

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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

**NOTICE OF PROPOSED RULEMAKING**

REPLY COMMENTS OF THE WGBH EDUCATIONAL FOUNDATION,  
MEDIA ACCESS DIVISION

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The Media Access division of Boston's public broadcaster, WGBH, hereby submits these reply comments in the above-captioned proceeding. WGBH has been a pioneer in making media accessible to people with disabilities through The Caption Center, the world's first television captioning agency; Descriptive Video Service ®, the developer of access to television for people who are blind and visually impaired; and the CPB/WGBH National Center for Accessible Media, an R&D facility for access to new media and new applications of accessible technology.

**Introduction and Summary**

For more than five years the Commission has been studying and reporting on the needs, costs, technical and legal issues and progress of video description. In issuing this Notice of Proposed Rulemaking (NPRM), the Commission has taken into account many factors which would impact and be impacted by a video description mandate. The NPRM fairly weighs all concerns and concludes, as do we that: the Commission has jurisdiction in this matter, that there are no First Amendment grounds to halt a video description mandate, that copyright issues can be readily dealt with, that technical problems and costs can be managed efficiently and pragmatically and, most important, that an audience of neglected American consumers and citizens have expressed their sincere and just desire to be served by

the most pervasive medium of communication in this country. We also believe that, in order to avoid looming difficulties, the Commission should take action now, under this Notice, to assure that digital television providers, distributors and manufacturers of professional and consumer hardware produce, build and design to standards which support services for people who are blind or visually impaired.

### **Voluntary Efforts Have Not Been Effective**

WGBH's Media Access departments have long considered its clients to be partners in the effort to make television and movies more accessible to people with disabilities. From broadcast and cable networks to Hollywood and New York producers to local affiliates and cable systems operators, the success of closed captioning and video description relies on cooperative efforts by all concerned. The involvement of the U.S. Department of Education has of course been invaluable to the growth of both services.

On page 1 of its comments, the National Association of Broadcasters (NAB) states, "Although NAB supports voluntary efforts to make television programming more accessible to persons with visual disabilities," it believes the Commission's proposal for a video description mandate should not be adopted. NAB does not suggest an alternative however and the record has shown that voluntary efforts have not been effective. In fact, aside from the successful 10-year history of video description on public broadcasting, not one program with video description has been broadcast in this country. Not one of NAB's members has ever agreed to have a single program described for people who are blind or visually impaired, even when the cost of producing the video description would be paid by a Federal grant or independent producer. The Commission understood this when proposing their rulemaking.

The National Cable Television Association (NCTA) also states their support for "the Commission's goal of increasing the accessibility of video programming for people with disabilities" (NCTA comments at p. 1). NCTA correctly notes the laudable involvement of Turner Classic Movies (TCM) in having their programming video

described but suggests numerous reasons to disagree with the Commission's proposal for a mandate. While TCM should absolutely be considered the pioneer in large cable network video description, they unfortunately stand alone in their field. Not one of the other major cable programming networks has provided any described programming. Without supporting a mandate from the Commission, it's hard to imagine in what way NCTA is supporting the Commission's goal, since voluntary efforts have yielded so little results.

MPAA states that its members have "voluntarily and successfully facilitated greater access to entertainment programming..." (MPAA, p. 2). We highly value our business relationships with a number of studios and home video distributors, but these relationships are not fully explained by MPAA in its comments. In referring to the licensing agreements that some MPAA members have entered into with the DVS Home Video project, MPAA doesn't explain that access to home video is being provided via grants from the U.S. Department of Education and license fees paid to the distributors. Therefore, any growth in this program will be tied to government funding, not voluntary efforts. In fact, Congress in 1998 restricted use of Department of Education video description funds to educational and informational programming only, thereby making an FCC mandate or truly high-levels of voluntary cooperation, and funding, essential. In addition, providing accessibility via a service users must pay for is not the same as access to free, over-the-airwaves television.

### **Video Description is Not a New Technology or Service**

NCTA attempts to compare and contrast closed captioning and video description on p. 2 of their comments. NCTA argues that while closed captioning is well-established, "Video description is still in its nascent stages." The first experiments with use of the SAP channel for video description occurred in the mid-1980s and the first on-air test was in 1988. Regular service began with the launch of WGBH's Descriptive Video Service ® in 1990. It's hard to imagine how a more than 12 year

on-air history can be called "nascent." Production and delivery methods have been worked out and the process is an accepted and regular part of many PBS programs. Other technologies that have emerged since the mid-1980s include audio CDs and CD-ROMs, digital sound for movie theaters and the World Wide Web. Would NCTA also refer to these technologies as "nascent" and undeserving of support from society?

### **The FCC Has Full Statutory Authority to Require Video Description**

In response to the Commission's request for comment on jurisdictional issues,<sup>1</sup> opponents of the proposed video description rules incorrectly assert that Commission authority over video description is limited to conducting an inquiry and reporting to Congress.<sup>2</sup> Relying on legislative history indicating that Congress refrained from mandating a video description rulemaking when it enacted § 713(f) as part of the Telecommunications Act of 1996 ("1996 Act"), NAB and other opponents jump to the unwarranted conclusion that by declining to expressly require the FCC to make video description rules, Congress actually intended to indicate that the FCC was permanently barred from issuing such rules without express instructions from Congress.

The interpretive approach suggested by these opponents misconstrues the statute itself and misconstrues the Commission's rulemaking authority. In so doing, it also contradicts the Supreme Court's recent decision interpreting the 1996 Act in *AT&T Corp. v. Iowa Utilities Board*.<sup>3</sup> On its face, § 713(f) requires the FCC to conduct an inquiry regarding video description and report to Congress. Beyond that it places no limits on FCC rulemaking authority – it does not say "and do nothing else." In that situation, as described below, *Iowa Utilities* confirms that even without specific authorization for video description rules, the Commission may, in its discretion,

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<sup>1</sup> *Implementation of Video Description of Video Programming*, MM Docket No. 99-339, Notice of Proposed Rulemaking, FCC 99-353 at ¶¶34-39 (Nov. 18, 1999) ("Notice").

<sup>2</sup> *See, e.g., NAB Comments* 2-10; *A&E Television Comments* at 5-11; *DIRECTV Comments* at 4-5; *MPAA Comments* at 3-4; *NCTA Comments* at 4-5.

<sup>3</sup> 525 U.S. 366, 119 S. Ct. 721 (1999).

make such rules based on the general rulemaking authority provided to it elsewhere in the Communications Act of 1934<sup>4</sup> and amply described in the *Notice*.<sup>5</sup>

### **Specific Authority**

Far from limiting the Commission's authority to make video description rules, Congress in the 1996 Act gave the Commission implied authority to conduct a video description rulemaking by requiring it to conduct an inquiry. Congress is well aware that the FCC frequently conducts such inquiries to gather information for an eventual rulemaking. Had Congress intended to forestall a subsequent rulemaking, it could have done so and surely would have done so. Thus, a fair reading of the 1996 Act reflects that by mandating the initial inquiry and not expressly barring any natural further steps, Congress allowed the FCC to proceed at its discretion, consistent with the Commission's broad rulemaking powers.

Congress also demonstrated in the 1996 Act and elsewhere that it favored improving accessibility of communications services for persons with disabilities,<sup>6</sup> making it all the more reasonable for the Commission to find in § 713(f) implied authority to adopt video description rules, and all the more unreasonable to conclude that Congress intended permanently to bar the Commission from issuing such rules in the absence of further legislation.

### **General Authority**

Even in the absence of specific authority, the Commission still retains ample general authority under the Communications Act, as amended, to make mandatory video description rules. Parties opposed to the proposed rules generally do not take issue with the fact that the Commission possesses broad power to regulate broadcast television. Indeed, the FCC's specific and ancillary jurisdiction to make rules

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<sup>4</sup> As explained below, Congress incorporated § 713 and other provisions of the 1996 Act into the 1934 Act. *See infra* n.15.

<sup>5</sup> *See Notice* at ¶¶35, 37.

<sup>6</sup> *See Notice* at ¶36. At the very least, these provisions confirm that issuance of video description rules pursuant to the FCC's general rulemaking authority would be consistent with Congress' objectives.

governing broadcasting and cable is a matter of well-settled law.<sup>7</sup> Instead, opponents of the proposed rules mistakenly assert that the Commission's broader powers "cannot be interpreted as providing separate authority to adopt mandatory rules with regard to video description" because that subject is covered by the later enactment of § 713(f),<sup>8</sup> which specifically addresses video description but is silent on the precise question of whether the Commission may proceed to make rules after conducting the required inquiry and making the required report.<sup>9</sup>

**Lack of Express Authorization for a Particular Rule in the 1996 Act Does Not Negate the Commission's Preexisting General Rulemaking Authority**

The Supreme Court recently rejected claims advanced by parties who, like NAB and others parties here, sought to prevent the Commission from relying on its broad authority under preexisting provisions of the 1934 Act to enact rules that were not expressly authorized in relevant provisions of the 1996 Act. In *Iowa Utilities*, the FCC was alleged to have exceeded its authority by issuing various rules designed to facilitate local competition in the market for telephone service, including rules mandating a pricing methodology for interconnection and unbundled access.<sup>10</sup> The Court rejected these claims, holding that a preexisting provision of the Telecommunications Act of 1934 ("1934 Act") conferring general rulemaking authority on the Commission "*explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies."<sup>11</sup> Even though the 1996 Act did not specifically authorize the Commission to promulgate pricing rules, that lack of express authorization did not, in the Court's view, change the fact that the Commission was permitted to make such rules under its preexisting § 201(b) general rulemaking authority, which empowers the Commission to "prescribe such rules

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<sup>7</sup> See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173-78 (1968).

<sup>8</sup> See *NAB Comments* at 8-9.

<sup>9</sup> See *A&E Television Comments* at 6-7 (stating that "Section 713 ... is silent regarding prescription of video descriptor regulations").

<sup>10</sup> *Iowa Utilities*, 119 S. Ct. at 728.

<sup>11</sup> *Id.* at 730 (emphasis in original).

and regulations as may be necessary in the public interest to carry out the provisions of this Act."<sup>12</sup>

The Court's reasoning with respect to § 201(b) is equally applicable to the Commission's asserted bases of jurisdiction for issuance of video description rules. The most obvious parallel is § 303(r), which grants the Commission general rulemaking authority to "make 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."<sup>13</sup> Section 303(r) and other general provisions authorizing the FCC to make broadcast rules are to Title III of the 1934 Act exactly what § 201(b) is to Title II – general grants of authority to make rules governing the subject matter of the statute.

Describing the relationship between the general rulemaking provisions of the 1934 Act and the more recent, more specific provisions of the 1996 Act, the *Iowa Utilities* Court explained that "the 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence part of" an act that already granted the Commission general rulemaking authority.<sup>14</sup> By directing that the provisions of the 1996 Act be inserted into the Communications Act of 1934,<sup>15</sup> Congress made the 1996 Act, including § 713(f), part of an organic statute that gives the FCC broad jurisdiction over broadcasting. Thus, it is simply incorrect to assert, as NCTA does, that Congress' decision not to mandate adoption of video description rules "precludes the Commission from now interpreting its general governing statute to provide it with discretion to do the same thing."<sup>16</sup> By directing that § 713(f) be integrated into the 1934 act, Congress intentionally placed it among the "provisions

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<sup>12</sup> *Id.* at 733.

<sup>13</sup> 47 U.S.C. § 303(r).

<sup>14</sup> *Iowa Utilities*, 119 S. Ct. at 729 n.5.

<sup>15</sup> *Telecommunications Act of 1996*, 110 Stat. 56 § 1(b); see *Iowa Utilities*, 119 S. Ct. at 729.

<sup>16</sup> *NCTA Comments* at 5.



of this Act" that, pursuant to § 303(r) and similar provisions, the Commission is expressly authorized to carry out through rules and regulations.<sup>17</sup>

### **Lack of Parallelism Between §§ 713(f) and 713(a)-(e) Does Not Displace the Commission's General Rulemaking Authority**

Opponents of the proposed rules erroneously claim that because the 1996 Act expressly mandated that the FCC adopt closed captioning rules but was silent with respect to video description rules, Congress thereby withdrew the Commission's general authority to enact video description rules.<sup>18</sup> The Court rejected a similar argument regarding the 1996 Act in *Iowa Utilities*, observing that it was "not peculiar" that Congress should make specific reference to mandated regulations but not refer to regulations permitted pursuant to broader jurisdictional provisions (in that case, § 201(b)). It held that "mere lack of parallelism is surely not enough to displace that explicit authority."<sup>19</sup> This same holding applies equally here. The "mere lack of parallelism" between the closed captioning provision and the video description provision does not, under the *Iowa Utilities* decision, displace Commission authority to make video description rules pursuant to other provisions of the Communications Act, as amended.<sup>20</sup>

### **Video Description Does Not Represent "Compelled" or "Forced" Speech**

NAB (p. 10 § E.) and NCTA (p. 6), and MPAA (§III., p. 6) argue that there exists a Constitutional limitation that would forbid video description. This is a misreading of the Supreme Court's rulings on compelled speech cases (see AFB memo excerpted below). MPAA states, "Compelled speech, if not content-neutral and narrowly tailored to serve a compelling state interest, violates the First Amendment of the U.S.

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<sup>17</sup> See *Iowa Utilities*, 119 S. Ct. at 730 ("[Section] 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies" (emphasis in original)). As the Court pointed out in *Iowa Utilities*, it cannot plausibly be asserted that the 1996 Congress was unaware of these general grants of authority. *Iowa Utilities*, 119 S. Ct. at 729 n.5.

<sup>18</sup> E.g., *NAB Comments* at 6-7, *NCTA Comments* at 5.

<sup>19</sup> *Iowa Utilities*, 119 S. Ct. at 733.

<sup>20</sup> E.g., 47 U.S.C. §§ 1, 2(a), 4(i), 303(r), 309(a), 307(c)(1), 310(d).

Constitution." (MPAA, p. 6). In fact, a video description mandate would not represent compelled speech, video descriptions can indeed be content-neutral and assuring equal access to a publicly regulated medium which is the primary means of receiving news, information and entertainment in this society is indeed a compelling state interest.

NAB says that video description "alters the character of the original work" when in fact, the original work of a described program remains untouched and unchanged and most users don't even know that an alternative version is resident on their SAP channel. NCTA also mistakenly argues on p. 6 of its comments that a video description mandate would, "force [cable program networks] to include dialogue in a program where it would otherwise be silent..." This argument also seems to imply that video description alters the existing soundtrack of a program. A key feature of SAP-based video description is that it provides only an alternative soundtrack for blind and visually impaired people and in no way alters the experience or the content of the main and original program audio. Video description is an added-on enhancement, not an alteration and would therefore not effect the experience of a sighted viewer in any way.

NCTA (p. 6) argues that a video description mandate cannot be legal because such "rules would effectively force an operator to carry certain program services only if they carried a specified amount of described programming – an obligation that effects content directly." This is exactly the case for the Commission's closed captioning rules which the cable industry has accepted and which the Commission believes should extend to provide equal opportunities for blind and visually impaired people as well.

NAB also argues that while closed captioning does not represent a Constitutional infringement, video description does because, "... unlike closed captioning, which involves merely the transcription of the existing script of a program" video description consists of interpretations and other more insidious attacks on a

program's content. In truth, closed captioning requires numerous judgements and interpretations during the process of turning the audio portion of a program into text. Captioners must finely tune the timing, editing and placement of captions – all of which effect the comprehension of a program by a deaf or hard-of-hearing viewer. In addition, a captioner must decide how to indicate essential sound effects, music and other non-speech information (who's talking and where are they?). Captioners at times must alter their captions for deaf or hard-of-hearing children who may have difficulty reading rapidly paced caption text. Neither captions nor video descriptions pose a challenge to any American citizen's First Amendment rights (though an argument could be made that affirmatively blocking access to video programming by refusing to employ a simple accommodation such as video description constitutes a form of censorship or unlawful restriction of access to a public accommodation).

In its December 4, 1995 response to the Commission's first Notice of Inquiry regarding closed captioning and video description, the American Foundation for the Blind (AFB) filed the following reply comments in rebuttal to the suggestion that video description could in any way represent compelled speech. [Note that AFB used the phrase Video Description Service and the acronym VDS in its comments]:

"B. The Requirement Of Video Description Service (VDS) Would Not Unconstitutionally Compel Speech.

Some opponents of a video description requirement argue that such a requirement would constitute 'compelled speech' because it would require those affected to add verbal messages concerning on-screen action to program content and thereby infringe upon editorial discretion. However, in developing programming and producing motion pictures, broadcasters and movie producers have made choices about plot, theme, focus, tone, dialog, stage direction and other elements which, in combination, total the 'speech' they wish to convey.

Description of those elements not accessible to blind or visually impaired persons, mandated by a VDS requirement, originates with the producer of the programming who has already expressed the message to the rest of the audience. Since the government will not be dictating the script of descriptions, producers retain complete editorial discretion as to the way in which they present their message to blind audiences. Thus, a VDS requirement allows the blind to more completely participate as programming 'viewers' by enabling them to be more effective listeners.

The Supreme Court's treatment of the 'compelled speech' issue further demonstrates the constitutionality of a VDS requirement. As sketched above, mandating VDS does not require broadcast and movie producers to 'advocate' views or themes with which they disagree. Thus, the VDS requirement is wholly unlike the speech compelled by the requirement, struck down by the Court, that school children pledge allegiance to the flag in direct contravention of their religious beliefs. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Nor is the requirement even slightly akin to the insistence of one state held unconstitutional by the Court, that motorists could not block out the motto 'Live free or die,' appearing on their license plates despite disagreement with the sentiment. *Wooley v. Maynard*, 430 U.S. 705 (1977). The Court has held that an incorporated public utility company cannot be compelled to place in its billing envelopes a third party's newsletter containing views which might be in disagreement with those of the utility. *Pacific Gas & Electric v. Public Utilities Commission*, 475 U.S. 1 (1986).

These 'compelled speech' cases pertain to those situations where the government attempts to force speakers to convey messages with which they disagree or which they would rather not convey at all. Observe that a VDS requirement, although not really a requirement to articulate a point of view, does not demand that a producer 'say' anything that has not already been said through the other elements of the program. Moreover, the cases concern governmental

involvement with the content of the speech to be compelled. Interestingly, the Court has held that a state is not prohibited from requiring a large privately owned shopping center, open to the public, to permit persons to exercise their speech rights on shopping center property, as long as the particular message is not dictated by the state. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). Thus, the Court's distaste for compelled speech is tempered by the value of viewpoint diversity, even as against private property, where the state is not dictating the message and when the general public has access to the speakers. It is clear, then, that the VDS requirement does not unconstitutionally compel speech.

### C. The VDS Requirement Is A Content-Neutral Regulation of Speech.

The basic question in determining the content neutrality of regulations is whether the government has adopted a regulation of speech because of disagreement with the message that the speech conveys; the government's purpose is the controlling consideration. *Clark v. Community for Creative Non-Violence*, 486 U.S. 288, 295 (1984). Regulations that serve purposes unrelated to the content of expression are considered by the Court to be neutral, even if the regulations result in incidental effects on some speakers or messages but not others. *Renton v. Playtime Theatres Inc.*, 475 U.S. 41, 47-48 (1986). The restrictions will be upheld as content-neutral so long as they are 'justified without reference to the content of the regulated speech.' 486 U.S. at 293. Based upon these guiding principles, the Court overturned a municipal ordinance which banned the placement on public property of news racks purveying commercial publications while permitting non-commercial ones; the city could advance no purpose for the restriction that was not grounded in the content of the publications. *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516-17 (1993). The Court has held that a law may not forbid only those signs within 500 feet of a foreign embassy that are critical of the foreign government; all signs or no signs must be forbidden. *Boos v. Barry*, 485 U.S. 312 (1988). It is a failure of common sense and

a misreading of the law which results in the erroneous suggestion that the proposed VDS requirement is a content-based regulation of speech like the restrictions struck down in the cases above. The requirement would apply irrespective of artistic, literary, dramatic, historical, comedic or informative value. A VDS requirement would not exempt a class of 'speakers' based upon any evaluation or characterization of the programming offered. Most importantly, the requirement is not an attempt to regulate speech with which the government disagrees.

A VDS requirement, then, is very much like the regulation upheld in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). In order to prevent excessive noise levels at concerts, city guidelines required that the city's sound technician, using the city's sound equipment, would be responsible for the sound amplification and mix for concerts. Against the claims of some performers that the guidelines amounted to a content-based regulation of their speech, the Court found that the city's concern with sound quality extended only to the 'clearly content-neutral goals of insuring adequate sound amplification and avoiding the volume problems associated with inadequate sound mix.' *Ward*, 491 U.S. at 792-93.

Moreover, the Court noted that the city had a substantial interest in making sure that the sound mix was sufficient to enable as much of the audience as possible to enjoy the concerts, and that such quality concerns had nothing to do with the content of the performers' speech. *Id.* The performers' First Amendment rights were not violated because the city's guidelines pertained to overall quality and the interest in clear sound for the entire audience and did not threaten the performers' rights to "speak altogether." *Id.* at 794. The VDS requirement has as its singular purpose the opening up of the information age to persons with disabilities, enabling the entire audience to access, learn from, and enjoy programming, and leaves artistic judgment by producers intact."

## **Video Description Does Not Present Insurmountable or Unduly Burdensome Technical or Operational Challenges**

NAB (p. 13, § II.), attempts to argue that, "the Commission has understated the technical difficulties and costs associated with providing described programming in the analog environment." NCTA (p. 7, §II.) states that "Providing video description raises significant technical issues" and that, "It is not simply, as in the case of captioning, creation of a verbatim transcript of material that already is being spoken." (NCTA, p. 9) As has been argued above, NCTA seems to be unaware of the true challenges involved in authoring and delivering captions and here exaggerates the difficulties inherent in video description ("producing video description would conflict with airdates for many types of programming." NCTA, p. 9).

MPAA also seems to overly simplify the nature of captioning while overstating the complexity of video description. In their comments (p. 5), MPAA says, "Only one set of accurate closed captions can exist for a given television program, but an infinite number of video descriptions for the same program could be produced by different creators..." It is not true that captioning is such an exact science with hard and fast rules that no interpretation or variation is possible. Those who know the true details and content of captioning – that is, deaf and hard-of-hearing viewers – can definitely tell a good captioning job from a bad one and a creative treatment of a program's audio from a bland or rote transcription. Yet MPAA does not seem to protest these content decisions by caption providers. The FCC has clearly stated its intention to not attempt to control the content side of captioning by including in its captioning Report and Order, adopted August 7, 1997 the following statement:

222. We will not adopt standards for the quality and accuracy of closed captioning at this time. We are not persuaded that our initial assessment of the difficulty in establishing standards at this time was incorrect. There are vast amounts of programming that will need to be captioned and those responsible for captioning under our rules will need to undertake significant efforts to ensure that the programming they distribute is in compliance with our rules. By leaving the development of quality standards to the marketplace, we are allowing video programming providers to establish

quality standards and quality controls for the non-technical aspects of captioning through their arrangements with captioning suppliers or as part of the requirements of their programming contracts and licensing agreements. We expect that this approach will result in high quality captions comparable to the level of quality of other aspects of programming such as the audio and video.

Thus the Commission both acknowledges the variations possible in captioning quality and at the same time refuses to issue dictates on how quality should be judged, leaving such issues to the marketplace. And while MPAA is accurate in stating (p. 5) that, "possible variations in the video description include script language, choice of timing for action descriptions, and voice inflection and emotion conveyed by actors," the Commission can address this issue the same way they have in the captioning rules, by letting the marketplace and contractual agreements determine the best approach to quality. This stance by the Commission also allays MPAA's concerns (p. 27) that the Commission has to define what makes good video description and therefore must be entangled in content decisions. In this case, the marketplace of consumers, providers and customers can decide what is passing muster and what is failing the audience.

While we agree that video description is a process which requires skill, imagination and creativity, a chief principle behind both captioning and video description is that these access technologies can never interfere with the television production process or its schedules. NCTA notes (p. 10) that at one time WGBH's Descriptive Video Service notified its constituents that a certain program would not be available with descriptions as had been previously announced. This was an unfortunate and rare occurrence due to an unexpected short-term rise in demand and coincidental loss of a few key personnel at one time. However, with the infrastructure in place, and with the lead-time anticipated as a result of rules issued by the Commission, this vendor among others will be able to staff up to handle the volume and turnaround demands required in a high-volume operation. It is important to note that the programs that



were to have been described were not delayed in their broadcast due to late delivery of descriptions, as NCTA and MPAA have warned would happen.

We believe NAB and NCTA have overstated the challenges and do not recognize the many innovative techniques and systems that can overcome many of these problems. While one could ostensibly spend \$1.6 million to upgrade one's physical plant (NAB quotes this figure, without any documentation, as one network's estimated cost of "modifying its network origination center, and of upgrading its satellite system to uplink a third audio channel") we can assure the Commission that nowhere near such sums have been spent by PBS nor any of its member stations combined. As of this writing, 169 public television stations broadcast descriptions on their SAP channels for hundreds of hours of programs each year – certainly not on an ad hoc basis but as part of set standards and practices utilizing often rather humble production facilities.

NAB distinguishes in its remarks the difference between the additional audio channel at the network level and the use of the SAP channel by local stations to deliver that additional audio to the viewer at home. Indeed, WGBH's previous filings in this matter clearly delineated the links in the broadcast and cable chain necessary to proper delivery of video descriptions, and the Commission has taken note of the program delivery process. At each point in the program origination, routing, satellite uplink and downlink, station recording and routing, studio-to-transmitter link, SAP encoding and finally transmission to the home there are affordable solutions to the successful delivery of descriptions. Public broadcasting's ten-year history of just such successful delivery should be evidence enough of the readily achievable nature of this enterprise. Ongoing PBS practice meets the stated desire by NAB to provide national and regional feeds, "seamlessly, as part of normal network operations." (NAB at p. 15).

The following examples (by no means an exhaustive list of possible solutions) illustrate various possible means of overcoming the challenges NAB and NCTA

warn about in managing three channels of audio through the "entire network program distribution and transmission chain."

In this discussion, it is very important to recognize that professional video and audio technology has been making a transition to the digital realm far in advance of the current transition to "digital broadcasting." Digital technologies have been an integral part of the broadcasting and cable industries for the past decade or more.

#### Network Origination Tape Formats

Type C one-inch videotape, commonly available since 1978, provided professional broadcasters with two full-bandwidth audio channels (for Stereo Left and Stereo Right), plus a third audio channel typically used to carry a Longitudinal Time Code (LTC) control code. In 1988, PBS started using one-inch videotape to support a third channel of audio for the Descriptive Video Service. PBS decided to switch to Vertical Interval Time Code (VITC, then an emerging and common industry practice), thereby freeing up the LTC channel for an additional audio service. While this audio channel supported limited bandwidth, it was sufficient to carry the monaural DVS mix intended for SAP transmission. This allowed simultaneous tape origination of dual audio services from a single video source.

Videotape formats have evolved significantly since then. Currently, all the major professional tape formats (D1, D2, D3, D5, DCT, BetaSP, DigiBeta, DVC-Pro-50 and BetacamSX) offer four channels of audio as a de-facto standard. All have been used successfully to support video description.

#### Network In-Plant Routing

In 1984, following a fire and the resulting rebuild of its network plant, PBS decided to support a "third layer" of audio throughout its network, anticipating future uses of the BTSC stereo television broadcast standard, including SAP. PBS chose a Bosch routing system, among a number of professional equipment manufacturers then offering multiple channels of audio routing support.

In 1994, as part of its transition to a digital plant, PBS implemented four channels of audio supported by a Philips/BTS Venus routing system.

Industry standards now provide a number of common solutions for routing multiple channels of audio throughout the network plant, including AES-EBU compressed audio (providing at least four channels of audio through an existing stereo pair of wires, SMPTE 272M-1994), transmission of AES-EBU digital audio signals over coaxial cable (SMPTE 276M-1995), Serial Data Interface with embedded audio (SMPTE 259M -1997), and a 12-channel serial interface for digital audio and auxiliary data (SMPTE 324M-1999).

#### Network Microwave Distribution to Satellite Uplinks

PBS has been supporting at least three channels of audio in its microwave link between its network operations center and its satellite operations center since 1988. Standard microwave technology has supported multiple audio channels for years. A typical microwave link can support at least a 25MHz signal. Video typically occupies 4.5MHz, and the remaining bandwidth can easily accommodate four channels of audio. One common microwave scenario assigns stereo left to 6.2MHz, stereo right to 6.8MHz, video description or other SAP service to 7.5 MHz, and a control signal at 8.27MHz. Many microwave products provide this support routinely, others allow additional audio subcarrier modulators to be added at reasonable cost. [\$3,000 per channel]

#### Satellite Transmission

The initial satellite transmission systems in the 1970s required a full transponder to carry a single video and a stereo audio signal. Additional audio subcarriers could be added, and indeed this is how PBS distributed the first Descriptive Video Service audio with its programming in 1988.

Much has changed since then. Today, digital compression technologies are very common in the satellite distribution business, and a single satellite transponder is

capable of supporting many services. General Instrument rightly boasts a number of industry milestones on its corporate web site (<http://www.gi.com/milestone.html>), among them its 1992 introduction of the DigiCipher digital compression technology. One significant development of DigiCipher was its support of four channels of audio per video channel.

General Instrument's latest version introduced in 1997, DigiCipher 2, allows up to six channels (three stereo audio pairs) of audio per video channel. Even more services can be carried on a single satellite transponder using General Instrument's DigiCipher 2 Multi-Channel Encoder, which can provide up to 24 television services and 72 audio channels (three stereo audio pairs per video service). See [http://www.gi.com/sdns/html/sdns\\_1.html](http://www.gi.com/sdns/html/sdns_1.html)

In fact, the two main PBS transponders currently in use support "multiple channels per carrier" (MCPC) using GI's DigiCipher 2 compression: 7 program channels on a single C-Band transponder (GE-1, Tr.3), and 8 channels on a single Ku-Band transponder (GE-3, Tr. 24). Each of these program channels can support the additional audio to deliver video description.

Similar support for multiple services is provided by the other major manufacturer of satellite encoding equipment, Scientific Atlanta, in its PowerVu line of products. See <http://www.sciatl.com/nav/html/top/tprdframe.htm>

#### Local Station Receive and Routing

On the local station or cable headend receive side, the companion IRDs (Integrated Receiver/Decoders) from each company (GI's DSR-4000, DSR-4001 and DSR-4800, and S/A's Multiple Decryption Decoder) can decode program channels and output a minimum of two stereo audio pairs per program. Creative use of this capability would allow a network to deliver to a local station not only video description, but a simultaneous second language feed as well.

Routing and switching at the receive site also allow many possibilities. Many of the solutions we have described for network routing and microwave distribution are also available for the local station. Even considering the economics of scale involved, support of video description must be seen as readily achievable. Some of the smallest PBS stations with the most limited resources have found ways to receive, route and broadcast video description on their SAP channels. (WMEM, Presque Isle, Maine, 205th DMA ; KPNE North Platte, North Dakota, 209th DMA).

### Alternative Solutions

Another simple and inexpensive solution has been developed by Ultech/Mixed Signals, a company which manufactures professional video equipment for both analog and digital broadcasters. They have developed and are marketing a low-cost solution to the routing of additional audio channels in-plant and between networks and local affiliates. This off-the-shelf solution is ideally suited for sending a third audio channel throughout a broadcast facility without rewiring. What is required for each audio channel is an Audio-in-VBI Encoder and an Audio-in-VBI Decoder. The encoder costs \$2,150 and the decoder costs \$1,700. The system requires just a single scan line from 10 through 20. Using this single line gives audio with roughly FM quality but at about a 6 KHz frequency response (about one octave lower than FM). The system passes music as well as speech.

While we recognize that scan lines in the VBI can be a scarce commodity at times, it would be easy to allocate a VBI line to video description via Audio-in-VBI through most of the chain, then use the line for another purpose once the Audio-in-VBI audio has been decoded and sent to the SAP exciter.

The Mixed Signals/ULTECH Audio-in-VBI technology is currently in use at several stations to provide IFB and to provide a backup audio channel from ENG crews to the station (in case the microwave link is impaired).

We are sympathetic with NAB's desire to institute ancillary audio systems that are not ad hoc or "temporarily patched through manually to the networks' satellite uplink facilities." (NAB at p.15). The provision of Spanish audio throughout the entire season of Monday Night Football and throughout much of the NBA playoffs seems to have been handled on a more than temporary basis, and in any case demonstrates that the networks are fully capable of overcoming technical delivery problems when they determine that it serves their advertisers and their bottom line.

### **Cost-Benefit Analyses Also Argue for a Mandate**

Though most broadcasters are well aware that the privilege of holding cost-free broadcast licenses requires certain public interest obligations, marketplace considerations tend to hold decision-making sway. We therefore offer the following cost-benefit analysis which demonstrates the return on investment through audience growth which serving blind and visually impaired audiences would enable:

The hypothetical case involves the highly rated network prime-time drama series, *ER*. According to the Sacramento Bee in an article dated 7/26/99, for the 98-99 season, *ER* had an average household rating of 17.8 (the percentage of the nation's 99.4 million homes that are watching TV). During the same season, the average cost to advertisers for a 30-second spot in *ER* was \$565,000.

Using the standard advertising calculation for CPM (cost per thousand households viewing a program), *ER*'s CPM is \$32. With 11 million blind and visually impaired people in this country, there are approximately 4 million households of blind and visually impaired people. If these homes watch a described version of *ER* at the same rate as the sighted audience, each 30-second spot will garner \$23,000 worth of added audience. With an inventory of approximately 20 spots per one-hour program, each episode of *ER* will have an added audience value of \$460,000. One month of described *ER* will pay off the entire capital investment NAB estimates each network will incur.

The other three weekly hours of described prime-time programming will gather new audiences representing nothing but profit. Not a bad return on investment.

Simply stated, as every broadcaster and cable provider knows, increasing audience increases revenues. This increase in revenues, even conservatively estimated, will more than cover the costs of upgrading network production and distribution facilities and their affiliates' own plants and transmission equipment. The left-over profits will gladly be accepted by their favorite blindness charity or public television station.

MPAA has partially accepted this logic when they state, "Because programmers and providers have a commercial interest in maximizing the size of their audiences, if left to their own devices they will insure that consumers of video description have access to the programs that they most prefer." (MPAA, p. 26). Unfortunately, serving people with disabilities is not an easy or obvious opportunity, it is not the "low hanging fruit" of the ingrained sales and marketing practices that programmers have followed for years. But with as many as 11 million people who are blind or visually impaired representing a hungry, loyal and available marketplace, programmers and providers seem to need a more direct incentive to begin realizing the opportunities they have so far ignored.

### **Costs Will be Incurred But Will Not Be Unduly Burdensome**

The costs of upgrading systems or changing program delivery practices have been vastly overstated by NAB; no data or details have been provided to back their claims of seven-figure expenditures to serve blind and visually impaired viewers. For example, in its comments on p. 17, NAB states, "This network estimates that it will cost \$800,000 to upgrade the local satellite receive systems of their affiliated stations to accommodate three channels of audio." However, the Commission's proposal only includes affiliates in the top 25 DMAs. To take the NBC network as an example, it provides programming to approximately 221 affiliate stations. Even

ignoring the fact that some of its largest stations don't need upgrading, the average cost per station as stated would be \$3,620. Therefore, to finance the satellite receive upgrade for its top 25 affiliates would cost approximately \$90,500. Even these costs wouldn't necessary be borne by the network alone since the affiliated stations are actually owned by a variety of corporations of substantial size and resources.

On p. 17, NAB states, "While it is true that many television stations' transmitter facilities are SAP-equipped, it is also true that many local television studios have been designed and engineered to support only two channels of audio on a routine basis. Likewise, many STLs<sup>21</sup> currently installed can only pass two channels of audio." NAB goes on to state, "one network estimates that it will cost \$400,000 to upgrade its owned and operated stations to support the three channels of audio needed to provide video description."

These types of expenditures may not actually be necessary; without supporting budget data it is impossible to determine, but the fact that a local TV station's local studio can't handle three channels of audio is irrelevant to the need to pass a network signal's three audio channels to its transmitter. As stated above, when faced by such technological challenges that burden a station's budget, television engineers have proven themselves uniquely resourceful in finding elegant solutions for such questions as signal routing.

But even if \$400,000 would be required to upgrade all of a network's "O&Os," a network with 12 owned and operated stations would be spending only \$33,000 per station for the upgrade. This cost, in a marketplace which values large-market TV stations in the hundreds of millions of dollars, must be considered minor. In addition, as the networks continue to lobby the FCC to increase the limit on the number of stations one company is allowed to own, such a small contribution toward their public interest obligations should be considered acceptable by the

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<sup>21</sup> Though NAB refers to "S-T-L" as Studio-Transmitter-Link, it is also commonly known as "Station-Transmitter-Link."



networks. If networks and their stations were so strapped for funds and so unable to manage the burdens of upgrading their plants, why would they be so interested in spending billions of dollars to acquire new stations?

NAB does admit, however, that many stations can actually handle a third audio channel, though perhaps only on an ad hoc basis. The footnote on p. 18 of its comments states, "Local stations that currently broadcast a Spanish language track for certain local programming on their SAP channels will often employ creative, *ad hoc* solutions for routing a third channel of audio." Such creativity should be employed to turn an ad hoc solution into one that serves only four hours of described programming per week and thereby saves the hundreds of thousands of dollars the NAB indicates is at stake. PBS stations have done so and not at significant costs.

NCTA states that "creating additional network audio capacity would be a costly undertaking." (NCTA, p. 14). While we agree that provision of video description will not be cost-free, we question the scale and amount of the changes and costs to be incurred. Aside from the technological solutions suggested above, we anticipate that the Commission will be setting a schedule over a certain period of time so that any costs incurred can be spread over a number of years.

NCTA also states that video description will have a negative impact on the video quality of programming delivered digitally (NCTA, p. 15). The amount of bandwidth that an additional narrative stream would require in a digital channel is negligible if even measurable. An added video description track has already been delivered via the HITS system (for TCM) and no complaints of degraded picture quality have been heard nor have channel selections been reduced.

To argue what they see as a vast and unjust cost burden on their cable operators, NCTA claims an inflated aggregate cost of \$20 million to upgrade cable systems for

a single channel not presently able to handle video description (NCTA, p. 16). To get to this number NCTA assumes that the 10,000 cable systems mentioned will all be covered by a video description mandate (the Commission has already stated otherwise) and that none of the existing systems are fully capable yet (but this can't be so since NCTA also argues that the use of the SAP channel for Spanish programming is common).

The numbers that NCTA quotes for a BTSC stereo generator (\$1,500 - \$2,000) or adding SAP capability to an existing stereo generator (\$200 - \$400) when taken system by system seem quite modest. This is especially true when one recognizes that the average cable viewer pays \$600/year for their service. Perhaps NCTA and its members should consider providing discounts to all blind and visually impaired subscribers pro-rated for each channel which can't or doesn't deliver video description.

NCTA warns that some cable converter boxes will need to be upgraded since they can't pass through video descriptions (p. 17). We have been aware of this problem for years and have contacted many in the cable industry to work with us to fix this problem. In the interim, converter boxes have been upgraded and new generations of boxes are in the field. Ample time and notice have been given to correct this unfortunate blocking of an essential service to cable subscribers. The fact that program guide menus are in Spanish when the SAP channel is chosen in certain digital set-top boxes is due to a faulty implementation of a user interface in a product that was rushed to market without consideration of the needs of millions of blind and visually impaired video description users. NCTA argues that this error in design is a reason that blind people should continue to be under-served by NCTA members; this argument should not be acceptable to the Commission. In fact, it demonstrates even more why rules are needed now so such errors aren't continuously made as new technology is rolled out.

MPAA suggests that the Commission doesn't understand the complexities of the video description process (MPAA, p. 29). They then go on to list what they call practical difficulties such as shipping, ensuring safety of program materials, creating a submaster, and returning the video master to the producer. These are such minor issues that they are hardly worth repeating. These activities have been finely tuned in two decades of closed captioning and ten years of video description. These are mere logistics. The creative process of creating a description script, having it voiced by a narrator and then mixed are the essence of video description and have also been well practiced and accomplished in the ten years video description has been on PBS and three years on Turner Classic Movies.

We are pleased to note that MPAA (footnote 9, p.5) does not disagree that ultimately distributors should be held responsible for enforcement of video description rules. If those distributors decide to contractually require delivery of programs to them with video description already recorded, MPAA's members will thus indirectly be the provider of video description, though by contract and not by direct FCC regulation. It is helpful for MPAA to be acknowledging the efficacy of a sharp increase in video description and the practical issues to be dealt with upon commencement of such rules.

### **Waiting for DTV is Unnecessary and Unfair**

NAB (p. 19) states that "forcing broadcasters to spend substantial monies on their soon-to-be obsolete analog systems constitutes an undue burden." We remind the Commission that video description has existed for more than 10 years and that broadcasters have had ample opportunity to upgrade their plants in order to amortize such costs over decades. In addition, though the best-case timeline for initiation of video description mandates would be a Fall of 2001 start date, it won't be until, at the earliest, 2006 that analog channels would go dark.

Though many people in industry are highly skeptical that the consumer-acceptance threshold will be met by 2006, we wonder whether broadcasters truly anticipate

virtually zero-based capital expenditures over the next five years? Will all analog tape machines be allowed to fall into obsolescence and disrepair? Will all analog equipment budgets be frozen? Most important, will blind and visually impaired people be forced to wait another five years (from 2001 to 2006) and then who knows how much longer before they can afford to upgrade their own consumer equipment to digital? And since NAB hasn't stated their unqualified support for a video description mandate in digital television, arguments suggesting delaying mandates due to anticipated demise of analog television are disingenuous at best.

NAB also fails to recognize that upgrading network and local station audio handling capabilities will be essential for digital TV and its 5.1 channels of sound. Upgrading now for handling video description will therefore not be a wasted expense but will be a necessary step in any case prior to full DTV conversion.

NAB (p. 21) "believes the Commission should instead focus on the current transition to digital broadcasting so as to insure that video description can be implemented in the digital environment." We agree that video description in DTV is a vital issue, though not to the exclusion of video description in analog TV. We strongly support the idea that the Commission begin the process of setting the rules for video description in DTV now so that broadcasters and all others in the industry can be prepared for their responsibilities in assuring proper delivery of video description digitally. Rules emerging from this proceeding should include an affirmative statement that video description will be required in DTV, that bandwidth should be set aside in the DTV spectrum to assure that video description's minor bandwidth needs do not have to compete with other DTV channel uses, and that video described programming must be delivered intact and in place via broadcast, cable, satellite and other transmission means in analog as well as digital television.

By beginning to build a library of described programming now, DTV providers will have an ample storehouse of series, movies, and children's programs that can readily be upconverted from analog to digital. This will lessen the impact of any

video description mandate in the digital environment by spreading out the production of video description programming over many more years.

NAB raises another important point on p. 22 of its comments. "NAB believes that such optimism [that digital provision of video description will be even easier and less costly: NPRM at ¶ 22] may be unfounded, given the uncertainty that exists with regard to the ability of DTV receivers to fully support video description." In addition, NAB states, "...it remains unclear whether DTV receivers are required to decode services other than the primary audio channel."

Though successful tests of the decoding of video description have been conducted on various DTV devices at the Model Station (WHD-TV in Washington, DC), we agree that the Commission needs to give further guidance to DTV receiver and set-top box manufacturers as to their responsibilities in assuring successful and consistent delivery of video descriptions. NAB rightly recognizes that any video description responsibility placed upon their members must be matched by standards and requirements placed upon the consumer reception hardware (and on the other links in the program delivery chain). It must also be recognized that consumer hardware which facilitates reception and display of video description must provide blind and visually impaired consumers with ready access to the video description on/off switch. Deeply nested, purely visual on-screen menus for activating video description are a cruel joke to consumers with little or no sight. Audible switches or dedicated physical buttons are simple solutions for this user-interface problem.

We fully support NAB's clear statement (p. 23) that, "the Commission should establish DTV receiver specifications" (at least as such specifications relate to services for people with disabilities) and thank NAB for its leadership on this issue.

### The SAP Channel is Available and Usage Can Be Shared

Regarding present use of the SAP channel, the NAB and NCTA seem to contradict their own arguments by indicating both that alternate audio services are virtually unused (and therefore would require vast expenditures to activate) and that "a number of broadcast stations currently use the SAP channel to provide other services..." (NAB, p. 19-20), "In several cases, a third audio track is used to transmit additional language services for both domestic and international audiences." (NCTA, p. 12).<sup>22</sup>

While NAB (p. 20) is unaware of any technical solutions that would allow the SAP channel to be used to provide both video description and foreign language audio for the same programming, no such solutions are needed in view of the fact that:

1. NAB and NCTA members are providing only a limited amount of Spanish programming and,
2. Though program types are not indicated, our experience is that most of these programs with Spanish in the SAP channel are sports or news and are therefore not of interest to blind and visually impaired viewers.

NAB's survey (NAB comments, Appendix A) indicates the present limited use of the SAP channel in the top markets which includes the aforementioned "Spanish language programming" (often local news), "weather updates" (probably only occasional and not in prime-time), "network programming" (no indication what is the content here), "promo feeds to stations" (seems to be an indication that the stations are also confused regarding the difference between the third audio feed from a network and the use of the SAP channel for delivery to the audience), "local programming" (of what sort and can it be shifted to another daypart?), "mono

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<sup>22</sup> Though NCTA claims a number of cable networks are presently providing Spanish on a third audio channel, no evidence as to the availability of this service could be found on any web site or program guide. The fact that many are contemplating adding this service is also not backed up by press releases, announcements or other evidence.

programs" (again, no indication of what that is), "audio feeds" (of what content and to whom?), "SAP explanation" (meaning a placeholder in case someone mistakenly turns on their SAP channel – is this an example of a more valuable use than video description?), and "reading services for the blind." This last is indeed an important service which many PBS stations also provide. A shared use of the SAP channel for video description and reading services has been acceptable in the many markets where PBS stations provide both video description and reading services.

NAB's survey of stations contains a significant flaw in its research and questions. The first question was, "Is your station currently equipped to broadcast in BTSC stereo audio?" The second question was "Are you broadcasting on your Secondary Audio Programming (SAP) channel?" No question asked, "Are you equipped to broadcast on your SAP channel" nor "Are you able to route three audio channels in your plant or to your transmitter?" We therefore have to assume that NAB assumed that being "BTSC equipped" equals "SAP equipped." The results, then, are encouraging as to the ability of stations in the top markets to deliver video description: "more than 80% of all stations in markets 1-25 are equipped to broadcast in BTSC stereo."

Unfortunately, only half of the chief engineers who were asked these questions responded and the results were unscientific due to the lack of random sampling. And surveyed were the "1,111 commercial stations with known fax numbers." How many additional stations did not have "known fax numbers" is unknown.

As NAB stated in its summary of results, "there is no way to estimate sampling error." In addition, questions regarding use of the PRO channel are irrelevant to this proceeding.

NAB concludes from its survey that, "viewers in the analog environment may be better served if licensees retain the discretion to determine which type of services – whether foreign language, video description or other – should be offered to local

viewers on the SAP channel." This suggestion would have some meaning if stations provided ANY video description or were provided described programming from their network parents or program providers. Then a station could actually ask its viewers which services were desired. The only such survey we are aware of is the one conducted by Lake Snell Perry & Associates in May of 1999<sup>23</sup>. The survey found that 85% of Americans agree that it is "important" or "very important" that broadcasters' debt to the public (in return for their free licenses) should include closed captioning and video description. The survey also found that 86% of those surveyed felt "favorable" or "highly favorable" toward a proposed mandate for captioning and video description.

### **Copyright Laws are No Barrier to a Video Description Mandate**

In its § II. D., NAB calls attention to an issue that has been rebutted time and again – the question of copyright and the notion of "derivative works" applying to video description. NAB, along with MPAA and NCTA in their comments, would have us believe that video description can and does take place in the absence of clear and explicit permission granted by copyright holders. As has been argued in WGBH's previous filings, not one of the thousands of hours of programming described by our service has been performed without the express permission of the copyright holder.

One wonders why these three organizations haven't made the same argument in the existing closed captioning mandates, which directly copy the audio portion of a program into a text format. With nearly 100% of TV programming to be closed captioned in the coming years, under a Congressional requirement, how is it that no copyright concerns are evident there? NAB argues (on p. 23) that, "Unlike closed captioning, which involves only the transcription of an existing video program," video description requires the creation of a separate script. Does NAB mean to

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<sup>23</sup> <http://www.bettertv.org/poll.html>



imply that unauthorized transcriptions of existing programs are not subject to copyright controls? That anyone can copy a program and distribute it, as long as it is an exact transcription?

In fact, the argument that "unauthorized incorporation of a pre-existing work" into a derivative work "constitutes an act of copyright infringement," may be true, but neither the Commission nor advocates for blind and visually impaired people have suggested that unauthorized usage should be allowed. As in captioning, once video description mandates are in place, simple agreements between program and video description service providers will be enacted. In fact, if program providers want to perform their own video description, both the original work and the "derivative work" will be under the control of the copyright holder.

On p. 24 of its comments, NAB says, "...described programming will require the obtaining of additional authorizations from the creators of pre-existing scripts and the revising of existing contractual obligations with the creative community." NAB here recognizes that any copyright problems can easily be remedied with an insignificant contractual agreement. Since ostensibly such agreements are already in place to meet their closed captioning requirements, the addition of the three words "and video description" to existing contracts seems a small price to pay to provide access to their publicly licensed stations for 11 million blind and visually impaired Americans.

MPAA (p. 17) goes so far as to imply that a video description mandate would trigger a global trade crisis that could only be rectified by the World Trade Organization. That the MPAA (though not its members who have been so cooperative in supporting the DVS Home Video project) will not be able to find the means to avert this looming global crisis in the interests of blind Americans is beyond belief. Perhaps the MPAA doesn't realize that the United Kingdom has already instituted a video description mandate, for 10% of all of its digital programming. We only hope the WTO doesn't find out.

As has been stated over and over again, consent by producers has and will be an essential part of the video description process, thereby obviating any and all copyright concerns. Indeed, as MPAA requests (p. 18), video descriptions have been considered the property of the producer and producers are encouraged to provide these descriptions in all subsequent distributions of their programs (such as pay cable, broadcast, DVD, etc.).

NCTA suggests that because much of the programming on cable is licensed from program syndicators therefore, "there is considerable doubt whether they would have the right to add video description to an existing soundtrack." (NCTA, p. 19). We don't understand why such a situation is any different from the closed captioning rules, where vast quantities of syndicated programming is captioned, sometimes at the request of the syndicator, sometimes at the request of the cable network and sometimes by the original copyright holder, or a combination of the three. Contractual agreements have readily solved these questions under the closed captioning rules and therefore boilerplate agreements already exist for adaptation for video description.

NCTA also notes that a storehouse of described programming doesn't exist as it does in the captioning field (due, as NCTA says, to government funding; NCTA, p. 19). In fact, government funding for video description has existed for ten years and while much of it presently goes for describing programs on public television, it has been offered to many cable networks for years. Aside from TCM, virtually all other cable networks have refused government assistance to build this "storehouse" of programs<sup>24</sup>. NCTA can hardly argue now that the Commission cannot act because of their own members decisions.

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<sup>24</sup> As of this writing, new government grants are pending approval and may actually increase the number of cable networks offering some described programming.

### **Video Description Will Not Have a Negative Impact on Production Schedules**

The NAB makes reference (p. 24) to the potential impact on the production process of video description. It states, "If the networks had to arrange for the programs to be described after receiving them, then the production process would have to be altered to guarantee receipt of the programs well in advance of air." Or, alternatively, requiring video description during the production process would "increase the time needed to produce programs before delivery to the networks." If only that were so.

Professionals in the field of accessible technologies and media know too well that when a manufacturer or software programmer or TV provider desires to make their products or services accessible, voluntarily or under a regulatory mandate, no additional time is provided for this added step in the process. As NAB and all of its members know, competition in the closed captioning field is intense and driven by two factors – price and service (turnaround time). Never in the almost 30-year history of WGBH's Caption Center has a producer held up delivery of a program or rescheduled a broadcast due to the captioning process. Captioners today, and describers tomorrow, have as their prime service mission the absolute hard and fast rule that making programs accessible can not hold up the production process. This is explicitly clear to all who deal with captioning and was explained in detail to NAB's legal counsel who interviewed this author prior to submitting NAB's comments in this proceeding.

### **Mandates Should Start at the Beginning of a TV Season**

We agree with NAB's suggestion (p. 25) that the commencement of any mandatory video description rule should coincide with the start of a television season.

However, while NAB refers to the start of the fall season, there is also an opportunity to startup in the mid-season of January, prior to the February sweeps period. Though 12 months following a Commission decision would be an adequate time period for all the parties to a rule to gear up for implementation, we

recommend that the NAB's suggested first of October would be an appropriate starting date, in the year 2001. January 1, 2002 would provide those who needed it even more time to prepare, without forcing blind and visually impaired viewers to extend their patience too far beyond the decade they have already been waiting for "voluntary compliance."

### **Compliance Should Be Measured for Each Covered Cable Network**

NCTA asks on p. 7 of its comments whether, "compliance with the fifty hours per quarter obligation would be measured across the entirety of the cable system's program offerings, or whether each program network that a cable system carries of a particular size would be required to offer the prescribed amount of video programming." We believe the Commission has been clear on this point and supports that latter option – that each cable programming network of the particular size and threshold of audience should be required to provide at least 50 hours per quarter of described programming.

### **Exemptions Should be Allowed but Benefits are Clear, Numerous and Justified**

In its §E. NAB calls on the Commission to institute exemptions and waivers comparable to its closed captioning rules based on what would be "economically burdensome." MPAA also calls for exemptions of program categories (p. 28). We agree that such rules would be fair. In addition, exempting certain program types, such as has been suggested by members of the blindness community, would be acceptable, but only when decided by the blind or visually impaired community and not by the exigencies of the MPAA or program providers and distributors. For instance, MPAA suggests that situation comedies should be exempted as a class (p. 28) even though the audience has spoken of their desire for these programs and experiments have shown that they do indeed "readily lend themselves to aural descriptions of on-screen action." (MPAA, p. 28). One wonders where MPAA acquired the expertise to make such a judgement.

However, we take issue with the NAB's suggestion (p. 27) that the Commission needs to carefully consider whether the benefits to be gained from a video description mandate are sufficient to justify the costs. NAB questions the demographic data, sometimes at variance, and concludes that the audience for video description may have been overestimated. Reliable statistics from the Federal government have put the blind and visually impaired population at 8-12 million. NAB points to another study estimating this population at 6.5 million. The fact that the exact number of blind and visually impaired people in this country isn't known shouldn't negate the rights of the millions of viewers we know are being shut out from this medium. If there is a number, somewhere between 6 million and 11 million people, that NAB is suggesting justifies a video description mandate, this sort of argument flies in the face of the history of strong protection of minority rights in this country, regardless of population figures. However, we do wonder what the critical mass of disenfranchised viewers NAB feels would justify Commission action, and if that number is not reached, what those millions of "too-few" viewers should do about gaining access to the public airwaves.

MPAA (p. 19) attempts to make an argument that there aren't enough blind people to justify Commission action. Putting aside the question of how many blind people it would take for MPAA to agree that some action needs to be taken, MPAA also distorts the data they quote. The University of California at San Francisco's Disability Statistics Center is quoted, but MPAA fails to note that the numbers cited do not include visual impairment and only count "disorders of the eye." Without attention to the overall population that can benefit from video description, citing statistics has no value at all. If MPAA accepts that there are 7 million people who are blind or visually impaired in the United States (a low estimate), how do they justify saying that the needs of such a mass of people should be ignored? On the other hand, MPAA says the marketplace should be allowed to operate freely to serve the needs of people who are blind or visually impaired (MPAA, p. 23), but how many businesses would ignore an opportunity to

gain 7 million customers through the kind of minor investment envisioned by the Commission's proposed rules? Clearly many have ignored this opportunity, and here is one of those occasions where the marketplace simply has failed.

MPAA suggests that "supply-and-demand mechanisms provide an effective means for determining audiences preferences for SAP programming..." (P. 23), yet MPAA has continually ignored the demands of people who are blind or visually impaired, even when faced by unanimous resolutions emanating from annual conventions (American Council of the Blind, 1998, 1999). MPAA has even directly interacted with a coalition of leaders of people who are blind or visually impaired who MPAA escorted to a number of Hollywood studios in 1998 so that the "demand" side of MPAA's supply-and-demand mechanism could directly be expressed to decision-makers. Yes, the marketplace should be allowed to operate, but it is not a perfect mechanism and cases like video description are the exception which demand regulatory action.

NAB (footnote 43, p. 27) and MPAA (p. 10) argue that because the AFB "Who's Watching" survey (Packer, Kirchner, 1997) indicates that blind people do watch television that therefore there is no problem with access. The blind community has addressed this fallacy again and again in numerous venues including this proceeding. Just because a person reluctantly endures a public accommodation or service that is only partially useful to them does not mean that they are being appropriately or equally served. People with disabilities spend innumerable hours of their days getting around barriers and overcoming the challenges placed in their paths by inaccessible physical and technological systems and services. It does not follow, however, that these highly unproductive efforts by people with disabilities means that there are no barriers in society. Would NAB similarly argue that because a person using a wheelchair is able to enter a building only if carried by attendants, that a ramp is not necessary? If NAB truly believes that people who are blind and visually impaired don't need video description, then NAB's members are wasting

billions of dollars providing pictures to the general population who should also be able to enjoy television with the pictures turned off and only the sound available.

Through numerous Notices of Inquiry, annual reports and internal studies, the Commission has indeed "carefully considered whether the benefits to be gained from adopting mandatory video description requirements are sufficient to justify imposing those requirements." (NAB, p. 27). Hence, this NPRM.

### **Consumers Have Expressed Their Need for Video Description**

Video description didn't spring up out of nowhere as some sort of government entitlement. For decades blind and visually impaired people have been fighting for access to all mainstream media including newspapers, television, movies and now the World Wide Web. Thousands of blind and visually impaired consumers and their friends and families have contacted us over the years to both praise our video description efforts and to plead for more programs. Multiple filings in this proceeding will express the heartfelt desire of large numbers of blind and visually impaired people to be treated equally by the television industry and to be provided access equal to that of non-disabled people and of deaf and hard-of-hearing viewers. A compelling filing by the Coalition of Organizational Representatives (COR – the leaders of the major organizations of and for deaf and hard-of-hearing) equated the access fought for and won through closed captioning to the battle blind and visually impaired people are now engaged in. Both communities recognize the essential nature of full and equivalent access to the sound and pictures of television.

In its comments, the National Federation for the Blind (NFB) argued that emphasis should be put on access to emergency messages and identifications on news programs. We agree that these are very important issues and have suggested that additional proceedings by the FCC can help to work out the complex issues of emergency alert systems and their usefulness by people with disabilities.

However, NFB also implies that blind people are not particularly interested in video description of entertainment or documentary programming. We respectfully disagree with those sentiments. Of course, the industry opponents in this proceeding will try to exploit those comments as indicative of the consensus in the blind community. We ask the Commission to weigh those comments against the hundreds of comments and e-mails being received and forwarded by other organizations of the blind. We also note that at the annual NFB conventions, our video description booth is continually crowded with NFB members getting information about video description (and continually asking when more video description will be available on commercial television) and buying thousands of dollars of described home videos. Our annual DVS Movie Nights at the Federation's conventions are extremely popular with their membership and are considered a highlight of the week. Without having spent much time among blind and visually impaired people, industry respondents should be wary of claiming to know the needs of this constituency.

### **Conclusion**

As fully explained above, the Commission has full authority to prescribe rules requiring the provision of video description services. WGBH also believes that arguments that video description embodies compelled or forced speech are incorrect and readily disputed. The technical problems NAB, NCTA and others are concerned about can be overcome in a relatively short period of time with a minimum amount of expenditure and some creative engineering practices. The legal issues raised, regarding copyright and Constitutional issues, are false barriers to a video description mandate and can be practically solved with appropriate contractual agreements. Practical solutions exist to extend video description to the commercial broadcast and cable sector, following a decade of low-cost, readily achievable implementation by public broadcasters.



All of these so-called problems can be solved not only in today's analog environment, but can and should be instituted in the digital television system as well. Finally, consumers who are blind and visually impaired have spoken compellingly about their needs and desires to be welcomed into the most popular and mainstream medium in the world today. More than 50 years after its invention, and in an economy that is historically robust, now is the time to open up this vital and essential communications medium to all who desire it.

Respectfully submitted,

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