

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

REPLY COMMENTS OF DIRECTV, INC.

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**REPLY COMMENTS OF DIRECTV, INC.**

DIRECTV, Inc. ("DIRECTV")<sup>1</sup> hereby submits the following reply comments in the above-captioned proceeding.

**I. INTRODUCTION & SUMMARY**

In its initial comments in this proceeding, DIRECTV questioned the Commission's authority to promulgate rules mandating video description pursuant to Section 713 of the Communications Act. Several commenters have echoed this concern and note that Congress considered granting the Commission authority to promulgate video description rules, but decided against it. In light of the serious questions concerning the Commission's authority, DIRECTV urges the Commission to refrain from imposing video description requirements without further instruction from Congress.

In addition to the apparent lack of authority to implement the proposed rules, the factual record demonstrates that it would be premature for the Commission to adopt the proposed

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<sup>1</sup> DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, Inc., a licensee in the DBS service and a wholly-owned subsidiary of Hughes Electronics Corporation.

requirements. The commenters suggest that the proposed requirements will be inordinately burdensome to industry yet, at the same time, will fail to address the real needs of visually-impaired consumers. Comments submitted by advocates for the blind present a broad range of problems with the proposal – some arguing that video description of prime-time programming is unnecessary and unwanted, and others arguing that the Commission must find ways to accommodate the needs of consumers who have additional or other unique needs. Indeed, given the broad range of viewpoints expressed by advocates for the visually-impaired on this issue, it is hardly surprising that Congress decided that a video description requirement would be premature.

In the absence of a clearer congressional mandate, and given the divergent positions taken even by the intended beneficiaries of the proposed rules, the Commission should proceed with caution. To achieve the intended goal of increasing the availability of video description programming, the Commission should continue to encourage voluntary efforts by industry to provide video description programming – as DIRECTV currently does – and should continue to work with visually-impaired audiences to determine what types of services best meet their needs.

In the event that the Commission nonetheless chooses to mandate video description as proposed, DIRECTV maintains that DBS operators should be expressly exempted from this requirement and permitted instead to continue their voluntary efforts to serve visually-impaired audiences. If the Commission does not create an outright exemption for DBS providers, it should create a waiver application process similar to the process for waiver of the closed captioning rules, which provide a mechanism for DBS providers to request and for the Commission to grant relief from the substantial technical and financial burdens this requirement

would impose. In any event, DBS operators should be accorded substantial flexibility in choosing video description offerings.

## **II. THE COMMISSION LACKS STATUTORY AUTHORITY TO ADOPT VIDEO DESCRIPTION REQUIREMENTS**

Nearly all the commenters that examined the scope of Section 713 of the Communications Act<sup>2</sup> agree that the Commission lacks the statutory authority to impose its proposed video description rules.<sup>3</sup> Commenters note that the House bill would have permitted the Commission to implement a video description requirement, but that this language was removed from the final version of the legislation.<sup>4</sup> Congress thus considered whether to grant the Commission authority to adopt video description rules, but decided against it. The absence of rulemaking authority in Section 713(f) precludes the Commission from implementing the proposed video description rules.

Several commenters contrast the provision granting the Commission authority to adopt closed captioning rules with the provision addressing video description. Section 713(a)<sup>5</sup> expressly directed the Commission to *adopt rules* to implement closed captioning and to provide schedules for such implementation, whereas Section 713(f) directed the Commission to *report to Congress* on the state of video description technology and the availability of video description programming. The commenters agree that the reporting requirement in Section 713(f) was intended to direct the Commission to gather information with respect to video description so that

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<sup>2</sup> 47 U.S.C. § 613(a).

<sup>3</sup> See, e.g., Comments of A&E Television Networks at 5-14; Comments of the National Association of Broadcasters at 2-13; Comments of the National Cable Television Association at 3-7; Comments of the Motion Picture Association of America at 3-6.

<sup>4</sup> Comments of A&E Television Networks at 7-8; Comments of the National Association of Broadcasters at 4-6; Comments of the National Cable Television Association at 4-5.

<sup>5</sup> 47 U.S.C. § 613(f).

Congress could determine whether it should take any further action.<sup>6</sup> As DIRECTV and others have noted, the Commission's reports to Congress fulfilled this requirement, and Congress has not enacted further legislation in response to the Commission's findings.<sup>7</sup>

Several commenters note, in addition, that a video description requirement would affect an operator's choice of which services and content to provide, and therefore would raise serious First Amendment issues.<sup>8</sup> These commenters correctly assert that any ambiguity as to the Commission's statutory authority to promulgate rules requiring video description must be resolved in a manner that does not raise doubts as to the constitutionality of the legislation.<sup>9</sup> DIRECTV agrees that such authority must be construed narrowly to avoid conflicts with the First Amendment.

### **III. THE COMMISSION SHOULD ENCOURAGE VOLUNTARY EFFORTS TO PROMOTE VIDEO DESCRIPTION PROGRAMMING RATHER THAN IMPOSE ONEROUS REQUIREMENTS THAT MAY NOT BE CONSISTENT WITH THE NEEDS OF THE INTENDED BENEFICIARIES**

Given the serious questions raised by the commenters as to the Commission's statutory authority to promulgate video description rules, as well as the lack of consensus as to what

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<sup>6</sup> See, e.g., Comments of A&E Television Networks at 6-7; Comments of the National Association of Broadcasters at 2-4; Comments of the National Cable Television Association at 4; Comments of the Motion Picture Association of America at 3-4.

<sup>7</sup> Comments of DIRECTV at 4.

<sup>8</sup> See, e.g., Comments of A&E Television Networks at 12-14; Comments of C-Span & C-Span-2 at 5-8; Comments of the National Association of Broadcasters at 10-13; Comments of the National Cable Television Association at 3-7; Comments of the Motion Picture Association of America at 6-16.

<sup>9</sup> See *Riley v. National Federation of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

services would best meet the needs of visually-impaired audiences, the Commission should refrain from adopting a mandatory video description policy. The Commission should instead encourage efforts to promote video description programming on a voluntary basis.

**A. There Is Serious Disagreement As To Whether The Proposed Rules Address The Real Needs Of Visually-Impaired Consumers**

The comments in this proceeding clearly indicate that more information is necessary to determine what types of services will best meet the needs of the intended beneficiaries. Most notably, the National Federation for the Blind -- the largest and most respected organization advocating policies on behalf of the visually-impaired -- *opposes* the Commission's video description proposals.<sup>10</sup> The NFB notes that most visually-impaired people are "ambivalent" about video description, and many do not use the services currently available because "they find it irritating, overdone, and full of irrelevant information."<sup>11</sup> The NFB notes that the Commission's proposals have placed too much emphasis on prime-time entertainment, and thereby fail to address more important needs of visually-impaired viewers, such as access to emergency information printed on the screen.<sup>12</sup>

Other commenters in this proceeding argue that the Commission's proposals do not go far enough. Indeed, one commenter contends that the Commission should commence an inquiry to determine how television can be made accessible to consumers who are both blind and profoundly deaf.<sup>13</sup> Commenters advocating the most extreme positions fail to provide useful

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<sup>10</sup> Comments of the National Federation of the Blind at 1.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> Comments of Telecommunications for the Deaf, Inc. at 4.

information as to how broadcasters and MVPDs could better serve the needs of visually-impaired persons. These commenters show no concern for the fact that other services, even services that could benefit visually-impaired users, will be supplanted if the Commission mandates video description of prime-time programming.<sup>14</sup>

**B. Voluntary Measures Aimed At Promoting Video Description Will Serve The Underlying Goals More Effectively Than A Federal Mandate**

DIRECTV currently offers video description programming on a voluntary basis in a manner that encourages networks to provide video description 24 hours per day. Because DIRECTV believes that the SAP channel should be fully devoted to serving a particular audience in order to avoid customer confusion, DIRECTV requires those networks that operate on channels that are equipped with a SAP to use the SAP full time. As noted previously, DIRECTV subscribers have learned to rely upon foreign translations on certain SAP channels.<sup>15</sup> DIRECTV's voluntary measures further the objectives that underlie video description in two ways: First, they prevent confusion among DIRECTV customers who rely on SAP channels for different purposes. Second, they increase the incentives for programmers to fund video description, because programmers must utilize their SAP capacity full time. Because these measures more effectively meet the needs of visually-impaired audiences, and balance their needs with the needs of other audiences without intrusive government regulation of service content, the Commission should refrain from imposing a video description requirement.

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<sup>14</sup> Indeed, this concern is voiced by the National Federation for the Blind, which argues that the Commission's proposal will interfere with the provision of emergency messages. Comments of the National Federation for the Blind at 3.

<sup>15</sup> DIRECTV Comments at 12-13.



**C. The Commission Should Not Adopt Rules That Effectively Prioritize One Underserved Community Over Another**

As DIRECTV explained in its initial comments, available SAP capacity on its DBS system is limited.<sup>16</sup> Approximately one-third of DIRECTV's channels that can support a SAP channel in the first instance are able to support only one SAP channel. Almost 80% of the SAP channels currently in use are devoted to Spanish-language programming. If the Commission were to require video description, DIRECTV essentially would have to develop a third audio program ("TAP") in order to comply with the Commission's mandate without correspondingly reducing services devoted to its Spanish-speaking subscribers. The addition of a third audio channel would require a massive, system-wide upgrade and would most likely necessitate the development of new equipment that is not commercially available.<sup>17</sup>

Several commenters in this proceeding recognized the inherent conflict between the provision of Spanish-language translation and video description on the SAP channel.<sup>18</sup> Others, however, assume incorrectly that no programming conflicts would occur if the Commission were to mandate video description.<sup>19</sup> Because of the limits on SAP channel capacity, and the fact that DIRECTV's SAP capacity is already heavily utilized, such conflicts are inevitable. To bolster the erroneous assumption that video description programming will not conflict with existing Spanish-language programming on the SAP channel, some commenters naively suggested that

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<sup>16</sup> *Id.* at 2-3.

<sup>17</sup> *Id.* 6-7.

<sup>18</sup> Comments of the American Council for the Blind at 6; Comments of the National Association of Broadcasters at 12-14; Comments of the Motion Picture Association of America at 25-26.

<sup>19</sup> Comments of the National Television Video Access Coalition at 4; Comments of the American Foundation for the Blind at 6; Comments of WGBH at 18.

translations are necessary for sports events but not for prime-time programming.<sup>20</sup> One commenter went so far as to suggest that consumers who rely upon Spanish translations should learn English.<sup>21</sup> These commenters fail to acknowledge the implications of a policy that prioritizes the needs of one audience over another.

Recognizing another issue with respect to competing uses of the SAP channel, the National Federation for the Blind noted that the Commission's proposals do not serve the needs of visually-impaired persons who are also Spanish-speaking.<sup>22</sup> On this point, however, the National Federation for the Blind explains that "the vast majority of Spanish-speaking blind people would much prefer to have the SAP channel used to translate English-language dialogue into Spanish rather than to have it used for English-language description of sets [and] costumes."<sup>23</sup>

The diversity of opinion expressed in the comments clearly demonstrates that the limitations of the SAP capacity cause an intractable conflict between competing uses and audiences. DIRECTV believes the Commission should avoid this controversy and refrain from imposing a requirement that would result in the substitution of one type of programming for another. The Commission should instead encourage voluntary efforts aimed at providing more programming for each of these underserved communities.

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<sup>20</sup> Comments of the American Foundation for the Blind at 6; Comments of Descriptive Theatervision at ¶ 30; Comments of the National Television Video Access Coalition at 4.

<sup>21</sup> Comments of the National Television Video Access Coalition at 4.

<sup>22</sup> Comments of the National Foundation for the Blind at ¶ 8.

<sup>23</sup> *Id.*

#### **IV. IF THE COMMISSION ADOPTS VIDEO DESCRIPTION RULES, THE COMMISSION SHOULD PROVIDE AN EXEMPTION FOR DBS OPERATORS**

As explained in greater detail in DIRECTV's initial comments, the Commission's proposed rules will create enormous technical and financial burdens if they are applied to DBS operators.<sup>24</sup> The proposed rules do not impose equivalent burdens on broadcasters or cable incumbents.<sup>25</sup> Without regard to the cost of compliance with the proposed rules or to the fact that such burdens could harm MVPD competition, a few commenters suggest that the Commission should require DBS operators to comply with the proposed video description rules.<sup>26</sup> These commenters assume, incorrectly, that DBS systems can support multiple audio signals per channel and that no further modifications would be necessary. To the contrary, DIRECTV would have to modify its entire uplink and downlink systems to accommodate a third audio channel. Such modification would be necessary to avoid displacing services that currently occupy the SAP channel and would most likely require an enormous investment as well as the development of additional equipment that is not commercially available. It is critical that the Commission take these technical and financial burdens into account.

In the event that the Commission nonetheless mandates video description as proposed, DIRECTV urges the Commission to exempt DBS operators from the requirement due to the unique burdens such rules would impose on them. To the extent that the Commission does not expressly exempt DBS operators from compliance with the video description rules, the Commission should implement a waiver process that provides a mechanism for DBS operators to

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<sup>24</sup> DIRECTV Comments at 5-7.

<sup>25</sup> *Id.* at 7-8.

<sup>26</sup> Comments of the American Council of the Blind at 6; Comments of Descriptive Theatervision at ¶ 27; Comments of the National Television Video Access Coalition at 7; Comments of WGBH at 9-10.

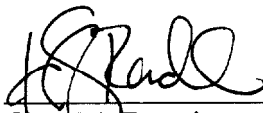
request and for the Commission to grant relief from the technical and financial burdens associated with compliance. If the Commission nonetheless imposes the proposed video description rules on DBS operators, the Commission should allow DBS operators the flexibility to implement the policy in a less burdensome manner.

**V. CONCLUSION**

The commenters in this proceeding have raised serious questions concerning the Commission's statutory authority to adopt the proposed video description requirements and the extent to which the proposed requirements serve the needs of the visually-impaired. In the absence of a congressional mandate, and in the face of discord among advocates for the visually-impaired, DIRECTV urges the Commission to refrain from mandating video description. The Commission should instead encourage broadcasters, networks and MVPDs to adopt voluntary measures aimed at increasing the accessibility of video programming in a manner that is responsive to the needs of visually-impaired consumers.

Respectfully submitted,

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