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February 22, 2000

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Magalie Roman Salas, Commission Secretary
Office of the Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Room TW-A325
Washington, DC 20554

Dear Ms Salas,

Please accept the attached comments of the WGBH Educational Foundation in the Matter of Implementation of Video Description of Video Programming, MM Docket No. 99-339.

A disk version has also been submitted. An attachment is only included in the print version.

Sincerely,

Larry Goldberg, Director
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Enc. Original and four copies

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List A B C D E

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

COMMENTS OF

THE WGBH EDUCATIONAL FOUNDATION
MEDIA ACCESS DIVISION

REGARDING
NOTICE OF PROPOSED RULEMAKING
ON VIDEO DESCRIPTION
February 23, 2000

Introduction

The WGBH Educational Foundation and its Media Access division are pleased to be able to make the following comments regarding the Federal Communications Commission's Notice of Proposed Rulemaking in the Matter of Implementation of Video Description of Video Programming, MM Docket No. 99-339 (the "Notice"). The Federal Communications Commission ("the Commission") has crafted a pragmatic and fair proposal which will serve as the basis for a comprehensive public interest proceeding that will finally extend access to our nation's most pervasive and influential medium to a population long ignored by the television industry.

The Commission's decision to base much of its Notice on the precedent set by previous closed-captioning requirements is a rational next step under the provisions of the Telecommunications Act of 1996. Producers, distributors and others in the television field have now comfortably accommodated the closed-captioning requirements and have accepted not only the mandates but also the opportunities presented by a service useful to many more people than the originally intended population. We believe the same will hold true for video description, that the television field will come not only to accept the importance of video description to people who are blind or visually impaired, but will come to embrace the service and its intrinsic technologies and techniques for a myriad of other uses and additional consumers.

Background

The WGBH Educational Foundation is one of the country's leading public broadcasters and has long considered one of its central missions to be increasing access to media for people with disabilities. In 1971, WGBH established The Caption Center, the world's first captioning agency, to produce captions for TV programs so that deaf and hard-of-hearing viewers could gain equal access to those programs.

In 1990, WGBH launched Descriptive Video Service® (DVS®). DVS is a free national service, established to provide access to TV programs, home videos and theatrical motion pictures for blind and visually impaired people. Prior to 1990, in the early development stage of DVS, WGBH worked with The Metropolitan Washington Ear, Inc. which had been providing live audio-description of stage performances since 1981.

DVS has described more than 2,000 PBS programs including *Mystery!, Nature, Arthur, Masterpiece Theatre, The American Experience* and more than 80 films for the Turner Classic Movies cable channel including *Casablanca, Citizen Kane, National Velvet* and *King Kong*. The DVS narration is available on the SAP channel which allows sighted viewers to turn off the description. Secondary Audio Program reception and playback is a standard feature on most television sets and VCRs built since 1990. DVS also provides more than 185 openly described home videos including *Schindler's List, Toy Story, The Sound of Music, Unforgiven, Singing in the Rain* and *Forrest Gump* through funding by the U.S. Department of Education and arrangements with most of the major Hollywood studios.

In 1993, in partnership with the Corporation for Public Broadcasting, the CPB/WGBH National Center for Accessible Media (NCAM) was established at WGBH as an research and development facility designed to extend the Boston public television station's previous media access efforts into new media and to further the uses of captioning and descriptive video in the home, classroom, workplace, and community.

Major support for video description comes from the U.S. Department of Education. DVS also raises funds from foundations, corporations and individuals.

Phase-in and Application to Distributors

In ¶19 of the Notice, the Commission proposes to adopt limited rules to phase video description into the marketplace, with applicability to the largest video programming distributors and their prime time and/or children's programming. We agree with the Commission that these limitations will not be economically burdensome and will ensure the widest availability of video description to audiences that are most likely to benefit from it.

We address the specifics of the phase-in amounts and period and designation of appropriate distributors below, but would like to first suggest that an extended schedule for additional amounts of programming, next-step timelines and designation of further distributors be part of the Commission's rulemaking. As in the Closed Captioning Report & Order[1], a multi-year schedule for implementation not only serves

[1] FCC 97-279

the needs and expectations of consumers but also allows distributors to plan for the future. As it states in ¶21 ("We expect to increase the amount of required described programming over time..."), the Commission did not intend that a rule which required only four hours per week or 50 hours per quarter was going to be the final or sole action it takes to address the needs of people who are blind or visually impaired. If the Commission, through this or subsequent proceedings, is intending to increase the amount and distribution of programming accessible to people who are blind or visually impaired, this is the time to set out such a schedule. Such plans for the mid- and long-term future should also be explicit about the transition to digital television as well as expansion to additional geographical markets.

Covered Broadcast and Cable Networks

In ¶20 of the Notice, the Commission proposes to apply its rules to "broadcasters affiliated with ABC, CBS, Fox, and NBC in Nielsen's top 25 Designated Market Areas (DMAs), and larger MVPDs..."

MVPDs, as defined in ¶24 of the Notice, are to include "cable operators, direct broadcast satellite (DBS operators, home satellite dish (HSD) operators, open video system (OVS) operators, satellite master antenna (SMATV) operators, and wireless cable operators using channels in the multichannel, multipoint distribution service (MMDS). We agree with the Commission's assertion that these MVPDs are "increasingly the primary source of video programming for most Americans" and that "most of the distribution technologies are capable of transmitting audio" in support of video description.

We support the Commission's proposed rules requiring the larger MVPDs to carry the described programming of the affected broadcasters and, in principle, of nonbroadcast networks that reach 50% or more of MVPD households.

UPN, WB, PBS

However, for the reasons discussed below ("Distributors to be Covered"), we support the expansion of the list of broadcast networks to include UPN, WB and PBS; expansion of the initial list of effected broadcasters to include the top 33 DMAs; and expansion of these rules to nonbroadcast networks reaching more than 50% of their targeted MVPD market.

The additional commercial broadcast networks (UPN and WB) have demonstrated their strength in the marketplace through a full slate of original programs, a large group of affiliated stations and parent corporations with ready access to highly desirable programming and sufficient financial resources to assure that no economic burden will befall them if included in this proceeding.

A different situation pertains to PBS, where the first described programming appeared and where the great majority of described programming appears today. While PBS can easily meet a threshold of 50 hours per quarter and could also meet any next-step threshold as may be indicated for the next few years, funding vagaries and changes in focus or management should not permit this excellent record to falter. As the described programming threshold rises (through an extended roll-out schedule such as that

suggested below), PBS should be expected to meet those rising levels along with their commercial counterparts.

While the Commission recognizes that PBS stations are feeling the financial pressures of the transition to digital TV, it should be noted that the description of PBS programming today is almost 100% funded by U.S. Department of Education grants and a large number of PBS member stations are already SAP-equipped. Since the cost of many if not most noncommercial stations' transition to DTV will be taxpayer-financed, it is perhaps even more incumbent upon these stations to assure that their programming is accessible to all viewers. Additional resources exist to assist PBS member stations in their DTV transition, especially regarding the closed captioning and video description technology needed. Both the Department of Commerce's National Telecommunications and Information Administration and the Corporation for Public Broadcasting are helping ease these burdens to such an extent that PBS stations should be able to meet FCC video description requirements.

In addition, when rules governing cable and satellite carriage of the description signal in today's analog and tomorrow's digital television systems are written, those rules should insure that the descriptions embedded in PBS programming will be protected and delivered to consumers intact and without disruption along with those delivered by the commercial broadcast networks listed above.

In fact, all program video descriptions, whether or not produced under the mandate of any Commission ruling, should be guaranteed of proper delivery at all times, whether broadcast, cablecast, satellite-fed or otherwise delivered to the home. This principle has already been embodied in closed-captioning regulations; the technology exists to assure proper delivery at all times.

Designated Market Areas

Also in ¶20, the Commission proposes that its rules initially cover Nielsen's top 25 Designated Market Areas (DMAs). As we outline below in our discussion of "larger MVPDs" and parallels to broadcast markets, we feel this should be expanded to the top 33 DMAs.

While a designation of the top 25 (or 33) DMAs may be a reasonable starting point, the Commission should also determine a schedule for coverage of all 210 Designated Market Areas (DMAs) over the coming four years. A reasonable roll-out of additional broadcast and nonbroadcast markets would include the top 50 markets by the end of the second year, the top 100 by the end of year three and all 210 markets by the end of year four.

Based on the substantial experience of PBS stations, this should not represent an undue burden to the affiliated or member stations since the necessary upgrade equipment is not costly and the costs to describe the programming will likely be born by the networks and their program suppliers, not by the local stations. In this suggested seven-to-eight-year timespan, many stations will be upgrading to digital transmission (with its inherent capacity to deliver multiple ancillary audio tracks); these upgraded

stations should be required to deliver described programming as well and therefore need to know now that there will be such an expectation.

There are many affiliated broadcast stations outside the top 25 markets that are already equipped with SAP equipment. Since these stations will have available to them described programming from their network supplier under proposed Commission rules, they should be required to pass those descriptions to their viewers and to their local cable carriers. Such a no-cost pass-through is common sense and should be accomplishable at little to no cost to these additional stations.

Amount of Described Programming

The proposed benchmark for the amount of described programming is stated in the Notice (¶20) as, "a minimum of 50 hours per calendar quarter (roughly four hours per week) of described prime time and/or children's programming." A footnote in that section indicates that this amount was derived from information provided by NCAM and by the Movie Access Coalition ("the Coalition"), a group of leaders of organizations dedicated to issues of concern to people who are blind or visually impaired. We remain convinced that this is an appropriate and achievable amount of described programming, for the first year of a mandate. However, it is essential that as the Commission considers its rulemaking, it take this opportunity to lay out the plans for subsequent years.

The proposed schedule previously presented by the Coalition was a carefully considered and reasonable approach to a phase-in period over a number of years and remains a schedule worth including in rules emerging out of this, and not future, rulemaking procedures. The Coalition's proposal regarding prime time programming states:

> Prime time
>
> It took approximately eight years from the time of the first closed-captioned broadcast until all prime-time commercial network television programming was closed-captioned. In addition, by the time the Commission announced its captioning mandates, the major networks had already achieved a level of 80% or more of captioned programming.
>
> It would therefore be a modest proposal to require video description of the prime-time programming [...] to be phased in over a seven-year period. At the end of the first year of a video description mandate, distributors would be required to have at least four hours per week of described prime time programming. An additional three hours per week should be added each year for six years until all 22 hours of primetime (excluding live news broadcasts) are described.

For the area of children's programming, the Coalition's proposal is also reasonable for the initial years of an FCC rule:

> Children's Programming
>
> In addition to primetime programs, the Coalition asserted that children's programming should carry a very high priority for description. This priority is

consistent with recent Congressional and Commission policy statements in the field of children's television[2]. Therefore it is appropriate that within two years, distributors as defined above should provide three hours per week of described educational children's programming.

Finally, as regards other programming, not included above, the Coalition pragmatically states:

> Additional Programming
> Once the infrastructure for video description is fully functional and the value of the service is appreciated, we anticipate that a strong demand for description of non-prime time programs will develop as well. We recommend that the Commission defer for two to three years a determination as to what other categories of programming should bear the highest priorities for description. After the initial two-to-three-year period, as description services are more established and greater audience feedback is available, it will be more practical to make priority choices. The communications field is changing so rapidly that at this time we do not exempt any classification from being described. ... In addition, sports and news were given a lower priority by the Coalition, with the exception of special events such as the inauguration of the President and the Olympics.

We have heard well-reasoned and strong arguments within the community of people who are blind or visually impaired that the requirements for described prime time programming and children's programming be clearly and separately delineated with separate schedules as noted above. This requirement would of course be different for the covered nonbroadcast networks that program exclusively for children (e.g., Disney, Nickelodeon, Fox Family, etc.). In these cases, the children's programming requirements would simply be added to the prime-time requirements.

Start-up Date
Paragraph 20 of the Notice proposes that, "broadcasters and MVPDs begin providing the required described programming no later than 18 months after the effective date of our rules."

This phase-in schedule is intended to allow program producers and distributors as well as video description agencies time to prepare their technology, train staffs and ready their distribution chain for assured delivery of described programs to consumers. Our research into the technical infrastructure of programming networks and projections of our own production capacity argue that a start date as soon as 12 months after the effective date of rules would allow ample time to meet the requirements. Certainly no more than 18 months would be needed, nor should people who are blind or visually impaired be asked to wait any longer than that for a service that has long been out of the experimental stage.

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[2] Children's Television Report and Policy Statement, 50 FCC 2d 1 (1974), aff'd Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir 1977); Policies and Rules Concerning Children's Television Programming, FCC 96-335, 3 CR 1385 (1996).

Digital Technology

In ¶22, the Commission raises the question of digital technology and its potential effect on the proposed rules. We agree with the Commission's following statement from ¶22 that waiting for full-scale roll-out of digital television before adopting video description requirements would be unwise, with the stated need for accessible programming being immediate:

> "Given that the need for video description exists now and that the transition to digital will not occur overnight, however, we do not wish to wait for the transition to be complete before adopting video description requirements."

Though the Commission states its intention to, "extend our video description requirements to digital broadcasters in the future," ¶22 goes on to explain that, "We are inclined not to adopt a specific timetable to apply to digital broadcasters in the *Report and Order* arising out of this *Notice*, but rather to address such specifics in a future proceeding."

NCAM feels strongly that technical and programmatic requirements for DTV broadcasting and cablecasting are needed now while these technologies are still developing, to assure that video description is considered an inherent component of DTV. Right now as these comments are being written, standards committees continue to meet, program providers continue to craft digital program schedules and equipment manufacturers are trying to decide on feature sets for their DTV receivers and set-top boxes. Without a clear and immediate signal from the Commission that video description will be required in the digital environment, perhaps not in 12-18 months but soon thereafter, decisions will be made in each of the above sectors that could operate to the detriment of video description.

One example of the kind of problems we anticipate in the future is the recent discovery that no menu item was designated for video description in the on-screen menu of a particular digital set-top box. While video described movies from the Turner Classic Movie channel are being provided, this particular digital delivery system neglected to recognize the availability of the video descriptions. The solution is an almost totally inaccessible workaround – if the user selects "Spanish" during a described movie, the video descriptions will be heard. Of course, if this option is selected, all the on-screen menus (which are already inaccessible to blind consumers) turn into Spanish as well. With a clear signal from the Commission that video description for DTV is imminent, and with explicit schedules published, the links in the program production and delivery chain will begin to design their technology to readily accommodate video description when fully implemented in DTV.

The Commission also asks for comment on "what technical issues are raised by the provision of video description by digital broadcasters and on how the conversion to digital affects the costs associated with the provision of video description." Some of these issues continue to be discussed in the various production, routing transmission, and reception working groups within the ATSC, SMPTE, CEA and elsewhere. These discussions have been ongoing for at least five years and are likely to continue for another five years if the Commission does not "light a fire" under these groups. The

work of these groups has been productive and fair to all interests but lag far behind the actual availability of DTV broadcasts.

It is known at this time however that certain cost-savings are likely as the conversion to digital nears completion. The ATSC standard allows the provision of ancillary audio without the need for a separate SAP-like channel to the home from the broadcaster or cablecaster. Therefore, SAP exciters for audio subcarriers will no longer be needed at the transmission sites. Routing of extra audio channels within a production or distribution facility will no longer be reliant upon extra wires and switchers for third or fourth audio channels in plants that only have the capacity for two or three audio channels. All audio (and video and ancillary data) will be part of the same digital signal and while data formats are still being argued over, the resolution to these questions are based in software, not hardware.

The cost of the provision of video description is not likely to be seriously affected by the conversion to digital. Video description will continue to be a relatively labor-intensive process involving scripting and voicing well-timed pieces of narrative. Embedding these bits of narrative in the digital signal will require the same industry tools used for other digital audio production and will not add any more complexity or expense than the existing overall digital audio production process.

In addition, since much of the early described digital programming will consist of upconverted analog programming, a simple transfer and encoding of the analog video descriptions will be possible and won't require an entirely new video description track.

Entities to Describe Programming

In ¶23 of the Notice, the Commission proposes to, "hold programming distributors, as opposed to producers, responsible for compliance with our video description rules." This proposal, and the subsequent acknowledgement that, "distributors may not actually describe the programming," appropriately recognizes the realities of the nature of the video production and distribution process. The Commission's existing oversight of the distribution process reasons that distributors are the best party to be responsible for compliance with video description requirements. It has certainly been an effective means of instituting the closed-captioning requirements now in their third year.

Types of Distributors (MVPDs)

The Commission rightly argues in ¶24 that fairness dictates that all program distribution types be equally responsible for provision of described programming. As the use of non-broadcast, non-cable distribution grows, the newer entrants to this filed should not have the competitive advantage of automatic exemption from video description or captioning rules. Provisions for "undue burden" exceptions will be available to any distributor that can make such a case so that video description requirements will not be considered a barrier to entry into the distribution marketplace.

The Commission is attempting to make forward-thinking rules in today's rapidly changing television world, rules that need to be relevant 10 or 20 years from now. It's possible that in just a few short years a means of distribution that may be a minority player today could easily emerge as the preferred customer choice. People who are blind or visually impaired should be

offered these competitive consumer choices and know that video description will be equally available on all of them.

Though the specific means of delivering ancillary audio channels may be different for broadcasters or home satellite dish providers or others, the technological means exist for successful transmission and reception of described programming for each of the distribution means indicated in the Notice and under the jurisdiction of the Commission: "television broadcast stations, cable operators, direct broadcast satellite (DBS) operators, home satellite dish (HSD) providers, open video system (OVS) operators, satellite master antenna television (SMATV) operators, and wireless cable operators using channels in the multichannel multipoint distribution service (MMDS)."

Distributors to be Covered

In ¶25 of the Notice, the Commission restates its proposal to initially only require, "the affiliates of the four largest broadcast networks (ABC, CBS, Fox, and NBC) in the top 25 DMAs" to provide described programming.

In our comments above, "Covered Broadcast and Cable Networks," we argue for the expansion of this list to the top 33 DMAs, that affiliates or member stations of PBS, WB and UPN networks also be covered in this first phase of the rules and that all SAP-equipped stations be required to pass through to the consumer the video descriptions of programming they air.

The Notice appropriately protects stations with legitimate economic concerns: distributors that believe such requirements pose an undue burden will have ample opportunity to make such a case before the Commission.

Larger MVPDs

In an effort to further define a reasonable roll-out of described programming equally applied to broadcasters and other larger MVPD distributors, we would begin with a definition of "larger MVPDs." We feel these should be defined as those MVPDs which do not qualify as "small businesses" under the Small Business Administration, Commission rules and Telecommunications Act definitions clearly spelled out in Appendix A of the Notice.[3]

The following table, taken from the Commission's recent "Sixth Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming"[4] illustrates the current reach of MVPDs.

[3] FCC 99-339, Appendix A, pp. 18-22

[4] FCC 99-418, Released January 14, 2000

Sixth Competition Report, Appendix C, Table C-1

June 99	Total	% of TV Households	% of MVPD Total
Total TV Households	99,400,000		
MVPD Households	80,882,411	81.37	
Cable Subscribers	66,690,000	67.09	82.45
MMDS Subscribers	821,000	8.26	1.02
SMATV Subscribers	1,450,000	1.46	1.79
HSD Subscribers	1,783,411	1.79	2.20
DBS Subscribers	10,078,000	10.14	12.46
OVS Subscribers	60,000	.06	.07
VDT Subscribers	0	0	0

Since the overwhelming majority of MVPD households remain cable households (82%), and since the large majority of program services carried by the other MVPDs remain broadcast signals or cable program services, our main focus here remains on broadcast and cable. However, we would expect that as other MVPDs gain market share, the same rules for description would apply.

In the case of DBS, where there is a quickly expanding subscriber base dominated by two major players, we feel the Commission's rules on video description should apply immediately, particularly since so many DBS channels consist of carriage of the effected broadcast and nonbroadcast networks.

Cable System Operators

To determine the list of "larger MVPDs" that will be effected by the proposed rules, it is useful to look at the existing criteria used to determine "small" MVPDs.

We suggest that smaller MVPDs be defined as those serving fewer than 500,000 subscribers in the aggregate nationwide, an average of the figures defined by the Commission's rate regulation rules (those "serving fewer than 400,000 subscribers nationwide"[5]) and by the Commission's numbers stemming from the Communications Act definition ("in the aggregate fewer than 1% of all subscribers in the United States"[6], or 617,000).

Under this definition, all systems run by cable operators serving more than 500,000 subscribers nationwide would be required to provide video description under the initial rules.

According to recent figures from Cablevision Magazine[7], MSOs of this size include the Top 18 companies (see table below), reaching roughly 87% of total cable households:

[5] Notice, p. 19.

[6] Notice, p. 20.

[7] Cablevision Online Database, February 2000: http://www.cvmag.com/database/

Rank	MSO	Subscribers	Date
1	AT&T Broadband & Internet Services	11,818,721	(12/99)
2	Time Warner Cable	6,504,900	(12/99)
3	Comcast	5,387,659	(12/99)
4	Charter Communications	5,113,273	(11/99)
5	MediaOne	5,099,548	(12/99)
6	Adelphia Communications	4,643,188	(12/99)
7	Time Warner Entertainment-Advance/Newhouse	4,500,000	(12/99)
8	Cox Communications	4,126,570	(12/99)
9	Cablevision Systems	3,437,377	(11/99)
10	Lenfest Group	1,104,255	(11/99)
11	AT&T Broadband/Time Warner	1,080,000	(12/99)
12	TCA Group	883,232	(12/99)
13	AT&T Broadband/Insight	750,000	(12/99)
14	Cable One	744,543	(12/99)
15	Mediacom	710,800	(11/99)
16	Bresnan Communications	648,300	(12/99)
17	Cablecomm	636,200	(12/99)
18	Multimedia Cablevision	508,849	(12/99)
		57,697,415 or 87% of the 66,690,000 basic Cable Subscribers	

Broadcast Markets Affected By These Rules

The Commission should determine the number of broadcast DMAs initially affected by these rules on a comparable scale. Since cable television penetration nationwide averages 67% (two-thirds) of total television households, the minimum size of a covered broadcast market should be 750,000 households (extrapolating from the 500,000 figure for the definition of a small cable system). In order to provide equivalent coverage under these rules, and based on current figures from the Television Bureau of Advertising (TVBA)[8], initially these rules should effect the Top 33 DMAs.

It is interesting to note that within this group of broadcast markets, PBS member stations regularly provide video description via SAP broadcasts in all but one market, and often have multiple stations offering description. The table below lists the top 33 DMAs:

[8] TVBA online: http://www.tvb.org/tvfacts/householdmarket/appendix.html

Rank	DMA	TTH	PBS station w/description via SAP
1	New York	6,812,540	WNET-13, WEDW-49
2	Los Angeles	5,135,140	KCET-28
3	Chicago	3,164,150	WTTW-11, WYIN-56
4	Philadelphia	2,667,520	WHYY-12, WLVT-39
5	San Francisco-Oakland-San Jose	2,368,970	KQED-9
6	Boston	2,186,100	WGBH-2, WENH-11, WEKW-52
7	Dallas-Ft. Worth	1,959,680	KERA-13
8	Washington, DC	1,956,160	WETA-26, WFPT-62, WWPB-31
9	Detroit	1,846,950	WTVS-56
10	Atlanta	1,722,130	WPBA-30
11	Houston	1,665,550	KUHT-8
12	Seattle-Tacoma	1,548,200	KCTS-9
13	Cleveland	1,475,820	WVIZ-25, WEAQ-49
14	Tampa-St. Petersburg	1,463,090	WEDU-3, WUSF-16
15	Minneapolis-St. Paul	1,457,130	KTCA-2, WHWC-28
16	Miami-Ft. Lauderdale	1,418,940	WPBT-2
17	Phoenix	1,343,040	KAET-8
18	Denver	1,230,440	KRMA-6
19	Pittsburgh	1,136,230	WQED-13, WGPT-36, WNPB-24
20	Sacramento-Stockton-Modesto	1,131,300	KVIE-6
21	St. Louis	1,110,290	KETC-9
22	Orlando-Daytona Beach-Melbourne	1,072,150	
23	Portland, OR	993,540	KOPB-10, KTVR-13
24	Baltimore	991,610	WMPB-67, WMPT-22
25	Indianapolis	955,800	WFYI-20, WTIU-30
26	San Diego	945,170	KPBS-15
27	Hartford-New Haven	909,930	WEDH-24, WEDN-53, WEDY-65
28	Charlotte	859,670	WTVI-42, WUNG-58
29	Raleigh-Durham	834,260	WUNC-4, WUNP-36
30	Nashville	811,870	WDCN-8
31	Milwaukee	809,040	WMVS-10
32	Cincinnati	805,990	WCET-48
33	Kansas City	802,290	KCPT-19

Nonbroadcast Networks

Since cable households remain the dominant share of the MVPD market, we feel it would be appropriate to apply the Commission's proposed rule to those nonbroadcast networks reaching at least 50 % of their targeted market (in the case of basic cable networks, 33 million of approximately 67 million total subscribers).

The following table[9] from Cablevision Magazine would suggest at least the following basic cable networks would be affected by the Commission's proposed rules. We note that there are a number of major program services not included in this table, since their subscriber counts were not reported or were not available. We also note that there may

[9] Cablevision Magazine Online Database, February 2000: http://www.cvmag.com/database/

be exceptions granted to those program services primarily consisting of news, as we discuss below.

Basic Cable Network	Affiliates	Subscribers	Date
TBS Superstation	11,233	78,618,000	(11/99)
Discovery Channel	10,884	77,788,000	(11/99)
Cable News Network	11,137	77,410,000	(11/99)
ESPN	12,017	77,204,000	(11/99)
USA Network	12,500	77,181,000	(11/99)
TNT	10,579	77,142,000	(11/99)
Nickelodeon/Nick at Nite	11,788	76,304,000	(11/99)
C-SPAN	6,114	76,100,000	(11/99)
Fox Family Channel	13,750	75,791,000	(11/99)
A&E Network	11,436	75,692,000	(11/99)
TNN	14,382	75,538,820	(11/99)
Lifetime	11,467	75,349,000	(11/99)
The Weather Channel	6,500	74,304,000	(11/99)
MTV	8,927	73,294,000	(11/99)
Headline News	7,084	72,446,000	(11/99)
The Learning Channel	6,401	72,048,000	(11/99)
American Movie Classics	4,100	71,985,000	(11/99)
CNBC	4,300	71,036,000	(11/99)
ESPN2	5,663	65,437,000	(11/99)
QVC	6,427	65,386,000	(11/99)
VH1	6,088	63,666,000	(11/99)
The Cartoon Network	4,125	60,036,000	(11/99)
E! Entertainment Television	6,900	60,000,000	(11/99)
Comedy Central	2,300	59,300,000	(11/99)
The History Channel	3,266	57,615,000	(11/99)
Black Entertainment Television	2,622	57,000,000	(11/99)
C-SPAN II	1,688	55,500,000	(11/99)
The Disney Channel	1,255	53,170,000	(11/99)
Home Shopping Network	3,165	52,565,749	(11/99)
Home & Garden TV Network	2,040	51,300,000	(11/99)
Animal Planet	3,681	50,900,000	(11/99)
The Sci-Fi Channel	3,000	46,911,000	(11/99)
WGN	9,554	46,451,758	(11/99)
Bravo	1,535	44,850,000	(11/99)
Fox News Channel	2,200	41,800,000	(11/99)
Trinity Broadcasting Network	4,915	41,724,912	(11/99)
Country Music Television	7,167	41,363,000	(11/99)
FX	2,201	40,190,000	(11/99)
Food Network	1,652	39,676,877	(11/99)
MSNBC	2,000	39,650,000	(11/99)
Court TV	1,490	36,075,000	(11/99)
Turner Classic Movies	3,737	34,180,000	(11/99)

Pay Cable Services

In the arena of pay cable services, there are major players that dominate the marketplace. However, even the largest pay cable services do not reach the proposed threshold of 50% of MVPD households. The Commission gave no indication of its intent to exclude these services from the rules, therefore it would be appropriate to apply the proposed video description rules to at least the following pay cable networks based on their relative position in the effected market.[10] Since there are some services not reporting subscriber counts in the source cited, there may be additional services that should be included.

Pay Cable Network	Affiliates	Subscribers	Date
Home Box Office	9,300	26,659,000	(11/99)
Cinemax	5,900	14,820,000	(11/99)
Showtime	6,000	13,554,000	(11/99)
Encore	1,145	13,179,000	(11/99)
Movieplex	493	9,519,000	(11/99)
Starz!	877	9,160,000	(11/99)
The Movie Channel	3,249	7,987,000	(11/99)

News, Sports, Shopping Channels

The Commission will need to consider how its initial rules will be applied to popular cable news and sports channels (e.g., CNN, CNBC, CSPAN, ESPN, MSNBC, and others). Formal and informal surveys of people who are blind or visually impaired have indicated that these types of programs are further down the list of priorities for described programming. People who are blind or visually impaired have also noted that home shopping channels are lower priorities for video description. Consumer choice and opinions should be heeded when determining channels by content type.

MVPDs and Broadcast Stations

When trying to create an analogy between broadcast networks, affiliates and MVPDs, fairness and common sense dictate that the rules should apply to any cable system or other type of MVPD operating in those same DMAs. If the range of DMAs is expanded over the years (for example, to the top 50 or 100 or all 210), then comparable MVPDs must also be included in the expansion.

These MVPDs will need to adjust or upgrade their networks so that the descriptions of described video programming can be passed from their program providers to their network distribution centers to their cable or other type of head-ends to their customers in these DMAs. They will also need to notify the group of affected nonbroadcast program providers which are carried by their system of the requirement for provision of a minimum number of hours of described prime-time and/or children's programs.

The Notice doesn't raise the further question of the means to be used for counting these 50 hours/quarter. The count of described programs should not include the re-broadcast or re-transmission of previously distributed described programming. That is,

[10] Cablevision Magazine Online, February 2000: http://www.cvmag.com/database/

these should be 50 new hours of described programming each quarter and not, for example, 25 hours each transmitted twice. Or, for example, 50 hours which consist of 25 newly available described hours and 25 hours of described programming which were distributed in the previous quarters. In addition, when examining the compliance by MVPDs, the described programming provided by local broadcast stations and carried by MVPDs and their local operators should not be counted as part of their quarterly commitments.

Noncommercial Stations

The Notice's ¶25 makes reference to the exclusion of noncommercial stations from this rulemaking procedure at this time for two reasons: the financial burdens they face due to DTV conversion and other matters and the good record they already have in providing described programming. As a division of a public broadcasting station, this commenter thanks the Commission for its special consideration of public broadcasting but reiterates the reasons detailed above for the inclusion of PBS and its top member stations at this time. First, proper broadcast and cable carriage and delivery of described programming from noncommercial broadcasters to consumers must be enshrined in the Commission's rules. And second, though PBS member stations will have no problem meeting a threshold of 50 hours per quarter now and in the next few years, if the Commission agrees to delineate a schedule for additional hours over the coming years, the publicly funded television network should be as accessible as the private, commercial ones. A third point that can be added here is that there is a distinct need for clear directions from the Commission as to the place for video description in the digital environment. Public broadcasters are among the many in the television industry that need guidance as to how their digital infrastructure should be designed and built in order to anticipate eventual requirements for carriage and delivery of described programming.

Number of SAP-equipped Stations

In ¶26 of the Notice, the Commission seeks comment about the number of broadcasters and MVPDs that are SAP-equipped. We have made similar inquiries as to the size of the SAP-equipped population of commercial stations and cable operators and look forward to the results of the member survey referred to in the request for extension filed by National Association of Broadcasters. The number of SAP-equipped PBS member stations has risen to 169 since our last report, including PTV stations in 32 of the top 33 DMAs. This represents coverage of nearly 85% of U.S. TV households.

Cost of Producing Descriptions

The Commission also seeks comment on the costs of "describing programming, including more information on the costs relative to the production budgets of programming such as prime time programming."[11] In the time since we wrote the documents the Commission refers to in its Notice, WGBH's Descriptive Video Service has been able to reduce its general costs of video description due to efficiencies and enhanced productivity. Though the cost can vary based on type of programming, turnaround time and volume of total hours in a project, a general estimate is $4,000 per

[11] Notice, ¶26.

one-hour episode. This rate includes scripting, narration, and a full audio mix of the description track with the original program audio.

Costs of Producing TV Programs

For the world of public television, the cost of producing one-hour of prime-time television varies according to the type of programming, specifically documentary or drama. It is well-known that PBS programming budgets are significantly smaller than their commercial counterparts, but a very ballpark estimate is $1.5 million per hour for dramas and $750,000 per hour for documentaries.

Start-up

The barriers to start-up of a four-hour per week described programming schedule are slight, both on the distributors' technical infrastructure side as well as on the description provider side. Off-the-shelf hardware exists to upgrade any station transmitter or cable head-end; technology is simple and straight-forward to install. Network infrastructures do not need to be completely rebuilt to handle a third audio channel as has been proven by the numerous Spanish-language sports simulcasts offered by the commercial networks and delivered via local stations and cable systems on the SAP channel.

Existing video description providers can begin hiring and training as soon as the Commission releases its rules and new entrants to the field can rapidly begin providing services due to the non-technical nature of the service. These factors lead us to conclude that program providers and description providers can easily meet an 18-month timeline for commencement of new service and could even accomplish a one-year ramp-up. Assuming the Commission takes no more than 90 days to craft its Report and Order, this schedule would therefore deliver an expanded variety of described programming for the fall 2002 season, or, at worst, for the early 2003 second season.

Timetable

In ¶28, the Notice describes its proposed rules as a "starting point for further development of the service," but does not specify "an appropriate timetable for the next phase in." Additional distributors beyond those suggested in the Notice have been suggested in these comments. Setting a timetable now, to phase in all 210 DMAs over a four-year period, will enable distributors to plan and budget for their near-term future and will give blind and visually impaired people an opportunity to receive levels of accessible programming only barely approaching the levels enjoyed by deaf and hard-of-hearing viewers. If the experience of the largest programming distributors in the top 25 markets (or 33 as we have argued) indicates a scaling back is appropriate, then the Commission can take such action to delay the next phase-in at that time.

Programming to be Described

The Notice's ¶29 requests comment on distributor flexibility regarding the type of programming (prime time and/or children's or distributor's choice), establishment of parameters to assure selection of programs that have significant audiences, adequacy of suggested minimums, resources available to provide description, and audience notification procedures. We have already commented on many of these issues above, but would like to emphasize the following points and add the following suggestions.

While common sense and available program production funds would argue that the highest rated, most popular and successful programs would be selected by distributors and program providers to be the first made accessible to blind and visually impaired people, the Commission is right to clearly specify prime time and children's programs. What must be avoided are program selection decisions based on expediency, longer-than-usual lead times and more generous production deadlines, all of which may lead certain distributors to select programs not of interest or of immediate use to video description users. For example, while live description of news or sports programs could be less expensive to produce, blind and visually impaired people have clearly stated that this type of programming is of far less interest or utility to them than dramas, comedies, movies and narrative documentaries.

Start-up and Extended Phase-in Schedule

The proposal for an initial requirement of approximately four hours per week of newly described programs is a modest, fair and achievable one. However, the Commission should decide in this proceeding a schedule for increasing this number at a steady and achievable rate to eventually provide a fully accessible prime-time schedule, a complete schedule of children's programs and a consideration of other types and times of programs. We refer to the schedule suggested by the Coalition which achieves such a level of described programming within seven years.

Description Production Capacity

At present, experienced and professional organizations exist which describe television programs, movies and live events; these organizations handle existing demand, often with funding provided by the federal government. Like any business, these organizations can and will grow to meet expanded demand, but cannot hire new staff, rent new production space and expand production capacity until the demand is apparent and tangible. It is therefore disingenuous for arguments to be made, in opposition to the requirements proposed in the Notice, that description resources are not available today. Upon establishment of rules which clearly indicate the production demand to be met, the supply of services will assuredly be expanded by existing agencies and new entrants anxious to participate in this newly opened marketplace. The history of the captioning business proves this to be true, where at one time three or four agencies handled 99% of the workload now hundreds of companies exist to meet the national and local captioning requirements.

Audience Notification

Adequate and timely notification about programming available with descriptions is an important issue raised in the Notice. Prior to air, in television guides, newspaper listings and promotional advertisements, and in the starting minutes and during programs, audiences will need to be made aware of the newly accessible programs. Television program providers and distributors are very adept at reaching out to audiences to promote new services. The Commission needn't be overly specific in stating how such notifications be made, but its rules should clearly state that audiences for video description should be well informed of availability of programs via both traditional and innovative means; via avenues such as press and promotional activities, on-air announcements, notification tones and tag lines that lead into programs. Described PBS programs have long included such announcements in their press

materials, in program guides and in online information. Recently, a logo, tone and announcement – "The following program has been described for visually impaired audiences" – have been displayed at the top of many PBS programs. As a service provider, WGBH's Descriptive Video Service maintains a toll-free 800 number, publishes a program guide and provides schedules via e-mail and the Web (www.wgbh.org/dvs) for the programs it describes. Similar techniques can be used by other description agencies and by the program distributors themselves.

Spanish-language Ancillary Audio

While it is true that today's SAP-channel technology can only provide a single alternate audio service at one time, the instances of conflict between video description and Spanish-language tracks are so few as to be almost non-existent. The primary reason for such a lack of conflict is that, except for an occasional sports event or series, the commercial broadcast networks, and most cable networks, have aired virtually no programming with Spanish tracks destined for the SAP channel in the entire history of the SAP channel and the stereo television standard. As has been stated previously, sports events are not the desired program types for people who are blind or visually impaired. We have heard of no plans for any broadcast network to dramatically increase their non-sports ancillary audio services for Spanish-speaking viewers, but we do know of various solutions should such conflicts arise.

On rare occasions on PBS programs, video description has competed with an alternate language for use of the SAP channel. The solution on these occasions has been for local stations to air the program more than once, with each SAP service being made available for at least one airing. This practice was followed for the Ken Burns *Baseball* documentary where both a video description and a Spanish track was available. HBO has exploited the SAP channel for alternate Spanish audio with growing frequency in recent years. HBO and other cable networks often repeat their movies and other programming at various times, so alternating cablecasts of each SAP-carried audio service would avoid or minimize the rare conflict. Addressable cable converter boxes would also allow nonbroadcast program providers and MVPDs to target the particular ancillary audio service to those homes which desire a choice of alternate language or video description.

The digital television standard will enable multiple ancillary or alternate audio channels so that such conflicts will be non-existent once DTV becomes pervasive among consumers. However, the eventual widespread availability of DTV and its numerous audio channels is not a valid reason to suspend video description mandates for the years, if not decades, before commonplace use of DTV is a reality. Simple solutions exist for the rare conflict, and DTV is too distant in time and beyond the means of the average, sighted or blind viewer, for such delays to be acceptable.

Copyright Issues

The Notice's ¶31 seeks comment on any possible conflict between the mandated provision of video described programs and copyright law. In the more than ten years that DVS has been describing television programs and movies for public and commercial distributors for broadcast, cablecast and home video, not one such conflict has arisen.

A mandate for description, like the mandate for captioning, does not imply or require a copyright holder to give up any ownership rights. All captioning takes place under the aegis and control of the program owner and no conflict has arisen even with the new captioning requirements in place. Some people have raised the concern that description could be considered a "derivative work;" even if it can be considered as such, that (description) work can and will still be under the control and ownership of the copyright holder, particularly if that owner is paying for the descriptions.

Based on WGBH's experience in providing thousands of public television and cable program hours with video description and hundreds of described home videos from numerous Hollywood studios, WGBH continues to have no difficulties with copyright protection of the original rights holders. Copyright holders have been more than willing to permit description to be added to their works since they continue to own the copyright on the described version of the work and the description adds value to the work.

If the Commission deems this issue to be of sufficient concern, it can require that any video description provider first obtain permission from the copyright holder before commencing any work. Since the description process requires that the program provider supply a video copy of the program to be described, clearly the work is being performed with the tacit and explicit permission of the owner of the work. Contractual relationships can and have relieved any copyright concerns for both captioning and description; we believe strongly that this issue is of no consequence to any eventual rule.

Emergency Messages

In ¶32 of the Notice, the Commission raises an important lifeline issue regarding public safety messages and emergency announcements. These are crucial questions that should be solved through further inquiry and proposed solutions. The complexity and effectiveness of adding signaling tones and triggering open descriptions or directing people who are blind or visually impaired to turn to alternate media are not well-enough known or studied to suggest rules within the context of this proceeding. We recommend that the Commission take up this issue in a separate proceeding that includes consumer input, reports and information from the Federal Emergency Management Agency, from other FCC emergency messaging rules and from the parties that have attempted to resolve these questions for deaf and hard-of-hearing people.

Waivers and Enforcement Procedures

The Notice's ¶33 raises the questions of enforcement of the rules, means of applying for and offering waivers based on undue burden and institution of complaint procedures. We agree that with the statement that, "factors relevant to a showing that compliance with its [video description] rules would result in an undue burden are the nature and cost of [describing] the programming, the impact on the operation of the petitioner, the financial resources of the petitioner, and the type of operations of the petitioner." The procedures for applying for a waiver, for receiving a hearing and for offering the public a chance to comment are all reflected in the Closed Captioning rules: 47 C.F.R. § 79.1(f) (procedures for waiver).

However, at 47 C.F.R. § 79.1(g), the procedures for enforcement constitute a significant burden on consumers, particularly ones with limited or no vision. These procedures read, in part:

> (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.

The procedures go on to spell out a complicated schedule for notifications of the programmer, return documentation to the complainant, and eventual appeal to the Commission. These requirements are all onerous to a person with limited sight and knowledge of the television industry. How would a blind person look up the address of a TV station, locate its general manager and read the response from the station? Would we require all communications back to the complainant be in accessible formats (i.e., Braille, audio tape, electronic mail)?

With the establishment of the Commission's new Disability Rights Office of the Consumer Information Bureau, a less onerous complaint and enforcement procedure should be established. Perhaps use of phone interviews, even in an automated voice response telephone system, could enable people who are blind or visually impaired to register their complaints. These complaints could be immediately directed to the allegedly offending distributor for their investigation and response rather than asking the consumer to be the detective for failures to comply.

Enforcement of the rules should be timely and just. It will be in no one's interest to allow a backlog of complaints to build up without resolution. In its closed captioning enforcement rules, the Commission states:

> (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.

This approach would work equally as well for video description rule enforcement. Delineation at this time of the specific type and size of penalties the Commission

contemplates for intentional violations would help assure compliance and would reduce the number of complaints.

Statutory Authority

The Commission seeks comment in ¶34 of its Notice about its statutory authority to adopt video description rules. We have made inquiries regarding this question to an outside attorney at the communications law firm of Covington & Burling. The response from their attorney, Harold Feld, has previously been submitted to the Commission for the record and is available on the Commission's web site as an appendix to the report submitted by the CPB/WGBH National Center for Accessible Media (NCAM) on November 19, 1999.

In its analysis, Mr. Feld states,

> "...we conclude that, although Congress did not require the Commission to hold a video description rulemaking in the same fashion that it required the Commission to hold a closed captioning rulemaking, the authority for such a rulemaking falls within the Commission's broad grant of authority based on the Communications Act of 1934. Furthermore, such a rulemaking would further Congress' clearly expressed intention that video services become accessible to the visually impaired."

Rather than repeat the citations and arguments presented by Mr. Feld, we have appended his legal brief to these comments. The precedents are strong for Commission action on this matter as Mr. Feld concludes,

> "For the reasons stated above, the Commission has jurisdiction and authority to mandate video description through its rulemaking procedures."

Accessibility of Reception Equipment

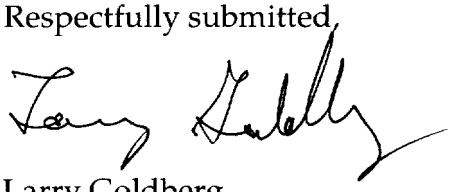
A final issue not raised in the Notice is the problem people who are blind or visually impaired have in navigating through the on-screen menus of most SAP-equipped receivers and VCRs in order to turn on the SAP channel and hear video descriptions. Only rarely does consumer reception equipment include such facile modes of accessing the SAP channel as a physical button or switch or a dedicated, physically differentiated button on the remote control. More often than not, the means of turning on the SAP channel involve multiple inaccessible on-screen menus, leading one after another deeper into the menu system, which is often poorly labeled even for sighted people. In its authority to regulate consumer reception equipment, the Commission should consider a requirement to assure ease-of-access to the video description service via any one of many simple approaches. Such a decision would guarantee user-friendliness and would complete the regulatory structure necessary to assure that people who are blind or visually impaired truly will have access to television programming.

Summary

Since the Commission began considering how it could meet the mandate of the Telecommunications Act of 1996 regarding service to blind and visually impaired people, much has changed. Cost of technology and description services have dropped. Digital television development has advanced, but lingering engineering and consumer acceptance concerns make it likely that we will be relying on our analog system for quite a while, possibly another decade or more.

At the same time, blind and visually impaired people continue to wait, not always patiently, for access to our most pervasive and influential medium. The marketplace has not, and will not serve this group which has been assured of its rights of equal access by numerous legislative and societal acts over the past decade. Advances in technology have paved the way for a more rapid, affordable, and reliable video description system which can bring the benefits of today's analog and tomorrow's digital television systems to all Americans. Through a fair and practical application of its authority, the Commission can play its most essential role - that of assuring equal access to communications for all. A set of video description rules, decided upon in a timely fashion, and which assure a robust and growing service for today's and tomorrow's media, will be a great step toward accomplishing this goal.

Respectfully submitted,



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February 22, 2000

PRIVILEGED & CONFIDENTIAL **AUGUST 31, 1998**

MEMORANDUM TO RAY JOYCE

Re: FCC Jurisdiction Over Video Description

You asked us to examine whether the Federal Communications Commission ("Commission") has jurisdiction to issue rules regarding video description. As discussed below, we conclude that, although Congress did not require the Commission to hold a video description rulemaking in the same fashion that it required the Commission to hold a closed captioning rulemaking, the authority for such a rulemaking falls within the Commission's broad grant of authority based on the Communications Act of 1934. Furthermore, such a rulemaking would further Congress' clearly expressed intention that video services become accessible to the visually impaired. As we discussed last week, I have prepared and attached an insert on the jurisdiction question for your comments to the Commission on this matter.

Please let me know if you have any questions, or if there is any further way we may be of assistance.

Harold Feld

cc: Bill Fitz

It is clear that the Commission has broad powers to effectuate Congress' goals, including the goal of making video programming accessible to the visually impaired. The Supreme Court, as discussed below, has in the past noted the authority and jurisdiction of the Commission in the area of program accessibility. Nothing in the legislative history of the Telecommunications Act of 1996, which mandated that the Commission conduct a study on video description but which did not set a deadline for a rulemaking, indicates that Congress wished to limit the Commission's authority in this area. Instead, it appears that Congress decided to set some definite milestones, such as the study, but intended to leave the method of phasing video description into the market to the Commission. The Commission's previous interpretation of the relevant section of the Telecommunications Act of 1996, which is entitled to considerable deference, is in accord with this interpretation.

An analysis of the Commission's jurisdiction must begin by acknowledging the broad jurisdiction conferred upon the Commission by Congress in the Communications Act of 1934. See United States v. Southwestern Cable Co., 392 U.S. 157, 173 (1968). This broad jurisdiction includes any matter "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." Id. at 178. "Reasonably ancillary" includes not merely adopting rules that achieve specific statutory objectives, but includes adopting rules that promote the broad goals of Congress. See id. at 173-78 (general Congressional mandate to promote community-based programming and to create national broadcasting system equitable to all communities justifies FCC imposing "must carry" requirement on early cable systems); General Telephone Co. of the Southwest v. United States, 449 F.2d 846, 853-54 (5th Cir. 1971) (anti-trust concerns are "reasonably ancillary" to promoting national broadcast system).

The Supreme Court acknowledged the application of this broad authority to making video communications accessible to all individuals, including individuals with hearing or visual impairments, in Community Television of Southern California v. Gottfried, 459 U.S. 498 (1983). While rejecting the argument that the Rehabilitation Act of 1973 imposed any new requirements upon the FCC, id. at 509, the Court stated that the FCC impose could "require extraordinary efforts to make certain types of programming universally accessible," provided that the FCC engaged in appropriate rulemaking proceedings and supported its decision with appropriate findings. Id. at 511-12. While the case did not turn on this issue in light of the disposition of the case, i.e. that the FCC acted within its authority by not taking action, it indicates that the FCC does indeed have the authority to act in the area of programming accessibility without explicit authorization from Congress.

The Telecommunications Act of 1996 further strengthened the Commission's jurisdiction in this matter. The Telecommunications Act amended the Communications Act of 1934 to include a requirement that the Commission study video description "to ensure the accessibility of video programming to persons with visual impairments." Pub. L. No. 104-104, § 713 (1996). Both to emphasize the importance of this goal and to ensure swift action by the Commission, the statute ordered the Commission to commence its inquiry within six months of enactment of the Act. Id. In addition, the Act required the Commission to undertake a study on the availability of closed captioning in video programming, and to prescribe regulations mandating closed captioning within 18 months of enactment. Although the section of the statute referring to video

description does not directly refer to an FCC rulemaking, the legislative history makes clear that Congress intended to make video programming as accessible as possible to Americans with visual impairments. See H.R. Rep. No. 104-204 Part I at 115 (1995) ("House Report"); S. Rep. No. 104-23 at 52 (1995) ("Senate Report"); H.R. Rep. No. 104-458 at 182-83 (1996) ("Conference Report"). Indeed, Congress explicitly instructed the Commission to report on "the appropriate methods and schedules for phasing video descriptions into the marketplace," Pub. L. No. 104-104 § 713(f), clearly expressing Congress' intent that the Commission ultimately should require video description. Accordingly, the Commission may act under its broad powers to effectuate the will of Congress and proceed with a video description rulemaking. See Southwestern Cable Co., 392 U.S. at 173-78.

The failure of Congress to mandate video description by a date certain, as it did with closed captioning, does not remove the Commission's authority to adopt video description pursuant to a standard rulemaking proceeding. The House version of Section 713 of the Telecommunications Act of 1996 required the Commission to mandate both closed captioning and video description on a very specific timetable. See House Report at 38 & 115. The Senate version, while requiring that the Commission mandate closed captioning within a specific timeframe, did not require such a timeframe for video description. See Senate Report at 52. Instead, it required that the Commission promptly conduct a study of video description. Id. In conference to resolve the differences between the bills, the Conference Committee adopted the House language for Section 713 with the exception of mandating video description. See Conference Report at 183-84. On the subject of video description, Congress ultimately adopted the Senate version and required a study within a short period of time, without setting a date certain for adoption of regulations. Id.

It is well established that Congress' failure to require the Commission take specific action implies nothing about the Commissions broad jurisdiction to carry out Congress' goals. See Southwestern Cable Co., 392 U.S. at 170-71 (that Congress twice failed to pass legislation explicitly authorizing Commission jurisdiction over cable television did not imply that Commission lacked jurisdiction, nor did legislative history of these legislative efforts shed light on jurisdiction granted by Communications Act of 1934). Rather, if Congress does not explicitly limit the Commission's broad jurisdiction over broadcast media, it is assumed that the Commission's jurisdiction remains 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, Commission was free to use its authority under the Communications Act of 1934 to determine the matter; legislative silence cannot be taken as meaning that Congress has resolved the issue).

Furthermore, nothing in the legislative history suggests that Congress intended to restrict the Commission's jurisdiction in this area. Nor does anything in the legislative history suggest that Congress felt a need to provide the Commission with new authority to make video programming more accessible to Americans with disabilities. The only direct statements in the legislative history on these sections concern the Congressional intent to make video programming accessible to all Americans.[1] The more logical interpretation of the legislative

[1] See, e.g., 140 Cong. Rec. E1439-03 (Statement of Rep. Slattery). ("H.R. 3636 directs the Federal Communications Commission to undertake inquiries regarding the provision of both closed captioning and video

history, therefore, is that Congress felt the need to compel the Commission to act, but did not feel that it had sufficient information regarding video description to set specific deadlines for implementation. Accordingly, Congress required that the Commission study the problem of implementing video description, but left the schedule for implementation to the Commission's discretion.[2]

Finally, the Commission has consistently interpreted Section 713 as requiring the Commission to mandate video description over time. In its report to Congress on video description made pursuant to Section 713, the Commission stated that "Congress has directed the Commission to assess the appropriate methods and schedules for phasing video description into the marketplace." In re: Closed Captioning and Video Description of Video Programming, 11 FCC Rcd. 19214, 19222 & 19265 (1996). The Commission's interpretation of Congress' intent is entitled to great weight; it is definitive if Congress has not spoken to the issue and if the Commission's interpretation is reasonable. See TRT Communications, 876 F.2d at 142.

For the reasons stated above, the Commission has jurisdiction and authority to mandate video description through its rulemaking procedures.

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description services of video services, and further directs the Commission establish regulations to require an appropriate schedule for deadlines for the provision of closed captioning. We have finally set the stage for full access – access which is long overdue to video programming to these populations"); House Report at 115 ("it is the goal of the Committee to ensure that all Americans ultimately have access to video services and programs"); Senate Report at 52 ("The Committee recognizes the importance of access to communications for all Americans").

[2] Closed captioning, by contrast, is a much more mature technology. Congress therefore appears to have felt more comfortable setting a specific timetable for closed captioning than for video description.