

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554

In the Matter of)
)
Video Description: Implementation of the) MB Docket No. 11-43
Twenty-First Century Communications and)
Video Accessibility Act of 2010)

To: The Commission

**COMMENTS OF THE
MOTION PICTURE ASSOCIATION OF AMERICA**

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CONTENTS

SUMMARY	iii
I. THE COMMISSION MUST ACT WITHIN THE BOUNDS OF ITS STATUTORY AND CONSTITUTIONAL AUTHORITY.	3
II. CERTAIN PROPOSED CHANGES TO THE VIDEO DESCRIPTION RULES LACK SUFFICIENT JUSTIFICATION.	9
III. ANY SIGNIFICANT CHANGES IN THE RULES SHOULD FOLLOW ADDITIONAL STUDY AND CONSIDERATION.	10
CONCLUSION	15

SUMMARY

The Motion Picture Association of America (“MPAA”), the voice of the American motion picture, home video and television industries, applauds the Commission for its work toward expanding programming choices for people with visual disabilities, a goal that the MPAA and its members share. Consistent with this shared objective, we agree with the Commission’s proposal to increase the amount of video described programming on each included network carried by a covered broadcast station or multichannel video programming distributor (“MVPD”) from 50 hours per calendar quarter to 87.5 hours per calendar quarter, so long as there is suitable study and consideration of the practicalities of this proposal and the industry has additional flexibility as to what programming may be counted toward this requirement as well as sufficient time to prepare. This change will substantially expand the amount of video described content available to people with visual disabilities.

It is important to recognize, however, that video description is a complex undertaking that requires significant coordination, authorship, planning and innovation to be successful, and is even more challenging than closed captioning. For that reason, as well as the constitutional status of video description, it is essential that the Commission accomplish its goals within the context of the specific guidance established by Congress in the Twenty-First Century Communications and Video Accessibility Act of 2010.

Certain of the NPRM’s proposals exceed this authority, and should not be adopted. In particular, the Commission’s proposal to increase the number of included networks carried by covered distributors from four broadcast and five nonbroadcast networks to five broadcast and ten nonbroadcast networks exceeds its statutory authority. Similarly, the proposal to require a network to provide video description in perpetuity if it ever is considered an “included network,” is both beyond the statute and unconstitutional. The removal of the threshold requirement that nonbroadcast networks reach 50 percent of pay-television or MVPD households in order to be subject to the video description rules would be an indirect way to accomplish an objective that the statute does not permit, and should not be adopted. Finally, the Commission does not have statutory authority to extend video description obligations to video-on-demand programming.

We appreciate the Commission’s efforts, and look forward to working with the Commission toward final rules in this proceeding.

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We applaud the Commission for its work toward expanding programming choices for people with visual disabilities, a goal that the MPAA and its members share. The Motion Picture Association of America (“MPAA”), the voice of the American motion picture, home video and television industries, submits these comments in response to the Notice of Proposed Rulemaking (the “NPRM”) in this proceeding¹ on behalf of its members: Walt Disney Studios Motion Pictures; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; and Warner Brothers Entertainment Inc.

We agree with the Commission’s proposal to increase the amount of video described programming on each included network carried by a covered broadcast station or multichannel video programming distributor (“MVPD”) from 50 hours per calendar quarter to 87.5 hours per calendar quarter, so long as there is suitable study and consideration of the practicalities of this proposal and the industry has additional flexibility as to what programming may be counted toward this requirement as well as sufficient time to prepare. This change will substantially expand the amount of video described content available to people with visual disabilities, as do

¹ *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Notice of Proposed Rulemaking, FCC 16-37, MB Docket No. 11-43 (rel. Apr. 1, 2016) (“NPRM”).

the MPAA’s audio description efforts in the in-theater film marketplace. Indeed, the Department of Justice has recognized and commended the efforts undertaken by the MPAA and its members to make their films more accessible to persons with disabilities, stating that “movie studios appear committed to making their movies accessible to individuals who are deaf or hard of hearing or blind or have low vision, and the Department commends their efforts.”² Our members now provide closed captioning and audio descriptions for theatrical releases of virtually all of their movies released in digital print.

It is important to recognize, however, that video description is a complex undertaking that requires significant coordination, authorship, planning and innovation to be successful, and is even more challenging than closed captioning. For that reason, as well as the constitutional status of video description, it is essential that the Commission accomplish its goals within the specific guidance established by Congress in the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA” or the “Act”).³ Certain of the NPRM’s proposals exceed this authority:

- An increase in the number of included networks carried by covered distributors, from four broadcast and five nonbroadcast networks to five broadcast and ten nonbroadcast networks;
- Providing that once a network is designated an “included network” required to provide video description, it would remain an “included network” even if it falls out of the top-five or top-ten ranking;
- The removal of the threshold requirement that nonbroadcast networks reach 50 percent of pay-television or MVPD households in order to be subject to the video description rules; and

² See *Nondiscrimination on the Basis of Disability by Public Accommodations — Movie Theaters; Movie Captioning and Audio Description*, 79 Fed. Reg. 44976, 44989 (proposed Aug. 1, 2014).

³ See 47 U.S.C. § 613(f)(4)(B).

- The extension of video description obligations to video-on-demand (“VOD”) programming if such programming has been previously carried with video description.⁴

For the reasons that we describe in more detail in these comments, we urge that these proposals, which exceed the Commission’s authority, should not be adopted.

We do not believe, however, that deciding against these specific proposals will mean that the industry will not continue to innovate toward greater service for people with visual disabilities. We and other members of the video ecosystem will continue to move forward, particularly as the number of overall hours of video described programming required by the rules is permissibly increased. This continued market-driven progress will be superior to the adoption of mandatory rules that cannot sustain judicial review. Even the most valuable ends must be met by proper means.

I. THE COMMISSION MUST ACT WITHIN THE BOUNDS OF ITS STATUTORY AND CONSTITUTIONAL AUTHORITY.

In crafting the CVAA, Congress chose unusually specific and limited statutory language empowering the Commission to adopt rules to create new video description obligations. In directing the Commission in 2010 to reinstate its invalidated video description rules,⁵ Congress took great care to specify when and to what extent the Commission may impose additional video description obligations on broadcast television stations and MVPDs. Under the CVAA, “[t]he Commission may not issue additional regulations unless the Commission determines, at least 2 years after completing [video description reports to Congress,] that the need for and benefits of providing video description for video programming, insofar as such programming is transmitted

⁴ NPRM ¶¶ 2, 37.

⁵ See 47 U.S.C. § 613(f)(1).

for display on television, are greater than the technical and economic costs of providing such additional programming.”⁶

By its terms, the Act expressly contemplates only two types of “additional regulations” that the Commission has the authority to implement. *First*, if the Commission determines that the benefits of providing video description outweigh the costs of such provision and seeks to issue additional regulations on that basis, “the Commission may not increase, in total, the hour requirement for additional described programming by more than 75 percent of the requirement in the regulations reinstated.”⁷ *Second*, the Act specifies that the Commission may expand the scope of the regulations to include additional designated market areas (“DMAs”), but only over a period of years after particular prerequisites are met.⁸ Whatever authority the Commission may have to issue “additional regulations,” that authority does not allow the Commission to make wholesale changes to or completely overturn the rules as ordered to be reinstated by Congress.

Given the particular (and precarious) history of the video description rules, the absence of explicit authority for the specific proposals offered by the Commission in this NPRM is of great import. Shortly after the adoption of the initial video description rules in 2000, the D.C. Circuit struck them down, holding that the Commission wrongly took a congressional directive to prepare a report on video description as authority to promulgate a wide-ranging array of video description requirements.⁹ In reaching its decision, the court highlighted the “marked” distinction in Congress’s treatment of closed captioning, for which the Commission *was* given an

⁶ *Id.* § 613(f)(4)(A).

⁷ *Id.* § 613(f)(4)(B).

⁸ *See id.* § 613(f)(4)(C)(iv).

⁹ *See MPAA v. FCC*, 309 F.3d 796, 801-07 (D.C. Cir. 2002).

affirmative mandate to prescribe regulations.¹⁰ Most significantly, the court rejected the Commission’s argument that the lack of an express prohibition on the adoption of video description rules permitted the agency’s action, concluding that “silence surely cannot be read as ambiguity resulting in delegated authority to the FCC to promulgate the disputed regulations.”¹¹

Congress was, of course, highly aware of this precedent when it drafted and passed the CVAA. Congress clearly recognized that, particularly in light of this historical context, the absence of express authority would be understood to constitute an effective *limitation* on the Commission’s authority. In essence, if Congress had wanted the Commission to promulgate rules such as the ones proposed in the NPRM, Congress would have clearly provided statutory authority for the Commission to do so in the Act itself. Congress did not do so, however, and limited the Commission to the 75 percent hours-increase limitation and deferred DMA expansion and, even then, subject to a particular showing.

Congress’ limitation of the Commission’s authority in this area is consistent with the sensitive First Amendment status of video description obligations. Unlike closed captioning, which is essentially a rote transcription of dialogue into digestible text, video description is “an interpretation of visual scenes” that “require[s] programmers to create a second script.”¹² Because it forces programmers to engage in such interpretative exercises, video description is a type of compelled speech that is significantly more burdensome on First Amendment rights than closed captioning. Importantly, both the D.C. Circuit and the Commission have recognized the

¹⁰ *Id.* at 799.

¹¹ *Id.* at 805-06.

¹² *Id.* at 803; *see also* 47 C.F.R. § 79.3(a)(2) (defining “video description” to mean “[t]he insertion of audio narrated descriptions of a television program’s key visual elements into natural pauses between the program’s dialogue”).

considerable impact that video description has on program content.¹³ Time and time again, courts have taken a narrow view of agency authority when faced with rules that function to regulate program content.¹⁴

The NPRM's proposals stand far outside the ambit of authority that Congress conferred upon the Commission to expand its video description rules. Certain of the significant rule expansions proposed in the NPRM are inconsistent with the CVAA, and their adoption would exceed the Commission's authority.

First, a proposed rule in the NPRM would require a channel that falls entirely out of the range of the Commission's video description rules to comply with them, apparently in perpetuity, solely because it had been required to comply with them at some point in time. The CVAA states that the Commission's reinstated regulations may be modified only in certain discrete ways, which includes "updat[ing] . . . the list of top 5 national nonbroadcast networks."¹⁵ In the *2011 Video Description Order*, the Commission itself acknowledged that "[s]ince

¹³ See, e.g., *MPAA*, 309 F.3d at 803, 805 (concluding that "[t]here is no doubt that the video description rules regulate programming content" and that "[o]ne of the reasons why § 1 [of the Communications Act] has not been construed to allow the FCC to regulate programming content is because such regulations invariably raise First Amendment issues"); *Implementation of Video Description of Video Programming*, Report and Order, 15 FCC Rcd 15230, 15277-78 (2000) ("*2000 Video Description Order*") (statement of Comm'r Michael K. Powell, concurring in part and dissenting in part) ("It is important to note that video description is a creative work. It requires a producer to evaluate a program, write a script, select actors, decide what to describe, decide how to describe it and choose what style or what pace."), *recon. granted in part and denied in part*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1251 (2001) ("*2001 Video Description Order*"), *vacated by MPAA*, 309 F.3d 796 (D.C. Cir. 2002); *Closed Captioning and Video Description of Video Programming*, Report, 11 FCC Rcd 19214, 19221 (1996) (explaining that "video description requires the development of a second script, which raises creativity . . . issues").

¹⁴ See, e.g., *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 651 (1994) ("[O]ur cases have recognized that Government regulation over the content of broadcast programming must be narrow, and that broadcast licensees must retain abundant discretion over programming choices."); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 126 (1973) (identifying "the risk of an enlargement of Government control over the content of broadcast discussion of public issues" as a "problem of critical importance to broadcast regulation and the First Amendment").

¹⁵ 47 U.S.C. § 613(f)(2)(B).

Congress specifically directed us to reinstate the ‘top 5’ requirement, we are not authorized to expand this number.”¹⁶ The Commission rightly determined in 2011 that this proposal exceeded the CVAA, and nothing about the “passage of time” has changed the Commission’s statutory mandate.¹⁷ Had Congress intended to authorize the Commission to impose a *permanent* obligation on channels, it certainly could have done so.

Imposing a video description obligation on channels that no longer fall within the range of the rules also raises troubling constitutional issues. This is the case both because of the substantial compelled speech issues raised by video description mandates and because format changes — which might otherwise take a channel outside the ambit of the video description requirement if they result in less programming eligible for description — are editorial decisions protected by the First Amendment that the Commission has long determined fall beyond its regulatory purview.¹⁸ This constitutional impediment would be even more pronounced as applied to a nonbroadcast network. This particular proposal is thus ill-considered and beyond the CVAA’s grant of authority to the Commission, and should not be adopted.

And even if the Commission actually had such authority,¹⁹ there is no limit to how many nonbroadcast networks could be subject to these requirements. The proposal relies on a highly variable notion of audience share, which can change dramatically from year to year. The

¹⁶ *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 26 FCC Rcd 11847, 11858 n.88 (2011) (“*2011 Video Description Order*”).

¹⁷ See NPRM ¶ 25; see also *2011 Video Description Order* at 11858 n.88.

¹⁸ See *Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations*, Memorandum Opinion and Order, 60 F.C.C.2d 858, 865-66 (1976), *recons. denied*, 66 F.C.C.2d 78 (1977), *rev’d*, *WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979), *rev’d*, 450 U.S. 582 (1981).

¹⁹ In the *2011 Video Description Order*, the Commission argued that it had the authority to expand the number of covered networks “after the passage of time and a review of [the rules’] impact.” *2011 Video Description Order* at 11858 n.88.

Commission cannot *permanently* impose obligations on an *indefinite* number of nonbroadcast networks.

Second, the proposed increase in the number of included networks carried by covered distributors, from four broadcast and five nonbroadcast networks to five broadcast and ten nonbroadcast networks, is beyond the CVAA’s grant of statutory authority to the Commission. As noted above, the CVAA authorizes the Commission to expand the required hours of video described programming and the DMAs subject to the requirement, in both cases subject to certain limitations. It does not provide authority for this proposal.

Third, the proposal to remove the threshold requirement that nonbroadcast networks reach 50 percent of pay-television or MVPD households in order to be subject to the video description rules exceeds the Commission’s statutory authority. This change would be an indirect route to greatly expand the number of networks subject to video description requirements, contrary to Congress’s clear mandate to the Commission that its new rules be consistent with its prior rules.

Fourth, extending video description obligations to VOD programming would step outside the bounds of the Commission’s statutory authority. The Commission’s video description rules are limited in application to prime time and children’s programming.²⁰ The rules define “prime time” programming to mean programming that is aired during specific windows of times on specific days of the week.²¹ However, VOD programming cannot be considered “prime time” programming because such programming can be watched at *any* hour on *any* day. In addition, because VOD programming may not necessarily come from a covered network — but may,

²⁰ See 47 C.F.R. § 79.3(b)(1), (4).

instead, come directly from a producer through a separately negotiated arrangement — it cannot be counted toward any network’s hours. Thus, the Commission is without authority to make any changes to the video description rules that implicate VOD programming.

II. CERTAIN PROPOSED CHANGES TO THE VIDEO DESCRIPTION RULES LACK SUFFICIENT JUSTIFICATION.

Even if one were to presume that the Commission has been delegated the general authority to adopt the rules proposed in the NPRM, the Commission cannot implement such rules absent sufficient justification.²²

The Commission’s proposal to double the number of nonbroadcast networks subject to the video description rules from five to ten is based largely on the fact that there are proportionately more nonbroadcast networks than broadcast networks.²³ But this fact is not new. Congress presumably knew while drafting the CVAA that there are many more nonbroadcast networks than broadcast networks, and yet it limited the application of the video description rules to five nonbroadcast networks *and* exempted from coverage those nonbroadcast networks that did not, on average, (1) transmit at least 50 hours of nonexempt prime time programming per quarter or (2) reach at least 50 percent of U.S. MVPD households.²⁴ It is unreasonable to assume that Congress would have imposed a strict hourly limit on covered networks, further reporting requirements, or specific limitations on the rollout of video description requirements to additional DMAs if it simultaneously was granting the Commission authority, *sub silentio*, to

²¹ See *id.* § 79.3(a)(6).

²² See *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (explaining that changes to agency rules must be accompanied by “a reasoned analysis for the change”).

²³ See NPRM ¶ 23.

²⁴ 47 C.F.R. § 79.3(b)(1), (4).

extend the hourly requirement to virtually every nonbroadcast network — even those networks exempted under the reinstated regulations that air too little nonexempt prime time programming or do not reach at least half of U.S. MVPD households. The NPRM’s proportionate representation explanation especially falls flat when viewed in light of the fact that, through this proceeding, the Commission is simultaneously proposing other changes that would subject an indefinite number of nonbroadcast networks to the video description rules. The Commission has not proffered any rationale for the particular lines drawn.

Finally, the NPRM does not offer sufficient justification to eliminate the 50 percent threshold exemption for nonbroadcast networks (discussed above).²⁵ Through the establishment of the minimum-reach threshold, the Commission originally relieved networks with limited consumer access from complying with the video description rules in an effort to maximize the percentage of video described programming available to the public.²⁶ The NPRM’s proposed outright elimination of the minimum-reach threshold is without basis or explanation and, therefore, should be rejected accordingly.

III. ANY SIGNIFICANT CHANGES IN THE RULES SHOULD FOLLOW ADDITIONAL STUDY AND CONSIDERATION.

To the extent that the Commission determines that it has the authority to promulgate its proposed video description rules and believes it can do so consistent with its statutory and constitutional obligations, it should nevertheless abstain from proceeding with the rules’ implementation until it has undertaken further study into the total impact that the rules will have on covered networks and considered how the rules will affect other policy considerations.

²⁵ See NPRM ¶¶ 25-29.

²⁶ See 2001 Video Description Order at 1257 (¶ 12).

For example, the proposed increase in the number of hours of video described programming required to be aired on covered networks — from 50 hours per quarter to 87.5 hours per quarter — is likely to impose significant new burdens on covered networks. The NPRM acknowledges that commenters have in the past voiced concerns about covered networks having sufficient prime time and children’s programming to meet the pre-existing hours requirement in a given quarter, but it dismissed these concerns out of hand based on the Commission’s statement in the *2011 Video Description Order* that it “anticipate[d] that these instances [would] be exceedingly rare” because the covered networks “air many, many hours of prime-time and children’s programming each quarter.”²⁷ However, this argument fails to take account of four critical points.

First, as noted above, the proposal to require a channel that falls entirely out of the range of the Commission’s video description rules to comply with them in perpetuity is likely to dramatically increase the number of *new* networks subject to the rules, so the fact that pre-existing covered networks may face few challenges in meeting the hours requirement is immaterial. *Second*, the proposed hours requirement would disadvantage nonbroadcast networks vis-à-vis broadcast networks, as the latter run far fewer repeat shows and far more children’s programming than the former. *Third*, the NPRM ignores the fact that the existing video description rules permit covered networks to 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.”²⁸ This “count only twice” policy meaningfully constrains the degree to which networks can satisfy the hours requirement with existing prime time and children’s programming. *Fourth*, for First Amendment

²⁷ *2011 Video Description Order* at 11870 (¶ 46); see NPRM ¶ 19.

reasons, video description minimums cannot be allowed to affect programming decisions,²⁹ especially by networks that air significant live or near-live programming or that must negotiate for the rights to describe others' content. Given all of the above, the Commission should consider whether to allow additional types of programming to count toward the hourly video description requirement if the requirement is moved from 50 hours to 87.5 hours per quarter.

The Commission's proposal to extend video description obligations to VOD programming also warrants further consideration.³⁰ In support of its proposal, the NPRM relies on the fact that the Commission in 2014 extended closed captioning obligations to all VOD programming not subject to an exemption.³¹ However, video description is even more complicated than closed captioning. The technical issues that must be resolved to ensure that video description can be provided through multiple, technically divergent VOD systems are significant, and there has been no showing that applying this requirement to VOD can be accomplished technically. Additionally, unlike the closed captioning regime, which was rolled out over the course of many years and applies to virtually all television programming, video description historically has applied only to particular linear networks, and even then only during particular periods of time.³² Because video description requirements apply on an hourly basis per quarter and apply to networks selected by audience share (which are significantly different bases from those undergirding the near-universal application of closed captions), additional

²⁸ 47 C.F.R. § 79.3(c)(2).

²⁹ See *infra* Part I.

³⁰ See NPRM ¶ 37.

³¹ *Id.*; see *Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc., Petition for Rulemaking*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 2221, 2290-91 (¶¶ 118-19) (2014).

inputs are needed to determine whether these requirements should be held to apply to VOD programming.

The Commission must also take care to balance the expansion of video description against other policy considerations, such as the loss of secondary audio programming channels for foreign-language viewers. In the *2011 Video Description Order*, the Commission noted that although “digital transmission enables broadcasters and MVPDs to provide numerous audio channels for any given video stream,” due to technical limitations, many broadcasters and nonbroadcasters alike are unable to carry numerous audio streams, and many consumers were incapable of receiving more than two audio streams.³³ If covered networks were required to carry video description on the secondary audio stream, the inevitable result would be a reduction in access for foreign-language viewers, since secondary audio streams are commonly used to carry foreign-language audio. The consequences of such a reduction in access would be far-reaching. In a survey of language use in the United States conducted in 2011, the Census Bureau reported that “[o]f 291.5 million people aged 5 and over, 60.6 million people (21 percent of this population) spoke a language other than English at home.”³⁴ Many Spanish-speakers — who made up 62 percent of this group — claimed to have limited English-language proficiency, with more than 25 percent of Spanish-speakers reporting that they spoke English either “not well” or “not at all.”³⁵ The loss of foreign-language audio would therefore significantly frustrate members of immigrant and minority populations who rely on secondary audio streams and

³² See 47 C.F.R. § 79.3.

³³ *2011 Video Description Order* at 11862-63 (¶¶ 28-31).

³⁴ Camille Ryan, U.S. Census Bureau, *Language Use in the United States: 2011*, at 2 (Aug. 2013), <http://www.census.gov/prod/2013pubs/acs-22.pdf>.

³⁵ *Id.* at 3 tbl. 1.

would otherwise disserve the public interest principles that the Commission is purporting to further through this NPRM.

Finally, any significant changes in the video description rules will require additional time to implement. The original rules, which were far narrower than those proposed in the NPRM, would have been implemented over the course of just under two years (from the August 2000 release date of the *2000 Video Description Order* to a proposed, second quarter 2002 compliance deadline) if they had they not ultimately been overturned in *MPAA*.³⁶ The NPRM proposes to make the new rules effective by July 2018.³⁷ Reply comments in this proceeding are not even due until July 26, 2016, however,³⁸ and the date on which the Commission's new rules will be final is unknown. Keying the effectiveness of new rules to an arbitrary date established without regard to when the final rules actually will be issued is both unpredictable and irrational. Even assuming an unusually expeditious turnaround with respect to the Commission's adoption of the proposed rules, given the breadth of the changes proposed, a window of less than two years from the close of the pending comment period would not leave enough time to ensure that programmers are able to timely and fully comply with the new requirements. It would be more consistent with past Commission practice for an implementation period to run from the date on which the newly adopted rules become final, an approach that has the benefit of permitting the Commission to receive comments during the proceeding on the appropriate length of an implementation period.

³⁶ See *2000 Video Description Order* at 15233 (¶ 6).

³⁷ NPRM ¶ 30.

³⁸ Public Notice, Media Bureau Announces Comment and Reply Deadlines for Video Description Expansion Notice of Proposed Rulemaking, MB Docket No. 11-43 (rel. May 27, 2016).

CONCLUSION

For the reasons set out above, MPAA believes the Commission's proposals are inconsistent with its statutory and constitutional obligations. We urge the Commission not to adopt them.

Respectfully submitted,

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