

**ORIGINAL**

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

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In the Matter of )  
)  
Implementation of )  
Video Description of )  
Video Programming )  
)

MM Docket No. 99-339

TO: The Commission

**REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters ("NAB")<sup>1</sup> submits this reply to certain comments on the Commission's *Notice of Proposed Rulemaking* in this proceeding.<sup>2</sup> In the *Notice*, the Commission sought comment on proposals for the introduction of video description in the programming of major market television broadcasters and the larger multichannel video programming distributors. Comments were submitted in response to this *Notice* by various video programming distributors, program producers, members of the visually disabled community, and providers of video description services. In this reply, NAB expresses agreement with the commenters that questioned the Commission's statutory authority to require the provision of video description and asserted that any such requirements raised constitutional concerns. NAB also addresses the technical difficulties and costs presented by the Commission's proposals for all video programming distributors (broadcast, cable and satellite). NAB concludes that the

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<sup>1</sup> NAB is a nonprofit, incorporated association of television and radio stations and broadcast networks which serves and represents the American broadcast industry.

<sup>2</sup> *Notice of Proposed Rulemaking* in MM Docket No. 99-339, FCC 99-353 (rel. Nov. 18, 1999) ("*Notice*").

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record in this proceeding fails to demonstrate that the benefits of mandating video description in the analog environment justify the costs.

**I. A Number of Commenters Agreed that the Commission Lacks Statutory Authority to Mandate Video Description and that its Proposal Implicates the First Amendment.**

A number of commenters in this proceeding agreed with NAB that the Commission lacks statutory authority to prescribe rules mandating the provision of video description services.<sup>3</sup> In accordance with NAB, these commenters asserted that the language, legislative history and structure of Section 713 of the Communications Act of 1934 (“Act”) show that the Commission has only the authority to conduct an inquiry and issue a report on the use of video description. Commenters similarly agreed that the Commission’s proposal to mandate the provision of video description is constitutionally suspect as a form of compelled speech.<sup>4</sup> NAB expresses its agreement in particular with the comments of MPAA, which asserted that mandatory video description would compel content-based speech and that the Commission’s proposals accordingly compromise the First Amendment because they are not narrowly tailored to serve a compelling state interest. In this regard, NAB objects to the comments by the American Foundation for the Blind (at 7), proposing that new feature films and syndicated series be forbidden from broadcast in any form on any station unless video described. For the reasons already set forth in MPAA’s comments, this proposal is an unconstitutional content-based restriction on speech.

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<sup>3</sup> See Comments of National Cable Television Association (“NCTA”) at 4-5; Motion Picture Association of America, Inc. (“MPAA”) at 3-4; A&E Television Networks (“A&E”) at 6-8; DIRECTV, Inc. at 4-5.

<sup>4</sup> See Comments of MPAA at 6-14; NCTA at 6-7; A&E at 12-14; C-SPAN at 5-8.

Although no commenter specifically contended that the Commission’s video description proposal passes constitutional muster, two commenters did argue that the Commission possesses statutory authority to adopt mandatory description rules.<sup>5</sup> Both of these commenters primarily rely on the broad jurisdiction of the Commission under the Act generally. In considering these commenters’ assertions, NAB initially observes that, in the *absence* of specific action by Congress, arguments relying on the general authority of the Commission might be more convincing. In the case of video description, however, the Commission is not writing on a “clean slate,” but is required to implement the very clear and specific terms of Section 713.<sup>6</sup> As explained in detail in NAB’s comments (at 7-10), the Commission cannot rely upon its general grants of authority in the Act that do not even refer to video description to expand the terms of Section 713(f), which explicitly limit the Commission to conducting an inquiry and issuing a report on video description. Thus, cases discussing the general jurisdiction of the Commission (such as *U.S. v. Southwestern Cable*, 392 U.S. 157 (1968)), in which Congress and the Act were *silent* as to the specific subject at issue, cannot properly be relied upon to justify Commission action contrary to the express terms of a statutory provision.<sup>7</sup>

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<sup>5</sup> See Comments of WGBH Educational Foundation (“WGBH”) at Appendix; National Television Video Access Coalition (“Coalition”) at 16-22.

<sup>6</sup> Section 713(f), entitled “Video Descriptions Inquiry,” directs the Commission to “commence an inquiry to examine the use of video descriptions” and “report to Congress on its findings.” 47 U.S.C. § 613(f). The Commission “must give effect” to this “unambiguously expressed intent of Congress,” which only authorizes the commencement of a study and the issuance of a report. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984).

<sup>7</sup> See Comments of WGBH at 1-2 of Appendix; Coalition at 17 n.1. The Coalition’s reliance in its comments (at 17-18) on the American with Disabilities Act (“ADA”) is also misplaced. The ADA was primarily concerned with discrimination experienced by the disabled in the workplace and in gaining physical access to public facilities, not with the provision of television entertainment. In addition, the Commission order cited by the Coalition implemented certain provisions of the ADA pertaining to common carriers, and specifically required each common carrier providing telephone voice transmission services to provide telecommunications relay

Both of these commenters also misread different provisions of Section 713. WGBH asserted that Section 713(f), which requires the Commission to “report” on the subject of video description, expresses “Congress’ intent that the Commission ultimately should require video description.” Comments of WGBH, Appendix at 2. NAB disagrees, as Section 713(f) actually directs the Commission to “report *to Congress* on its findings,” which clearly implies that Congress wanted the Commission’s report so as to enable *Congress* to determine the appropriate action to be taken with regard to video description. 47 U.S.C. § 613(f) (emphasis added). The Coalition contended that Section 713(h), which bars private rights of action “to enforce any requirement of this section *or any regulation thereunder*,” implies that Congress envisioned regulations being adopted in connection with video description. 47 U.S.C. § 613(h) (emphasis added). NAB again disagrees. As Section 713(a)-(e) expressly directs the Commission to adopt rules requiring the provision of closed captioning, Section 713(h) merely refers to the mandated closed captioning regulations, not to any video description regulations.

Finally, both WGBH and the Coalition overlook the striking differences in the statutory scheme that Congress created with regard to closed captioning and video description. With regard to closed captioning, Congress *mandated* the adoption of regulations, specifically directed the Commission to establish a schedule for implementation, and authorized certain exemptions from the captioning requirements. 47 U.S.C. § 613(a)-(e). In stark contrast, Congress directed the Commission only to commence an inquiry and report to Congress on the use of video description. 47 U.S.C. § 613(f). Indeed, when Congress adopted Section 713 of the Act, the

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services for individuals with hearing or speech disabilities. *See Telecommunications Services for the Hearing and Speech Disabled*, CS Docket No. 90-571, 56 Fed. Reg. 36729 (1991). These common carrier provisions have no connection whatsoever to video description, and cannot be interpreted as authorizing the adoption of video description requirements for broadcasters in light of Section 713’s express provision to the contrary.

Conference Committee *removed* language that had only *permitted* (but did not require) the Commission to adopt regulations with regard to video description.<sup>8</sup> Thus, the contrast could not be more clear. In the same section of the Act, Congress *mandated* the Commission to prescribe closed captioning regulations, but expressly *eliminated* language that would merely have *permitted* the Commission to adopt video description regulations. The Commission does not possess the discretion to ignore Congress' express limitation of its statutory authority with regard to video description and adopt regulations as it did with regard to closed captioning.<sup>9</sup> As NAB discussed in detail in its comments (at 6-7), where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."<sup>10</sup> The adoption of video description regulations would be contrary to Congress' clear purpose to authorize a Commission rulemaking with regard to closed captioning, but not with regard to video description. The Commission cannot disregard the overall approach taken by Congress in these statutory provisions.<sup>11</sup>

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<sup>8</sup> See H.R. Rep. No. 458, 104th Cong., 2d Sess. 183 (1996) (Conference Committee deleted language stating that the Commission "*may* adopt regulations it deems necessary to promote the accessibility of video programming to persons with visual impairments") (emphasis added).

<sup>9</sup> See *Chevron*, 467 U.S. at 843 and note 9 (because Congress "had an intention on the precise question" of video description, that "intention is the law and must be given effect").

<sup>10</sup> *Gozlon-Peretz v. U.S.*, 498 U.S. 395, 404 (1991); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987); *Russello v. U.S.*, 464 U.S. 16, 23 (1983).

<sup>11</sup> See *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. \_\_\_ (March 21, 2000) (in finding that Congress had precluded the Food and Drug Administration from asserting jurisdiction to regulate tobacco products, the Supreme Court emphasized that the provisions of the Food, Drug, and Cosmetic Act had to be "read in their context and with a view to their place in the overall statutory scheme").

## **II. Commenters From All Segments of the Video Programming Industry Agreed that the Commission Has Seriously Underestimated the Technical Difficulties and Costs Associated with Providing Described Programming, Especially in an Analog Environment.**

Commenters representing a variety of video programming distributors agreed that implementing video description rules would be technically difficult and financially burdensome. For example, NCTA stated in its comments (at 11-17) that a video description requirement would force cable networks to add an additional audio channel or eliminate existing uses of an existing channel, and would force cable systems to reconfigure their systems to add a new channel, both at significant cost. Similarly, DIRECTV asserted (at 2-3) that the Commission's proposal would require DIRECTV to modify its entire uplink and downlink systems to accommodate the additional audio channel needed for video description. And as NAB explained in its comments (at 13-19), the origination centers and distribution systems of the broadcast networks, as well as the studio and plant of local television stations, were generally not designed to support the extra channel of audio needed to provide video description. Thus, the record shows that the Commission has severely underestimated the technical difficulties and costs associated with providing described programming, especially in an analog environment.

In addition to these significant direct costs, the record also demonstrates that requiring the provision of video description would entail substantial opportunity costs. For example, DIRECTV (at 15) explained that video description would unavoidably conflict with Spanish-language and other programming currently occupying SAP channels on DIRECTV's Direct Broadcast Satellite system. NCTA reported (at 12-14) that the minority of cable networks with a third audio track that could be used for video description already use that track for a variety of other purposes, including additional language services or supplementary audio information (such as news or local weather). NAB similarly explained in its comments (at 19-21) that, to the extent

that video description requirements are adopted in an analog environment, other important broadcast uses (such as foreign language audio) of the SAP channel would be foreclosed.<sup>12</sup> Mandating the provision of video description would therefore require these video programming distributors to alter or even eliminate certain valuable services they currently provide to viewers.

Given the clearly significant direct costs and opportunity costs that would be imposed on video programming distributors, NAB opposes the suggestions of several commenters that the initial video description requirements should be expanded to include broadcasters in markets beyond the top 25 and additional broadcast networks beyond ABC, CBS, Fox and NBC.<sup>13</sup> In particular, it would be inappropriate to impose these technically challenging and expensive video description requirements on networks such as UPN, WB and Pax TV, which have struggled to turn a profit and successfully compete in an increasingly competitive video programming marketplace. Similarly, due to the costs involved, the Commission, if it determines to adopt video description rules in an analog environment, should impose those requirements only on major network affiliates in the 25 largest markets, as it originally proposed.<sup>14</sup> Finally, NAB opposes the suggestion that, once a video program has been described, the descriptions should

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<sup>12</sup> This foreclosure would become more serious as the Commission “increase[s] the amount of required described programming over time,” as the *Notice* (at ¶ 21) expressly contemplated.

<sup>13</sup> See, e.g., Comments of WGBH at 3; Coalition at 7.

<sup>14</sup> NAB also questions suggestions that all network affiliated stations outside the top 25 markets that are “SAP equipped” be required to pass through descriptions in programming received from their networks. See Comments of WGBH at 5; Coalition at 6. As explained in NAB’s comments (at 16-19), the fact that a local network affiliate may be regarded as “SAP equipped” (*i.e.*, has a BTSC/MTS stereo generator that can produce a SAP channel), does not mean that the local station’s satellite downlink system, studio and plant were designed to support the extra audio channel needed to receive and route described network programming. Although NAB would certainly encourage local affiliates with the requisite capabilities to pass through described network programming, we do not believe the Commission should adopt such a requirement for stations outside the top 25 markets.

always accompany it in reruns, even if reformatting would be necessary.<sup>15</sup> The Commission recognized in its closed captioning rules that reformatting of captions could be “economically burdensome,” and declined to adopt such a requirement.<sup>16</sup> NAB believes the Commission should follow its own precedent in this regard and not require reformatting of video descriptions.

### **III. The Record Does Not Demonstrate that the Benefits of Mandating Video Description Justify the Costs.**

Given the significant costs that mandatory video description requirements would entail, especially in an analog environment, NAB believes that the record does not demonstrate that the benefits of such requirements outweigh those costs. *See* Comments of MPAA at 19-23 (arguing that costs of video description substantially outweigh potential benefits). Even the visually disabled community – the audience intended to benefit from video description – did not uniformly agree in their comments that video description should be mandated. Indeed, the National Federation of the Blind, the largest organization of the blind in the U.S., opposed the imposition of video description as a “federal mandate” because: (1) many blind people find video description irritating and overdone; and (2) the Commission’s proposal emphasizes entertainment at the expense of more important information (such as information that is only printed in news, emergency announcements and advertisements).<sup>17</sup> For these reasons, NAB concludes that the Commission should refrain from imposing mandatory video description rules, particularly in the current analog environment.

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<sup>15</sup> *See* Comments of Coalition at 11.

<sup>16</sup> *Report and Order* in MM Docket No. 95-176, 13 FCC Rcd 3272 at ¶ 86 (1997).

<sup>17</sup> *See* Comments of National Federation of the Blind at 2-5. These comments also estimate that there are approximately one million legally blind persons in the United States. This figure is substantially smaller than the 8-12 million people with visual disabilities that the Commission claimed was the primary audience for video description.



With regard to the question of video description in a digital environment, NAB reemphasizes that the most important question is whether digital television (“DTV”) receivers will be manufactured with the capability of decoding and playing multiple audio channels. *See* Comments of NAB at 21-23. Given this basic uncertainty as to whether digital televisions will even be able to support the described programming that broadcasters may provide, NAB believes it would be premature for the Commission to adopt at this time any rules requiring digital video programming distributors to provide video description, even assuming the Commission’s statutory authority to do so.<sup>18</sup>

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<sup>18</sup> Accordingly, NAB opposes the suggestion by some commenters that any video description rules adopted should be applicable to both analog and digital transmissions or broadcasters. *See, e.g.,* Comments of Coalition at 9.

#### **IV. Conclusion**

For the reasons set forth above, the Commission should not adopt its proposed video description requirements. The Commission lacks statutory authority to prescribe rules requiring the provision of video description services, and its proposal raises the First Amendment problem of forced speech. Beyond these statutory and constitutional difficulties, the record in this proceeding demonstrates the technical and financial burden that video description requirements would impose on all types of video programming distributors, including broadcasters. Given these substantial costs and the relatively limited benefits that a video description mandate would provide, particularly in an analog environment, NAB advises the Commission to instead focus on promoting the development of DTV receivers that will be able to support video description, now and in the future.

Respectfully submitted,

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March 24, 2000

**CERTIFICATE OF SERVICE**

**I, Stacey M. Phillips, Legal Secretary for the National Association of Broadcasters, hereby certifies that a true and correct copy of the foregoing Reply Comments of the National Association of Broadcasters was sent this 24<sup>th</sup> day of March, 2000, by first class mail, postage prepaid to the following:**

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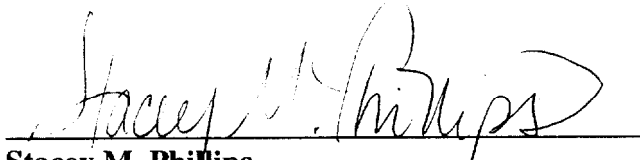
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