

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

REPLY COMMENTS OF A&E TELEVISION NETWORKS

A&E Television Networks ("AETN"), by counsel and pursuant to the Notice of Proposed Rulemaking in the captioned proceeding, 1/ hereby submits reply comments regarding the FCC's proposal to require video programmers to provide video descriptions to make television more accessible to persons with visual disabilities. This reply focuses on three issues highlighted by the comments filed thus far in this proceeding: (1) the lack of experience with video description to support any type of mandate; (2) the substantial cost of providing video descriptions, particularly for cable programmers; and (3) the absence of statutory authority to adopt video description requirements.

1/ *Implementation of Video Description of Video Programming*, MM Docket No. 99-339, Notice of Proposed Rulemaking, FCC 99-353 (rel. Nov. 18, 1999) ("*NPRM*").

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I. QUESTIONS ABOUT THE USEFULNESS OF VIDEO DESCRIPTION, AS WELL AS PRACTICAL PROBLEMS OF IMPLEMENTATION, MAKE ADOPTING RULES INAPPROPRIATE

The limited experience with video description underscores both practical and substantive reasons why the Commission should decide against programming mandates in this proceeding. As AETN pointed out in our initial Comments, the Commission previously has called for “a period of trial and experimentation,” as opposed to regulatory mandates, to determine the value and feasibility of video description. ^{2/} There are very good reasons for this, which have not changed since the Commission first pointed them out: (1) the feasibility of video description depends on resolving “certain technical, legal, funding and cost issues;” ^{3/} (2) SAP channel capacity is a limited resource in the current analog environment and a rule would force video description to compete with other uses of the channel; ^{4/} and (3) widespread use of video description depends on implementation of advanced digital television. ^{5/} In addition to these practical concerns, however, the comments filed in this proceeding call into question the Commission’s underlying assumption that video description requirements would be helpful.

^{2/} *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd. 1034, 1070 (1998) (“*Fourth Video Competition Report*”).

^{3/} *Closed Captioning and Video Description of Video Programming Implementation of Section 305 of the Telecommunications Act of 1996: Video Programming Accessibility*, 11 FCC Rcd. 19214, 19222 (1996) (“*Report on Video Programming Accessibility*”).

^{4/} *Fourth Video Competition Report*, 13 FCC Rcd. at 1048.

^{5/} *Report on Video Programming Accessibility*, 11 FCC Rcd. at 19222.

In this regard, the Comments filed by the National Federation of the Blind (“NFB”) demonstrate that there is no consensus on the value of video description. As NFB put it, “[s]ome [blind people] like the service of ‘descriptive video’; some dislike it; many are frankly indifferent.” NFB at 1. The comments describe current examples of video description as “irritating, overdone, and full of irrelevant information” and note that many visually impaired people who have experimented with secondary audio “turn it off in relief and watch the program with our other senses in peace.” *Id.* at 2. Although NFB agreed that, when “done right,” video description “can add to the entertainment value of certain movies and television programs,” it concluded that fact “does not justify a federal mandate for its use.” *Id.* at 3. NFB is less concerned about video description of entertainment programming than it is of more important information that appears textually on the screen, such as critical weather updates. *Id.* at ¶¶ 4-7.

Significantly, NFB questioned the Commission’s comparison of video description to closed captioning requirements, stating that “such an inappropriate analogy will only lead the FCC down the wrong road to the imposition of inappropriate rules.” *Id.* at 3. NFB observed that the proposed separate audio obligation is not comparable to closed captioning because video description is less central to enjoyment of television and because it would entail “serious practical difficulties” arising from the need to create new product involving “countless value judgments” about what to describe, whether and how to interrupt the existing audio track, etc. *Id.*

There are compelling reasons to accord great weight to NFB’s views in this proceeding. As NFB pointed out, it is the largest and most active organization of

blind people in the United States, with more than 50,000 members. 6/ More importantly, NFB has devoted significant attention to the issue of video description. At its 1996 convention, NFB's members adopted a formal resolution "support[ing] voluntary use of audio description in television programming but oppos[ing] the imposition of audio description as a federal mandate." 7/ As NFB put it, "[o]ur 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." 8/

II. THE PROPOSED VIDEO DESCRIPTION RULES WOULD BE COSTLY AND WOULD DISPROPORTIONATELY BURDEN CABLE NETWORKS LIKE AETN

The comments reflect that the FCC has paid insufficient attention to the costs that would be imposed by mandatory video description will impose. While several non-industry commenters favoring regulation suggest that the costs of providing video descriptions will be nominal, 9/ comments filed by those most familiar with the costs involved all indicate the opposite is true. 10/ The comments are supported by the FCC's video description report, which noted that "the costs of providing video

6/ *Id.* at 2-3. For further information, see NFB's website at www.nfb.org. NFB is active throughout the 50 states and Puerto Rico, with over 700 local chapters.

7/ See NFB Resolution 96-04, adopted July 5, 1996, attached to NFB Comments.

8/ NFB at 3. See also www.nfb.org/represent.htm ("There are numerous governmental agencies and private charitable organizations and foundations providing services for blind people, but only the blind themselves (acting through their own organization, the National Federation for the Blind) are able to speak for the blind.").

9/ *E.g.*, AFB at 4-5; Dr. R. I. Feigenblatt, *passim*; National Television Video Access Coalition at 12.

10/ See *infra* note 13 and accompanying text.

description are substantial” and “significantly higher than those associated with closed captioning.” 11/ Comments suggesting that the costs of providing video descriptions will not be burdensome were filed largely by those having relatively little direct experience with the economics of video programming, and are based on pure speculation. Comments filed by various sectors of the visual arts industry, however, all demonstrated that video description costs will be significant.

For example, in our initial Comments, we noted NCTA’s confirmation that “the production cost alone for creating four hours of described programming per week would amount to \$700,000 per network, [that] there would be many other costs as well,” and that “such costs would have a disproportionate impact on cable networks[.]” 12/ On a nationwide basis, costs could amount to millions of dollars for each cable network for which a SAP generator would be required. Comments by other video programming providers, as well as others in the visual arts chain of production, bear out the substantial costs FCC-mandated video description will entail. 13/ Moreover, the comments reflect that the costs of imposing video description requirements will not be limited to pecuniary concerns. Various commenters described the loss of programming

11/ *Fourth Video Competition Report*, 13 FCC Rcd. at 1169.

12/ See AETN at 17 (citing NCTA at 10-11).

13/ See NAB at 26 (“the costs associated with providing described programming (including both program production and technical upgrades) may be greater than the Commission anticipated”); Game Show Network at 5 (“video description is . . . much more expensive than closed captioning”); DirecTV at 5-8; C-SPAN at 10 (“The cost of video description is not such a ‘small fraction’ of the budget in the news and public affairs programming context.”); International Cable Channels Partnership, Ltd., at 4-6 (“The economic burden of describing [] foreign-language programming [] would be prohibitive.”); MPAA at 21 (“investment in video description distribution via analog is a questionable use of valuable resources”).

or other services that would accompany a video description requirement. 14/ All told, the Commission should substantially re-evaluate the financial and other costs video description requirements will impose before taking any action in this proceeding.

III. THE COMMISSION LACKS STATUTORY AUTHORITY TO ADOPT THE PROPOSED VIDEO DESCRIPTION RULES

Efforts by commenters in this proceeding to demonstrate FCC authority to adopt video description rules consist primarily of mere recitals – without explanation – of the statutory provisions cited in the *NPRM*, 15/ and the one attempt to make a greater showing, by the National Television Video Access Coalition (“NTVAC”), is entirely unpersuasive. As AETN's initial comments make clear, suggestions that such statutory authority exists in either Section 713(f) of the Act, or the Commission's general public interest mandate, must fail. 16/ Nothing presented in the comments supports a different outcome, nor do the comments offer any legal authority sufficient to overcome the substantial constitutional infirmities embedded in the proposed video description regulations. 17/

14/ See, e.g., SBCA at 6 (“Adding video description to programming on a DBS transponder may require the provider to delete an entire video channel to accommodate the audio channels required for description.”); C-SPAN at 9 (indicating that “a video description requirement imposes a burden on bandwidth that is not without cost” because C-SPAN would have to eliminate either its carriage of the BBC's *World Service* or of the *World Radio Network* to accommodate video descriptors); accord, MPAA at 22-23; see also AETN at 19 (noting other technical degradations that could occur if some AETN channels were forced to provide video descriptions).

15/ See, e.g., WGBH at 21.

16/ AETN at 6-11; accord, NAB at 2-10; DirecTV at 4-5; NCTA at 3-5.

17/ See, e.g., C-SPAN at 5-8; NAB at 10-13; NCTA at 6-7; MPAA at 6-8.

The one attempt to bolster the Commission's claim to statutory authorization to adopt video description rules, which expands upon a mere footnote allusion in the *NPRM* to the Commission's ancillary jurisdiction under Section 255 of the Act, ^{18/} must also fail. NTVAC's argument that the FCC has authority to impose video description requirements based on prior FCC use of ancillary jurisdiction to include two information services – voicemail and interactive menus – into its Section 255 rules is misplaced. As AETN's initial comments demonstrate, there are many key differences between the exercise of ancillary jurisdiction under Section 255, and the necessary authority to impose video description requirements on video programmers such as AETN. See AETN at 10-11.

Finally, the Supreme Court's decision issued this week in *FDA v. Brown & Williamson Tobacco Corp.*, No. 98-1152 (U.S. March 21, 2000), reinforces AETN's position that the Telecommunications Act cannot be interpreted to grant the FCC authority to impose video description rules. See AETN at 4-13. In *Brown & Williamson Tobacco Corp.*, after examining the Food, Drug, and Cosmetic Act, 21 U.S.C. § 301, the Court held that the FDA was not empowered to regulate tobacco products as "drugs" or "devices." The Court noted that, no matter how compelling the government's interest may be, "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *Brown & Williamson Tobacco Corp.*, slip op. at 39. In that case, the Court found that the FDA lacked authority to regulate tobacco because, among other reasons, "Congress considered and rejected

^{18/} *NPRM* at ¶ 36 n.78 (citing *Implementation of Sections 255 and 251(a) of the Communications Act*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, FCC 99-181, ¶¶ 93-98 (Sept. 1999) ("Section 255 Order")).

bills that would have granted the FDA such jurisdiction.” *Id.* at 21. The same is true here – Congress considered giving the FCC rulemaking authority for video description, and declined to do so. 19/

Where, as here, Congress has directly spoken to the issue of the FCC’s jurisdiction and decided against it, the Commission cannot create rulemaking authority through creative interpretation of the law. 20/ This is particularly true in this case, since the only specific references to video description in the Act empower the Commission merely to study the issue. *Brown & Williamson Tobacco Corp.*, slip op. at 20. There is no basis in this proceeding for the Commission to conclude that it is authorized to adopt video description requirements.

19/ S. Conf. Rep. No. 230, *reprinted in* 1996 U.S.C.A.A.N. 1, 197.

20/ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984); *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 228 (1994).

IV. CONCLUSION

For the foregoing reasons, and those set forth in its initial comments, AETN respectfully urges the Commission to reconsider its proposal to implement rules for video descriptions.

Respectfully submitted

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