Before the
Federal Communications Commission
Washington, D.C.

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

Reply Comments of the American Foundation for the Blind

The American Foundation for the Blind is pleased to have the opportunity to reply to the comments submitted to the Federal Communications Commission (hereinafter Commission or FCC) concerning the proposed video description rule. Although a number of legal issues have been raised which, in our view, lack merit, we do wish to address at some length the concerns of commenters over the First Amendment implications of the proposed rule. We have targeted this concern because it persists as an objection to mandating video description, even though we have answered these objections repeatedly. We would offer the following analysis in support of the proposition that any video description rule ultimately adopted by the Commission bearing resemblance to the NPRM would be upheld under the First Amendment.

The American Foundation for the Blind--the organization to which Helen Keller devoted more than 40 years of her life--is a national nonprofit whose mission is to eliminate the inequities faced the ten million Americans who are blind or visually impaired. Headquartered in New York City, AFB maintains offices in Atlanta, Chicago, Dallas, San Francisco, and a governmental relations office in Washington, D.C.

I. The Proposed Video Description Mandate Is a Content-Neutral Time, Place or Manner Regulation of Speech and Is, Therefore, Constitutional.

A. The Proposed Requirement Does Not Unconstitutionally Compel Speech

Critics of the proposed video description mandate argue that it would require affected parties to add verbal messages to program content and that such a requirement infringes upon editorial discretion. However, this "compelled speech" argument overlooks the obvious fact that broadcasters, cable operators, motion picture companies and other video programming providers often make choices about whether to produce/carry particular video programming, as well as choices concerning plot, theme, focus, tone, dialogue, stage direction or other elements which, in combination, total the message they wish to convey. Mandating descriptions of the visual elements of programming not accessible to blind or visually impaired persons, would require programming providers to either furnish such descriptions directly during the production process or to seek the assistance of another party to provide these descriptions on a post-production basis. Since the government will not be dictating the script of descriptions, programming providers

retain complete editorial discretion as to the way in which they present their message to blind audiences and to the public as a whole. The provision of video description, then, allows people who are blind or visually impaired 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 the Commission's proposed video description requirement. As indicated above, mandating video description does not require programming providers to "advocate" views with which they disagree. Thus, the Commission's proposed video description rule 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 proposed mandate even slightly akin to one state's unconstitutional insistence that motorists not block out the motto "Live free or die," appearing on their license plates over their objections. *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 company. *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. By contrast, the proposed video description mandate does not demand that programming providers "say" anything that has not already been said through the other elements of the program. Moreover, the Court's "compelled speech" decisions concern governmental involvement with the content of the speech to be compelled. However, the Commission's proposed rule is not such a regulation because it leaves program providers in charge of content.

The Court's disdain for "compelled speech" is not absolute. The Court has held that a state may require private owners of a large shopping center, open to the public, to permit persons expressing opposing points of view 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 content of the message and when the general public has access to the forum. In terms of the Commission's proposed video description rule, the government will not be dictating the message to be expressed through programming. Indeed, the descriptions accompanying covered programming merely make the "speech" of program providers accessible to members of the audience who are blind or visually impaired. The proposed rule does not require program providers to "say" anything to blind viewers that would not be "said" to the audience generally. The Commission's proposed regulation, therefore, does not unconstitutionally compel speech.

B. The Proposed Rule Is A Content-Neutral Regulation Of Speech

Because of the long-recognized intrinsic and instrumental value of freedom of expression, governmental regulations which seek to restrict the content of speech are met with the strictest judicial scrutiny. The basic question in determining the content neutrality of regulations is whether

the government has adopted a regulation of speech because it disagrees 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." *Clark, 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., 507 U.S. 410 (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 *Boos v. Barry, 485 U.S. 312 (1988).*

It is a failure of common sense and a misreading of the law to suggest that the proposed video description requirement is a content-based regulation of speech like the restrictions struck down in the cases above. The mandate would apply irrespective of artistic, literary, dramatic, historical, comedic or informative value, and the proposed rule only addresses times of day during which a minimal number of hours of described programming are to be shown in major markets, ensuring maximal impact of this modest requirement. Most importantly, the mandate is not an attempt to regulate speech with which the government disagrees.

The proposed rule, 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 in Central Park, city guidelines required that the city's sound technician, using the city's sound equipment, would be responsible for the sound amplification and mix. 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.* Applying this analysis to the present context, the proposed rule has as its singular purpose the provision of some measure of nonvisual access to the world of popular culture, entertainment and education which is readily available and heavily marketed to sighted viewers. Guaranteeing such access would enable the entire audience to enjoy programming while leaving artistic judgment and editorial discretion intact.

C. The Video Description Mandate Is A Valid Time, Place or Manner Regulation

If a regulation is not found to be content-based, then courts will view it as a restraint on the conduct associated with speaking or as a governmental attempt to establish conditions under which expressive freedoms can be exercised. Such time, place or manner restrictions are valid if they "are justified without reference to the content of the regulated speech, [if] they are narrowly tailored to serve a significant governmental interest, and [if] they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence, 468 U.S. at 293; See Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981) (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)).* Moreover, the regulation need not be the least restrictive means of accomplishing the governmental interest. *Ward, supra, at 797; United States v. Albertini, 472 U.S. 675, 689 (1985).*

The Commission's proposed rule satisfies these requirements. If a regulation is drawn too broadly, it is a substantial burden on the free speech right. However, The proposed video description mandate only requires that programming be accompanied by a signal carrying descriptions which would only be heard by those who actively seek to receive it and would not interfere with ordinary program reception. The requirement is narrowly drawn to serve the government's interest in wide diversity of viewpoint and the judicially recognized substantial public interest in enabling persons with disabilities to lead full and independent lives. See generally, *Community Television of S. Cal. v. Gottfried, 459 U.S. 498 (1983).*

Since the inclusion of video description does not affect programming as viewed by nondisabled audiences, the mandate quite literally provides for "alternative channels of communication" of program providers' speech. The Supreme Court has held that such alternative channels of communication must be available for challenged regulations to be ultimately upheld. Thus, the Court was willing to uphold a restriction against targeted residential picketing because protesters could make use of neighborhood streets to express their message. The regulation was narrowly tailored because it was merely concerned with the content-neutral ban on focused picketing to further the interest in homeowners' privacy. *Frisby v. Schultz, 487 U.S. 474 (1988).* Alternative channels are open to program providers because an overwhelmingly substantial portion of the audience would receive a program free of descriptions which they neither want nor need. Therefore, the proposed rule constitutes a valid time, place or manner regulation of speech.

II. Electronic Media Enjoy Less First Amendment Protection Than Print Media.

Even if courts were to treat an FCC rule mandating video description as a content-based regulation of speech, such a restriction would nevertheless be upheld because electronic media enjoy significantly less First Amendment protection than print media. The contrary claims of some are premised on the erroneous assumption that all media enjoy equal First Amendment protection--they do not.

There are a variety of reasons for the Supreme Court's special treatment of electronic media. The Court has used the concept of frequency scarcity on the electromagnetic spectrum as justification for lowering First Amendment standards for broadcasting. Moreover, courts have seen the

pervasive character of broadcasting as justifying more government involvement to protect the privacy and sensitivities of viewers and listeners. In its *Turner* decisions, infra, the Supreme court struggled with the determination of the appropriate First Amendment standard to apply to regulations impacting on the channel offerings of cable providers; the Court was ultimately not willing to treat cable providers in the same manner as the print media for First Amendment purposes. Whatever the rationale, however, and regardless of the extent to which changing technologies make these concepts obsolete or less significant, they remain vital and controlling principles of First Amendment jurisprudence. See generally, Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 Harv. L. Rev. 1062 (March, 1994).

The precepts embodied in the First Amendment are among the most sacred governing principles of American life. Yet, the right of self-expression and the public interest in diversity of viewpoint often clash. In order to strike an appropriate balance between these two competing legal and social values, the Supreme Court has developed a body of law which countenances less judicial scrutiny of regulations of speech where the two values conflict most frequently, namely in the context of broadcasting.

According to the Court, the purpose and function of the First Amendment is the preservation of an uninhibited marketplace of ideas rather than to defend monopolization of that market, either by the government or by private licensees. *Associated Press v. United States, 326 U.S. 1, 20 (1945); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).*

The concern for the availability of diverse points of view in the marketplace of ideas has led the Court to uphold content-based regulations in the context of broadcast media which would be summarily struck down if applied to print media. In *Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)*, the Court upheld the Federal Communications Commission's "fairness doctrine" requiring broadcasters to provide air time for replies to personal attacks and for responsive political editorials. Such rights of reply were rejected out-of-hand as impermissible governmental restrictions of speech when applied to newspapers. *Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).* In *FCC v. Pacifica Foundation, 438 U.S. 726 (1978)*, the Court held that the FCC had the authority to sanction a radio station for airing an indecent monologue at two o'clock in the afternoon. Because of the broadcast media's "uniquely pervasive presence in the lives of all Americans," the FCC's action did not violate the licensee's First Amendment rights. *Id. at 729-30.* The Court stated that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Id. at 748.* "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion, 395 U.S. at 390.* These are all indications that some content-based regulation of broadcast media is constitutionally tolerable.

In fact, broadcast licensees must satisfy a variety of public interest obligations, and these requirements, which are both affirmative and negative in character, have a direct bearing on programming content. Some of the affirmative requirements include: all licensees must serve their community needs and interests, *47 U.S.C. Sec. 307(b); United States v. Southwestern Cable Co., 392 U.S. 157, 174 (1968); Malrite TV of New York v. FCC, 652 F.2d 1140, 1144 (2d Cir. 1981)*; provision of reasonable amounts of air time to candidates for federal elective office, *47 U.S.C. Sec. 312(a)(7)*; allowance of "equal opportunities" to political candidates at all levels to have access to the airwaves when their opponents have been given access, *47 U.S.C. Sec. 315(a)*; and

television licensees must provide sufficient educational programming for children, *47 U.S.C. Sec. 303b*. Similarly, licensees may not transmit: "indecent" programming, *18 U.S.C. Sec. 1464*; or advertisements for tobacco products or casinos, *18 U.S.C. Sec. 1304*; *15 U.S.C. Sec. 1335.*

In a ruling consonant with the Supreme court's posture in *Pacifica* (supra), the decision in Action for *Children's Television v. FCC ("Act III"), 58 F.3d 654, (D.C.Cir.1995)*, upheld the "safe harbor" requirements specified in the 1992 Cable Act banning "indecent" programming between the hours of 6:00am and 10:00pm. These requirements, which have been sustained by the judiciary and have been part of the fabric of communications law for years, provide ample precedent for concluding that an FCC video description mandate would survive First amendment challenges. Again, a video description requirement, if it can be considered content-based at all, is far less burdensome than the clearly content-related provisions upheld by the courts.

Similarly, the issue of content-based speech regulation in the cable TV context has been raised in the Supreme Court's *Turner* decisions. *Turner Broadcasting System, Inc. v. FCC ("Turner I"), 512 U.S. 622 (1994); Turner Broadcasting System, Inc. v. FCC ("Turner II"), 520 U.S. 180 (1997).* After much deliberation and debate among the Justices, the Court upheld the "must carry" provisions requiring cable operators to include local broadcast stations among the channels they make available to cable consumers. These decisions have significance for the proposed video description rule because the Court ultimately found that the "must carry" provisions did not amount to a content-based restriction, even though the requirement obviously compelled cable operators to include stations they would otherwise exclude. Moreover, even though the Court did not give determinative guidance concerning the precise standard of judicial scrutiny to use in evaluating content-related regulation in the context of cable, the Court was not willing to employ the strictest scrutiny applied to print media regulation which the Court most clearly articulated in *Tornillo* (supra).

As applied to the proposed rule, the video description requirement would not begin to approach the degree of content control which the "must carry" obligation represents. Additionally, the *Turner* cases reinforce the precedent that electronic media do not enjoy the same constitutional status as print media, even though technology continues to evolve and challenge the scarcity rationale which gave birth to the distinction. Early on, some of the opponents of the proposed rule indicated that the video description requirement was premature because of the need to first transition to digital television. Ironically, when such a transition has been made, no doubt these opponents will argue that the diminished concerns over scarcity in the digital context warrant the further removal of this distinction and, consequently, the use of the strictest of judicial scrutiny. Even so, given that current and future technology will not make the provision of video description an undue burden, the proposed rule would merely call upon the video programming providers of today and tomorrow to ensure full access to programming for their audience members with disabilities–an obligation they are easily able to satisfy.

For further information, contact:

Mark Richert
Governmental Relations Representative
American Foundation for the Blind
Governmental Relations Group
820 First Street, N.E., Suite 400
Washington, DC 20002
202-408-8170
mrichert@afb.net