

ORIGINAL

LAW OFFICES
LEVENTHAL, SENTER & LERMAN P.L.L.C.

SUITE 600
2000 K STREET, N.W.
WASHINGTON, D.C. 20006-1809

TELEPHONE
(202) 429-8970

TELECOPIER
(202) 293-7783

NORMAN P. LEVENTHAL
MEREDITH S. SENTER, JR.
STEVEN ALMAN LERMAN
RAUL R. RODRIGUEZ
DENNIS P. CORBETT
BRIAN M. MADDEN
BARBARA K. GARDNER
STEPHEN D. BARUCH
SALLY A. BUCKMAN
NANCY L. WOLF
DAVID S. KEIR
DEBORAH R. COLEMAN
NANCY A. ORY
WALTER P. JACOB
ROSS G. GREENBERG
H. ANTHONY LEHV
JOHN D. POUTASSE
CHRISTOPHER J. SOVA
PHILIP A. BONOMO
JUAN F. MADRID
SARAH R. ILES

OF COUNSEL
MARLA R. WOLFE

March 24, 2000

DOCKET FILE COPY ORIGINAL

WWW.LSL-LAW.COM

WRITER'S DIRECT DIAL
202-416-6755

WRITER'S DIRECT FAX
202-429-4603

WRITER'S E-MAIL
BGARDNER@LSL-LAW.COM

RECEIVED
MAR 24 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-A325
Washington, D.C. 20554

**Re: MM Docket No. 99-339
Video Description of Video Programming**

Dear Ms. Salas:

Transmitted herewith on behalf of the Motion Picture Association of America, Inc., are an original and nine (9) copies of its Reply Comments on the *Notice of Proposed Rulemaking* (FCC 99-353 released November 18, 1999) in the above-referenced proceeding.

Diskettes containing these Reply Comments are being simultaneously submitted to Wanda Hardy and to International Transcription Service, Inc.

Respectfully submitted,

Barbara K. Gardner

Barbara K. Gardner

Enclosures

No. of Copies rec'd 0+9
List ABCDE

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED
MAR 24 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of)
Video Description of)
Video Programming)

MM Docket No. 99-339

To: The Commission

**REPLY COMMENTS OF
THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

**THE MOTION PICTURE
ASSOCIATION OF AMERICA, INC.**

By: Barbara K. Gardner
John D. Poutasse
Sarah R. Iles

Leventhal, Senter & Lerman P.L.L.C.
2000 K Street, N.W., Suite 600
Washington, DC 20006-1809
(202) 429-8970

By: Eric J. Schwartz

Smith & Metalitz, L.L.P.
1747 Pennsylvania Avenue, N.W.
Suite 825
Washington, DC 20006-4604
(202) 833-4198

March 24, 2000

Its Attorneys

TABLE OF CONTENTS

SUMMARY	ii
I. Commenters Have Failed to Establish That the Commission Has Statutory Authority to Impose Mandatory Video Description Requirements	3
II. For Additional Reasons, The Adoption of Video Description Rules Is Premature	10
A. There Is No Consensus within the Visually-Impaired Community Regarding the Need for Video Description	10
B. Other Impediments to Video Description Should Not Be Ignored	12
III. The Commission Should Deny All Requests to Expand the Scope of the Proposed Video Description Rules	15
A. There is No Basis for Subjecting Feature Films to Any Video Description Rules	15
B. Requiring Premium Cable Services to Describe their Video Product Would Be Unduly Burdensome and Would Disrupt the Provision of Spanish-Language Translations Via the SAP Channel	16
C. There is No Basis for Imposing Separate Quantitative Requirements and/or Phase-In Periods for Describing Children’s Television Programming	18
D. The Commission Should Not Accelerate the Timetable for Describing Video Programming	19
E. The Commission Should Not Require That Once Described, A Program Must Remain Described	21
IV. Any Proposals That Would Involve the Commission in Impermissible Content-Based Judgements Should be Rejected	22
V. The Commission Has Correctly Determined Not to Address the Application of Video Description to Digital Transmissions in This Proceeding	24
VI. Mandatory Video Description Would Conflict With Governing Copyright Law.....	25
Conclusion	27

SUMMARY

The Motion Picture Association of America (“MPAA”) demonstrates herein that supporters of the proposed video description rules have failed to establish that the Commission has statutory authority to impose a mandatory description requirement. Even if the Commission had such authority, MPAA makes clear that mandatory description rules nevertheless are premature and should not be adopted at this time.

First, the opposition of the National Federation of the Blind to mandatory description reveals that there is no consensus within the visually-impaired community regarding the need for video description. Indeed, the relatively small number of potential beneficiaries of description services, coupled with the lack of consensus within that group, stands in stark contrast to the closed captioning proceeding, where representatives of the much larger hearing-impaired community were united in their support for the need for captioned video programming.

Second, the FCC cannot ignore other serious impediments to mandatory description, including the fact that described programming will monopolize the SAP channel and disrupt Spanish-language translations presently carried on that channel; that serious technical impediments to description exist with respect to each type of distribution system; and that there is insufficient industry experience with video description as an assistive technology.

Third, mandatory video description will impermissibly impinge on program producers’ First Amendment rights. Indeed, comments that suggest enforcement by the FCC of specific video description quality controls, and that propose ways to mitigate the monopolization of the SAP channel by video descriptions, illustrate quite vividly how the proposed rule will entangle the agency in constitutionally impermissible program content regulation.

Although MPAA strongly opposes the adoption of any rules that would require video description, if the Commission nevertheless elects to adopt such rules, there is absolutely no basis to go beyond the scope of the current proposal, as suggested by some commenters. Thus, the FCC should reject the suggestion to single out particular classes of programming, *i.e.*, feature films, for particularly onerous treatment. The Commission also should not expand the scope of the proposed rules to include premium cable services such as Showtime, The Movie Channel and HBO; to do so would profoundly interfere with the Spanish-language translations they currently offer. Finally, the FCC should reject any attempt to accelerate the timetable for describing video programming, or to require that once a program has been described it cannot be utilized by any broadcaster or MVPD unless the video description remains intact. Such proposals ignore certain basic industry realities and therefore are misplaced.

There also is no basis for addressing the application of video description to digital transmissions in this proceeding, as some commenters urge; the proper forum for this discussion clearly is the Commission's ongoing proceeding in MM Docket No. 99-360, where the Commission has already solicited comments on video description obligations in the digital age.

Finally, the fact that video description services to date have not encountered copyright problems in describing video titles does not demonstrate that the copyright issues MPAA has highlighted in opposing the FCC's proposals are insignificant. The very reason that there have not been copyright problems is that the video description system has been a voluntary one, whereas the mandatory video description scheme envisioned by the Commission would in fact be contrary to current U.S. copyright law, and to international treaties to which the U.S. is bound.

For the foregoing reasons and those set forth in MPAA's Comments, the Commission should not adopt video description requirements.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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

To: The Commission

**REPLY COMMENTS OF
THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

The Motion Picture Association of America, Inc. ("MPAA") hereby replies to comments filed in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding (FCC 99-353, released November 18, 1999) ("*NPRM*").

In its Comments, MPAA endorsed the Commission's ultimate goal of enhancing the ability of Americans with visual disabilities to more fully enjoy the benefits of television, and pointed out that through the voluntary efforts of its member companies, over half of the more than 200 video described titles available to the public through WGBH's described home video service are licensed by MPAA members. However, MPAA's Comments challenged the constitutional, statutory and policy underpinnings of the Commission's decision to adopt rules *mandating* the description of video programming. Specifically, MPAA demonstrated that the imposition of video description requirements would exceed the intentionally limited authority Congress accorded the Commission in this area, and would compel content-based speech in

contravention of the First Amendment.¹ In addition, MPAA argued that mandatory description would pose serious problems in the copyright law arena,² impose excessive social costs, including limiting the editorial discretion of programming providers and monopolizing the SAP channel to the detriment of other existing and worthwhile programming services (*e.g.*, Spanish-language programming),³ introduce unwarranted distortions into the competitive market for video programming,⁴ and inflict highly impractical and unnecessary requirements on the program production process.⁵ MPAA notes that the comments of many other parties strongly concur that the FCC should not promulgate its proposed video description rules.⁶

In these Reply Comments, MPAA shows that other commenters favoring video description rules have failed to demonstrate either that the Commission has the necessary statutory authority to adopt such rules, or that the rules would not sacrifice core First Amendment principles. In addition, even assuming the absence of such constitutional and statutory

¹ Comments of the Motion Picture Association of America, Inc. at 6-14 (“MPAA Comments”).

² *Id.* at 14-19.

³ *Id.* at 19-23.

⁴ *Id.* at 23-25, 26-27.

⁵ *Id.* at 27-29.

⁶ *See, e.g.*, Comments of the National Federation of the Blind (“NFB Comments”); Comments of DIRECTV, Inc. (“DIRECTV Comments”); Comments of A&E Television Networks (“AETN Comments”); Comments of The Game Show Network, LP; Comments of the National Association of Broadcasters (“NAB Comments”); Comments of the National Cable Television Association (“NCTA Comments”).

impediments, MPAA shows why the requests of some members of the visually disabled community to expand the scope of the proposed video description rules are unjustified, particularly given the lack of consensus within that community on even the need for compelled video description. MPAA also observes that the FCC correctly decided not to address the potential application of video description to digital technologies in the present proceeding, and that the proponents of video description have failed to rebut MPAA's arguments regarding copyright issues.

I. Commenters Have Failed to Establish That the Commission Has Statutory Authority to Impose Mandatory Video Description Requirements.

In its Comments, MPAA showed that the Commission lacks authority to promulgate mandatory video description rules because Congress, in crafting Section 713 of the Communications Act, considered and deliberately rejected FCC rulemaking authority for video description, in contrast to its directive (in the same statutory section) that the agency should prescribe regulations to implement closed captioning.⁷ MPAA also noted that the FCC's proposed rules would substantially burden programming producers and others whose operations fall outside the scope of the Commission's more general statutory authority.⁸

⁷ MPAA Comments at 3-4.

⁸ *Id.* at 5-6.

The National Television Video Access Coalition (“NTVAC”)⁹ and the WGBH Educational Foundation Media Access Division (“WGBH”),¹⁰ however, claim that FCC authority to adopt mandatory video description requirements can be derived (1) from Section 713's language regarding “ensur[ing] the accessibility of video programming;” (2) from other provisions in the Communications Act; (3) from two Supreme Court decisions, *Community Television of Southern California v. Gottfried*, 459 U.S. 498 (1983), and *United States v. Southwestern Cable Co.*, 392 U.S. 159 (1968); and/or (4) from a supposedly analogous provision of the 1996 Telecommunications Act, codified as 47 U.S.C. § 255. As MPAA demonstrates below, whether considered individually or in the aggregate, these purported sources of authority to adopt video description rules fail to provide a valid basis for such authority.¹¹

⁹ Comments of National Television Video Access Coalition at 16-22 (“NTVAC Comments”).

¹⁰ H. Feld, Memorandum to Ray Joyce (“Feld Memorandum”) (attachment to Comments of the WGBH Educational Foundation Media Access Division (“WGBH Comments”). All citations herein to the WGBH Comments refer to the print version of such comments.

¹¹ WGBH’s further claim that “nothing in the legislative history suggests that Congress intended to restrict the Commission’s jurisdiction in this area,” WGBH Comments, Feld Memorandum at 2, strains credulity. As noted by the NAB, “the deletion of a provision from a bill in conference committee ‘strongly militates against a judgment that Congress intended a result that it expressly declined to enact.’” NAB Comments at 5, quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974). See also *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, FCC 00-99 at 6-7 (released March 16, 2000) (citing *INS v. Cardozo-Fonseca*, 480 U.S. 421, 442-43 (1987), for proposition that statutes should not be interpreted to require approach that Congress has rejected).

First, Congress declined to provide the FCC with any means for implementing video description beyond studying the matter and reporting to Congress. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. ___, slip. op. at 33, 39 (Mar. 21, 2000) (Congress has explicitly acted to preclude FDA from making policy on tobacco and health; consequently, FDA lacks power to regulate tobacco products in the public interest); *Original Honey Baked Ham Co. v. Glickman*, 172 F. 3d 885, 887 (D.C. Cir. 1999) (“A statute listing the things it does cover exempts, by omission, the things it does not list. As to the items omitted, . . . Congress has spoken – these are matters outside the scope of the statute.”) And, as MPAA previously noted, in the three and one-half years since the FCC completed its report to Congress on video description, Congress has neither mandated video description, nor explicitly authorized the Commission to do so.¹²

Second, both NTVAC and WGBH argue that the authority necessary to mandate video description can be derived from the Communications Act’s broad mandate to the Commission to regulate communications in the United States.¹³ However, as well-established rules of statutory construction clearly dictate, “a statute dealing with a narrow, precise, and specific subject [such as video description] is not submerged by” a more general statute, such as the Communications Act of 1934.¹⁴

¹² MPAA Comments at 3.

¹³ NTVAC Comments at 17-18; WGBH Comments, Feld Memorandum at 1.

¹⁴ *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), cited in NAB Comments at 7-10.

Another source heavily relied upon by NTVAC and WGBH to support their claim that sufficient statutory authority exists, *Community Television of Southern California v. Gottfried*,¹⁵ fails to rebut the fundamental principle that the Commission's authority cannot extend farther than the limits of the Congressional language of Section 713. *Gottfried* holds that because Congress did not intend the Rehabilitation Act to impose any special enforcement obligations on the FCC, the agency acted within its authority in declining to impose a greater obligation to provide special programming for the hearing impaired on a public broadcaster than on a commercial licensee.¹⁶ In so holding, the Court rejects the concept that public policy goals, no matter how worthy, give an agency either the duty or the authority to execute laws that do not provide it with such authority,¹⁷ notwithstanding the Court's additional comment that "[a]ll parties agree that the public interest would be served by making television broadcasting more available and more understandable to the substantial portion of our population that is handicapped by impaired hearing."¹⁸

Similarly, although the *Gottfried* Court, in dicta, imagines that the Commission "[c]onceivably, . . . might determine that the policies underlying the Communications Act require

¹⁵ 459 U.S. 498 (1983).

¹⁶ *Id.* at 509-11.

¹⁷ *Id.* at 509 and n.14.

¹⁸ *Id.* at 508.

extraordinary efforts to make certain types of programming universally accessible,”¹⁹ the Court never suggests that such “extraordinary efforts” would permit the Commission to exceed its jurisdictional and statutory authority. Given the indisputable rules of statutory construction cited above, the ruling in *Gottfried* does not permit the Commission to exceed the bounds of explicit, narrow statutory language granting it authority only to commence an inquiry regarding video description and report its findings to Congress.²⁰

Another U.S. Supreme Court case on which NTVAC and WGBH rely, *United States v. Southwestern Cable Co.*,²¹ similarly fails to support the commenters’ assertion that sufficient statutory authority for mandatory video description rules exists. Although commenters correctly cite the case for the proposition that the Commission’s jurisdiction extends to any matter “reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting,”²² they fail to establish a jurisdictional basis for imposing video description rules *on broadcasters*; thus, the predicate for reliance on *Southwestern Cable* to establish broad FCC rulemaking authority regarding video description — namely, possession of such authority with respect to television broadcasters — is wholly absent. In addition, whereas the *Southwestern Cable* Court determined that broad FCC jurisdiction could

¹⁹ *Id.* at 512.

²⁰ *See* MPAA Comments at 3; AETN Comments at 6; NAB Comments at 2-4.

²¹ 392 U.S. 157 (1968).

²² *See* WGBH Comments, Feld Memorandum at 1; NTVAC Comments at 19.

be found in the Act's mandate to regulate interstate communications,²³ Section 713 constitutes an explicit limitation on the FCC's authority over video description, and thus (as noted above) overrides more general sources of statutory authority.²⁴

MPAA also disputes NTVAC's characterization of Section 713 as exactly paralleling Section 255 of the Act. The language of crucial subsections of these two provisions is indeed identical:

Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section *or any regulation thereunder*. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

47 U.S.C. §§ 255(f), 613(h) (emphasis added). While the FCC found that the italicized language "expressly contemplates the Commission's enactment of regulations" in the Section 255 context,²⁵ the same language in Section 713 (47 U.S.C. § 613) cannot lead to the same conclusion regarding video description rules.

Section 255's sole reference to Commission regulation is the quoted language, but the remainder of the provision *mandates* accessibility to certain information services deemed critical to making telecommunications accessible to people with disabilities --- services over which the

²³ See *Southwestern Cable*, 392 U.S. at 171-73.

²⁴ See NAB Comments at 7-10; AETN Comments at 8-9.

²⁵ *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, FCC 99-181 at ¶ 13 (released September 29, 1999).

Commission has long held subject matter jurisdiction. Thus, the FCC found that its assertion of jurisdiction was “reasonably required to perform an express statutory obligation.”²⁶

In stark contrast, the Section 713 reference to “any regulation thereunder” refers only to the explicitly mandated *closed captioning* regulations in Section 713(b); it cannot imply authority to enact video description regulations given Congress’ deletion of such authority. Thus, in contrast to the rulemaking authority the Commission found with regard to Section 255, jurisdiction to enact video description rules is not “reasonably required to perform an express statutory obligation,” and therefore cannot be derived from the language in Section 713(h).

Finally, MPAA calls attention to the additional point made by A&E Television Networks (“AETN”) that the rules of statutory construction require the Commission to construe Section 713 so as to avoid constitutional problems.²⁷ As discussed below in Part IV of these reply comments, MPAA and many other commenters have demonstrated that the proposed rule creates serious First Amendment pitfalls. To avoid these constitutional problems, the Commission must read Section 713 narrowly.

²⁶ *Id.* at ¶ 95; see also *id.* at ¶¶ 93-103 (explaining the derivation of the FCC’s well-settled ancillary jurisdiction over Title II matters for which it meets requirements of subject matter jurisdiction and an express statutory obligation).

²⁷ AETN Comments at 12-14 (citing *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr.*, 485 U.S. 568 (1988); *Rust v. Sullivan*, 500 U.S. 173 (1991); *International Union, UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991); and *Marshall v. Gibson’s Prods., Inc.*, 584 F.2d 668 (5th Cir. 1978)); see also NAB Comments at 12 n.20 (citing *DeBartolo Corp.* and *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979)).

II. For Additional Reasons, The Adoption of Video Description Rules Is Premature.

Even if the Commission had statutory authority to enact mandatory video description rules, such rules would be inappropriate for other reasons, including the absence of consensus regarding their desirability, and the myriad technical difficulties inherent in their implementation.

A. There Is No Consensus within the Visually-Impaired Community Regarding the Need for Video Description.

Even within the visually impaired community, there is no consensus concerning the need for Commission-imposed video description rules. The National Federation of the Blind (“NFB”), which describes itself as the largest and most active organization working on behalf of the visually impaired,²⁸ *opposes* the adoption of mandatory video description requirements, and instead encourages the Commission to allow the continued development of video description on a purely *voluntary basis*.²⁹ In fact, NFB members overwhelmingly passed a resolution in 1996 declaring the organization’s opposition to federally-mandated video description:³⁰

WHEREAS, although audio description may at times make the presentation more enjoyable, this fact alone does not necessarily justify a requirement by the federal government that virtually all audio/visual programming must contain audio descriptions of visual images; . . .

²⁸ NFB Comments at 2-3.

²⁹ National Federation of the Blind, Resolution 96-04 (attachment to NFB Comments).

³⁰ NFB Comments at 3.

BE IT RESOLVED by the National Federation of the Blind in convention assembled this fifth day of July, 1996, in the City of Anaheim, California, that this organization support voluntary use of audio description in television programming but oppose the imposition of audio description as a federal mandate; . . .

NFB Resolution 96-04.³¹

NFB's comments also highlight the substantial differences between the justifications underlying the Commission's adoption of its closed captioning rules and its video description proposal. In the closed captioning proceeding, the Commission's proposed rules were intended to benefit an estimated 22 million persons with hearing disabilities,³² and the representatives of that community were united in their support for rules requiring the captioning of video programming. In contrast, NFB's comments make clear that an influential portion of the visually-impaired community does not believe that mandatory video description is necessary, or that the benefits of that service are adequate to justify the adoption of the rules proposed by the Commission: "Our members understand the difference between what we as blind people might enjoy versus what we really need. Audio description is clearly in the former category."³³

³¹ Attachment to NFB Comments.

³² *Public Notice*, Commission Adopts Report on Closed Captioning and Video Description of Video Programming (MM Docket No. 95-176) (released July 29, 1996).

³³ NFB Comments at 3.

Because of the widely disparate estimates of the visually-impaired population provided by some commenters, it is difficult to assess how many people might benefit from video description.³⁴ However, it is certain that the figure is substantially lower than was the case with closed captions. For its part, NFB reports that there are approximately 1 million people in the United States who are legally blind (defined as those with 10% or less of normal vision).³⁵ Significantly, however, NFB also states that “[m]any in the blind population . . . can see some, and television is one of the things persons with poor vision can see.”³⁶ As a consequence, it is entirely unclear what percentage of the blind or visually impaired need video-described programming as a prerequisite to their enjoyment of television, or whether the benefits of video description justify their costs at this time.

B. Other Impediments to Video Description Should Not Be Ignored.

Several commenters in this proceeding, including representatives of the visually-impaired community, appear to share MPAA’s concerns with respect to certain important implementation issues. For example, the American Council of the Blind (“ACB”) acknowledges that the

³⁴ For example, Helen Harris of RP International and Descriptive Theatre Vision™ claims (without citing to a single source) that there are 31 million visually impaired persons in this country. Comments of Helen Harris at 1. In contrast, the American Foundation for the Blind states that there are up to 10 million people in this country who are either blind or visually impaired, while NTVAC puts the figure at 12 million. Comments of the American Foundation for the Blind at 2 (“AFB Comments”); NTVAC Comments at 2.

³⁵ NFB Comments at 2.

³⁶ *Id.*

monopolization of the SAP channel for video description may interfere with the delivery of foreign-language translations over that channel and suggests that alternate methods of delivery, such as Radio Reading Services, should be investigated.³⁷ Similarly, NFB argues that the Commission's proposed use of the SAP channel for video description is unwarranted:

To the extent that any federally mandated use of the SAP channel for the blind is justified, the SAP channel should be used to transmit audio warnings about hazardous weather and other emergency conditions It would indeed be ironic if the SAP channel were unavailable to warn blind people about an impending emergency because it was already tied up describing the set of some sitcom so that a network could comply with its government-imposed audio description mandate.

NFB Comments at 4.

In its comments, MPAA briefly highlighted several additional issues inherent to implementing video description, including the complexity of the production process and the fact that live programs, including news and sports, as well as other program genres such as situation comedies, music, and short-form programming, are not suitable for describing.³⁸ Many commenters, including WGBH, similarly pointed out that these types of programming either are of less interest to the visually disabled, or are simply not conducive to video description.³⁹

³⁷ Comments of American Council of the Blind (“ACB Comments”) at 6.

³⁸ MPAA Comments at 28-29.

³⁹ *See, e.g.*, WGBH Comments at 17 (news and sports are of limited interest); Comments of C-SPAN (news and public affairs should be exempt); NCTA Comments at 18-19 (live programming and music programming involve unique problems).

In addition, the Commission must not ignore the many other commenters who convincingly described further practical impediments to commencing video description, particularly technical impediments unique to each type of distribution system. *See, e.g.*, NAB Comments at 13-19 (noting inadequate broadcast network and local station plant); NCTA Comments at 7-17 (detailing production and retooling costs cable networks and cable systems would incur); Comments of the Satellite Broadcasting and Communications Association at 2-3, 5-6 (noting security and other technical issues that direct-to-home satellite providers would encounter).

More basically, as the Comments of AETN demonstrate, there is insufficient experience with video description as an assistive technology to support a mandatory description rule.⁴⁰ By contrast, as AETN notes, “broadcasters and cable operators had accumulated almost three decades of experience with closed captioning before Congress authorized the FCC to adopt captioning rules.”⁴¹ Particularly given the fact that analog transmissions are being phased out, requiring video description at this time would compel a wholly inappropriate allocation of program providers’ resources.

⁴⁰ AETN Comments at 14-16.

⁴¹ *Id.* at 15.

III. The Commission Should Deny All Requests to Expand the Scope of the Proposed Video Description Rules.

For the reasons set forth above and in its Comments, MPAA opposes the adoption of any rules that would require that video programs be described. However, in the event that the Commission elects to adopt such rules, the requests of certain commenters to go *beyond* the scope of the Commission's current proposals and to expand the reach of those requirements are wholly unwarranted, and must be rejected.

A. There is No Basis for Subjecting Feature Films to Any Video Description Rules.

As proposed, the Commission's video description rules would generally require that broadcasters and certain "larger" multichannel video programming providers ("MVPDs") provide a minimum of 50 hours per calendar quarter of described prime time and/or children's programming.⁴² However, AFB attempts to expand the scope of the Commission's proposed description rules to target a particular class of programming, feature films, and recommends that the Commission *prohibit* the broadcast of any such films that were released 18 months after the adoption of the rules in this proceeding unless such films have been video described.⁴³

This suggestion is wholly inconsistent with one of the principal components of the Commission's proposed rules -- that rather than dictate the class of programming to be described,

⁴² NPRM at ¶ 20.

⁴³ AFB Comments at 7.

the Commission would allow program distributors the discretion to choose between two broad categories of programming (*i.e.*, prime time and children's programming) as the most appropriate means to provide video described programming to the largest possible audience.⁴⁴ Although MPAA continues to challenge mandatory described programming in either of these two categories (or any other category based on scheduling or intended audience), there is no basis for singling out a particular genre of video programming, feature films, for required captioning. In the event that the Commission adopts any mandatory video description rules, AFB's proposal must be rejected because it is supported by neither reasoned explanation nor adequate justification, and is highly suspect on First Amendment grounds.

B. Requiring Premium Cable Services to Describe their Video Product Would Be Unduly Burdensome and Would Disrupt the Provision of Spanish-Language Translations Via the SAP Channel.

WGBH has proposed that the Commission include within the scope of its description rules programming provided by certain premium cable services, such as Showtime, The Movie Channel, and HBO.⁴⁵ However, such a requirement would be unduly burdensome, would profoundly interfere with Spanish-language translations that these cable program providers currently offer via the SAP channel, and would unreasonably expand the FCC's proposed definition of "larger MVPDs."

⁴⁴ *NPRM* at ¶ 29.

⁴⁵ WGBH Comments at 14.

By way of illustration, Showtime and The Movie Channel each currently provides Spanish-language translations via the SAP channel for approximately 85% of their respective cable program services;⁴⁶ more than 85% of the HBO program schedule also has Spanish audio on the SAP. Because the audio track of the playback tapes used for such programming cannot simultaneously accommodate both Spanish-language translations and video description, mandatory descriptions would necessitate that duplicate videotape libraries be maintained for all described programs -- one containing Spanish-language translations, and one containing video descriptions. In addition to the substantial dubbing costs that cable program providers would incur as a result of making these additional tapes, additional logistical problems would be created, including the scheduling and trafficking of alternate versions of each tape, and additional resources would be necessary to maintain the greatly expanded playback tape inventory.

Finally, alternately presenting Spanish-language translation and described versions of each such cable program would become confusing and frustrating to the viewing audience, especially those Spanish-language viewers who have come to rely on the Spanish-language translations provided via the SAP channel. *See* DIRECTV Comments at 12 (noting the importance of utilizing the SAP channel consistently throughout the day, rather than mixing foreign language and video description, to avoid subscriber confusion).

⁴⁶ This includes Showtime, Showtime 2, Showtime 3, Showtime Extreme, Showtime Beyond, The Movie Channel, and The Movie Channel 2.

Finally, if the Commission intends video description to be accessible to the greatest number of the disabled, MPAA fails to see the logic of requiring it on premium channels which reach far fewer than 50 percent of MVPD households.

C. There is No Basis for Imposing Separate Quantitative Requirements and/or Phase-In Periods for Describing Children’s Television Programming.

Several commenters have argued that the Commission should adopt separate quantitative benchmarks and phase-in periods for the description of children’s television programming. For example, WGBH states that within two years of the adoption of the description rules, program distributors should provide three hours of described children’s programming per week.⁴⁷ WGBH also argues that nonbroadcast networks that primarily provide children’s programming should be required to satisfy the video description benchmarks for both prime time television *and* children’s programming.⁴⁸ Similarly, ACB called on the Commission to require that all children’s programming be described within three years.⁴⁹

As MPAA made clear in its initial Comments, however, the Commission’s claim that learning-disabled children would benefit from video described programming is purely

⁴⁷ WGBH Comments at 6.

⁴⁸ *Id.*

⁴⁹ ACB Comments at 5. Specifically, ACB recommended that 33% of such programming be described within the first year, 66% in the second year, and 100% in the third year. *Id.* See also Comments of the Massachusetts Assistive Technology Partnership at 2 (calling for the description of ten hours of children’s programming per week after the first year, and an overall phase-in period of three to five years).

speculative.⁵⁰ Indeed, the principal source cited by the Commission for this proposition concedes that “little work has been done in the field of video description for students with learning disabilities,” and that further research is needed to ascertain whether any potential benefits in fact exist.⁵¹ Moreover, although given the clear opportunity to do so, none of the commenters that participated in this proceeding provided any direct evidence of any such benefits. In light of the foregoing, and the fact that only 1% to 2% of the total number of persons with visual disabilities are children,⁵² there is no basis for the Commission to adopt separate quantitative benchmarks and phase-in periods for the description of children’s television programming.

D. The Commission Should Not Accelerate the Timetable for Describing Video Programming.

MPAA opposes the adoption of any rules mandating that video programing be described. However, if the Commission were to adopt such rules, there is certainly no justification for the various proposals to hold program distributors responsible for compliance within 12 months of the effective date of those rules.

First and foremost, if the Commission were to require program distributors to supply programming in described form within one year, many distributors would be unable to do so under their existing contracts with various program producers, because the terms of these

⁵⁰ MPAA Comments at 20-21.

⁵¹ WGBH Report on Video Description (NCAM Letter) at 6-7 (November 5, 1998), cited in *NPRM* at ¶ 7.

⁵² NTVAC Comments at 10.

contracts typically exceed one year. Had the Commission's future description timetables for prime time and children's programming been known when these contracts were entered into, or had description been a delivery requirement in such contracts, the compliance costs thereof would have been a factor in the contract negotiations. To attach a description requirement to such contracts after the fact alters their entire economic basis.

Such an accelerated compliance timetable also is entirely inconsistent with the approach the Commission adopted in the closed captioning arena (the purported model for the instant proceeding).⁵³ Specifically, the Commission's initial closed captioning benchmark merely required program providers to "maintain captioning at substantially the same level as the average level captioning that they provided during the first six months of 1997."⁵⁴ This reasonable requirement recognizes the fact that compliance with any new regulatory scheme is more difficult in the early stages. Moreover, in apparent recognition that program distributors lack the base of experience with video description that they had with closed captioning, the Commission has said it intends that video description implementation be even "more measured" than was the case with closed captioning, because "video description technology is not as developed as closed captioning technology, and all distributors may not have the technical ability now to provide

⁵³ *NPRM* at ¶ 21.

⁵⁴ *Closed Captioning and Video Description of Video Programming*, Order on Reconsideration, MM Docket No. 95-176 at ¶ 15 (released October 2, 1998).

described programming.”⁵⁵ Accelerating the implementation timetable for described programming is therefore unwarranted on several counts.

E. The Commission Should Not Require That Once Described, A Program Must Remain Described.

The Commission should reject the proposal that once a program has been described, it cannot be utilized by any broadcaster or MVPD unless the video description remains intact.⁵⁶ Such a requirement ignores the fact that different release venues for program product may require different formats, potentially requiring the production of separate described audio tracks for different versions of the same work. Even if the Commission were to adopt mandatory description, it does not presently plan to require that *all* programs, but only specified amounts of programming, be described. Accordingly, the notion that once described, a program cannot be transmitted without video descriptions, must be rejected.

⁵⁵ *NPRM* at ¶ 21.

⁵⁶ *See* NTVAC Comments at 8.

IV. Any Proposals That Would Involve the Commission in Impermissible Content-Based Judgements Should be Rejected.

As MPAA made clear in its Comments, the imposition of mandatory video description requirements would impermissibly restrict program producers' First Amendment rights by compelling content-based speech.⁵⁷ MPAA went on to argue that:

the proposed requirements would inevitably involve the Commission in a quagmire of content regulation, since in order to implement a regulatory regime for video description, the FCC will need to resolve such questions as how much of the action must be described, or how long each segment of description must be.

MPAA Comments at 9.

The Comments of the NTVAC suggesting enforcement of video description quality controls illustrate quite vividly the First Amendment perils of the Commission's proposal. Indeed, NTVAC would appear to advocate that the Commission become actively involved not only in assessing the quantity and/or adequacy of video descriptions (*i.e.*, when "descriptions are sparse, or there are long silences without any description"⁵⁸), but also in determining the degree to which such descriptions remain artistically consistent with the essential message of the underlying work (*i.e.*, when descriptions "are confusing and/or inadequate . . ."; and when "the descriptions stray from purely describing the *essential* visual elements of a program and instead

⁵⁷ MPAA Comments at 6-14.

⁵⁸ NTVAC Comments at 12.

attempt to evaluate the program or interpret its meaning.”).⁵⁹ The Commission must avoid entangling itself in this obvious First Amendment quagmire.

Even proposals that attempt to mitigate the problems associated with video description’s monopolization of the SAP channel run afoul of the First Amendment. For example, commenters have suggested that in order to avoid displacing Spanish-language translations from the SAP channel, program distributors could alternately present two versions of each program: one in which the SAP channel is dedicated to video description, and one in which that channel is dedicated to Spanish-language translations.⁶⁰ In the alternative, as one commenter suggested, the Commission could unilaterally decide that video-described programming takes precedence over programs with Spanish-language translations.⁶¹ What these commenters fail to discern, however, is that either choice represents impermissible Commission involvement in program content regulation.⁶² In light of the obvious perils to the First Amendment associated with the

⁵⁹ *Id.* (emphasis in original).

⁶⁰ WGBH Comments at 18; NTVAC Comments at 4; AFB Comments at 6.

⁶¹ Comments of Helen Harris at 4.

⁶² Several commenters further suggest that because there are presently relatively few instances of conflicts between the provision of Spanish-language translations and video description on the SAP channel, those two services can coexist after the effective date of any rules adopted in this proceeding. *See, e.g.*, WGBH Comments at 18; NTVAC Comments at 4; AFB Comments at 6. However, these comments ignore the obvious fact that the number of conflicts between Spanish-language translations and video description is likely to increase exponentially if the latter service becomes mandatory, particularly if commenters’ proposals to include more program distributors, more markets, and more hours of described programming are adopted.

Commission's proposed rules, the Commission should decline to adopt any mandatory description requirements.

V. The Commission Has Correctly Determined Not to Address the Application of Video Description to Digital Transmissions in This Proceeding.

MPAA strongly disagrees with those commenters that suggest that the Commission address in this proceeding the applicability of any future video description rules to digital transmissions. MPAA believes that the proper forum for this discussion is the Commission's ongoing proceeding in MM Docket No. 99-360, in which the Commission has already solicited comments on video description obligations in the digital age.⁶³ Given that the Commission is already compiling a record of comments in that proceeding, and that the television industry's experience with both video description and digital transmissions is presently inadequate to allow meaningful comment on their interrelationship at this time, MPAA does not believe that it is appropriate to address any possible video description obligations of digital television licensees or MVPDs in this proceeding.⁶⁴

⁶³ *Public Interest Obligations of TV Broadcast Licensees*, Notice of Inquiry at ¶¶ 24-28 (released December 20, 1999).

⁶⁴ Margaret R. Pfanstiehl, the President of The Metropolitan Washington Ear, recounts certain meetings that were held in California in 1995 with representatives of five Hollywood studios in which the possibility of providing video descriptions in the DVD format was discussed. *See* Comment of The Washington Metropolitan Ear and Margaret R. Pfanstiehl at 5; NTVAC Comments at 4. Ms. Pfanstiehl contends that studio representatives promised in those meetings that "A title" releases would be described once DVD became established in the

(continued...)

VI. Mandatory Video Description Would Conflict With Governing Copyright Law.

The few commenters other than MPAA who address copyright questions, such as WGBH, note that copyright matters have not been an issue in the past for video description services.⁶⁵ In fact, the reason for this is precisely consistent with the comments MPAA filed. Up to now, the video description system has been a voluntary one; this has allowed copyright owners to create or license others to create video descriptions without any problems. This is consistent with the exclusive rights of copyright owners to create (or to authorize others to create) derivative works, such as video descriptions.

What such commenters ignore is that the Commission is proposing a *mandatory* video description system. Such a system, however well-intentioned, would be contrary to current U.S. copyright law, and to international trade and copyright treaties to which the United States is bound. As MPAA's Comments noted,⁶⁶ such a mandatory system would in fact be barred by our copyright law and international treaty obligations because of the mandate to copyright owners to

⁶⁴(...continued)

marketplace. NTVAC Comments at 4. Although studio representatives did meet with Ms. Pfanstiehl and others concerning the possibility that DVD output would be described if consumers accepted and liked the fledgling format, absolutely no promises were made. Indeed, it was made clear to Ms. Pfanstiehl and the other representatives of the visually impaired community that uncertainty concerning consumer acceptance of the DVD format prevented the studios from committing to any description schedule at that time.

⁶⁵ See WGBH Comments at 18-19, Narrative Television Network Comments at 5.

⁶⁶ MPAA Comments at 14-19.

either create, or allow others to create, that which only the copyright owner can authorize under domestic and international copyright law. That is why, instead of adopting a mandatory system, MPAA recommends that the Commission allow motion picture and television producers to continue their ongoing voluntary video description services.

Conclusion

For the reasons set forth herein and in its previously filed comments in this proceeding, MPAA respectfully submits that mandatory rules for video description are not appropriate.

Respectfully submitted,

**THE MOTION PICTURE
ASSOCIATION OF AMERICA, INC.**

By: _____
Barbara K. Gardner
John D. Poutasse
Sarah R. Iles

Leventhal, Senter & Lerman P.L.L.C.
2000 K Street, N.W., Suite 600
Washington, DC 20006-1809
(202) 429-8970

By: Eric J. Schwartz

Smith & Metalitz, L.L.P.
1747 Pennsylvania Avenue, N.W.
Suite 825
Washington, DC 20006-4604
(202) 833-4198

March 24, 2000

Its Attorneys