

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

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

**COMMENTS OF DIRECTV, INC.**

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION & SUMMARY.....	1
II. THE COMMISSION LACKS STATUTORY AUTHORITY TO REQUIRE DBS OPERATORS TO PASS THROUGH VIDEO DESCRIPTION PROGRAMMING.....	4
III. THE PROPOSED VIDEO DESCRIPTION REQUIREMENTS WILL IMPOSE ONEROUS FINANCIAL AND TECHNICAL BURDENS ON DBS OPERATORS THAT WILL UNDERMINE MVPD COMPETITION.....	5
IV. THE COMMISSION SHOULD DRAW TECHNOLOGICAL DISTINCTIONS TO IMPLEMENT A VIDEO DESCRIPTION FRAMEWORK IN A MANNER THAT DOES NOT THREATEN DBS AS A COMPETITOR TO CABLE .....	8
A. The Commission Should Exempt DBS Operators From Video Description Requirements .....	9
B. The Commission's Waiver Procedures Should Take Into Account Financial And Technical Burdens.....	13
C. The Commission Should In Any Event Allow DBS Operators Substantial Flexibility In Choosing Video Description Program Offerings.....	14
V. ADDITIONAL ISSUES .....	14
A. Spanish-Language And Other Programming.....	14
B. Local Emergency Messages.....	15
VI. CONCLUSION.....	16

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DIRECTV, Inc. ("DIRECTV")<sup>1</sup> hereby submits the following comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.

**I. INTRODUCTION & SUMMARY**

DIRECTV is the nation's leading provider of Direct Broadcast Satellite ("DBS") services. As of the end of January 2000, DIRECTV had more than 8.1 million subscribers nationwide.<sup>2</sup> DIRECTV currently offers more than 210 channels of digitally-delivered entertainment, educational, and informational programming directly to homes and businesses across the nation.

DIRECTV's dedication to customer satisfaction and increased service offerings has extended to a variety of audiences with special needs. For example, DIRECTV is among the first MVPDs to respond to increased consumer demand for Spanish-language programming by launching DIRECTV PARA TODOS™ ("DIRECTV For Everyone"), a bilingual programming

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<sup>1</sup> DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, Inc., a licensee in the DBS service and a wholly-owned subsidiary of Hughes Electronics Corporation.

<sup>2</sup> This figure includes customers subscribing to the *PRIMESTAR* by *DIRECTV* medium-power service.

service.<sup>3</sup> DIRECTV was also among the first MVPDs to pass through closed captioning, which dramatically increases the accessibility of programming to the hearing-impaired.<sup>4</sup> Most relevant to this proceeding, DIRECTV already provides video description programming on a voluntary basis in excess of the Commission's proposed hourly requirement.<sup>5</sup>

The Commission's video description proposal appears to require that DBS operators pass through video programming originated by the top four commercial broadcast networks in the top 25 television markets and certain nonbroadcast networks. While DIRECTV is committed to continuing to provide video description programming on a voluntary basis, DIRECTV does not believe that the Commission has the statutory authority to promulgate and apply video description rules to DBS providers. Furthermore, on the merits, this proposal is fundamentally incompatible with DBS technology and with the Commission's policy of promoting competition between cable incumbents and other multichannel video programming distributors ("MVPDs").

As explained in more detail below, incorrect assumptions concerning DBS technology and utilization of the Secondary Audio Programming ("SAP") channel underlie the Commission's proposal. Only about one-third of DIRECTV's total video channels support a SAP

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<sup>3</sup> DIRECTV PARA TODOS offers more than 33 channels of Spanish-language programming.

<sup>4</sup> In the Matter of Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility, MM Docket No. 95-176, Comments of DIRECTV at 2 (submitted Feb. 28, 1997) (noting that DIRECTV's Castle Rock Broadcast Center was specifically designed to promote seamless pass-through of closed captioned programming).

<sup>5</sup> As noted in the Report submitted by the National Center for Accessible Media, DIRECTV offers video description programming provided by PBS and Turner Classic Movies. See WGBH Educational Foundation, Issues To Be Addressed In A Possible FCC Requirement For Video Description Of Video Programming at 12 (Nov. 5, 1998, updated Oct. 19, 1999) ("NCAM Report").

channel. Of these, close to 80% already are devoted to providing a Spanish-language audio track for pay per view movies and local television channels. Moreover, contrary to the statement made in the National Center For Accessible Media Report ("NCAM Report") that DBS systems can support "multiple" audio signals per channel,<sup>6</sup> the DIRECTV system is equipped to provide only one SAP channel. To the extent that the Commission proposes to require MVPDs to carry video description programming on channels on which the SAP is already devoted to Spanish-language programming or another use, the proposal imposes an immense technological and financial burden on DIRECTV, as DIRECTV would be required to modify its entire uplink and downlink systems to accommodate a third audio channel. Such a requirement would have severe adverse effects on DIRECTV, and would inevitably hamper its ability to compete with cable incumbents.

The Commission's rules requiring increased provision of video description programming must take into account the technological and financial burdens to which DBS operators will be subjected if they are required to comply. Thus, to the extent that the Commission has authority to promulgate video description rules applicable to DBS operators, DIRECTV urges the Commission to exempt DBS operators from the requirement and to allow DBS operators to continue their voluntary efforts to serve visually-impaired audiences. If the Commission does not create an outright exemption for DBS providers, it should create a waiver application process similar to the process for waiver of the closed captioning rules, which provide a mechanism for DBS providers to request and for the Commission to grant relief from the substantial technical and financial burdens this requirement would impose. And in any event, DBS operators should be accorded substantial flexibility in choosing video description offerings.

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<sup>6</sup> NCAM Report at 11.

## II. THE COMMISSION LACKS STATUTORY AUTHORITY TO REQUIRE DBS OPERATORS TO PASS THROUGH VIDEO DESCRIPTION PROGRAMMING

Section 713(f) of the Communications Act<sup>7</sup> required the Commission to assess the state of video description technology and to report to Congress on the availability of such programming for visually impaired audiences. Unlike Section 713(a),<sup>8</sup> which expressly directed the Commission to adopt closed captioning rules and to provide schedules for such implementation, Section 713(f) directed the Commission *only* to provide Congress with a report. It is well established that "when some statutory provisions expressly mention a requirement, the omission of that requirement from other statutory provisions implies that Congress intended both the inclusion of the requirement and the exclusion of the requirement."<sup>9</sup> Nowhere in the text of Section 713(f) did Congress confer authority upon the Commission to impose video description requirements on MVPDs such as DIRECTV.<sup>10</sup>

Congress *intentionally mandated* implementation of closed captioning rules, and *intentionally omitted* any mention of implementation measures for video description. The Commission's duties with respect to Section 713(f) were limited to its reporting requirement. Upon receiving such reports, Congress took no further action. It certainly did not direct the Commission to establish rules to promulgate or implement a video description obligation. There simply is no evidence that Congress intended for the Commission to turn a simple reporting requirement into a broad mandate to require MVPDs to incur substantial implementation costs

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<sup>7</sup> 47 U.S.C. § 613(a).

<sup>8</sup> 47 U.S.C. § 613(f).

<sup>9</sup> *West Coast Truck Lines, Inc. v. Arcata Community Recycling Ctr., Inc.*, 846 F.2d 1239, 1244 (9th Cir. 1988).

<sup>10</sup> *Cf. Hazardous Waste Treatment Council v. Association of Petroleum Re-Refiners*, 861 F.2d 270, 275 (D.C. Cir. 1988) (holding that the EPA fulfilled its obligations under a similar provision when it delivered its report to Congress).

necessary to pass through video description programming provided by broadcasters around the country.

**III. THE PROPOSED VIDEO DESCRIPTION REQUIREMENTS WILL IMPOSE ONEROUS FINANCIAL AND TECHNICAL BURDENS ON DBS OPERATORS THAT WILL UNDERMINE MVPD COMPETITION**

The Commission's proposal initially would require the broadcasters affiliated with ABC, CBS, FOX and NBC in Nielsen's top 25 designated market areas ("DMAs") each to provide 50 hours of video description programming per quarter.<sup>11</sup> "Larger MVPDs" then would be required to carry the video description programming provided by the broadcasters affiliated with the top 4 networks and also nonbroadcast networks that reach 50% or more of MVPD households. The Commission has sought comment on a definition of "larger MVPDs" that are "comparable" to the broadcast stations that will be required to provide described programming.<sup>12</sup>

First, local markets for the delivery of multichannel video programming continue to be dominated by cable incumbents. According to the Commission's most recent Competition Report, 82% of MVPD subscribers receive their video programming from a local franchised cable operator, while only 12.5% subscribe to DBS.<sup>13</sup> In view of the cable industry's continued dominance in the local markets, DIRECTV urges the Commission to conclude that DBS operators do not fall within the category of "larger MVPDs" to which the Commission has

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<sup>11</sup> *Notice* at ¶ 20.

<sup>12</sup> *Id.* at ¶ 25.

<sup>13</sup> In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 99-230, FCC 99-418, Sixth Annual Report ¶ 5 (rel. Jan. 14, 2000).

proposed the video description requirements apply. The Commission could use this as a basis for exempting DBS operators from video description requirements.<sup>14</sup>

Second, the Commission's proposal appears to place great weight on the assumption that compliance with these rules will be equally easy for all operators, regardless of the technology employed. To the contrary, the proposal will require DBS operators to shoulder a substantially greater burden, due to the technological configuration of DBS systems and the national geographic coverage of DBS service.

As a result of recent amendments to the Satellite Home Viewer Improvement Act,<sup>15</sup> DBS operators now may provide local broadcast channels in markets around the country. In response to consumer demand, DIRECTV has initiated an aggressive roll-out of such services. DIRECTV currently provides service in nearly all 25 of the DMAs covered by the Commission's proposal and consequently could be required by the proposed rule to pass through video description on more than 100 separate channels around the country. The technical and financial burdens inherent in the coordination and use of the SAP channels are exacerbated by the national geographic scope of DBS service and the expansion of local channel service into markets across the nation.

Particularly because of the provision of local broadcast channels, the proposed rules could create enormous technical and financial burdens for DBS operators. Massive upgrades would be necessary, for example, to provide an additional audio channel for each broadcast and

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<sup>14</sup> See *infra* Section IV.A.

<sup>15</sup> Act of Nov. 29, 1999, P.L. 106-113, § 1000(9), 113 Stat. 1301 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999, Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999, relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.).

nonbroadcast network covered by the rules. In fact, even if only a few channels must be equipped with a third audio program ("TAP"), new equipment would be necessary that would cost tens of millions of dollars. The DIRECTV network consists of: (i) a backhaul network for local channels, (ii) receiving equipment for turnaround channels, (iii) tape and video server playback equipment for movies, (iv) editing facilities for movies and promotional segments, (v) MPEG compression equipment for all channels, (vi) monitoring equipment for all incoming and off-air channels, and (vii) customer set top boxes. All of the subsystems required to process and monitor the signal would be affected for the backhaul network, tape machines and servers, and MPEG compression equipment. In many cases, such equipment is not commercially available, and would have to be designed specifically to support the TAP for DIRECTV's system.

In contrast, cable operators that qualify as "larger MVPDs" may comply with the proposed video description rules merely by passing through the signal of their local broadcast stations intact. The cable operators subject to the rules are likely to have SAP capability on most, if not all, channels. Although it may be necessary for a cable operator to add SAP capability in some cases, according to the NCAM Report and the Commission's past reports to Congress, the cost to cable operators of adding such capability is insignificant.<sup>16</sup> Finally, the local nature of cable service will allow the costs of implementation of the video description requirement to be dispersed among many operators.

It is critical that the Commission take these technological differences into account in its implementation of a video description requirement. Such a requirement could severely affect DBS operators' ability to compete successfully with cable incumbents because of the tremendous

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<sup>16</sup> NCAM Report at 10-11; In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, Fourth Annual Report ¶ 261 (1998).

investment and resources that would be required for DBS operators to increase their systems' video description capabilities dramatically as required by the proposed rule, particularly in markets where DIRECTV is offering local service. And there would be little countervailing public interest benefit. At best, the proposed rule might encourage programmers to provide video description for certain programming that otherwise may not have been described. However, on this score, the proposed rule will not create better incentives for programmers than DIRECTV's current policy of requiring programmers to step up to full-time use of the SAP channel.<sup>17</sup> At worst, the proposed rule could create yet another imbalance in the MVPD marketplace and ultimately may deter DBS operators from expanding their local service offerings into as many geographic areas as possible. The Commission must strike the appropriate balance between promoting MVPD competition and promoting the proliferation of video description programming.

**IV. THE COMMISSION SHOULD DRAW TECHNOLOGICAL DISTINCTIONS TO IMPLEMENT A VIDEO DESCRIPTION FRAMEWORK IN A MANNER THAT DOES NOT THREATEN DBS AS A COMPETITOR TO CABLE**

DIRECTV urges the Commission to limit the proposed video description rules to cable operators, broadcasters, and nonbroadcast networks. According to the NCAM Report, these entities will be able to comply with the proposed rule with few modifications and with little or no expense. In contrast, DIRECTV could be required to make major modifications to its system in order to comply with the proposed rules, and incur potentially millions of dollars in expenses to do so. Such an enormous burden easily could negate the inroads DBS operators have made in an

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<sup>17</sup> See *infra* Section IV.A. (discussing DIRECTV's voluntary pass-through of video description provided by programmers that commit to full-time use of the SAP channel to serve visually-impaired subscribers).

MVPD market dominated by cable incumbents at a time when they are beginning to offer local channel service.

To ensure that the Commission's video description rules do not impose disproportionate costs on DBS operators, DIRECTV proposes that the Commission provide an express exemption for DBS operators because of the unique burdens such rules would place on DBS. To the extent that the Commission does not expressly exempt DBS operators from compliance with the video description rules, for example, by finding that DBS operators do not fall within the definition of "larger MVPDs,"<sup>18</sup> the Commission should implement a waiver process that provides a mechanism for DBS operators to request and for the Commission to grant relief from the technical and financial burdens associated with compliance. If the Commission nonetheless imposes the proposed video description rules on DBS operators, the Commission should allow DBS operators the flexibility to implement the policy in a less burdensome manner.

**A. The Commission Should Exempt DBS Operators From Video Description Requirements**

As noted above, cable incumbents still dominate the MVPD market. Local franchised cable operators collectively control 82% of the MVPD market whereas national DBS operators have only a 12.5% market share combined.<sup>19</sup> Based on this comparison, the Commission could exempt DBS operators from the video description requirements by finding that they are not "larger MVPDs" comparable to the large cable operators or broadcast networks to which the Commission has proposed the requirements apply.

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<sup>18</sup> See *supra* Section III (noting that the Commission has historically defined the MVPD market as a local market and that cable incumbents continue to dominate this market with 82% market share).

<sup>19</sup> See Sixth Annual Report at ¶ 5.

The Commission can also exempt DBS operators from the video description requirements based on the technological burdens such rules will impose on them. It is clear both from the NCAM Report and the Commission's Notice proposing broadly that "larger MVPDs" pass through video description provided by affiliates of the major broadcast networks that little consideration was given to the unique implications of such a requirement if imposed on DBS operators.<sup>20</sup> The NCAM Report devotes less than one page to DBS service, with only two sentences providing a simplistic description of the technology employed by DBS operators.<sup>21</sup> The NCAM Report states that DBS systems "typically employ analog or digital compression and encryption mechanisms such as MPEG-1 and DigiCypher" and concludes that such systems "typically can support multiple audio signals per channel."<sup>22</sup> This statement misleadingly suggests that all of DIRECTV's channels are equipped with "multiple" audio channels. The Report further notes that "subscribers to these services receive additional audio in the home as part of the compressed and encoded satellite signal and select the 'auxiliary' or 'alternate' audio feature on their DBS remote controls to hear video description."<sup>23</sup>

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<sup>20</sup> The Notice appears to rely entirely on the conclusions of the NCAM report with respect to ease of implementation for DBS operators, even though the Commission's 1997 Report to Congress acknowledged that there may be technical issues that would affect pass through of video description by DBS operators.

<sup>21</sup> NCAM Report at 12.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

Although the Report suggests that all additional issues of distribution, availability of programming and potential conflicts with foreign language services are addressed,<sup>24</sup> these are the only sections of the Report that discuss the technology DBS operators will use to accommodate video description programming.

There is no mention, either in the NCAM Report or in the Notice, of the technological burdens DBS operators might face in complying with video description proposals. The Commission does, however, recognize that video description technology "is not as developed as closed captioning technology, and all distributors may not have the technical capability now to provide described programming."<sup>25</sup> DIRECTV agrees with this statement and urges the Commission to exempt DBS operators from the proposed video description requirements based on the excessive technical and financial burdens such requirements will place on DBS operators. Rather than subject DBS operators to these burdens, the Commission should allow them to continue to serve visually impaired audiences on a voluntary basis.

As demonstrated by its *voluntary* carriage of video description programming provided by the Turner Classic Network and PBS, DIRECTV has shown a willingness to devote SAP channel capacity to video description on a full-time basis. To date, DIRECTV has only received requests by these two programmers for carriage of video description programming on the SAP channel. In its voluntary carriage of video description programming, DIRECTV has required programmers who seek to use the SAP channel to do so on a full-time basis. This reflects DIRECTV's concern that consumers who rely upon video description programming may be

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<sup>24</sup> NCAM Report at 16.

<sup>25</sup> Notice at 21.

confused if the SAP channel only carries video description programming for a few hours per week.

DIRECTV also wishes to avoid confusing its customers who rely on SAP channels for different purposes. For instance, subscribers who rely upon foreign translations of DIRECTV programming would be confused if video description in English were suddenly to occupy the SAP channels devoted to their respective foreign languages. The same would be true if a person who relied upon video description were to tune in and hear a foreign language rather than the desired video description programming. There is no simple way to make such subscribers aware of the schedule for the video description programming or for the foreign language programming. DIRECTV continues to believe that it is important to utilize the SAP channel for consistent purposes throughout the day, rather than to mix foreign language and video description programming. Subscribers who rely on those channels in order to understand and enjoy the programming for which they are paying should not be subject to confusing schedules or conflicting audio programs. Nor should the Commission engage in policy decisions which "prioritize" one underserved community over another; in this instance, by determining that providing service for the visually impaired is more important than providing service for non-English speaking consumers.

Both the Commission and the NCAM Report recognize that the paucity of video description programming is a result of a lack of funding and sponsorship for such programming.<sup>26</sup> DIRECTV's policy of carrying video description programming full-time on a voluntary basis can only serve to increase the incentives for programmers to fund video description, as programmers will need to fill SAP capacity with video description and related

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<sup>26</sup> NCAM Report at 3-4; *Notice* at ¶ 2.

programming. Because this voluntary method serves the Commission's underlying goals in implementing video description requirements, the Commission should allow DBS operators sufficient flexibility to preserve this approach.

**B. The Commission's Waiver Procedures Should Take Into Account Financial And Technical Burdens**

DIRECTV strongly urges the Commission to be mindful of the effect that inflexible rules requiring video description pass-through by all types of MVPDs may have on competition between DBS and cable incumbents. In the event that the Commission chooses not to exempt DBS operators from its video description rules, the Commission should adopt waiver provisions that will permit the Commission to accommodate and address the disparate impact that video description rules may have on various MVPD delivery technologies. Such waiver provisions should mirror the language contained in the Commission's rules governing the provision of closed captioning for the hearing-impaired.<sup>27</sup> The statutory provision underlying the Commission's closed captioning rules allows the Commission to grant waivers based on a determination that compliance with the rule would result in an "undue burden."<sup>28</sup> The waiver provision struck a balance between imposing a closed captioning obligation and ensuring that the Commission had the discretion to tailor that obligation to the competitive marketplace by suspending that obligation in situations where it would be "economically burdensome" to programmers or MVPDs. DIRECTV thus urges the Commission to adopt a consistent waiver provision in its implementation of video description requirements.

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<sup>27</sup> 47 C.F.R. § 79.1.

<sup>28</sup> 47 U.S.C. § 613(e). The factors to be considered include: "(1) the nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner; (4) the type of operations of the provider or program owner."

**C. The Commission Should In Any Event Allow DBS Operators Substantial Flexibility In Choosing Video Description Program Offerings**

To the extent that the Commission does not exempt DBS operators from video description requirements, the Commission should give DBS operators maximum flexibility to satisfy such requirements. DIRECTV proposes that, if no DBS exemption is created, the Commission set a number of hours during which video description programming must be provided and allow DBS operators to select programming to meet the required hours based on the willingness of programmers to provide video description on a full-time basis. Under no circumstances should the Commission require DBS operators to develop an additional SAP channel for video description if such channel is already being used for other purposes, such as Spanish-language programming.

**V. ADDITIONAL ISSUES**

**A. Spanish-Language And Other Programming**

The Commission has requested comment on the extent to which the SAP channel is used to provide Spanish-language and other programming and the impact of its proposed video description framework on alternative uses of the SAP channel.<sup>29</sup> The Commission states its belief that the conversion to digital technology "will eliminate any potential conflict between competing users of the SAP channel" and seeks comment on whether potential conflicts exist in the analog environment.<sup>30</sup>

For DBS operators, the distinction between analog and digital signals is irrelevant. DIRECTV's DBS system already employs digital compression technologies throughout its system, but approximately one-third of DIRECTV's channels that can support a SAP channel in

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<sup>29</sup> Notice at ¶ 30.

<sup>30</sup> *Id.*

the first instance are able to support only one SAP channel. A high percentage of the SAP channels currently in use are devoted to Spanish-language programming to serve a growing number of subscribers who rely upon this service. As discussed above in Section III, a massive, system-wide upgrade would be required to add a third audio channel. In sum, the conclusion that video description programming will conflict with Spanish-language and other programming currently occupying SAP channels on DIRECTV's DBS system is unavoidable.

**B. Local Emergency Messages**

The Commission has requested comment on the Coalition's proposal that programmers be required to provide an aural tone to accompany emergency messages that scroll across the television screen in order to alert persons with visual disabilities to turn on a radio.<sup>31</sup> To the extent that DIRECTV carries local broadcast channels that feature captioned local emergency information, DIRECTV has no objection to a requirement that broadcasters supply an aural message to accompany the screen scrolls so long as the aural message is contained in the basic audio soundtrack accompanying the programming. If the Commission imposes such a requirement on broadcasters, however, it should limit the message to a brief, general alert that an emergency announcement appears on screen so that persons who are visually impaired will know to consult an alternative medium. This will make the announcement available to DIRECTV customers subscribing to local broadcast channels where available and will not require modification to DIRECTV's system.

In no event should the Commission require DBS operators to devote limited SAP channel capability to the announcement of such emergencies, or to supply such emergency information. Because of the national nature of DBS service, DBS is unsuited to the origination or distribution

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<sup>31</sup> *Id.* at ¶ 32.

of local emergency information. Indeed, if DIRECTV were required to provide aural emergency messages on one SAP or other audio channel, severe weather warnings and announcements of school closings around the country could occupy the channel 24 hours per day, and most announcements would at best be irrelevant, and at worst be confusing or alarming, to customers located in geographical areas that are not affected by the regional emergencies. DIRECTV urges the Commission to refrain from imposing any emergency message requirements on DBS operators.

## **VI. CONCLUSION**

While DIRECTV has supported and continues to support the goal of making its programming available to as many subscribers as possible, regardless of physical impairment, DIRECTV believes the Commission lacks the statutory authority to impose its proposed video description framework. If the Commission were to impose such rules, it would create tremendous technical and financial burdens for DBS operators. The proposed framework does not affect cable incumbents, broadcasters, or nonbroadcast networks in a comparable manner. Because of the unique challenges video description poses for DBS technology, DIRECTV urges the Commission to exempt DBS from its proposed requirements. In the alternative, the Commission should implement a waiver mechanism that allows DBS operators to request and the Commission to grant relief from the technical and financial burdens such rules will impose. Finally, if the Commission nonetheless imposes such requirements on DBS operators, DIRECTV urges the Commission to allow DBS operators substantial flexibility in the means by which they pursue the goal of promoting video description so that DBS service is accessible to persons with visual impairments.

Respectfully submitted,

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