

**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)

REPLY COMMENTS OF HOME BOX OFFICE

Home Box Office (“HBO”), a Division of Time Warner Entertainment Company, L.P., by its attorneys, hereby submits its reply comments in the above-captioned proceeding.

Introduction and Summary

Although HBO supports the goal of making video programming accessible to people with visual disabilities, the regulatory approach outlined in the Notice of Proposed Rulemaking^{1/} is the wrong vehicle for accomplishing that end. The record before the Commission demonstrates a myriad of problems with the proposed rules.

Perhaps the most vexing problem is that the Commission simply lacks the authority to promulgate the proposed rules. In addition, commenters have raised substantial technical and cost concerns, as well as copyright and constitutional impediments to the proposals. Similarly troubling is that the proposed rules are not market driven and are not uniformly supported by the blind community.

In this reply, HBO focuses on (i) the substantial record demonstrating that the Commission lacks jurisdiction to adopt video description rules and that other legal concerns preclude the regulatory approach the Commission advocates, and (ii) policy concerns that demonstrate that the proposed rules are inappropriate here. For these reasons, HBO urges the Commission to let video

^{1/} Implementation of Video Description of Video Programming, MM Docket No. 99-339 (rel. Nov. 18, 1999 (“Notice”).

description continue to develop through the current process of government subsidies and donations to the WGBH Educational Foundation (“WGBH”), and through the marketplace.

I. THE PROPOSED VIDEO DESCRIPTION REQUIREMENTS LACK A JURISDICTIONAL PREDICATE AND FACE OTHER LEGAL INFIRMITIES

Among other things, the Notice seeks comment on whether the Commission “possess[es] statutory authority to adopt the . . . video description rules.”^{2/} Of all the questions asked in the Notice, the jurisdictional question is the most fundamental and perhaps the easiest to resolve. The resounding answer to the Commission’s inquiry is “no.”

In 1996, Congress specifically considered video description and assigned the Commission a simple, two-step task — make an inquiry and report its findings.^{3/} Granting the Commission rulemaking authority over video description was neither mentioned nor intended in the 1996 Act. The record amply supports this conclusion.^{4/} General assertions of authority by the Commission and a claim that Congress “generally” supports its actions in this area do not negate the fact that Congress deliberately withheld FCC rulemaking authority in the area of video description. Where Congress has specifically removed administrative jurisdiction, the Commission is not free to act.^{5/} Only days ago, the Supreme Court reiterated that “[r]egardless of how serious the problem an administrative

^{2/} Notice ¶ 34.

^{3/} Section 713 of the 1996 Act specifically states that the FCC must “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.” 47 U.S.C. § 613(f).

^{4/} NCTA Comments at 3 (“Congress considered whether to give the FCC authority to adopt rules, and decided against it.”); see also DIRECTV Comments at 4 (“Congress intentionally mandated implementation of closed captioning rules and intentionally omitted any mention of implementation for video description.”) (emphasis in original); Motion Picture Association of America (“MPAA”) Comments at 3 (noting that Section 713’s silence concerning the Commission’s video description rulemaking authority stands in stark contrast to the express mandate of Congress elsewhere in Section 713 that the Commission “shall prescribe” regulations for closed captioning); Grupo Televisa Comments at 2 (“Unlike closed captioning . . . no legislative mandate exists for the Commission to adopt regulations requiring the description of video programming.”).

^{5/} Chevron, U.S.A. v. Natural Resource Defense Council, Inc., 467 US 837, 843 (1984) (Noting that agencies “must give effect to the unambiguously expressed intent of Congress.”). Here, no effect was given because the Commission did not even address the legislative history of Section 713.

agency seeks to address, however, it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’”^{6/}

The issue of jurisdiction is not the only legal difficulty with the Commission’s proposed rules. The rules as proposed would force programmers to create a certain type of content in violation of the First Amendment,^{7/} and they would raise serious copyright issues.^{8/} Due to the overwhelming legal impediments surrounding the suggested rules, the Commission should not adopt them.

II. THE ADOPTION OF THE PROPOSED VIDEO DESCRIPTION REGIME WOULD NOT BE THE BEST POLICY CHOICE

Even if the FCC had authority to adopt video description rules, it should refrain from doing so for several reasons. First, there is a limited market for the services. Second, there is significant disagreement within the blind community concerning the rules’ utility. Finally, the proposed rules would negatively affect the Spanish-speaking community in the United States. At more than 17 million, the Spanish-speaking audience is a much larger minority community than the blind.^{9/} Under these circumstances, establishing mandatory description rules would thwart, rather than promote, the public interest.

There is a very limited market for video description services. While some parties claim that the market for video description is as large as 11.5 million people,^{10/} one of the leading national organizations of the blind reports that there are only about one million legally blind persons in the United States.^{11/}

^{6/} Food and Drug Administration, et al. v. Brown & Williamson Tobacco Corp. et al., 2000 WL 289576 (March 21, 2000) (quoting ETSI Pipeline Project v. Missouri, 484 U. S. 495, 517 (1988) (holding that the FDA lacked the statutory authority to regulate tobacco even though the product “poses perhaps the single most significant threat to public health in the United States.” Brown & Williamson at * 23).

^{7/} See MPAA Comments at 6-13; C-SPAN Comments at 5-8.

^{8/} MPAA Comments at 14-18

^{9/} 1990 U.S. Census, Table 4: “Language Spoken at Home by Persons 5 Years and Older.”

^{10/} Letter from Larry Goldberg, Director, WGBH Educational Foundation, to Meryl Icove, Director, Disabilities Task Force, Federal Communications Commission (“WGBH Request”) at 5 (Nov. 4, 1998).

^{11/} National Federation of the Blind Comments at 1. Of the estimated one million blind persons, only 10% cannot see anything. Id.

In addition to the uncertainty as to the size of the market for video description services, there is substantial debate about the level of demand for such services within the market. For example, the National Federation of the Blind (“NFB”), a reputable national advocate for the blind, opposes mandatory video description. NFB explains that among the blind, the topic of video description does not elicit positive responses: “some dislike it; many are indifferent.” Others “find it irritating, overdone and full of irrelevant information.”^{12/} According to the NFB, blind persons “fail to comprehend why anyone would either want to receive or want to require describing costumes, lighting, and gestures when the real information remains unavailable.”^{13/} Instead of video description, the NFB reports that blind people want access to “genuinely important information [that is printed or flashed] right there on the screen to which [blind persons] do not have access.”^{14/}

Because the blind community itself is in substantial disagreement as to the utility of video description,^{15/} it is not at all evident that the lack of video description places visually impaired persons at “a significant disadvantage.”^{16/} Rather, it appears more likely that the Commission’s proposed solution would not address significant concerns.^{17/}

The absence of any significant demand for video description is confirmed by the development of the service to date. As opposed to closed captioning, which was abundant long before the Commission adopted closed captioning rules,^{18/} there is very little video description in evidence today and almost all of it is government funded. In fact, after ten years of video

^{12/} NFB Comments at 2.

^{13/} Id.

^{14/} NFB Comments at 2.

^{15/} The American Foundation for the Blind supports the proposed rules.

^{16/} Notice at ¶ 1.

^{17/} <<http://www.nfb.org/>> (visited March 14, 2000). (“The real problem of blindness is not the lack of eyesight. The real problem is the misunderstanding and lack of information which exists.”).

^{18/} Closed Captioning and Video Description of Video Programming Implementation of Section 305 of the Telecommunications Act of 1996 Video Programming Accessibility, 13 FCC Rcd 3272 ¶ 7 (rel. Aug. 22, 1997) (“The closed captioning of television programming began over 20 years ago and today is a common feature of much widely available and popular programming.”).

description, WGBH, the originator of Descriptive Video Service (“DVS”), remains “the only national source of descriptive video.”^{19/}

WGBH’s advocacy for video description perhaps is explained by the fact that a sizable portion of its nearly \$200 million in annual revenues is derived from government and foundation grants for activities related to closed captioning and video description.^{20/} In fact, WGBH “receives lucrative contracts to provide closed captioning and descriptive video for Hollywood films and television programs and grants from an alphabet soup of federal programs.”^{21/} Thus, although forcing video description on commercial multichannel programmers undoubtedly would boost WGBH’s revenues from its descriptive service business, there is little evidence that such Commission action would meet a material public need that is not being fulfilled.

In the process of attempting to accommodate an uncertain demand for video description by a community of uncertain size, the Commission would be causing significant harm to a much larger minority group – the Spanish-speaking community. Such would be the result because many broadcasters and cable program services use the second audio programming (“SAP”) channel, which would carry video description material, for a second (Spanish) language audio feed to accompany the particular video. In HBO’s case,^{22/} approximately 85% of the HBO program schedule (and approximately 93% of the primetime schedule) has Spanish audio on the SAP. Many other cable programmers and broadcasters make extensive use of the SAP for Spanish language audio.

WGBH and others concede that there are occasions where “video description has competed with an alternate language for use of the SAP channel.”^{23/} In these cases, the commenters suggest

^{19/} Opening First-Run Films to the Blind, Boston Globe at C4 (Feb. 4, 1998) (quoting Ray Joyce, director of descriptive video). Blockbuster Video’s desire to provide descriptive video recently “went bust” because “the chain could not target the DVS market.” The Virginian-Pilot and Ledger-Star (August 16, 1999).

^{20/} < http://www.wgbh.org/wgbh/about/annualreport99/fr_financials.html>. According to WGBH’s records, the company earned 177 million dollars in total revenue in FY 1999, over 111 million dollars was earned through grants and contracts and over 22 million dollars related to captioning and sales.

^{21/} Laurence Jarvik, Political Bias Scandal, The Wall St. J. , July 28, 1999 at A22.

^{22/} WGBH recognizes HBO’s extensive use of the SAP for Spanish customers. WGBH Request at 25. (“[n]o distributors are using their SAP channels to capacity, with the possible exception of HBO.”).

^{23/} WGBH Comments at 18.

that the solution is for “stations to air the program more than once, with each SAP service being made available for at least one airing.”^{24/}

This solution is unworkable. Requiring that programs be aired at different times in different formats would overcome a key marketing tool of HBO and similar networks — allowing subscribers to watch what they want, when they want. Thus, if the HBO Spanish speaking audience was deprived of its ability to have multiple chances to view programming on the HBO network, they would forfeit one of the principal values inherent in program services that offer viewers multiple viewing time periods.

Imposing video description services on program networks also could have significant implications for the security of video transmissions by satellite. As the Satellite Broadcasting and Communications Association noted, “C-Band utilizes two encrypted audio channels within a satellite television program signal for stereo reception. As a result, video description could only be delivered to subscribers on an unencrypted audio subcarrier.”^{25/} In order to provide video description over the C-Band, the audio portion of the programs would have to be distributed in a non-encrypted way and would “compromis[e] the security of the entire television service signal.”^{26/} Signal security is of prime importance to the viability of HBO’s business, HBO’s signal cannot be transmitted in such an unsecured manner.

While there are considerable problems with a regulatory solution for video description, this does not mean that the interests of the blind in having access to video programming will be ignored. Through the current system of individual contributions and foundation and government grants, a growing amount of video programming is being described and made available via PBS, home video and other outlets. Moreover, services such as Turner Classic Movies, an HBO sister service, are beginning to find ways, using government grants, to accommodate video-described programming. HBO believes these efforts will continue, and will be expanded as additional video description

^{24/} Id.

^{25/} Satellite Broadcasting and Communications Association at 5.

^{26/} Id.

service providers become established. In the meantime, the Commission should recognize the significant legal and policy impediments to the rules it proposes and refrain from proceeding.

CONCLUSION

The Commission's proposed rules lack a credible basis in law. Additionally, the proposed rules would require Commission intervention to enhance a market of an uncertain size with an uncertain level of demand. Worse yet, the rules would impair service to the much larger Spanish speaking community. HBO, therefore, respectfully requests that the Commission suspend this rulemaking and channel its efforts toward encouraging voluntary video description initiatives.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, Jette Ward, a secretary with the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. hereby certifies that this 24th day of March, 2000, I have caused a true and correct copy of the foregoing **Reply Comments Of Home Box Office** to be served via U.S. first class mail, postage prepaid, on the following:

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