IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1149
(consolidated with No. 01-1155)

MOTION PICTURE ASSOCIATION OF AMERICA, *ET AL.*,

PETITIONERS

V.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,

RESPONDENTS

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties

All parties, intervenors, and amici appearing before this Court are listed in the brief for petitioners Motion Picture Association of America, *et al.*

B. Rulings Under Review

Implementation of Video Description of Video Programming, 15 FCC Rcd 15230 (2000), *on reconsideration*, 16 FCC Rcd 1251 (2001) (JA 149, 200)

C. Related Cases

The orders on review have not previously been before this Court. Counsel are not aware of any related cases pending in this or any other Court.

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GLOSSARY

MVPD	multichannel video programming distributor
SAP	second audio program

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BRIEF FOR RESPONDENTS

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Petitioners in these cases seek review of the FCC's adoption of rules to begin to make television more accessible to people with visual disabilities. The rules require some television broadcasters in large markets and operators of large cable television systems and other multi-channel video programming distributors to provide video descriptions for some of their programs

and to make emergency information more accessible to visually impaired viewers. The issues presented are:

1. Whether the Commission acted beyond its statutory authority in adopting the video description rules.

2. Whether the video description rules violate the First Amendment.

3. Whether the video description rules are reasonable.

JURISDICTION

The Court has jurisdiction pursuant to 47 U.S.C. 402(a) and 28 U.S.C. 2344(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Statutory Appendix to this brief.

COUNTERSTATEMENT OF THE FACTS

A. BACKGROUND

1. Development Of Closed Captioning And Video Description

From the beginning of the development of commercial television broadcasting in this country, millions of people with hearing and visual disabilities have been unable to participate fully in the benefits of this important medium of communication because they could not hear spoken words on the programs or could not see actions taking place. The FCC first began to address this problem with respect to hearing disabilities 25 years ago when, at the urging of the Public Broadcasting Service (PBS), it adopted technical rules that provided a method for closed captioning of television programs. *See Captioning for the Deaf*, 63 F.C.C.2d 378 (1976). Closed captioning is similar to subtitles in that it displays the audio portion of television signals as words displayed on the screen and can be activated at the discretion of the viewer. *See Closed Caption-*

ing and Video Description of Video Programming, 12 FCC Rcd 1044 (1997).[1] Stations began to provide closed captioning of programming, and Congress enacted legislation in 1990 to require that most television sets sold in the United States have the capability to display closed captions. *See Implementation of the Television Decoder Circuitry Act of 1990*, 6 FCC Rcd 2419 (1991).

Video description is a more recent innovation than closed captioning that employs different technology to make television programs more accessible to people with visual disabilities. Video descriptions provide aural descriptions of a program's key visual elements that are inserted during the natural pauses in the program's dialogue.[2] For example, it describes an action that is otherwise not reflected in the dialogue such as the movement of a person in a scene. It was first used in theatrical performances in the early 1980s, and since that time has been developed for television programming primarily by WGBH, a public television station licensee and production center in Boston, and other PBS affiliates. *See Closed Captioning and Video Description of Programming*, 11 FCC Rcd 19214, 19253-54 ¶94 (1996)[*Video Accessibility Report*].

The video description of a television program is most often transmitted through the second audio program, or SAP, channel. The SAP channel is a subcarrier that allows each distributor of video to transmit an additional soundtrack. Essentially video distributors which utilize a SAP channel allow the viewer to choose between the primary soundtrack and an additional, or secondary, soundtrack transmitted on the SAP channel for the program. In addition to video

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[1] *See also Use of Telecasts to Inform and Alert Viewers with Impaired Hearing*, 26 F.C.C.2d 917 (1970). Efforts to provide "open" captioning, which required no changes in FCC technical rules were begun by WGBH Educational Foundation in 1975. *See Captioning for the Deaf*, 63 F.C.C.2d at 383.

[2] See 47 U.S.C. 613(g)(describing video description as "the insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue."). Similar services have been available at least since the early 1980s in many stage and movie theaters. *See, e.g.,* JA 564-66.

description, the SAP channel is also frequently used for foreign language programming. To receive the service, one must have a stereo television or a videocassette recorder that is capable of receiving the SAP channel, or a television adapter for this channel. Stereo sound capability, which includes the SAP feature, has been a standard feature on television sets, including relatively inexpensive models, since 1990. *See NPRM*, 14 FCC Rcd 19845, 19849 ¶12 (JA 130).

2. The Telecommunications Act Of 1996

One of the many amendments to the Communications Act made by Congress in the Telecommunications Act of 1996 was the addition of Section 713 to the Communications Act, 47 U.S.C. 613, Pub.L. No. 104-104, §305, 110 Stat. 56 (1996). That provision addressed both closed captioning and video description and was "designed to ensure that video services are accessible to hearing impaired and visually impaired individuals." H. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. at 182 (1996). Sections 713(a) – (e) required the Commission to complete an inquiry into closed captioning, to submit a report of the results of the inquiry to Congress and then to establish regulations and implementation schedules to ensure that video programming is fully accessible through closed captioning within 18 months of the enactment of the 1996 Act. The Commission has completed those tasks.[3]

The new Section 713(f) required the Commission to commence an inquiry within six months "to examine the use of video descriptions on video programming in order to ensure the accessibility of video programming to persons with visual impairments." 47 U.S.C. 613(f). The statute also directs the Commission to report to Congress on its findings, including an assessment

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[3] *See Video Accessibility Report*, 11 FCC Rcd 19214 (1996) (JA 46); *Closed Captioning and Video Description of Video Programming*, 13 FCC Rcd 3272, *on reconsid.*, 13 FCC Rcd 19973 (1997)(adopting closed captioning rules).

of the appropriate methods and schedules for phasing video descriptions into the marketplace, technical and quality standards for video descriptions, a definition of programming for which video descriptions would apply, and other technical and legal issues that the Commission deems appropriate. *Id.*

3. FCC Inquiry And Report On Video Description

The Commission first formally considered the issue of video description when it issued a *Notice of Inquiry* on closed captioning and video description in December 1995. *Closed Captioning and Video Description of Video Programming*, 11 FCC Rcd 4912 (1995)("*NOI*")(JA 28). Several months later, the Telecommunications Act of 1996 was enacted, adding the new Section 713(f), directing the Commission to commence an inquiry into video description. In July 1996, the Commission released its report. *Video Accessibility Report*, 11 FCC Rcd 19214 (JA 46). The Commission stated that "[i]nitial requirements for video description should be applied to new programming that is widely available through national distribution services and attracts the largest audiences, such as prime time entertainment series. . . . Lower priority for video description should be given to programming that is primarily aural in nature, including newscasts and sports events." *Id.* at 19270 ¶140 (JA 102). The Commission concluded that it should monitor development of the service and seek more information in the context of its annual report on competition in the market for the delivery of video programming. *Id.* at 19271 ¶142 (JA 103).

4. The Notice Of Proposed Rule Making To Adopt Video Description Rules

In November 1999 the Commission adopted a *Notice of Proposed Rulemaking* in the proceeding at issue in this case. *Implementation of Video Description of Video Programming*, 14 FCC Rcd 19845 (1999)(JA 126)("*NPRM*"). The Commission noted that public television stations had been airing described programming for more than a decade, but few commercial television

stations and cable television systems had provided any described programs, although many had the technical capability to do so. The Commission observed that the "availability of video description has not meaningfully improved during the past several years" while it had been studying the issue in order to submit reports to Congress. *Id.* at 19845 ¶3 (JA 127). The Commission found that less than 1% of all television programming was being provided with video description. *Id.* at 19845 ¶2 (JA 126). The Commission proposed to adopt "limited requirements to ensure that video description is more available so that all Americans can enjoy the benefits of television. We expect to expand these requirements once we have gained greater experience with video description." *Id.* ¶1 (JA 126).[4]

B. FCC ADOPTION OF VIDEO DESCRIPTION RULES.

1. The Report And Order

In an August 2000 action the Commission adopted rules requiring video description of television programming to make television more accessible to persons with visual disabilities. *Implementation of Video Description of Video Programming*, 15 FCC Rcd 15230 (2000)("*Report & Order*")(JA 149). The Commission noted that its action came after "review and study of video description for nearly five years …." *Id.* at 15231 ¶3 (JA 150). The rules require television stations affiliated with the ABC, CBS, Fox and NBC networks in the 25 largest television markets to provide a minimum of 50 hours per calendar quarter of described programming during prime

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[4] The Commission's proposals relied in part on a report on video description submitted to the Commission by the CPB-WGBH Center for Accessible Media. *See Issues to be Addressed in a Possible FCC Requirement for Video Description of Video Programming*, *A Report from the WGBH Educational Foundation* (Nov. 5, 1998, updated Oct. 19, 1999)("*WGBH Report*") (JA 654). *See NPRM*, 14 FCC Rcd at 19846 n.4 (JA 127). The Commission noted WGBH's substantial experience since 1990 with video description through its Descriptive Video Service which "has described more than 1600 PBS programs, and in the fall of 1998 provided video description of three daily programs, four weekly programs, selected episodes of three other series and several specials." *Id.* at 19846 ¶2 (JA 127); *see also WGBH Report* at 2-3 (JA 659-60).

time or in children's programming beginning in April 2002. Multichannel video programming distributors (MVPDs), such as cable television systems and direct broadcast satellite systems, with 50,000 or more subscribers are required to provide video descriptions for the same amount and type of programming on at least each of any of the top five national non-broadcast networks they carry that reach 50% of MVPD households, as determined by those networks' national prime time audience share. In addition, any television station or MVPD, regardless of market or size, is required to "pass through" any video description it receives from a programming provider if the station or MVPD has the technical capability to do so. Finally, the Commission adopted rules requiring all television stations and MVPDs to make accessible to persons with visual disabilities certain local emergency information. *See Report & Order*, 15 FCC Rcd at 15233 ¶6 (JA 152).

a. Need For The Rules

The Commission found that the record in this proceeding demonstrated "the importance of video description to persons with visual disabilities," citing the experience recounted in the hundreds of letters and formal comments of individuals with visual disabilities, advocacy groups for the blind and organizations involved in providing video description. *See Report & Order*, 15 FCC Rcd at 15232 ¶4 (JA 151).[5] The Commission noted that public broadcasting had "developed and refined the process of producing and distributing programming with video description over the last ten years, but virtually no commercial market has followed." *Id.* at 15231 ¶2 (JA 150).[6] The Commission concluded that the audience for described television programming that would

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[5] *See also* `http://www.fcc.gov/cgb/dro/comments_for_vd.html` (providing excerpts of comments from persons with visual disabilities supporting video description rules)

[6] *See* JA 433-34 (explaining that voluntary efforts had not been effective).

enable persons with visual disabilities "to 'hear what they cannot see,'" is substantial, with estimates of the number of persons as high as twelve million. *Id.* at 15234 ¶8 (JA 153). In addition, the Commission noted that the record reflected that a secondary audience of over a million children between 6 and 14 with learning disabilities could benefit from video description of programs. *Id.* at 15234-35 ¶10 (JA 153).

b. What The Rules Require

The rules adopted by the Commission require that television stations and MVPDs subject to the rules provide at least fifty hours per calendar quarter of programming with video description. The rules simply repeat the statutory definition of video description as the "insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue." *See* 47 C.F.R. 79.3; 47 U.S.C. 613(g). The rules leave to individual stations or MVPDs which specific programs to provide with video descriptions and how to fulfill the requirement of descriptions of a program's key visual elements. The Commission concluded that its goal of bringing the "benefits of video description to the commercial video marketplace, while at the same time not impos[ing] an undue burden on" the entities subject to the rule would be met by this level of programming. *Report & Order*, 15 FCC Rcd at 15244 ¶32 (JA 163).

The Commission also established that the fifty hour requirement must either be met in prime time programming or children's programming. *Report & Order*, 15 FCC Rcd at 15246 ¶36 (JA 165). "Requiring broadcast stations and MVPDs to provide children's or prime time programming with video description thus ensures that the programming reaches the greatest portion of the audience it is intended to benefit the most. Permitting broadcast stations and MVPDs to select between the two provides them flexibility without compromising that goal." *Id.*

The Commission provided for an "undue burden" exemption to the rules for "any affected broadcast station or MVPD that can demonstrate through sufficient evidence that compliance would result in an 'undue burden,' which means significant difficulty or expense." *Report & Order*, 15 FCC Rcd at 15247-48 ¶42 (JA 167).

The Commission also adopted related rules requiring "any broadcast station or MVPD that provides local emergency information to make the critical details of that information accessible to persons with visual disabilities." *Report & Order*, 15 FCC Rcd at 15250 ¶49 (JA 169). These rules apply to all television stations and MVPDs. The Commission recognized that some commenters, in particular the National Federation of the Blind, had argued that it should focus its attention not on video description of entertainment programming but on "accessibility of text information aired on TV, such as emergency information, the identity of speakers on news and talk shows, and telephone numbers or other contact information in advertisements." *Id.* at 15246 ¶38 (JA 165). The Commission did not disagree that making such information more accessible was important, and, insofar as emergency information was concerned, addressed that concern with the adoption of rules. The Commission questioned whether the SAP channel was an appropriate vehicle to provide general accessibility to text-based information. The Commission however encouraged program producers to provide text information aurally. *Id.*

c. Applicability Of The Rules

As noted above, the Commission limited the requirement to provide video description of programming to television stations in larger markets and to larger MVPDs. Specifically, the rules apply to television stations in the largest 25 markets[7] which are affiliated with the four major

[7] These are defined by the Commission as "Designated Market Areas," or DMAs which are "[u]nique county-based geographic areas designated by Nielsen Media Research, a television audience measure-
(footnote continued on following page)

commercial television networks (ABC, CBS, Fox, and NBC) and to MVPDs with at least 50,000 subscribers. For MVPDs, the requirement is limited to the top five non-broadcast channels that they carry, which reach at least 50% of MVPD households, as defined by prime time audience share.[8] The Commission concluded that these limitations provided an appropriate balance between making video description available to significant numbers of people while avoiding undue burdens on program producers and distributors. *See Report & Order*, 15 FCC Rcd at 15238-42 ¶¶19-28 (JA 157-61). These limitations, the Commission predicted, would still provide video description to approximately 50% of both television and MVPD households, in addition to the two direct broadcast satellite systems that, at that time, served 12 million customers. *See id.* at 15238, 15241 ¶¶20, 25 (JA 157, 160). Moreover, the Commission found, these provisions would limit the rules' applicability to television stations and cable systems which either already have the technical capability to provide video description or which have the resources to upgrade their capability as well as to support the costs of providing video description. *See id.* at 15239-40, 15241-42 ¶¶21-23, 26-28 (JA 158-61); JA. 453-57 (describing experience of public stations and arguing that cost of providing video descriptions would not be unduly burdensome on commercial stations and MVPDs).

d. FCC Authority To Adopt The Rules

In its *Notice of Proposed Rulemaking*, the Commission had sought comment on its statutory authority to adopt rules requiring video description of television programming. *See NPRM*,

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ment service, based on television viewership in the counties that make up each DMA." 47 C.F.R. 79.3 (JA 224).

[8] Non-broadcast networks include such well known cable channels as Discovery Channel, USA Network, Lifetime, Nickelodeon and others.

14 FCC Rcd at 19857 ¶34 (JA 138). Some commenters, including petitioners here, argued that the Commission lacked authority under the Communications Act to adopt video description requirements. The Commission was not persuaded by these arguments, concluding that it had ample authority under the Act to adopt these rules.

Congress, the Commission pointed out, had authorized it "to make available to all Americans a radio and wire communication service, and to promote safety and life through such service, and to make such regulations to carry out that mandate, that are consistent with the public interest and not inconsistent with other provisions of the Act or other law." *Report & Order*, 15 FCC Rcd at 15252 ¶55 (JA 171). In particular, the Commission pointed to Section 1 of the Act, which established the Commission "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, *to all the people of the United States* … a rapid, efficient, Nation-wide, and world-wide wire and radio communication service …." and "for the purpose of promoting safety of life and property through the use of wire and radio communication." 47 U.S.C. 151 (emphasis added). The Commission also cited Section 4(i) of the Act, which states that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions" and section 303(r), which states that "the Commission from time to time, as public convenience, interest, or necessity requires, shall … [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act …." 47 U.S.C. 154(i), 303(r). *Report & Order*, 15 FCC Rcd at 15251-52 ¶54 (JA 170-71).

The Commission considered arguments made by some commenters that Congress, in enacting Section 713(f) of the Communications Act, 47 U.S.C. 613(f), in 1996 intended to con-

fine the Commission's authority to conducting an inquiry on video description, and thus foreclosed a rule making. Looking at the statutory language itself, the Commission observed that

> Section 713(f) is silent with respect to – and thus by itself neither authorizes nor precludes – a rulemaking. In other words, section 713(f) does not change the purpose for which the Commission was created, as expressed in section 1 of the Act, nor does it derogate the general rulemaking powers the Commission has, as expressed in sections 4(i) and 303(r) of the Act.

Report & Order, 15 FCC Rcd at 15252-53 ¶57 (JA 172). The Commission acknowledged that the legislative history of Section 713(f) indicated that Congress considered during the legislative process, but did not enact, language specifically referencing a rule making. In the Commission's judgment, this history indicated that Section 713 should be construed neither to require nor to prohibit rule making, "given our otherwise broad powers to make rules, as expressed in sections 4(i) and 303(r) of the Act. Had Congress intended to limit our general authority, it could have expressly done so, as it has elsewhere in the Act." *Id.* at 15253 ¶58 (JA 172).

The Commission also found unpersuasive arguments which attached significance to Congress' different approach to closed captioning in Sections 713(a) – (e), which require the Commission to adopt rules for closed captioning following an inquiry, from the treatment of video description in Section 713(f), which only requires an inquiry and report to Congress. Relying on a recent decision of the Supreme Court rejecting a similar argument with respect to other sections of the Act, the Commission explained that

> the difference in treatment between closed captioning and video description simply means that Congress intended the Commission not to have any discretion on whether to adopt closed captioning rules, but left it to the Commission to decide whether to adopt video description rules. The difference in treatment does not displace the Commission's more general rulemaking powers, as expressed in sections 4(i) and 303(r). In sum, section 713 does not preclude the Commission from adopting video description rules.

Report & Order, 15 FCC Rcd at 15254 ¶60 (JA 173).

The Commission also considered and found no basis for arguments that Section 624(f) of the Act, 47 U.S.C. 544(f), precluded the Commission from adopting video description for cable operators. Section 624(f) states that "[a]ny Federal agency . . . may not impose requirements regarding the provision or content of cable services, except as expressly provided in [Title VI]." This Court, the Commission noted, has interpreted this section to forbid "rules requiring cable companies to carry particular programming."[9] The Commission said that the video description rules "are not content based, and as such, do not require cable companies (or any other distributor of video programming) to carry particular programming. Rather, our rules simply require that, if a distributor chooses to carry the programming of the largest networks, it must provide a small amount of programming with video description." *Report & Order*, 15 FCC Rcd at 15254 ¶61 (JA 173).

Similarly, the Commission rejected the arguments of some commenters that requiring video description is inconsistent with the First Amendment because it compels speech or is content based regulation. The Supreme Court, the Commission pointed out,

> has held that "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to free expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." The purpose of our video description rules is to enhance the accessibility of video programming to persons with disabilities, and is not related to content.

Report & Order, 15 FCC Rcd at 15254-55 ¶62 (JA 173-74), *quoting Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

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[9] *United Video, Inc. v. FCC*, 890 F.2d 1173, 1187-88 (D.C.Cir. 1989).

The applicable test for such content neutral rules, the Commission noted, is "whether the regulations promote an important government purpose, and whether they do not burden substantially more speech than necessary." *Report & Order*, 15 FCC Rcd at 15255 ¶64 (JA 174), *citing Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997). Considering that millions of Americans have visual disabilities and would benefit from video description, the Commission concluded that improving accessibility to television is "an important government purpose in the context of the First Amendment." *Id.* The rules, which the Commission noted are limited in their applicability, require no more than "the translation of the visual elements of programming into another language to provide functional equivalency for the blind" and thus "will not burden any more speech than necessary." *Report & Order*, 15 FCC Rcd at 15256 ¶65 (JA 175).

That the rules require, rather than restrict, speech did not, in the Commission's judgment, change the analysis. "Our rules simply require a programmer to express what it has already chosen to express in an alternative format to enhance the accessibility of the message." *Report & Order*, 15 FCC Rcd at 15255 ¶63 (JA 174). The video description rules, the Commission noted, were similar to closed captioning for the hearing impaired. The Commission pointed out the Court's observation, albeit in dictum, "nearly twenty years ago that any requirement to provide programming with closed captioning would not violate the First Amendment." *Id., citing Gottfried v. FCC*, 655 F.2d 297, 311 n.54 (D.C.Cir. 1981), *rev'd in part on other grounds*, *Community Television of So. Calif. v. Gottfried*, 459 U.S. 498 (1983).

The Commission also was not persuaded that the rules presented any copyright issues, as some of the commenters had claimed. The Commission pointed out that WGBH, "which actually describes programming, states that in more than ten years of doing so, no copyright issues have arisen that prevented it from describing programming." *Report & Order*, 15 FCC Rcd at 15256

¶66 (JA 175). The Commission saw no reason to believe that "copyright problems will become an obstacle" to video description. "[J]ust as a broadcast network, in negotiating the rights to air a movie, may request copyright holders to change a program in order to comply with indecency restrictions, so may it request copyright holders to provide video description of the program. Should the distributors that are subject to our rules be unable to obtain the necessary clearances from copyright holders, they are free to bring those difficulties to our attention, and seek appropriate relief." *Id.*[10]

2. The Reconsideration Order

A number of parties filed petitions for reconsideration of the *Report & Order*. In a January 2001 ruling, the Commission made some modifications to and clarifications of the rules in response to the petitions but essentially adhered to the basic decisions it had made in the *Report & Order*. *Implementation of Video Description of Video Programming*, 16 FCC Rcd 1251 (2001) (JA 200)("*MO&O*"). The Commission stated that based on the record compiled in the proceeding, it "continue[d] to believe that the public interest benefits of requiring video description outweigh the costs of complying with the rules." *Id.* at 1253 ¶3 (JA 202).

The Commission also addressed arguments presented by the National Federation of the Blind that the Commission should rescind the video description rules and should, instead, give priority to making printed information on the screen accessible. The Commission pointed out that a number of parties supported NFB's goal of making such information more accessible but

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[10] Two Commissioners dissented from the *Report & Order*. Both expressed agreement generally with the goal of the rules to make television more accessible to persons with visual disabilities, but they concluded that the Communications Act did not authorize the Commission to adopt video description rules. *See Report & Order*, 15 FCC Rcd at 15268 (Commissioner Furchtgott-Roth, dissenting); 15272 (Commissioner Powell, dissenting)(JA 187, 191).

opposed the "request, in effect, to 'start all over again.'" *MO&O*, 16 FCC Rcd at 1265 ¶32 (JA 214). The Commission acknowledged the importance of describing text information, but concluded that "video description of programming should not be delayed until the issues of describing text information are addressed." *Id.* 1266 ¶33 (JA 215). The Commission said that video description of programming and describing text information are not mutually exclusive services, and it indicated that the issue of describing text information was better addressed in a separate proceeding. *Id.*

The Commission also reiterated its conclusion in the *Report & Order* that it had authority under the Communications Act to adopt video description rules:

> As discussed in detail in the *Report and Order*, sections 1, 2(a), 4(i), and 303(r) make clear that the Commission's fundamental purpose is to make available so far as possible to all Americans a radio and wire communication service, and it has the power to make rules to carry out this mandate that are consistent with the public interest, and not inconsistent with other law. Our video description rules further the public interest because they are designed to enhance the accessibility of video programming to persons with visual disabilities, but at the same time not impose an undue burden on the video programming production and distribution industries. Our video description rules are not inconsistent with sections 624(f) and 713(f) of the Act, the First Amendment, or copyright law. Our rules are not inconsistent with section 713(f), because that section neither authorizes nor prohibits a rulemaking on video description. Our rules are not inconsistent with section 624(f), because they do not require cable operators to carry any particular programming. Our rules are not inconsistent with the First Amendment, because they are content-neutral regulations, and satisfy the applicable test of serving an important government interest without burdening substantially more speech than necessary. Our rules are not inconsistent with copyright law because they do not violate any copyright holder's rights. In sum, as we explained in greater detail in the *Report and Order*, we believe that our video description rules further the very purpose for which the Commission was created – "to make available, so far as possible, to all the people of the United States … a rapid, efficient, Nation-wide, and world-wide wire and radio communication service" – and are within our power to adopt because they are "not inconsistent with [the] Act" and serve the "public convenience, interest, and necessity" and are "not inconsistent with law."

MO&O, 16 FCC Rcd at 1271 ¶46 (JA 220) (footnotes omitted).

SUMMARY OF ARGUMENT

The rules at issue in this case were adopted by the FCC in furtherance of what the Supreme Court has described as the "expansive powers" delegated to the agency by Congress in the Communications Act. In particular, the Commission's mandate includes the responsibility "to make available, so far as possible, *to all the people of the United States*, … a rapid, efficient, Nation-wide, … wire and radio communications service …." 47 U.S.C. 151 (emphasis added). The modest requirements imposed by the video description rules and the indisputable public interest benefits of making television programs more accessible to persons with visual disabilities demonstrate that the FCC acted well within its statutory authority under the Communications Act when it adopted these rules.

Congress' action in 1996 in amending the Communications Act by adding Section 713 did not alter the FCC's general rule making authority under the Act with respect to video description. The statutory language of Section 713 is silent as to the FCC's authority to adopt video description rules. Petitioners' attempt to draw meaning from that silence by relying on the "*expressio unius*" maxim fails to take into account the established case law in this Court that the *expressio unius* "maxim has little force in the administrative setting, where [courts] defer to an agency's interpretation of a statute unless Congress has directly spoken to the precise question at issue."[11] Petitioners' attempt to draw meaning from statutory silence also conflicts with the "cardinal rule" of statutory interpretation "that repeals by implication are not favored."[12] The further inferences petitioners draw from what is at best ambiguous legislative history are unwar-

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[11] *Mobile Communications Corp. v. FCC*, 77 F.3d at 1404-05 (internal quotations omitted)

[12] *Traynor v. Turnage,* 485 U.S. at 547.

ranted because they rely on unexplained changes in the statutory language during the legislative process. It is well established that such legislative history has little if any value.

This is plainly a *Chevron* Step Two case – there is no reasonable basis to contend as petitioners do that Congress has spoken directly to the precise issue before the Court. In adopting Section 713, Congress was silent or ambiguous as to the issue of the FCC's authority to enact video description rules. The Commission reasonably construed Congress' action as neither mandating nor precluding its adoption of video description, but instead as leaving the matter to the Commission's discretion. That judgment was reasonable and should be respected by the Court.

Petitioners' contentions that the First Amendment and other provisions in the Communications Act preclude adoption of video description rules are equally flawed. The Commission properly rejected petitioners' claim that the rules conflict with the First Amendment, noting that the rules were justified without relation to content, burdened no more speech than necessary and furthered the important governmental interest in enhancing the accessibility of video programming to persons with disabilities. As applied to broadcast stations, the rules are constitutionally permissible under *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). As applied to MVPDs, the rules are constitutionally permissible under *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997).

Petitioners also contend that Sections 326 and 624(f) of the Communications Act, 47 U.S.C. 326, 544(f), preclude Commission adoption of the video description rules. The former provision prohibits "censorship" and forbids the Commission from interfering with "the right of free speech by means of radio communication." Section 326 does not extend greater protections than the First Amendment. For the same reasons that petitioners' First Amendment argument has no basis, its reliance on Section 326 is unpersuasive.

Section 624(f) provides that "[a]ny Federal agency . . . may not impose requirements regarding the provision or content of cable services, except as expressly provided in [Title VI]." This Court has interpreted that section to forbid "rules requiring cable companies to carry particular programming." *United Video, Inc. v. FCC*, 890 F.2d 1173, 1188 (D.C.Cir. 1989). The Commission properly concluded that Section 624(f) did not preclude adoption of video description rules applicable to cable systems because the rules do not require carriage of particular programming, but address only the manner in which they carry some programming – with video descriptions – that they have independently chosen to carry.

The arguments of the National Federation of the Blind fail to demonstrate that the FCC acted unreasonably in adopting the video description rules. NFB, which does not question the FCC's authority to adopt some rules in this area, favors rules that provide for audio description of on-screen text rather than the rules the Commission adopted. The Commission in fact adopted some rules in this proceeding relating to audio description of on screen text involving emergencies but did not go as far as NFB has urged. The Commission pointed out that the rules NFB favors are not mutually exclusive with the video description rules adopted by the FCC. The Commission indicated that audio text description rules involved different questions that should be considered in a separate proceeding. NFB's further complaint that the FCC failed to study demand for the video description rules is erroneous. The record in this proceeding makes clear that there was a very substantial demand among persons with visual disabilities for the rules the Commission adopted. Even NFB acknowledged before the Commission that there was "undeniable support" for video description.

ARGUMENT

I. STANDARD OF REVIEW

Claims of the MPAA petitioners focus on whether the Commission acted outside the scope of its statutory authority in adopting rules requiring video description. To determine whether the Commission acted within its legally delegated authority in promulgating rules, the Court employs the familiar test outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984): If, through the Communications Act, Congress has spoken directly to the precise issue presented by petitioners, "that is the end of the matter," and the court defers to the "unambiguously expressed intent of Congress." *Id.* at 842-43. If, however, the Communications Act "is silent or ambiguous with respect to the specific issue" at hand, the Commission may exercise its reasonable discretion in construing the statute. *Id.* at 843. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 387, 397 (1999). The Court properly applies *Chevron* analysis to these rules because "Congress delegated authority to [the Commission] generally to make rules carrying the force of law, and [the video description rule] was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2001). Canons of statutory construction are relevant in that analysis if "employment of an accepted canon of construction illustrates that Congress has a *specific* intent on the issue in question …." *Michigan Citizens for an Independent Press v. Thornburgh*, 868 F.2d 1285, 1292-93 (D.C.Cir.), *aff'd by an equally divided Court*, 493 U.S. 38 (1989). "If, however, the statute is ambiguous, then *Chevron* step two 'implicitly precludes courts picking and choosing among various canons of construction to reject reasonable *agency* interpretations." *Halverson v. Slater*, 129 F.3d 180, 184 (D.C.Cir. 1997).

Petitioner National Federation for the Blind challenges the reasonableness of the Commission's adoption of these rules. The Court must uphold the Commission's action in the face of such a challenge unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This "[h]ighly deferential" standard of review "presumes the validity of agency action;" the Court "may reverse only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000) (internal quotations omitted); *see also Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d 1195, 1202-08 (D.C. Cir. 1996). Ultimately, the Court should affirm the Commission's decision if the agency examined the relevant data and articulated a "rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted).

II. THE FCC ACTED WITHIN ITS STATUTORY AUTHORITY.

Petitioners argue that the FCC's expansive power under the Communications Act does not include authority to adopt regulations requiring video description and that specific provisions of the Communications Act also preclude the FCC from adopting such regulations. Both arguments are wrong.

A. The Communications Act Grants The FCC Broad Powers To Adopt Regulations To Make Television Available To All The People Of The United States.

The FCC was established "to make available, so far as possible, to all the people of the United States, … a rapid, efficient, Nation-wide, ... wire and radio communication service with adequate facilities at reasonable charges ...." 47 U.S.C. 151. Moreover, the Commission is authorized to "make such rules and regulations … as may be necessary in the execution of its

functions," 47 U.S.C. 154(i), to "encourage the larger and more effective use of radio in the public interest," 47 U.S.C. 303(g), and "[m]ake such rules and regulations … not inconsistent with law, as may be necessary to carry out the provisions of this Act …." 47 U.S.C. 303(r). The video description rules were adopted by the Commission in order to further the objective of making "television programming more accessible to the many Americans who are visually impaired without imposing an undue burden on the programming production and distribution industries." *MO&O*, 16 FCC Rcd at 1251 ¶1 (JA 200).

Both the Supreme Court and this Court have recognized that making television broadcasting more accessible to the hearing impaired by the provision of captioning is in the public interest. *See Community Television of Southern Calif.*, 459 U.S. at 508 ("All 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."); *Gottfried*, 655 F.2d at 315 ("[W]e believe that some accommodations for the hard of hearing are required of commercial stations, under the general obligation of licensees to serve 'the public interest, convenience and necessity.'"). The video description rules serve a similar public interest purpose and directly further the FCC's mandate under Section 1 of the Act to make wire and radio communications available so far as possible to <u>all</u> the people of the United States. The rules were well within the Commission's broad statutory authority under the provisions cited above.[13]

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[13] The Commission has not, as MPAA claims, "shifted its position on its authority to adopt rules." Br. at 13. As even MPAA recognizes, prior to the *Report & Order* in this proceeding, the Commission had taken no position on whether it had authority to adopt video description rules. *See, e.g.,* Br. at 10 ("Commission did not suggest that it had independent authority to enact mandatory video description rules."). The Commission simply did not address the issue previously because the earlier FCC actions cited by MPAA did not involve any proposal to adopt rules. Thus, the agency's discussion of its authority to adopt rules was irrelevant. The first time that the FCC reached a conclusion about its authority under the Com-

(footnote continued on following page)

Many court decisions have discussed the "expansive powers" delegated to the FCC by the Communications Act. *National Broadcasting Co., Inc. v. United States,* 319 U.S. 190, 219-20 (1943).

> While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject-matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.

Id. at 219-20; *see also FCC v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979)("[I]t is clear that Congress meant to confer 'broad authority' on the Commission … so as 'to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission.'").

Courts have long established that the Commission has the authority to promulgate regulations to effectuate the goals and accompanying provisions of the Act in the absence of explicit regulatory authority, if the regulations are reasonably ancillary to existing Commission statutory authority. *See, e.g., United States v. Southwestern Cable*, 392 U.S. 157 (1968) (*Southwestern Cable*) (upholding the Commission's authority to regulate cable television); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (D.C.Cir. 1989) (upholding Commission's authority to reinstate syndicated exclusivity rules for cable television companies as ancillary to the Commission's authority to regulate television broadcasting); *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C.

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munications Act to adopt video description rules was in the *Report & Order* here, where it held that it had authority to do so.

Cir. 1988) (upholding Commission's authority to adopt rules establishing a "Universal Service Fund" in the absence of specific statutory authority as ancillary to its responsibilities under Sections 1 and 4(i) of the Communications Act, "to further the objective of making communications service available to all Americans at reasonable charges"); *North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1292-93 (7th Cir. 1985) ("Section 4(i) empowers the Commission to deal with the unforeseen – even if [] that means straying a little way beyond the apparent boundaries of the Act – to the extent necessary to regulate effectively those matters already within the boundaries") (citations omitted); *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1109 (D.C. Cir. 1981) ("The instant case was an appropriate one for the Commission to exercise the residual authority contained in Section 154(i) to require a tariff filing...."); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1973) (holding that "even absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications service").

As the Commission noted in the *Report & Order*, the Supreme Court recently rejected claims by parties who, like petitioners here, sought to prevent the Commission from relying on its broad authority under pre-existing provisions of the Communications Act to adopt rules not expressly authorized in relevant provisions of the 1996 Act. In *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), the Commission was alleged to have exceeded its statutory authority by adopting rules designed to facilitate local competition in the market for telephone service, including rules mandating a pricing methodology in certain circumstances. The Court rejected these arguments, holding that a pre-existing provision of the Communications Act, 47 U.S.C. 201(b),

conferring general rule making authority on the Commission, "explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies." 525 U.S. at 380. That provision authorizes the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." The Court's reasoning is equally applicable to the Commission's asserted bases of jurisdiction to adopt video description rules here – 47 U.S.C. 154(i) and 303(r) – which contain essentially the same language as Section 201(b).

Describing the relationship between the general rule making provisions of the Communications Act and the more specific provisions of the Telecommunications Act of 1996, the *Iowa Utilities* decision explains that "the 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence *part of*" an act that already granted the Commission general rule making authority. *Iowa Utilities*, 525 U.S. at 378 n.5. Similarly, Section 713(f), is part of an organic statute that gives the FCC expansive rule making authority over wire and radio communications. Thus, it is simply incorrect to assert, as petitioners do, that Congress' decision not to mandate adoption of video description rules precludes the Commission from construing its general governing statute to provide it with discretionary authority to promulgate such rules.

Petitioners' repeated assertions that the FCC's action in adopting these rules amounts to an assertion of "plenary" or "unbounded" or "unbridled" or "unchecked" authority (*e.g.,* Br. at 26, 31, 34) to regulate programming on television stations and cable systems are, as discussed below, factually incorrect. It is obviously petitioners' intent to attempt to persuade the Court that this is a case where the Commission's position "amounts to the bare suggestion that it possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area …," a proposition that the Court has "categorically reject[ed]."

Railway Labor Executives' Ass'n v. National Mediation Bd., 29 F.3d 655, 670 (D.C.Cir. 1994). The Commission's action here does not amount to any such assertion of authority.

The Commission's expansive authority under provisions of the Communications Act such as Sections 1, 4(i), 303(g) and 303(r), must, of course, be guided by some principles or it could become unbounded. These provisions are not "infinitely elastic." *North American Tel. Ass'n*, 772 F.2d at 1292. However, the Court need not define the outer limits of those boundaries here to determine that these rules do not approach them. Here, for example, the subject of the rules clearly comes within the FCC's general authority under the Communications Act – the regulation of interstate and foreign communications by wire and radio. 47 U.S.C. 152(a).[14] Moreover, the "rules were reasonably adopted in furtherance of a valid communications policy goal. Hence, they fall under the Commission's § 303(r) powers unless they are 'inconsistent with law.'" *United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (D.C.Cir. 1989), *quoting FCC v. National Citizens Comm. For Broadcasting*, 436 U.S. 775, 796 (1978). It is obviously a "valid communications policy goal" and in the public interest for the FCC to enact rules to make television programs more accessible to persons with visual disabilities. The Commission's interpretation makes sense in terms of the statute's basic objectives. Indeed, Congress has repeatedly taken action that recognizes the public interest benefits of making television programs more accessible to those with hearing impairments. There would be no basis to argue that the similar interests served by the video description rules would not also be in the public interest. That the

[14] A decision to uphold the Commission's authority here thus would not support authority for the Commission to "impose a tax on an unregulated railroad or a tax on an individual for eating ice cream," a position the Court believed that the Commission was asserting in another case and which it refused to "countenance" because it was "preposterous." *See Comsat Corp. v. FCC*, 114 F.3d 223, 227 (D.C.Cir. 1997).

standard of the public interest is not "so indefinite as to confer an unlimited power" is long established. *See NBC*, 319 U.S. at 216; *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1422-24 (D.C.Cir. 1983). Contrary to MPAA's claims, this is not a case in which the Commission has asserted that it possesses all powers except those forbidden by Congress. There are, thus, plainly boundaries to the Commission's assertion of authority to adopt video description regulations and, as we have discussed above, its action falls well within those boundaries.

B. The Telecommunications Act Of 1996 Did Not Repeal Or Otherwise Limit The FCC's Power To Adopt Video Description Rules.

MPAA relies heavily for its claim that the Commission lacks authority to adopt these rules on Congress' differential treatment of closed captioning and video description in 1996 when it enacted the provisions now in Section 713 – specifically Congress' decision to mandate that the Commission adopt rules requiring closed captioning but, in the case of video description, to require only that the Commission conduct an inquiry and report to Congress. Its argument is bolstered, MPAA contends, by the fact that during the legislative process, the House bill initially contained essentially the same requirements for closed captioning and video description, then was amended to permit the Commission to adopt video description rules after conducting an inquiry and, finally, in conference, all reference to the FCC's authority to adopt a video description requirement was omitted in the final legislation. These arguments cannot withstand analysis. The statutory language itself contains no restrictions on the FCC's authority to enact video description rules, and the inferences petitioners draw solely from unexplained changes in language of the legislation during the legislative process are neither justified nor even the most likely explanation for Congress' action.

It is well established that Congress' failure to require the Commission to take particular action or to authorize with specificity such action implies nothing about the Commission's broad jurisdiction under the Act to adopt rules to carry out the Act's express goals. *See Southwestern Cable*, 392 U.S. at 170-71 (that Congress twice failed to enact legislation explicitly authorizing Commission jurisdiction over cable television did not imply that the Commission lacked jurisdiction, nor did the legislative history of those efforts shed any light on the authority granted to the Commission by the 1934 Act). If subsequent legislation does not expressly limit the broad authority over wire and radio communications granted the Commission by provisions of the Communications Act such as Sections 1, 4(i), 303(g) and 303(r), the Commission's jurisdiction is unaffected. *See TRT Telecommunications Corp. v. FCC*, 876 F.2d 134, 146 (D.C.Cir. 1989) (because Congress did not explicitly address ownership of certain satellite ground stations in the Communications Satellite Act of 1962, the FCC was free to use its pre-existing authority under the 1934 Act to determine the matter; legislative silence cannot be taken as meaning that Congress had resolved the issue).

Two decisions illustrate the lack of foundation for MPAA's view of the FCC's authority to adopt the rules at issue here. In *Rural Telephone Coalition*, 838 F.2d 1307, relied on by the Commission (JA 171) but not discussed by petitioners, this Court held that the FCC's authority to create a "Universal Service Fund," for which at the time there was no explicit statutory authority, was "within the Commission's statutory authority" under 47 U.S.C. 151 and 154(i) of the statute as the rules establishing the fund had been adopted "in order to further the objective of making communication service available to all Americans at reasonable charges …." 838 F.2d at 1315, *citing GTE Serv. Corp. v. FCC*, 474 F.2d 724, 730-31 (2nd Cir. 1973)(FCC had authority under 47 U.S.C. 151 and 154(j) to regulate data processing activities of common carriers that pose

a "threat to efficient public communications services at reasonable prices."). The Court held that the Commission's action creating the Universal Service Fund "falls within the 'expansive powers' delegated to it by the Communications Act." *Id., quoting NBC v. United States*, 319 U.S. at 329.

The video description rules were adopted by the FCC in furtherance of essentially the same goals as the Universal Service Fund upheld in *Rural Telephone Coalition* – to make wire and radio communications "available, so far as possible, to all the people of the United States …" as that mandate is set forth in Section 1 of the Communications Act, 47 U.S.C. 151; *see Report & Order*, 15 FCC Rcd at 15252 ¶55 (JA 171); *see also id.* at 15251 ¶53 (JA 170) (noting that "Title III of the Act requires the Commission to find that the 'public interest, convenience, and necessity' will be served by the grant, renewal, or transfer of a license authorized pursuant to that title."); *NPRM*, 14 FCC Rcd at 19858, ¶36 (JA 139)(noting that Congress has expressed the goal of increasing the accessibility of communications services for persons with disabilities). *Rural Telephone Coalition* should, therefore, lead to the same conclusion here that the rules in question are within the agency's authority under the Act and that Congress' adoption of Section 713 in 1996 did not affect that determination.

Insofar as Section 713(f) only mandates that the FCC conduct an inquiry and report its results to Congress, the Second Circuit, in a different context, has held that a similar requirement, also unaccompanied by any express authorization to enact rules, did not preclude the Commission from adopting rules in the relevant area. Section 215 of the Communications Act requires the Commission to investigate certain transactions entered into by common carriers and to "report to the Congress whether any such transactions have affected or are likely to affect adversely the ability of the carrier to render adequate service to the public … [and to] include in its report its recommendations for necessary legislation in connections with such transactions,

and [to] report specifically whether in its opinion legislation should be enacted …." 47 U.S.C. 215. The Second Circuit rejected claims, very similar to the ones made by petitioners here, that such a statutory provision implicitly foreclosed the Commission from adopting rules governing such transactions:

> In view of the Commission's broad responsibilities, we cannot believe that Congress intended by this section to preclude rule-making in the area of the Commission's prime concern – adequate public communications service. Had Congress wished to impose such a limitation on its expansive grant of power to the Commission, we think it would have done so explicitly. We refuse to impose the limitation. *See General Tel. Co. v. United States*, 449 F.2d 846, 858 (5th Cir. 1971).

GTE Service Corp. v. FCC, 474 F.2d at 731 n.9.

The proposition advanced by MPAA – that a statutory requirement that an agency investtigate an issue and report to Congress implicitly precludes the agency from adopting rules in the same area is baseless. The purpose of reporting requirements such as the one contained in Section 713(f) is to facilitate communications between the agency and Congress – not to paralyze the agency from acting. When Congress wants the FCC to investigate and report in an area but not to take any regulatory action, it knows how to accomplish that goal explicitly. *See, e.g.,* Radio Broadcasting Preservation Act of 2000, Pub.L. No. 106-553, 114 Stat. 2762, App. B, §§ 632(a)(2), (b)(3) (2000)(requiring the FCC to investigate and report to Congress on certain interference questions involving low power FM radio and expressly forbidding the agency from adopting new rules in the area absent further Congressional action).

Furthermore there simply is no direct evidence in the legislative history of Section 713 that Congress intended to restrict the Commission's jurisdiction to enact video description rules. MPAA relies exclusively on inferences it draws from unexplained changes made to the language of the legislation in committee. However, "[u]nexplained changes made in committee are not

reliable indicators of congressional intent." *Drummond Coal Co. v. Watt*, 735 F.2d 469, 474 (11th Cir. 1984) *quoted in Save Our Cumberland Mountains, Inc. v. Lujan*, 963 F.2d 1541, 1548 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 911 (1993). "'[M]ute intermediate legislative maneuvers' are not reliable indicators of congressional intent." *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947); *see also Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989). Courts should avoid delving into "legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945).

This proposition is particularly apt in this case where the Congressional intent that petitioners infer – that Congress intended to repeal the Commission's authority to adopt video description rules – runs up against the well-established case law rejecting the proposition that a later statute can be construed to repeal an earlier statutory provision by implication – "[t]he cardinal rule … that repeals by implication are not favored." *Traynor v. Turnage,* 485 U.S. 535, 547 (1988) (quoting *Morton v. Mancari,* 417 U.S. 535, 549-50 (1974)). The later statute displaces the first only when the statute "expressly contradict[s] the original act" or if such a construction "is absolutely necessary ... in order that [the] words [of the later statute] shall have any meaning at all." *Id.* at 548 (*quoting Radzanower v. Touche Ross & Co.,* 426 U.S. 148, 153 (1976)); *see also Wood v. United States,* 41 U.S. (16 Pet.) 342, 363 (1842) (there should be a "manifest and total repugnancy in the provisions, to lead to the conclusion that the [more recent laws] abrogated, and were designed to abrogate the [prior laws]"). *See Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1333 (D.C.Cir. 1996).

And recently, the Supreme Court held that a general grant of FCC rule making power governing pole attachments was not limited because the FCC's rules did not fall within one of

two more specific, later-enacted grants of specific rule making authority to the Commission. *See National Cable & Telecommunications Ass'n v. Gulf Power Co.*, 122 S.Ct. 789, 787-89 (2002).

The only direct statements in the legislative history of Section 713 concern Congress' intent to make video programming accessible to all Americans.[15] The more logical interpretation of the legislative purpose is that Congress concluded that there was a need to mandate the adoption of closed captioning regulations based on the substantial effort that public television interests, the Commission and Congress had devoted to facilitating closed captioning for over 20 years and the record that had been compiled as to its feasibility and benefits.[16] No similar record had been developed with respect to video description, and Congress lacked sufficient information regarding video description to justify mandating specific requirements. Accordingly, Congress directed the Commission to study the problem of implementing video description, but left the decision whether and when to adopt such rules to the agency. With respect to the deletion during the legislative process of language specifically authorizing rule making authority over video description, Congress could have concluded that this was not necessary in view of the expansive authority already possessed by the Commission.

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[15] The conference report describes the House amendment, which was adopted, as "designed to ensure that video services are accessible to hearing impaired and visually impaired individuals" and states that "[i]t is the goal of the House to ensure that all Americans ultimately have access to video services and programs, particularly as video programming becomes an increasingly important part of the home, school and workplace." H.R. Conf . Rep. 104-458 at 182, 183-84 (JA 287-88). The conference modification of the House amendment to remove language stating that the Commission may adopt video description rules after its inquiry and report is completely unexplained in the Conference Report or elsewhere. *See id.* at 184 (JA 289).

[16] The Commission has explained the history of closed captioning on a number of occasions. *See, e.g., Video Accessibility Report*, 11 FCC Rcd at 19223-25 ¶¶25-28 (JA 55-57); *Closed Captioning and Video Description of Video Programming - NPRM*, 12 FCC Rcd 1044 at ¶¶7-17 (1997); *Closed Captioning Report & Order*, 13 FCC Rcd 3272 at ¶¶7-10.

The Commission concluded that "the difference in treatment between closed captioning and video description simply means that Congress intended the Commission not to have any discretion on whether to adopt closed captioning rules, but left it to the Commission to decide whether to adopt video description rules. The difference in treatment does not displace the Commission's more general rulemaking powers [nor] … preclude the Commission from adopting video description rules." *Report & Order*, 15 FCC Rcd at 15254 ¶60 (JA 173). The Commission's authority to adopt video description rules is obviously a matter on which Congress was silent or, at most, ambiguous. Even if the Commission's construction of Section 713 is not the only explanation for Congress' action it is a reasonable construction of Section 713 when seen in the context of Congress' consideration of both closed captioning and video description, which were at different stages of development in 1996. The FCC's construction of the statute as permitting but not mandating video description rules therefore should be respected by the Court.

As the Commission pointed out in the *Report & Order* (JA 172), the claim that Congress' difference in treatment between closed captioning and video description demonstrated that Congress intended to withdraw the Commission's general authority to enact video description rules was very similar to an argument that the Supreme Court recently rejected in resolving similar statutory issues elsewhere in the Communications Act. The Court in *Iowa Utilities* observed that it was "not peculiar" that Congress should make specific reference to mandated regulations but not refer to regulations permitted pursuant to broader jurisdictional provisions. It held that "mere lack of parallelism is surely not enough to displace that explicit authority." 525 U.S. at 384. The same result applies here. The "mere lack of parallelism" between the closed captioning provision and the video description provision in Section 713, unaccompanied by any direct evidence of Congressional intent in the language of the statute or its legislative history, does not displace the

Commission's authority to adopt video description rules pursuant to other provisions of the Communications Act.

MPAA's reliance (*e.g.*, Br. at 27) on the *expressio unius* maxim of statutory construction – that the expression of one is the exclusion of others – is misplaced and ignores the well-established caselaw in this Court that the "maxim 'has little force in the administrative setting,' where we defer to an agency's interpretation of a statute unless Congress has '"directly spoken to the precise question at issue."' *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.,* 940 F.2d 685, 694 (D.C.Cir. 1991) (*quoting Chevron, U.S.A. v. NRDC,* 467 U.S. [at] 842 …. *Expressio unius* 'is simply too thin a reed to support the conclusion that Congress has clearly resolved [an] issue.' *Id.; see also Cheney R.R. Co. v. ICC,* 902 F.2d 66, 68-69 (D.C.Cir.1990) (similar)." *Mobile Communications Corp. v. FCC*, 77 F.3d 1399, 1405-06 (D.C.Cir.), *cert. denied*, 519 U.S. 823 (1996); *see also TRT Telecommunications Corp. v. FCC*, 876 F.2d 134, 146 (D.C.Cir. 1989) (same).

It is incorrect, as we have discussed above, to contend that the legislative history on which petitioners rely, consisting exclusively of unexplained changes made in committee during the consideration of the legislation that ultimately became Section 713, constitutes the "unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843.

The Court has explained further that the "difficulty with the [*expressio unius*] doctrine – and the reason it is not consistently applied … is that it disregards several other plausible explanations for an omission." *Clinchfield Coal Co. v. Federal Mine Safety & Health Rev. Comm'n*, 895 F.2d 773, 779 (D.C.Cir.), *cert. denied*, 498 U.S. 849 (1990). Congress may well have intended "that in the second context the choice should be up to the agency. Indeed, under *Chevron,* 467 U.S. at 842-44, 104 S.Ct. at 2781-82, where a court cannot find that Congress

clearly resolved an issue, it presumes an intention to allow the agency any reasonable interpretative choice." *Id.* Here, Congress did not clearly resolve the issue. The Commission's conclusion that Section 713 was not intended to deny it authority to adopt video description rules and that its broad and longstanding authority under other provisions of the Act provided authority for such rules is a permissible interpretation of the statute.

C. Other Statutory And Constitutional Provisions Cited By Petitioners Do Not Preclude Adoption Of The Video Description Rules.

MPAA also contends that the First Amendment and Sections 326 and 624(f) of the Communications Act affirmatively preclude the Commission from adopting video description rules. All three arguments are inter-related and are founded on the demonstrably false assertion that the video description regulations constitute content based regulation of speech.

1. The First Amendment

Although MPAA states in issues and headings that the video description rules "conflict with" and "are inconsistent with" the First Amendment" (Br. at 2, 39), their argument never quite makes either case, choosing to present more ambiguous assertions such as the Commission's action "raises significant tensions with the First Amendment" (Br. at 39, 41), "will have a significant impact on the First Amendment interests of program producers and other members of the creative community …" (Br. at 41) and "implicates the First Amendment." (Br. at 42). In any event, regardless of whether petitioners are arguing that the rules actually violate the First Amendment or create tensions with or impact on the First Amendment, the Commission properly rejected their First Amendment argument below, noting that the appropriate standard where the government has adopted a regulation affecting speech is whether the regulation is justified without reference to the content of the speech. *Report & Order*, 15 FCC Rcd at 15254-55 ¶62 (JA 173-74), *citing Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The purpose of the

video description rules, as the Commission pointed out, is "to enhance the accessibility of video programming to persons with disabilities," and is wholly unrelated to the content of the programming. *Id.* "A content neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997).

Petitioners make no effort to argue that making television programming more accessible to persons with visual disabilities is not an important government purpose. Such an argument would, in any event, be belied by Congress' adoption of Section 713 – plainly recognizing that enhancing access to television programming to persons with both hearing and visual disabilities is an important government purpose. *See* n. 15 above. Nor would there be any basis to contend that the limited requirements of the rules adopted by the Commission burden substantially more speech than necessary to further the government interests (assuming the rules actually "burden" speech at all). As the Commission explained, the "mandate to provide video description does not require a programmer to express anything other than what the programmer has already chosen to express in the visual elements of the program. Our rules simply require a programmer to express what it has already chosen to express in an alternative format to enhance the accessibility of the message." *Report & Order*, 15 FCC Rcd at 15255 ¶63 (JA 174).

Indeed this Court, admittedly in *dicta*, had little difficulty concluding that there was no merit to a contention that First Amendment challenges to a closed captioning requirement, which involves essentially the same First Amendment considerations as video description, were "without merit. A captioning requirement would not significantly interfere with program content. And in cases of more limited regulations such as those likely to come in issue it is well established

that the Commission may constitutionally condition licenses on a station's provision of programming in the public interest." *Gottfried*, 655 F.2d at 311 n.54.

For similar reasons, there is no basis for MPAA's suggestion that the video description regulations "violate the constitutional prohibitions against compelled speech." Br. at 42. "Compelled speech" cases such as the compulsory flag salute law struck down in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), and the law mandating display of the license-plate motto "Live Free or Die" struck down in *Wooley v. Maynard*, 430 U.S. 705 (1977), invalidated those laws because onlookers might mistakenly have concluded that those involuntarily compelled to assert the challenged messages agreed with them and because an individual has a right not to be made an "instrument [of] ... an ideological point of view he finds unacceptable." *Id.* at 715. *See Clarke v. United States*, 886 F.2d 404, 413 (D.C.Cir. 1989), *vacated as moot*, 915 F.2d 699 (D.C.Cir. 1990).

As the Commission correctly observed, the video description rules only require that broadcasters or MVPDs provide descriptions for programming that they have already independently, and without any government compulsion, determined to present in the exercise of their First Amendment rights and their business judgment. There is no reasonable basis to claim that even if video descriptions could be viewed as a type of compelled speech that the rules implicate in any way the concerns that motivated the decisions in *Barnette* and *Wooley*.

MPAA makes much of its characterization of the rules as "requiring the creation of new artistic works" (Br. at 42), *i.e.*, the video descriptions themselves. However, the rules only address the nature of the video descriptions that must be presented by repeating the statutory definition – "audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue." 47 C.F.R. 79.3(a)(3). There is nothing in the

rules or the Commission's order to suggest that the agency intends any oversight of the details of these "artistic works." As one commenter observed, video description "originates with the producer of the programming who has already expressed the message to the rest of the audience. Since the government will not be dictating the script of descriptions, producers retain complete editorial discretion as to the way in which they present their message to blind audiences." JA 442. In the circumstances here, such a requirement to describe visual elements of a program that the station or MVPD has independently determined to present cannot be properly characterized as "compelled speech" that courts have held in violation of the First Amendment.[17]

Similarly, MPAA's reliance on *Yniguez v. Arizonans for Official English*,[18] is also misplaced. MPAA claims *Yniguez* and related cases it cites stand for the proposition that the government "cannot compel [people] to speak in a language of its choice." Br. at 43. However, all of the cases cited by petitioners on this point involved requirements prohibiting speech in an unapproved language. The facts of those cases are materially different from the circumstances here. Moreover, insofar as the video description rules can be viewed as requiring a "translation," the principles established in *Yniguez* and similar decisions do not support petitioners' claim the video description rules violate their members' First Amendment rights.

In *Yniguez* a sharply divided court held unconstitutional a provision of the Arizona state constitution that prohibited state government employees from performing government business in any language other than English. The court observed that as a result of the requirement, "many

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[17] Insofar as MPAA suggests that there are Copyright Act implications arising from the video description rules, the Commission found no basis for such a claim. *See Report & Order*, 15 FCC Rcd at 15256 ¶66 (JA 175); *see also* JA 462-64, 598-99.

[18] 69 F.3d 920 (9th Cir. 1995), *vacated as moot*, 520 U.S. 43 (1997) .

thousands of Arizonans … would be precluded from receiving essential information from their state and local governments if the drastic prohibition contained in the provision were to be implemented." 69 F.3d at 923. Here, of course, the purpose of the video description is to make essential information about television program that persons with visual disabilities cannot see accessible to them so that, as the Commission said, they will be able to "hear what they cannot see." *Report & Order*, 15 FCC Rcd at 15234 ¶8 (JA 153). To the extent *Yniguez* is applicable at all, the video description rules do not conflict with the holding of that case.[19]

Petitioners' contention that the rules are content based because they refer to prime time or children's programming are the types of arguments that have been rejected by courts in similar contexts. In *Turner*, for example, parties contended that the "must-carry" requirement for cable television systems was content based because it required cable systems to carry specific local broadcast television stations. The Supreme Court acknowledged that "the must-carry provisions distinguish between speakers in the television programming market. But they do so based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 645 (1994). The Court added:

> That Congress acknowledged the local orientation of broadcast programming and the role that noncommercial stations have played in educating the public does not indicate that Congress regarded broadcast programming as more valuable than cable programming. Rather, it reflects nothing more than the recognition that the

[19] Related cases cited by petitioners are even less instructive. *See, e.g., Farrington v. Tokushige*, 273 U.S. 284 (1927) (affirming grant of temporary injunction against enforcement of Hawaii statute regulating foreign language schools); *Myer v. Nebraska*, 262 U.S. 390 (1923) (holding unconstitutional a Nebraska statute prohibiting teaching in schools in any language other than English); *Ruiz v. Hull*, 191 Ariz. 441 (Ariz. S. Ct. 1998), *cert. denied*, 525 U.S. 1093 (1999) (holding state constitutional amendment at issue in *Yniguez* unconstitutional as violation of First and Fourteenth Amendments of U.S. Constitution). None of these decisions addresses factual situations remotely similar to video description nor do they establish any principles that support MPAA's constitutional contentions.

> services provided by broadcast television have some intrinsic value and, thus, are worth preserving against the threats posed by cable.

Id. at 648. *See also Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 476-79 (2nd Cir. 1971) (upholding as consistent with First Amendment, FCC "prime time access rule" that prohibited television stations in large markets from broadcasting network programs in more than three of four evening hours); *National Ass'n of Independent Television Producers & Distrib. v. FCC*, 516 F.2d 526, 535-40 (2nd Cir. 1975)(upholding revised "prime time access rule," which contained exceptions for children's, documentary and public affairs programs, as consistent with First Amendment).

The Commission explained that initially requiring video description of prime time or children's programming was intended to maximize the availability of described programming by supplying video descriptions for programming that is the most watched or, in the case of children's programming, for programming that the record reflected could benefit children without visual disabilities as well. *See Report & Order*, 15 FCC Rcd 15246 ¶36 (JA 165). The Commission's decision had nothing to do with the message contained in the programming in question but was based upon the audience for the categories of programming that would benefit most from having video description. This is not materially different from the judgment Congress made about the applicability of the must-carry provisions upheld in the *Turner* cases or the Commission's rules upheld in *Mt. Mansfield* and *NAITPD.*

With respect to broadcast television stations, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), makes clear that rules such as the video description rules are not inconsistent with the First Amendment. The Court upheld in that case the FCC's fairness doctrine, requiring broadcast stations to present programming on controversial public issues and to air opposing viewpoints, against First Amendment challenge. *See also Time Warner Entertainment Co. v.*

FCC, 93 F.3d 957, 973-78 (D.C.Cir. 1996), *rehearing denied*, 105 F.3d 723 (D.C.Cir. 1997)(rejecting claim that a statutory requirement (47 U.S.C. 335(b)) for a limited set-aside of 4-7 percent of the channel capacity of a direct broadcast satellite (DBS) licensee for informational and educational programming violated the First Amendment and upholding statute, finding that Congress' action was to "promote speech, not to restrict it"). Contrary to MPAA's assertion, the video description rules do not "represent a significant expansion of FCC authority over programming …," and do not, as discussed above, involve "content regulation," of which, MPAA claims, "courts are increasingly skeptical." Br. at 41. To whatever extent courts may be skeptical of regulations that actually involve content regulation, this Court has made clear that *Red Lion* remains in full effect. *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1045 (D.C.Cir. 2002); *Ruggiero v. FCC,* 279 F.3d 1323, 1329 (D.C.Cir. 2002), *vacated upon grant of rehearing*, No. 00-1100 (D.C.Cir. May 2, 2002)

The video description rules are content neutral requirements that advance the important government objective of making television programming accessible to all the people of the United States, including those with visual disabilities, and impose minimal burdens on speech – clearly no more than necessary to further the identified interests. No more is required by the First Amendment.

2. Section 326 Of The Communications Act

MPAA contends that the video description rules are inconsistent with Section 326 of the Communications Act, 47 U.S.C. 326. That provision states:

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications.

MPAA does not explain precisely how it is that the rules amount to the "censorship" prohibited by the statute or "interfere with the right of free speech" other than to state – erroneously – again that the rules constitute an "assertion that the Communications Act gives [the Commission] plenary discretionary authority over programming." Br. at 35. Section 326 does not extend greater protections than the First Amendment. *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726, 735-37 (1978); *NAITPD v. FCC*, 516 F.2d at 531. The Supreme Court in *Pacifica* stated that Section 326 denies the Commission power to review broadcast material "in advance and excise material considered inappropriate for the airwaves," but that the statute "has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties." 438 U.S. at 735; *see also id.* at 736 n.10 (citing cases emphasizing focus of Section 326's statutory predecessor on prohibiting prior restraint). The video description rules plainly involve no attempt by the Commission to review the content of programming either before or after it is broadcast, although "in the performance of its regulatory duties," it could be called upon to review whether a broadcaster or MVPD had failed to make its programs accessible to people with visual disabilities by not providing the video descriptions required by the rules. That type of review does not conflict with Section 326.

In *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110 (1973), the Court pointed to Section 326 as evidence of Congress' desire in the Communications Act "to preserve values of private journalism under a regulatory scheme which would insure fulfillment of certain public obligations." (emphasis added). *See also Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C.Cir. 1966)("A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations."). Just as the Court has

found that regulatory obligations affecting speech such as the fairness doctrine and the must-carry requirements are enforceable public obligations that are lawful under the Constitution and the Communications Act, video description rules are similarly permissible. Section 326 interposes no obstacle to the rules.[20]

3. Section 624(f) Of The Communications Act

MPAA also contends that insofar as the video description rules apply to cable systems, they are inconsistent with Section 624(f) of the Communications Act, 47 U.S.C. 544(f), which provides that "[a]ny Federal agency . . . may not impose requirements regarding the provision or content of cable services, except as expressly provided in [Title VI]." This Court has interpreted that section to forbid "rules requiring cable companies to carry particular programming." *United Video, Inc. v. FCC*, 890 F.2d 1173, 1188 (D.C.Cir. 1989). MPAA contends that the video description rules are content based because they require cable operators to "provide content" and "transmit particular types of programs" and because they rely on content based categories – prime time and children's programming. The Commission properly rejected these same arguments below, holding that the rules "are not content-based, and as such, do not require cable companies (or any other distributor of video programming) to carry particular programming. Rather, our rules simply require that, if a distributor chooses to carry the programming of the largest networks, it must provide a small amount of programming with video description." *Report & Order*, 15 FCC Rcd at 15254 ¶61 (JA 173); *see also MO&O*, 16 FCC Rcd at 1271 ¶46 (JA 220).

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[20] It is not clear what to make of MPAA's observation that "much of the burden of compliance falls on cable networks, over which the FCC has no direct regulatory jurisdiction." (Br. at 12). The Commission made clear that television stations, cable operators and other MVPDs were responsible for compliance with the rules – not program producers or suppliers such as cable networks. *See Report & Order*, 15 FCC Rcd at 15238 ¶20 n.52; *MO&O*, 16 FCC Rcd at 1254 ¶6 (JA 157, 203). That cable networks and other program suppliers will be affected by the rules is something the Commission recognized (*see, e.g., id.* at ¶38 (JA 217)), but it has nothing to do with the issues in this case.

The Commission properly relied on the Court's decision in *United Video*, where the Court plainly held that the "historical context" of the enactment of Section 624(f) as part of the 1984 Cable Act "supports the Commission's belief that when Congress forbade 'requirements regarding the provision or content of cable services,' its concern was with rules requiring cable companies to carry particular programming." 890 F.2d at 1188. The Court added:

> the examples given in the House report suggest that the key is whether a regulation is content-based or content-neutral. Section 544(f), one must note, does not simply forbid "requirements;" it forbids "requirements regarding the *provision* or *content* of cable services" (emphasis added). The House report suggests that Congress thought a cable company's owners, not government officials, should decide what sorts of programming the company would provide. But it does not suggest a concern with regulations of cable that are not based on the content of cable programming, and do not require that particular programs or types of programs be provided. Such regulations are not requirements "regarding the provision or content" of cable services.

Id. at 1189. Just like the rules at issue in *United Video*, the rules here are "clearly different from a requirement or prohibition of the carriage of a particular program or channel." *Id.* And here, as in *United Video*, the rule "does not require carriage of any particular program or type of program, nor does it prevent a cable company from acquiring the right to present, and presenting, any program." *Id.*

MPAA dismisses *United Video* in a footnote (Br. at 37 n.9) on the ground that the Court analyzed "Section 624(f) in the very different context of copyright-based rules that predated the Cable Act." However, *United Video* speaks for itself, and its clear construction of Section 624(f) is that "Congress' concern in enacting [the statute] was with content-based rules." 890 F.2d at 1189. As discussed here and in the First Amendment discussion earlier, there is no basis to contend that the video description rules are content based.

MPAA also observes that Section 624(f) addresses requirements not only with respect to the "content" but also the "provision" of cable service and seems to suggest that the limiting con-

struction approved in *United Video* is not applicable to requirements concerning the "provision" of cable service. The Court there, however, evidenced an understanding that whatever the proper characterization of a regulation under the "content" and "provision" headings, it was invalid under Section 624(f) only when it required or prohibited cable carriage of "a particular program or channel." *United Video*, 890 F.2d at 1189. The Court thus referred to a requirement for a cable company to provide cable service seven days a week, an obvious example of a regulation regarding the "provision" of cable service, and found that, under the Court's limiting construction, such a requirement would not implicate section 624(f). *Id.*

III. THE VIDEO DESCRIPTION RULES ARE A REASONABLE EXERCISE OF THE FCC'S STATUTORY AUTHORITY.

Petitioner National Federation of the Blind does not contend that the Commission lacks statutory authority to adopt some rules in this area. Indeed NFB urged the Commission to focus on adopting different rules that would make written text on the television screen accessible to persons with visual disabilities. *See* Br. at 6-7. In its brief NFB contends, however, that the Commission's action was arbitrary and capricious because it failed to consider adequately adopting the sort of accessibility rules that NFB favors and because it did not adequately study the demand for the rules that it did adopt.

In fact, the Commission did consider the sorts of rules that NFB favors and adopted a rule requiring "any broadcast station or MVPD that provides local emergency information to make the critical details of that information accessible to persons with visual disabilities." *Report & Order*, 15 FCC Rcd at 15250 ¶49 (JA 169); *see also* 47 C.F.R. 79.2(b) (JA 179). Granted, the approach NFB favors is much broader and covers more than emergency information, but it is inaccurate to cite statutory provisions "emphasizing importance of 'promoting life and property'" (Br. at 16) and then to ignore that the Commission actually adopted rules in this proceed-

ing requiring all television stations and MVPDs to make the critical details of local emergency information accessible to those with visual disabilities.

The Commission also stated that described text information is important, noted that the television industry had begun to develop technology to address the issue and encouraged further development of such technology. *MO&O*, 16 FCC Rcd at 1266 ¶33 and n.104 (JA 215), *citing* JA 298, 308; *see also Report & Order*, 15 FCC Rcd at 15246 ¶38 (JA 165). However, the Commission pointed out that "video described programming and video described text information are not mutually exclusive services" and, therefore, reasonably concluded that the rules it had adopted for "video description of programming should not be delayed until the issues of describing text information are addressed." *MO&O*, 16 FCC Rcd at 1266 ¶33 (JA 215). The Commission added that it "recognize[d] the importance of addressing the issue of described information in a separate proceeding." *Id.*

NFB's argument concerning rules for described text information reduces to a question of priorities. The Commission's authority to establish priorities in promulgating rules is well established. *See FCC v. Schreiber*, 381 U.S. 279, 290 (1965)("Congress has 'left largely to [the FCC's] judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate' the proper dispatch of its business and the ends of justice."); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981)("the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference"); *Mobile Communications Corp.*, 77 F.3d at 1405 (same); *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 413 (D.C.Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984)(The "case law strongly supports the broad exercise of FCC discretion both to define the public interest and to determine what procedures best assure protection of that interest.").

In any event, NFB's argument is largely moot now that the Commission's rule making proceeding for these rules has concluded. Even if a persuasive argument could be made that the Commission should have addressed the type of rules NFB favors first, that does not make the rules the Commission did adopt unreasonable, nor would the remedy be to vacate or remand those rules. The two types of rules, the Commission noted, are not mutually exclusive. That the Commission has adopted video description rules does not preclude it at a later date from adopting rules concerning description of text information. We note, in this respect, that NFB has not filed a petition for rule making arguing that the Commission should institute an inquiry or rule making proceeding focusing on the text description rules that NFB favors.

Insofar as NFB claims that the Commission's action was arbitrary and capricious because the Commission did not "study the issue of demand for video description" (Br. at 13), its argument is in conflict with clear and substantial evidence in the record, in both formal comments and informal letters and e-mails, demonstrating a real and significant demand for the video description rules proposed, and ultimately adopted, by the Commission.[21] It does not suggest any lack of respect for NFB's views to note that it does not speak for all, or even a majority of, people with visual disabilities when it asserts that "the blind community does not want or need video description." Br. at 3. NFB states that it has a membership of 50,000. Br. at 5. NFB stated in its comments to the Commission that approximately one million people in the United States are legally blind. *See Report & Order*, 15 FCC Rcd at 15234 n.20 (JA 153). The Commission found that estimates of persons in the United States with visual disabilities (persons with prob-

[21] *See, e.g., Report & Order*, 15 FCC Rcd at 15232, 15234 ¶¶4-5, 8-10 (JA 151-53); JA 416-30, 432-35, 469-70, 472-80, 564, 573-80, 637-53. Even NFB acknowledged that "[t]here is undeniable support for described entertainment among blind people and advocates on behalf of the blind." JA 376.

lems seeing that cannot be corrected with ordinary glasses or contact lenses with a range of severity) are as high as 12 million. In fact, the record here reflected a wide range of views among people with visual disabilities as to the usefulness of video description.[22] As noted, however, the record reflects the views of many individuals and organizations who believe that video description rules are not only highly desirable but very important. *See* n. 21 above.

Moreover NFB ignores that the rules adopted by the Commission impose no requirements on individuals with visual disabilities who believe that video descriptions are not useful – they can ignore the descriptions as easily as people without visual disabilities. Conversely, however, if the Commission had failed to adopt the rules, no such options would be available to the many people with visual disabilities who find video descriptions highly beneficial. *See, e.g.,* (JA 419)("ACB absolutely supports the right of [NFB members] to choose not to watch descriptive video, but clearly our membership and the blind community at large reject their self-presumed authority to make that choice for the rest of us.")

Based on experience evident from the record, voluntary efforts seemed unlikely to result in any significant increase in video described programming.[23] In such circumstances, it was reasonable for the Commission to rely on the substantial evidence in the record of demand for video description without conducting a poll or some similar examination to determine the precise level of demand. In addition, the Commission made clear that it intended to monitor developments:

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[22] *See, e.g.,* JA 293-94, 307-08, 322, 416, 564, 573, 612-13.

[23] WGBH argued, based on its extensive experience with video description, that a mandate from the Commission was necessary because trade associations such as MPAA, NCTA and NAB had both opposed any government mandate for video description, and "have also been unwilling to encourage their members to voluntarily fund description of programming or even to simply participate in the delivery of video description funded by other sources." *WGBH Report* at 4 (JA 661).

> The rules we adopt today mark a starting point for further development of video description, depending on the efficacy of, and consumer demand for, video description implemented as a result of this *Report and Order*. We expect the experience of the broadcast stations, MVPDs, and networks affected by our rules to guide the industry, the public, and the Commission on whether, how, and when we should phase in more broadcast stations and MVPDs, as well as more programming.

Report & Order, 15 FCC Rcd at 15234 ¶7 (JA 153). Even beyond this statement, the Commission has a continuing obligation to review its rules, on its own or at the request of others, and to modify or repeal rules if it finds they no longer serve the public interest. *NBC*, 319 U.S. at 225 ("If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations."). Thus, if evidence should develop, contrary to the record in this proceeding, that the video description rules do not serve their intended purpose or do not prove useful or beneficial as the Commission and many commenters expect, it must be assumed that the Commission will address the issue. Opponents of the rules such as NFB may seek to compel the Commission to do so if it fails to carry out its duty. *See, e.g., Geller v. FCC*, 610 F.2d 973, 980 (D.C.Cir. 1979)(agency may be obliged to re-examine rule if substantial question raised that basis for adopting rule no longer exists).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review and affirm the Commission's action adopting the video description rules.

Respectfully Submitted,

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May 17, 2002

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION PICTURE ASS'N OF AMERICA, *ET AL.*, PETITIONERS	)	
v.	)	**No. 01-1149** (consolidated with No. 01-1155)
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA RESPONDENTS	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7) and this Court's order of August 28, 2001, in this case, I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 15764 words as measured by the word count function of Microsoft Word 2002.

C. Grey Pash, Jr.

May 17, 2002

Statutory Appendix

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER I--GENERAL PROVISIONS

Current through P.L. 107-136, approved 1-24-02

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

§ 152. Application of chapter

(a) Applicability to interstate and foreign communications or transmissions of energy originating in or received within the United States by wire or radio; Canal Zone exception; cable services

The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A of this chapter.

* * *

§ 154. Federal Communications Commission

* * *

(i) Duties and powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

(j) Conduct of proceedings; hearings

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

* * *

§ 201. Service and charges

* * *

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: Provided, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: Provided further, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: Provided further, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

* * *

§ 215. Examination of transactions relating to furnishing of services, equipment, etc.; reports to Congress

(a) Access to records and documents

The Commission shall examine into transactions entered into by any common carrier which relate to the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier and/or which may affect the charges made or to be made and/or the services rendered or to be rendered by such carrier, in wire or radio communication subject to this chapter, and shall report to the Congress whether any such transactions have affected or are likely to affect adversely the ability of the carrier to render adequate service to the public, or may result in any undue or unreasonable increase in charges or in the maintenance of undue or unreasonable charges for such service; and in order to fully examine into such transactions the Commission shall have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, of persons furnishing such equipment, supplies, research, services, finances, credit, or personnel. The Commission shall include in its report its recommendations for necessary legislation in connection with such transactions, and shall report specifically whether in its opinion legislation should be enacted (1) authorizing the Commission to declare any such transactions void or to permit such transactions to be carried out subject to such modification of their terms and conditions as the Commission shall deem desirable in the public interest; and/or (2) subjecting such transactions to the approval of the Commission where the person furnishing or seeking to furnish the equipment, supplies, research, services, finances, credit, or personnel is a person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier; and/or (3) authorizing the Commission to require that all or any transactions of carriers involving the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier be upon competitive bids on such terms and conditions and subject to such regulations as it shall prescribe as necessary in the public interest.

(b) Wire telephone and telegraph services

The Commission shall investigate the methods by which and the extent to which wire telephone companies are furnishing wire telegraph service and wire telegraph companies are furnishing wire telephone service, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable.

(c) Exclusive dealing contracts

The Commission shall examine all contracts of common carriers subject to this chapter which prevent the other party thereto from dealing with another common carrier subject to this chapter, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable.

* * *

§ 303. Powers and duties of Commission

* * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

* * *

§ 326. Censorship

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

* * *

§ 335. Direct broadcast satellite service obligations

* * *

(b) Carriage obligations for noncommercial, educational, and informational programming

(1) Channel capacity required

The Commission shall require, as a condition of any provision, initial authorization, or authorization renewal for a provider of direct broadcast satellite service providing video programming, that the provider of such service reserve a portion of its channel capacity, equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature.

(2) Use of unused channel capacity

A provider of such service may utilize for any purpose any unused channel capacity required to be reserved under this subsection pending the actual use of such channel capacity for noncommercial programming of an educational or informational nature.

(3) Prices, terms, and conditions; editorial control

A provider of direct broadcast satellite service shall meet the requirements of this subsection by making channel capacity available to national educational programming suppliers, upon reasonable prices, terms, and conditions, as determined by the Commission under paragraph (4). The provider of direct broadcast satellite service shall not exercise any editorial control over any video programming provided pursuant to this subsection.

(4) Limitations

In determining reasonable prices under paragraph (3)--

(A) the Commission shall take into account the nonprofit character of the programming provider and any Federal funds used to support such programming;

(B) the Commission shall not permit such prices to exceed, for any channel made available under this subsection, 50 percent of the total direct costs of making such channel available; and

(C) in the calculation of total direct costs, the Commission shall exclude--

(i) marketing costs, general administrative costs, and similar overhead costs of the provider of direct broadcast satellite service; and

(ii) the revenue that such provider might have obtained by making such channel available to a commercial provider of video programming.

(5) Definitions

For purposes of this subsection--

(A) The term "provider of direct broadcast satellite service" means--

(i) a licensee for a Ku-band satellite system under part 100 of title 47 of the Code of Federal Regulations; or

(ii) any distributor who controls a minimum number of channels (as specified by Commission regulation) using a Ku-band fixed service satellite system for the provision of video programming directly to the home and licensed under part 25 of title 47 of the Code of Federal Regulations.

(B) The term "national educational programming supplier" includes any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions.

* * *

§ 544. Regulation of services, facilities, and equipment

* * *

(f) Limitation on regulatory powers of Federal agencies, States, or franchising authorities; exceptions

(1) Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter.

(2) Paragraph (1) shall not apply to--

(A) any rule, regulation, or order issued under any Federal law, as such rule, regulation, or order (i) was in effect on September 21, 1983, or (ii) may be amended after such date if the rule, regulation, or order as amended is not inconsistent with the express provisions of this subchapter; and

(B) any rule, regulation, or order under Title 17.

* * *

§ 613. Video programming accessibility

(a) Commission inquiry

Within 180 days after February 8, 1996, the Federal Communications Commission shall complete an inquiry to ascertain the level at which video programming is closed captioned. Such inquiry shall examine the extent to which existing or previously published programming is closed captioned, the size of the video programming provider or programming owner providing closed captioning, the size of the market served, the relative audience shares achieved, or any other related factors. The Commission shall submit to the Congress a report on the results of such inquiry.

(b) Accountability criteria

Within 18 months after February 8, 1996, the Commission shall prescribe such regulations as are necessary to implement this section. Such regulations shall ensure that--

(1) video programming first published or exhibited after the effective date of such regulations is fully accessible through the provision of closed captions, except as provided in subsection (d) of this section; and

(2) video programming providers or owners maximize the accessibility of video programming

first published or exhibited prior to the effective date of such regulations through the provision of closed captions, except as provided in subsection (d) of this section.

(c) Deadlines for captioning

Such regulations shall include an appropriate schedule of deadlines for the provision of closed captioning of video programming.

(d) Exemptions

Notwithstanding subsection (b) of this section--

(1) the Commission may exempt by regulation programs, classes of programs, or services for which the Commission has determined that the provision of closed captioning would be economically burdensome to the provider or owner of such programming;

(2) a provider of video programming or the owner of any program carried by the provider shall not be obligated to supply closed captions if such action would be inconsistent with contracts in effect on February 8, 1996, except that nothing in this section shall be construed to relieve a video programming provider of its obligations to provide services required by Federal law; and

(3) a provider of video programming or program owner may petition the Commission for an exemption from the requirements of this section, and the Commission may grant such petition upon a showing that the requirements contained in this section would result in an undue burden.

(e) Undue burden

The term "undue burden" means significant difficulty or expense. In determining whether the closed captions necessary to comply with the requirements of this paragraph would result in an undue economic burden, the factors to be considered include--

(1) the nature and cost of the closed captions for the programming;

(2) the impact on the operation of the provider or program owner;

(3) the financial resources of the provider or program owner; and

(4) the type of operations of the provider or program owner.

(f) Video descriptions inquiry

Within 6 months after February 8, 1996, the Commission shall commence an inquiry to examine the use of video descriptions on video programming in order to ensure the accessibility of video programming to persons with visual impairments, and report to Congress on its findings. The Commission's report shall assess appropriate methods and schedules for phasing video

descriptions into the marketplace, technical and quality standards for video descriptions, a definition of programming for which video descriptions would apply, and other technical and legal issues that the Commission deems appropriate.

(g) Video description

For purposes of this section, "video description" means the insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue.

(h) Private rights of actions prohibited

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.

CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER C--BROADCAST RADIO SERVICES
PART 79--CLOSED CAPTIONING AND VIDEO DESCRIPTION OF VIDEO PROGRAMMING
Current through April 18, 2002; 67 FR 19131

§ 79.1 Closed captioning of video programming.

(a) Definitions. For purposes of this section the following definitions shall apply:

(1) Video programming. Programming provided by, or generally considered comparable to programming provided by, a television broadcast station that is distributed and exhibited for residential use. Video programming includes advertisements of more than five minutes in duration but does not include advertisements of five minutes' duration or less.

(2) Video programming distributor. Any television broadcast station licensed by the Commission and any multichannel video programming distributor as defined in § 76.1000(e) of this chapter, and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission. An entity contracting for program distribution over a video programming distributor that is itself exempt from captioning that programming pursuant to paragraph (e)(9) of this section shall itself be treated as a video programming distributor for purposes of this section. To the extent such video programming is not otherwise exempt from captioning, the entity that contracts for its distribution shall be required to comply with the closed captioning requirements of this section.

(3) Video programming provider. Any video programming distributor and any other entity that provides video programming that is intended for distribution to residential households including, but not limited to broadcast or nonbroadcast television network and the owners of such programming.

<Compliance date of subsection (a)(4) is July 1, 2002.>

(4) Closed captioning. The visual display of the audio portion of video programming pursuant to the technical specifications set forth in part 15 of this chapter.

(5) New programming. Video programming that is first published or exhibited on or after January 1, 1998.

(6) Pre-rule programming.

(i) Video programming that was first published or exhibited before January 1, 1998.

(ii) Video programming first published or exhibited for display on television receivers equipped for display of digital transmissions or formatted for such transmission and exhibition prior to the date on which such television receivers must, by Commission rule, be equipped with built-in decoder circuitry designed to display closed-captioned digital television transmissions.

(7) Nonexempt programming. Video programming that is not exempt under paragraph (d) of this section and, accordingly, is subject to closed captioning requirements set forth in this section.

(b) Requirements for closed captioning of video programming.--

(1) Requirements for new English language programming. Video programming distributors must provide closed captioning for nonexempt video programming that is being distributed and exhibited on each channel during each calendar quarter in accordance with the following requirements:

(i) Between January 1, 2000, and December 31, 2001, a video programming distributor shall provide at least 450 hours of captioned video programming or all of its new nonexempt video programming must be provided with captions, whichever is less;

(ii) Between January 1, 2002, and December 31, 2003, a video programming distributor shall provide at least 900 hours of captioned video programming or all of its new nonexempt video programming must be provided with captions, whichever is less;

(iii) Between January 1, 2004, and December 31, 2005, a video programming distributor shall provide at least an average of 1350 hours of captioned video programming or all of its new nonexempt video programming must be provided with captions, whichever is less; and

(iv) As of January 1, 2006, and thereafter, 100% of the programming distributor's new nonexempt video programming must be provided with captions.

(2) Requirements for pre-rule English language programming.

(i) After January 1, 2003, 30% of the programming distributor's pre-rule nonexempt video programming being distributed and exhibited on each channel during each calendar quarter must be provided with closed captioning.

(ii) As of January 1, 2008, and thereafter, 75% of the programming distributor's pre-rule nonexempt video programming being distributed and exhibited on each channel during each calendar quarter must be provided with closed captioning.

(3) Requirements for new Spanish language programming. Video programming distributors must provide closed captioning for nonexempt Spanish language video programming that is being distributed and exhibited on each channel during each calendar quarter in accordance with the following requirements:

(i) Between January 1, 2001, and December 31, 2003, a video programming distributor shall provide at least 450 hours of captioned Spanish language video programming or all of its new nonexempt Spanish language video programming must be provided with captions, whichever is less;

(ii) Between January 1, 2004, and December 31, 2006, a video programming distributor shall provide at least 900 hours of captioned Spanish language video programming or all of its new nonexempt Spanish language video programming must be provided with captions, whichever is less;

(iii) Between January 1, 2007, and December 31, 2009, a video programming distributor shall provide at least an average of 1350 hours of captioned Spanish

language video programming or all of its new nonexempt Spanish language video programming must be provided with captions, whichever is less; and

(iv) As of January 1, 2010, and thereafter, 100% of the programming distributor's new nonexempt Spanish language video programming must be provided with captions.

(4) Requirements for Spanish language pre-rule programming.

(i) After January 1, 2005, 30% of the programming distributor's pre-rule nonexempt Spanish language video programming being distributed and exhibited on each channel during each calendar quarter must be provided with closed captioning.

(ii) As of January 1, 2012, and thereafter, 75% of the programming distributor's pre-rule nonexempt Spanish language video programming being distributed and exhibited on each channel during each calendar quarter must be provided with closed captioning.

(5) Video programming distributors shall continue to provide captioned video programming at substantially the same level as the average level of captioning that they provided during the first six (6) months of 1997 even if that amount of captioning exceeds the requirements otherwise set forth in this section.

<Compliance date of subsection (c) is July 1, 2002.>

(c) Obligation to pass through captions of already captioned programs. All video programming distributors shall deliver all programming received from the video programming owner or other origination source containing closed captioning to receiving television households with the original closed captioning data intact in a format that can be recovered and displayed by decoders meeting the standards of part 15 of this chapter unless such programming is recaptioned or the captions are reformatted by the programming distributor.

(d) Exempt programs and providers. For purposes of determining compliance with this section, any video programming or video programming provider that meets one or more of the following criteria shall be exempt to the extent specified in this paragraph.

(1) Programming subject to contractual captioning restrictions. Video programming that is subject to a contract in effect on or before February 8, 1996, but not any extension or renewal of such contract, for which an obligation to provide closed captioning would constitute a breach of contract.

(2) Video programming or video programming provider for which the captioning requirement has been waived. Any video programming or video programming provider for which the Commission has determined that a requirement for closed captioning imposes an undue burden on the basis of a petition for exemption filed in accordance with the procedures specified in paragraph (f) of this section.

(3) Programming other than English or Spanish language. All programming for which the audio is in a language other than English or Spanish, except that scripted programming that can be captioned using

the "electronic news room" technique is not exempt.

(4) Primarily textual programming. Video programming or portions of video programming for which the content of the soundtrack is displayed visually through text or graphics (e.g., program schedule channels or community bulletin boards).

(5) Programming distributed in the late night hours. Programming that is being distributed to residential households between 2 a.m. and 6 a.m. local time. Video programming distributors providing a channel that consists of a service that is distributed and exhibited for viewing in more than a single time zone shall be exempt from closed captioning that service for any continuous 4 hour time period they may select, commencing not earlier than 12 a.m. local time and ending not later than 7 a.m. local time in any location where that service is intended for viewing. This exemption is to be determined based on the primary reception locations and remains applicable even if the transmission is accessible and distributed or exhibited in other time zones on a secondary basis. Video programming distributors providing service outside of the 48 contiguous states may treat as exempt programming that is exempt under this paragraph when distributed in the contiguous states.

(6) Interstitials, promotional announcements and public service announcements. Interstitial material, promotional announcements, and public service announcements that are 10 minutes or less in duration.

(7) ITFS programming. Video programming transmitted by an Instructional Television Fixed Service licensee pursuant to §§ 74.931(a), (b) or (c) of the rules.

(8) Locally produced and distributed non-news programming with no repeat value. Programming that is locally produced by the video programming distributor, has no repeat value, is of local public interest, is not news programming, and for which the "electronic news room" technique of captioning is unavailable.

(9) Programming on new networks. Programming on a video programming network for the first four years after it begins operation, except that programming on a video programming network that was in operation less than four (4) years on January 1,1998 is exempt until January 1, 2002.

(10) Primarily non-vocal musical programming. Programming that consists primarily of non-vocal music.

(11) Captioning expense in excess of 2% of gross revenues. No video programming provider shall be required to expend any money to caption any video programming if such expenditure would exceed 2% of the gross revenues received from that channel during the previous calendar year.

(12) Channels producing revenues of under $3,000,000. No video programming provider shall be required to expend any money to caption any channel of video programming producing annual gross revenues of less than $3,000,000 during the previous calendar year other than the obligation to pass through video programming already captioned when received pursuant to paragraph (c) of this section.

(13) Locally produced educational programming. Instructional programming

that is locally produced by public television stations for use in grades K-12 and post secondary schools.

(e) Responsibility for and determination of compliance.--

(1) Compliance shall be calculated on a per channel, calendar quarter basis;

(2) Open captioning or subtitles in the language of the target audience may be used in lieu of closed captioning;

(3) Live programming or repeats of programming originally transmitted live that are captioned using the so-called "electronic newsroom technique" will be considered captioned, except that effective January 1, 2000, and thereafter, the major national broadcast television networks (i.e., ABC, CBS, Fox and NBC), affiliates of these networks in the top 25 television markets as defined by Nielsen's Designated Market Areas (DMAs) and national nonbroadcast networks serving at least 50% of all homes subscribing to multichannel video programming services shall not count electronic newsroom captioned programming towards compliance with these rules. The live portions of noncommercial broadcasters' fundraising activities that use automated software to create a continuous captioned message will be considered captioned;

(4) Compliance will be required with respect to the type of video programming generally distributed to residential households. Programming produced solely for closed circuit or private distribution is not covered by these rules;

(5) Video programming that is exempt pursuant to paragraph (d) of this section that contains captions, except video programming exempt pursuant to paragraph (d)(5) of this section (late night hours exemption), can count towards the compliance with the requirements for new programming prior to January 1, 2006. Video programming that is exempt pursuant to paragraph (d) of this section that contains captions, except that video programming exempt pursuant to paragraph (d)(5) of this section (late night hours exemption), can count towards compliance with the requirements for pre-rule programming.

(6) For purposes of paragraph (d)(11) of this section, captioning expenses include direct expenditures for captioning as well as allowable costs specifically allocated by a programming supplier through the price of the video programming to that video programming provider. To be an allowable allocated cost, a programming supplier may not allocate more than 100% of the costs of captioning to individual video programming providers. A programming supplier may allocate the captioning costs only once and may use any commercially reasonable allocation method;

(7) For purposes of paragraphs (d)(11) and (d)(12) of this section, annual gross revenues shall be calculated for each channel individually based on revenues received in the preceding calendar year from all sources related to the programming on that channel. Revenue for channels shared between network and local programming shall be separately calculated for network and for non-network programming, with neither the network nor the local video programming provider being required to spend more than 2% of its revenues for captioning. Thus, for example, compliance with respect to a network service distributed by a multichannel video service distributor,

such as a cable operator, would be calculated based on the revenues received by the network itself (as would the related captioning expenditure). For local service providers such as broadcasters, advertising revenues from station-controlled inventory would be included. For cable operators providing local origination programming, the annual gross revenues received for each channel will be used to determine compliance. Evidence of compliance could include certification from the network supplier that the requirements of the test had been met. Multichannel video programming distributors, in calculating non-network revenues for a channel offered to subscribers as part of a multichannel package or tier, will not include a pro rata share of subscriber revenues, but will include all other revenues from the channel, including advertising and ancillary revenues. Revenues for channels supported by direct sales of products will include only the revenues from the product sales activity (e.g., sales commissions) and not the revenues from the actual products offered to subscribers. Evidence of compliance could include certification from the network supplier that the requirements of this test have been met.

(8) If two or more networks (or sources of programming) share a single channel, that channel shall be considered to be in compliance if each of the sources of video programming are in compliance where they are carried on a full time basis;

(9) Video programming distributors shall not be required to provide closed captioning for video programming that is by law not subject to their editorial control, including but not limited to the signals of television broadcast stations distributed pursuant to sections 614 and 615 of the Communications Act or pursuant to the compulsory copyright licensing provisions of sections 111 and 119 of the Copyright Act (Title 17 U.S.C. 111 and 119); programming involving candidates for public office covered by sections 315 and 312 of the Communications Act and associated policies; commercial leased access, public access, governmental and educational access programming carried pursuant to sections 611 and 612 of the Communications Act; video programming distributed by direct broadcast satellite (DBS) services in compliance with the noncommercial programming requirement pursuant to section 335(b)(3) of the Communications Act to the extent such video programming is exempt from the editorial control of the video programming provider; and video programming distributed by a common carrier or that is distributed on an open video system pursuant to section 653 of the Communications Act by an entity other than the open video system operator. To the extent such video programming is not otherwise exempt from captioning, the entity that contracts for its distribution shall be required to comply with the closed captioning requirements of this section.

(10) In evaluating whether a video programming provider has complied with the requirement that all new nonexempt video programming must include closed captioning, the Commission will consider showings that any lack of captioning was de minimis and reasonable under the circumstances.

(f) Procedures for exemptions based on undue burden.--

(1) A video programming provider, video programming producer or video

programming owner may petition the Commission for a full or partial exemption from the closed captioning requirements. Exemptions may be granted, in whole or in part, for a channel of video programming, a category or type of video programming, an individual video service, a specific video program or a video programming provider upon a finding that the closed captioning requirements will result in an undue burden.

(2) A petition for an exemption must be supported by sufficient evidence to demonstrate that compliance with the requirements to closed caption video programming would cause an undue burden. The term "undue burden" means significant difficulty or expense. Factors to be considered when determining whether the requirements for closed captioning impose an undue burden include:

(i) The nature and cost of the closed captions for the programming;

(ii) The impact on the operation of the provider or program owner;

(iii) The financial resources of the provider or program owner; and

(iv) The type of operations of the provider or program owner.

(3) In addition to these factors, the petition shall describe any other factors the petitioner deems relevant to the Commission's final determination and any available alternatives that might constitute a reasonable substitute for the closed captioning requirements including, but not limited to, text or graphic display of the content of the audio portion of the programming. Undue burden shall be evaluated with regard to the individual outlet.

(4) An original and two (2) copies of a petition requesting an exemption based on the undue burden standard, and all subsequent pleadings, shall be filed in accordance with § 0.401(a) of this chapter.

(5) The Commission will place the petition on public notice.

(6) Any interested person may file comments or oppositions to the petition within 30 days of the public notice of the petition. Within 20 days of the close of the comment period, the petitioner may reply to any comments or oppositions filed.

(7) Comments or oppositions to the petition shall be served on the petitioner and shall include a certification that the petitioner was served with a copy. Replies to comments or oppositions shall be served on the commenting or opposing party and shall include a certification that the commenter was served with a copy.

(8) Upon a showing of good cause, the Commission may lengthen or shorten any comment period and waive or establish other procedural requirements.

(9) All petitions and responsive pleadings shall contain a detailed, full showing, supported by affidavit, of any facts or considerations relied on.

(10) The Commission may deny or approve, in whole or in part, a petition for an undue burden exemption from the closed captioning requirements.

(11) During the pendency of an undue burden determination, the video programming subject to the request for exemption shall be considered exempt from

the closed captioning requirements.

(g) Complaint procedures.--

(1) No complaint concerning an alleged violation of the closed captioning requirements of this section shall be filed with the Commission unless such complaint is first sent to the video programming distributor responsible for delivery and exhibition of the video programming. A complaint must be in writing, must state with specificity the alleged Commission rule violated and must include some evidence of the alleged rule violation. In the case of an alleged violation by a television broadcast station or other programming for which the video programming distributor is exempt from closed captioning responsibility pursuant to paragraph (e)(9) of this section, the complaint shall be sent directly to the station or owner of the programming. A video programming distributor receiving a complaint regarding such programming must forward the complaint within seven days of receipt to the programmer or send written instructions to the complainant on how to refile with the programmer.

(2) A complaint will not be considered if it is filed with the video programming distributor later than the end of the calendar quarter following the calendar quarter in which the alleged violation has occurred.

(3) The video programming distributor must respond in writing to a complaint no later than 45 days after the end of the calendar quarter in which the violation is alleged to have occurred or 45 days after receipt of a written complaint, whichever is later.

(4) If a video programming distributor fails to respond to a complaint or a dispute remains following the initial complaint resolution procedures, a complaint may be filed with the Commission within 30 days after the time allotted for the video programming distributor to respond has ended. An original and two (2) copies of the complaint, and all subsequent pleadings shall be filed in accordance with § 0.401(a) of this chapter. The complaint shall include evidence that demonstrates the alleged violation of the closed captioning requirements of this section and shall certify that a copy of the complaint and the supporting evidence was first directed to the video programming distributor. A copy of the complaint and any supporting documentation must be served on the video programming distributor.

(5) The video programming distributor shall have 15 days to respond to the complaint. In response to a complaint, a video programming distributor is obligated to provide the Commission with sufficient records and documentation to demonstrate that it is in compliance with the Commission's rules. The response to the complaint shall be served on the complainant.

(6) Certifications from programming suppliers, including programming producers, programming owners, networks, syndicators and other distributors, may be relied on to demonstrate compliance. Distributors will not be held responsible for situations where a program source falsely certifies that programming delivered to the distributor meets our captioning requirements if the distributor is unaware that the certification is false. Video programming providers may rely on the accuracy of certifications. Appropriate action may be taken with respect to deliberate falsifications.

(7) The Commission will review the complaint, including all supporting evidence, and determine whether a violation has occurred. The Commission shall, as needed, request additional information from the video programming provider.

(8) If the Commission finds that a violation has occurred, penalties may be imposed, including a requirement that the video programming distributor deliver video programming containing closed captioning in an amount exceeding that specified in paragraph (b) of this section in a future time period.

(h) Private rights of action prohibited. Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

[63 FR 55962, Oct. 20, 1998; 64 FR 33424, June 23, 1999; 65 FR 58477, Sept. 29, 2000]

<General Materials (GM) - References, Annotations, or Tables>

47 C. F. R. § 79.1

CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER C--BROADCAST RADIO SERVICES
PART 79--CLOSED CAPTIONING AND VIDEO DESCRIPTION OF VIDEO PROGRAMMING
Current through April 18, 2002; 67 FR 19131

§ 79.2 Accessibility of programming providing emergency information.

(a) Definitions.

<Information collection requirements for subsection (a)(1) are not yet effective; OMB approval pending.>

(1) For purposes of this section, the definitions in §§ 79.1 and 79.3 apply.

(2) Emergency information. Information, about a current emergency, that is intended to further the protection of life, health, safety, and property, i.e., critical details regarding the emergency and how to respond to the emergency. Examples of the types of emergencies covered include tornadoes, hurricanes, floods, tidal waves, earthquakes, icing conditions, heavy snows, widespread fires, discharge of toxic gases, widespread power failures, industrial explosions, civil disorders, school closings and changes in school bus schedules resulting from such conditions, and warnings and watches of impending changes in weather.

Note to paragraph (a)(2): Critical details include, but are not limited to, specific details regarding the areas that will be affected by the emergency, evacuation orders, detailed descriptions of areas to be evacuated, specific evacuation routes, approved shelters or the way to take shelter in one's home, instructions on how to secure personal property, road closures, and how to obtain relief assistance.

(b) Requirements for accessibility of programming providing emergency information.

<Information collection requirements for subsection (b)(1) are not yet effective; OMB approval pending.>

(1) Video programming distributors must make emergency information, as defined in paragraph (a) of this section, accessible as follows:

(i) Emergency information that is provided in the audio portion of the programming must be made accessible to persons with hearing disabilities by using a method of closed captioning or by using a method of visual presentation, as described in § 79.1 of this part;

(ii) Emergency information that is provided in the video portion of a regularly scheduled newscast, or newscast that interrupts regular programming, must be made accessible to persons with visual disabilities; and

(iii) Emergency information that is provided in the video portion of programming that is not a regularly scheduled newscast, or a newscast that interrupts regular programming, must be accompanied with an aural tone.

(2) This rule applies to emergency information primarily intended for

distribution to an audience in the geographic area in which the emergency is occurring.

<Information collection requirements for subsection (b)(3) are not yet effective; OMB approval pending.>

(3) Video programming distributors must ensure that:

(i) Emergency information should not block any closed captioning and any closed captioning should not block any emergency information provided by means other than closed captioning; and

(ii) Emergency information should not block any video description and any video description provided should not block any emergency information provided by means other than video description.

(c) Complaint procedures. A complaint alleging a violation of this section may be transmitted to the Commission by any reasonable means, such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, audio- cassette recording, and Braille, or some other method that would best accommodate the complainant's disability. The complaint should include the name of the video programming distributor against whom the complaint is alleged, the date and time of the omission of emergency information, and the type of emergency. The Commission will notify the video programming distributor of the complaint, and the distributor will reply to the complaint within 30 days.

[65 FR 26762, May 9, 2000; 65 FR 54177, Sept. 7, 2000; 65 FR 54811, Sept. 11, 2000; 65 FR 56801, Sept. 20, 2000]

<General Materials (GM) - References, Annotations, or Tables>

47 C. F. R. § 79.2

CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER C--BROADCAST RADIO SERVICES
PART 79--CLOSED CAPTIONING AND VIDEO DESCRIPTION OF VIDEO PROGRAMMING
Current through April 18, 2002; 67 FR 19131

§ 79.3 Video description of video programming.

(a) Definitions. For purposes of this section the following definitions shall apply:

(1) Designated Market Areas (DMAs). Unique, county-based geographic areas designated by Nielsen Media Research, a television audience measurement service, based on television viewership in the counties that make up each DMA.

(2) Second Audio Program (SAP) channel. A channel containing the frequency-modulated second audio program subcarrier, as defined in, and subject to, the Commission's OET Bulletin No. 60, Revision A, "Multichannel Television Sound Transmission and Processing Requirements for the BTSC System," February 1986.

(3) Video description. The insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue.

(4) Video programming. Programming provided by, or generally considered comparable to programming provided by, a television broadcast station that is distributed and exhibited for residential use.

(5) Video programming distributor. Any television broadcast station licensed by the Commission and any multichannel video programming distributor (MVPD), and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission.

(6) Prime time. The period from 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday local time, except that in the central time zone the relevant period shall be between the hours of 7 and 10:00 p.m. Monday through Saturday, and 6 and 10:00 p.m. on Sunday, and in the mountain time zone each station shall elect whether the period shall be 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday, or 7 to 10:00 p.m. Monday through Saturday, and 6 to 10:00 p.m. on Sunday.

(b) The following video programming distributors must provide programming with video description as follows:

(1) Commercial television broadcast stations that are affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC), as of September 30, 2000, and that are licensed to a community located in the top 25 DMAs, as determined by Nielsen Media Research, Inc. for the year 2000, must provide 50 hours of video description per calendar quarter, either during prime time or on children's programming;

(2) Television broadcast stations that are affiliated or otherwise associated with any television network, must pass through video

description when the network provides video description and the broadcast station has the technical capability necessary to pass through the video description, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description;

(3) Multichannel video programming distributors (MVPDs) that serve 50,000 or more subscribers, as of September 30, 2000, must provide 50 hours of video description per calendar quarter during prime time or on children's programming, on each channel on which they carry one of the top five national nonbroadcast networks, as defined by an average of the national audience share during prime time of nonbroadcast networks, as determined by Nielsen Media Research, Inc., for the time period October 1999-September 2000, that reach 50 percent or more of MVPD households; and

(4) Multichannel video programming distributors (MVPDs) of any size:

(i) Must pass through video description on each broadcast station they carry, when the broadcast station provides video description, and the channel on which the MVPD distributes the programming of the broadcast station has the technical capability necessary to pass through the video description, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description; and

(ii) Must pass through video description on each nonbroadcast network they carry, when the network provides video description, and the channel on which the MVPD distributes the programming of the network has the technical capability necessary to pass through the video description, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description.

(c) Responsibility for and determination of compliance.

(1) The Commission will calculate compliance on a per channel, calendar quarter basis, beginning with the calendar quarter April 1 through June 30, 2002.

(2) In order to meet its fifty-hour quarterly requirement, a broadcaster or MVPD may count each program it airs with video description no more than a total of two times on each channel on which it airs the program. A broadcaster or MVPD may count the second airing in the same or any one subsequent quarter.

(3) Once a commercial television broadcast station as defined under paragraph (b)(1) of this section has aired a particular program with video description, it is required to include video description with all subsequent airings of that program on that same broadcast station, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description.

(4) Once an MVPD as defined under paragraph (b)(3) of this section:

(i) Has aired a particular program with video description on a broadcast station they carry, it is required to include video

description with all subsequent airings of that program on that same broadcast station, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description; or

(ii) Has aired a particular program with video description on a nonbroadcast station they carry, it is required to include video description with all subsequent airings of that program on that same nonbroadcast station, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description.

(5) In evaluating whether a video programming distributor has complied with the requirement to provide video programming with video description, the Commission will consider showings that any lack of video description was de minimis and reasonable under the circumstances.

(d) Procedures for exemptions based on undue burden.

(1) A video programming provider may petition the Commission for a full or partial exemption from the video description requirements of this section, which the Commission may grant upon a finding that the requirements will result in an undue burden.

(2) The petitioner must support a petition for exemption with sufficient evidence to demonstrate that compliance with the requirements to provide programming with video description would cause an undue burden. The term "undue burden" means significant difficulty or expense. The Commission will consider the following factors when determining whether the requirements for video description impose an undue burden:

(i) The nature and cost of providing video description of the programming;

(ii) The impact on the operation of the video programming distributor;

(iii) The financial resources of the video programming distributor; and

(iv) The type of operations of the video programming distributor.

(3) In addition to these factors, the petitioner must describe any other factors it deems relevant to the Commission's final determination and any available alternative that might constitute a reasonable substitute for the video description requirements. The Commission will evaluate undue burden with regard to the individual outlet.

(4) The petitioner must file an original and two (2) copies of a petition requesting an exemption based on the undue burden standard, and all subsequent pleadings, in accordance with § 0.401(a) of this chapter.

(5) The Commission will place the petition on public notice.

(6) Any interested person may file comments or oppositions to the petition within 30 days of the public notice of the petition. Within 20 days of the close of the comment period, the petitioner may reply to any comments or oppositions filed.

(7) Persons that file comments or oppositions to the petition must serve the petitioner with copies of those comments or

oppositions and must include a certification that the petitioner was served with a copy. Parties filing replies to comments or oppositions must serve the commenting or opposing party with copies of such replies and shall include a certification that the party was served with a copy.

(8) Upon a showing of good cause, the Commission may lengthen or shorten any comment period and waive or establish other procedural requirements.

(9) Persons filing petitions and responsive pleadings must include a detailed, full showing, supported by affidavit, of any facts or considerations relied on.

(10) The Commission may deny or approve, in whole or in part, a petition for an undue burden exemption from the video description requirements.

(11) During the pendency of an undue burden determination, the Commission will consider the video programming subject to the request for exemption as exempt from the video description requirements.

(e) Complaint procedures.

(1) A complainant may file a complaint concerning an alleged violation of the video description requirements of this section by transmitting it to the Consumer Information Bureau at the Commission by any reasonable means, such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, audio-cassette recording, and Braille, or some other method that would best accommodate the complainant's disability. Complaints should be addressed to: Consumer Information Bureau, 445 12th Street, SW, Washington, DC 20554. A complaint must include:

(i) The name and address of the complainant;

(ii) The name and address of the broadcast station against whom the complaint is alleged and its call letters and network affiliation, or the name and address of the MVPD against whom the complaint is alleged and the name of the network that provides the programming that is the subject of the complaint;

(iii) A statement of facts sufficient to show that the video programming distributor has violated or is violating the Commission's rules, and, if applicable, the date and time of the alleged violation;

(iv) the specific relief or satisfaction sought by the complainant;

(v) the complainant's preferred format or method of response to the complaint (such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e- mail, or some other method that would best accommodate the complaint's disability); and

(vi) a certification that the complainant attempted in good faith to resolve the dispute with the broadcast station or MVPD against whom the complaint is alleged.

(2) The Commission will promptly forward complaints satisfying the above requirements to the video programming distributor involved. The video programming distributor must respond to the complaint within a specified time, generally within 30 days. The Commission may authorize Commission staff either to shorten or lengthen the time required for responding to complaints in particular cases. The answer to a complaint must include a

certification that the video programming distributor attempted in good faith to resolve the dispute with the complainant.

(3) The Commission will review all relevant information provided by the complainant and the video programming distributor and will request additional information from either or both parties when needed for a full resolution of the complaint.

(i) The Commission may rely on certifications from programming suppliers, including programming producers, programming owners, networks, syndicators and other distributors, to demonstrate compliance. The Commission will not hold the video programming distributor responsible for situations where a program source falsely certifies that programming that it delivered to the video programming distributor meets our video description requirements if the video programming distributor is unaware that the certification is false. Appropriate action may be taken with respect to deliberate falsifications.

(ii) If the Commission finds that a video programming distributor has violated the video description requirements of this section, it may impose penalties, including a requirement that the video programming distributor deliver video programming containing video description in excess of its requirements.

(f) Private rights of action are prohibited. Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

[65 FR 54812, Sept. 11, 2000; 65 FR 56801, Sept. 20, 2000; 66 FR 8529, Feb. 1, 2001; 66 FR 16618, March 27, 2001]

<General Materials (GM) - References, Annotations, or Tables>

47 C. F. R. § 79.3

UNITED STATES PUBLIC LAWS
106th Congress - Second Session
Convening January 24, 2000

Additions and Deletions are not identified in this database.
Vetoed provisions within tabular material are not displayed

PL 106-553 (HR 4942)
December 21, 2000
DC APPROPRIATIONS--FY 2001

An Act Making appropriations for the government of the District of Columbia and other activities chargeable in whole or in part against the revenues of said District for the fiscal year ending September 30, 2001, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. (a) The provisions of the following bills of the 106th Congress are hereby enacted into law:
(1) H.R. 5547, as introduced on October 25, 2000.
(2) H.R. 5548, as introduced on October 25, 2000.

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Approved December 21, 2000.

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APPENDIX B – H.R. 5548

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SEC. 632. (a)(1) The Federal Communications Commission shall modify the rules authorizing the operation of low-power FM radio stations, as proposed in MM Docket No. 99-25, to—

(A) prescribe minimum distance separations for third-adjacent channels (as well as for co-channels and first--and second-adjacent channels); and

(B) prohibit any applicant from obtaining a low-power FM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of section 301 of the Communications Act of 1934 (47 U.S.C. 301).

(2) The Federal Communications Commission may not—

(A) eliminate or reduce the minimum distance separations for third-adjacent channels required by paragraph (1)(A); or
(B) extend the eligibility for application for low-power FM stations beyond the organizations

and entities as proposed in MM Docket No. 99-25 (47 CFR 73.853),

except as expressly authorized by an Act of Congress enacted after the date of the enactment of this Act.

(3) Any license that was issued by the Commission to a low-power FM station prior to the date on which the Commission modifies its rules as required by paragraph (1) and that does not comply with such modifications shall be invalid.

(b)(1) The Federal Communications Commission shall conduct an experimental program to test whether low-power FM radio stations will result in harmful interference to existing FM radio stations if such stations are not subject to the minimum distance separations for third-adjacent channels required by subsection (a). The Commission shall conduct such test in no more than nine FM radio markets, including urban, suburban, and rural markets, by waiving the minimum distance separations for third-adjacent channels for the stations that are the subject of the experimental program. At least one of the stations shall be selected for the purpose of evaluating whether minimum distance separations for third-adjacent channels are needed for FM translator stations. The Commission may, consistent with the public interest, continue after the conclusion of the experimental program to waive the minimum distance separations for third-adjacent channels for the stations that are the subject of the experimental program.

(2) The Commission shall select an independent testing entity to conduct field tests in the markets of the stations in the experimental program under paragraph (1). Such field tests shall include--

(A) an opportunity for the public to comment on interference; and

(B) independent audience listening tests to determine what is objectionable and harmful interference to the average radio listener.

(3) The Commission shall publish the results of the experimental program and field tests and afford an opportunity for the public to comment on such results. The Federal Communications Commission shall submit a report on the experimental program and field tests to the Committee on Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate not later than February 1, 2001. Such report shall include--

(A) an analysis of the experimental program and field tests and of the public comment received by the Commission;

(B) an evaluation of the impact of the modification or elimination of minimum distance separations for third-adjacent channels on--

(i) listening audiences;
(ii) incumbent FM radio broadcasters in general, and on minority and small market broadcasters in particular, including an analysis of the economic impact on such broadcasters;
(iii) the transition to digital radio for terrestrial radio broadcasters;
(iv) stations that provide a reading service for the blind to the public; and

(v) FM radio translator stations;

(C) the Commission's recommendations to the Congress to reduce or eliminate the minimum distance separations for third-adjacent channels required by subsection (a); and

(D) such other information and recommendations as the Commission considers appropriate.