction, partly explain Congress' ire.

It is important to emphasize that section 4(i) is not a stand-alone basis of authority and cannot be read in isolation. It is more akin to a "necessary and proper" clause. Section 4(i)'s authority must be "reasonably ancillary" to other express provisions.¹⁶ And, by its express terms, our exercise of that authority cannot be "inconsistent" with other provisions of the Act.¹⁷ The reason for these limitations is plain: Were an agency afforded *carte blanche* under such a broad provision, irrespective of subsequent congressional acts that did not squarely prohibit action, it would be able to expand greatly its regulatory reach.¹⁸

It is for this reason that I believe the courts often scrutinize carefully an agency's attempt to expand the scope of its jurisdiction. As the D.C. Circuit has noted, "[w]hen an agency's assertion of power into new arenas is under attack . . . courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue." *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987). Such scrutiny in this matter reveals an unambiguous congressional intent not to mandate rules, or to authorize the Commission discretionary authority to do so, thereby supplanting any reliance on the catchall provision of section 4(i).

For this reason, I cannot support the *Order's* adoption of rules mandating video description.¹⁹

II. The Statute Does Allow for Audio Description of Emergency Text Information

I can, however, support our adoption today of rules that require broadcasters and multi-channel video programming distributors ("MVPDs") to provide audio description of scrolling emergency text information. Those of us who are sighted have experienced that "beep, beep, beep" while watching television that alerts us to the presence of a critical warning that then scrolls across the screen for us to view. The blind, however, after hearing the beeps, are unable to learn the substance of the alert, since it scrolls across the screen silently. This poses a serious and unnecessary threat to the blind community and should be remedied.

¹⁶ See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (the Court sanctioned the Commission's general jurisdiction of interstate communications, to the extent that the regulations were "reasonably ancillary to the effective performance of the Commission's various responsibilities. . .") (emphasis added); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1479 (D.C. Cir. 1994); *Capital Network Sys. v. FCC*, 3 F.3d 1526, 1527 (D.C. Cir. 1993).

¹⁷ 47 U.S.C. § 154(i).

¹⁸ Indeed, it would be difficult to maintain that the legislative power of the United States rested exclusively with Congress, as it constitutionally must.

¹⁹ My concerns about the Commission's assertion of ancillary jurisdiction are not newfound. In July 1999, I dissented in part to the Section 255 implementation *Order* because of my "grave concern" of the Commission's reliance on the "use of 'ancillary jurisdiction' to extend the accessibility requirements of Section 255 to providers of voicemail and interactive menu services, as well as to manufacturers of telecommunications equipment and CPE which perform such functions." See Implementation of Section 255 of the Telecommunications Act of 1996—Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities, *Report and Order and Notice of Inquiry* (WT Docket No. 96-198) (Separate Statement of Michael K. Powell, Commissioner, Federal Communications Commission) [available on the World Wide Web at <<http://www.fcc.gov/commissioners/powell>>].

While I have continuing concerns about ancillary jurisdiction as a basis for rulemaking generally, I believe requiring emergency text that is scrolled on television to be read is an appropriate use of section 4(i). Section 1 states that a central purpose of the Communications Act and the FCC is "promoting safety of life and property through the use of wire and radio communication." 47 U.S.C. § 151. Moreover, for many years the Commission, by rule, has required the operation of an Emergency Alert System ("EAS") designed to provide wide dissemination of emergency information. 47 C.F.R. Part 11, § 73.1250 (1999).²⁰ Additionally, emergency information is simply a more compelling justification for policy action than video description of entertainment programming.

Unlike with video description, Congress has not expressed a desire that we not act in this area. Section 713(f) deals with video description that is the "insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue." 47 U.S.C. § 613(g). Scrolled emergency text that is inserted without regard to the original program by the broadcast station or MVPD operator is not a "key visual element" of the program that is airing, and it is not inserted into "natural pauses between the program's dialogue." *Id.* Thus, I am confident that section 713 does not cover the action we take today with respect to such information. Consequently, the legislative history that shows Congress did not wish us to advance video description rules also is inapplicable. As a result, I am comfortable that the general authority of 4(i) and 303(r) has not been supplanted by a more specific statutory provision.

Congress has not denied us authority in this area. Indeed, it appears to have recognized and ratified the invocation of our general authority for emergency information purposes. For example, section 624(g) of the Act states that "each cable operator shall comply with such standards as the Commission shall prescribe to ensure that viewers of video programming on cable systems are afforded the same emergency information as is afforded by the emergency broadcasting system." 47 U.S.C. § 544(g). The Emergency Broadcasting System (now known as the Emergency Alert System) was initially developed over 40 years ago and its specific provisions and scope are a product of Commission rulemaking, resting on sections 4(i), 303(r) and other broad provisions. For these reasons, I can support the emergency text portion of today's *Order*.

III. Other Infirmities of this Order

In addition to jurisdiction, I believe this *Order* attempts to gain weight from the admittedly high purpose of helping a segment of the disability community gain access to video programming. But, I believe the benefits are substantially less than celebrated in the *Order*. Moreover, I believe the *Order* is faulty in several key respects. I will list some of these points briefly:

First, I would note that the blind community is not unanimous in its support for video description

²⁰ 47 C.F.R. § 73.1250 reads, in relevant part:

(a) Emergency situations in which the broadcasting of information is considered as furthering the safety of life and property include, but are not limited to the following: Tornadoes, hurricanes, floods, tidal waves, earthquakes, icing conditions, heavy snows, widespread fires, discharge of toxic gasses, widespread power failures, industrial explosions, civil disorders and school closing and changes in school bus schedules resulting from such conditions.

rules. The National Federation of the Blind ("NFB"), representing 55,000 blind individuals, is the largest and oldest organization of the blind. NFB filed comments in which it stated unequivocally, "[w]e oppose the imposition of audio description as a federal mandate."²¹ True, others support the action, but we should not brush aside the opposing views of such a substantial portion of the blind community simply because they are inconsistent with our notion of what is best for blind people.

Second, the *Order* seems to suggest that government intervention is required because a market has failed to develop for video described programming. However, there is some evidence that suggests that the market has failed because there is not substantial demand by the blind community for such programming. For example, video described tapes have been available in the market for years, but as the Motion Picture Association of America notes, there has been very limited demand for these films.²²

Third, the *Order* wrongly analogizes the ease of video description to closed captioning. It is important to note that video description is a creative work. It requires a producer to evaluate a program, write a script, select actors, decide what to describe, decide how to describe it and choose what style or what pace. In contrast, closed captioning is a straight translation of dialogue into text. The same can be said for foreign language translations. Consequently, video description is more elaborate (and more costly) than closed captioning. Additionally, video description is overlaid onto an existing audio track. Some programs that are rich in dialogue or description, such as a news broadcast or a sports play-by-play program, may not benefit from additional description and in fact may be ruined for blind consumers. Also, some programs, like music videos or live events, may move too quickly to afford an opportunity for an adequate description in the pauses of the program. The point is that the viability and benefits of this service can vary widely based on the nature of the program. Yet, the Commission makes no categorical exemptions for programming types (as it did in closed captioning), nor does its waiver standard contemplate any of these bases for a waiver.

Fourth, access to video description is only obtained through the Secondary Audio Programming ("SAP") channel. As of 1998, only 59% of televisions sold had SAP functionality.²³ Moreover, before 1990 very few sets had this feature at all and many of those sets remain in the homes of consumers. With closed captioning, Congress mandated that television manufacturers include that functionality in television sets. No such command runs to manufacturers for SAP functionality. Thus, I question the reach or benefits of this service. Additionally, SAP functionality is an analog signal function. Because we are in the midst of a transition to digital television ("DTV"), it is highly likely that what benefits this service affords may be short lived.²⁴

²¹ See National Federation of the Blind, Comments on Notice of Proposed Rulemaking in the Matter of Video Description of Video Programming, MM Docket No. 99-339 (filed Feb. 23, 2000) at 1 (In the first paragraph of comments, NFB unequivocally opposes "the imposition of audio description as a federal mandate").

²² See Motion Picture Association of America, Comment on Notice of Proposed Rulemaking in the Matter of Video Description of Video Programming, MM Docket No. 99-339 (filed Feb. 23, 2000) at 25-26 (citing J. Packer & C. Kirchner, American Foundation for the Blind, *Who's Watching? A Profile of the Blind and Visually Impaired Audience for Television and Video*, at Table 2, p.9 (1997)).

²³ *Id* at 20 (citing Consumer Electronics Manufacturers Association data).

²⁴ The *Order* seems to embrace WGBH's view that digital television will require additional audio tracks and, thus, SAP functionality will not be wasted. We have no real confirmation of this view. One should note that we are adopting digital closed captioning rules in a separate proceeding today, and likely would have to reevaluate video description for DTV.

Fifth, I am unimpressed with the *Order's* evaluation of the costs. The item suggests that the revenues of the large commercial broadcast networks (and their affiliates) and the "larger MVPDs" are more than sufficient to account for any video description upgrade.²⁵ The item, however, only looks at total revenues without considering any other operating costs (especially the enormous costs associated with the transition to digital).²⁶ The issue of revenues cannot be considered in a vacuum, without reference to expenditures for utilities, personnel, programming, etc. To do so would be like considering a person's ability to shoulder an additional financial burden based on his overall income without regard to his existing burdens (*e.g.*, rent or mortgage, tuition, car and insurance payments). Moreover, the *Order* also fails to consider rigorously the costs of production, which might vary depending on the type of program and will be passed on in programming costs. As I mentioned above, there is a need for writers to draft video described scripts, actors to describe the scenes, directors to direct and producers to produce. These personnel resources also contribute to the overall costs of programming, at a time when there is already an initial concern about the escalating costs of premium primetime and sports programming.²⁷

Finally, one should not lightly dismiss the limitations on free speech that may result from these new rules. I question the majority's conclusion that its action is content-neutral. Video description is a creative work. It requires artistic and editorial judgment. Moreover, it is only one form of blind accessible programming. A programmer, if free to, might choose instead to introduce more dialogue or sound cues in the original soundtrack, rather than to have the program secondarily described. In addition, there are other uses for the SAP channel, such as Spanish language translation, that a provider must forgo in order to comply with the Commission's mandate. We are mandating a particular form of programming and I doubt the infringement is merely a secondary effect of improving access for the visually impaired.

These difficulties with the item reflect some of the challenges of mandating video description. It also may explain Congress' decision to evaluate the issue further, rather than requiring, or allowing, the Commission to require rules in this area.

IV. Conclusion

I wish I could support this *Order* more fully. I share my colleague's passion in wanting to help the visually impaired. It is discomfiting not to support a service for so deserving a community. But, it is precisely when the end is noble that the rule of law is most severely tested. I personally cannot read the law conveniently, even for so worthy a constituency.

²⁵ See Report at ¶¶ 22, 27, 28.

²⁶ The Report also assumes SAP equipment capability from newspaper articles, not from comments or other authoritative industry resources. See *id* at ¶ 21 nn. 57-59.

²⁷ See, *e.g.*, Kyle Pope, *Network Makes \$850 Million Deal with Warner Bros.*, Wall St. J., Jan. 15, 1998, at B1 (NBC strikes "a record \$850 million deal to keep the nation's top-rated show, ER"); *NFL Buyers, Sellers Could Butt Heads on Rates*, Multichannel News, Jan. 26, 1998, at 28 ("Fox Broadcasting, ABC, CBS and ESPN will shell out a combined \$17.6 billion across eight [NFL] seasons."); John M. Higgins, *Cable Operators Blast ESPN for NFL Megabid*, Broadcasting & Cable, Jan. 19, 1998, at 10 (Of \$17.6 billion total, ESPN "agreed to pay \$600 million per season for 18 Sunday night games"); See *Disney Offer Would Triple NHL's Current TV Deal*, Palm Beach Post, Aug. 6, 1998, at 8C (Walt Disney Co. offered "to pay the [NHL] almost \$600 million for exclusive U.S. broadcast rights for five years". . .the deal "would triple the amount Fox Sport and ESPN [paid] the league" under the previous deal).

