APPENDIX A

COMMENTS

A&E Television Networks, Inc. (A&E)
Adaptive Environments
Akamine, Anthony (Akamine)
American Council of the Blind (ACB)
American Foundation for the Blind (AFB)
Association of America's Public Television Stations (APTS)
Braille Institute Library Services (BILS)
Brandt, Dorothy
C-SPAN and C-SPAN 2 (C-SPAN)
Clive, Alan (Clive)
Council of Organizational Representatives (COR)
DIRECTV, Inc. (DirecTV)
Enders, William H.
Feingenblatt, Dr. R.I.
Game Show Network, L.P. (GSN)
Grupo Televisa, S.A. (GT)
Indiana Protection and Advisory Services (IPAS)
International Cable Channels Partnership (ICCP)
Massachusetts Assistive Technology Partnership (MATP)
Metropolitan Washington Ear (MWE)
Motion Picture Association of America (MPAA)
Narrative Television Network (NTN)
National Association of Broadcasters (NAB)
National Cable Television Association (NCTA)
National Federation of the Blind (NFB)
National Television Video Access Coalition (NTVAC)
QVC, Inc. (QVC)
R.P. International (RPI)
Satellite Broadcasting and Communications Association (SBCA)
Short, Charles and Maureen
Short, Charles Jr.
Telecommunications for the Deaf, Inc. (TDI)
WGBH Educational Foundation (WGBH)
Wireless Communications Association International, Inc. (WCA)

REPLY COMMENTS

A&E Television Networks (AETN Reply)
Alabama Council of the Blind (Alabama Council)
Allen, Seville (Allen)
American Council of the Blind (ACB Reply)
American Foundation for the Blind (AFB Reply)
Baker, Rob (Baker)
Benson, Stephen (Benson)
Blinded Veterans Association (BVA)
Brandt, Dorothy (Brandt Reply)
Brown, Deborah (Brown)

Carcione, Tracy (Carcione)
Chong, Curtis (Chong)
Chorney, Marla (Chorney)
Cumings, Cheryl (C. Cumings)
Cumings, Thomas (T. Cumings)
DIRECTV, Inc. (DirecTV Reply)
Dunnam, Jennifer (Dunnam)
Elliott, Peggy Pinder (Elliott)
Freeman, Michael (Freeman)
Gardner, Ronald J. (Gardner)
Grupo Televisa, S.A. (Grupo Televisa Reply)
Home Box Office (HBO)
Jacboson, Shawn (Jacobson)
Koeng, Sheila (Koeng)
League of United Latin American Citizens and the National Council of La Raza (LULAC)
Lifetime Entertainment Services (Lifetime)
Maine Independent Living Services, Inc. (MILS)
Massachusetts Association for Parents of the Visually Impaired (MAVPI)
Mayo, Shawn (Mayo)
Motion Picture Association of America (MPAA Reply)
Narrative Television Network (NTN Reply)
National Association of Broadcasters (NAB Reply)
National Cable Television Association (NCTA Reply)
National Federation of the Blind of Colorado (NFB-CO)
National Federation of the Blind of Maryland (NFB-MD)
National Federation of the Blind of Ohio (NFB-OH)
National Television Video Access Coalition (NTVAC Reply)
Oliver, Philip (Oliver)
Pease, J.M. (Pease)
Pietrolungo, Al
QVC, Inc. (QVC Reply)
Radio-Television News Directors Association (RTNDA)
RPI International, Inc. (RPI Reply)
Sanders, Judy (Sanders)
Sanfilippo, John (Sanfilippo)
Scanlan, Joyce (Joyce Scanlan)
Scanlan, Thomas
Sutton, Jennifer
VIPs of Attleboro (VIPs)
WGBH Educational Foundation (WGBH Reply)
Wales, Nathanael (Wales)
Walhof, Ramona (Walhof)
Walker, Barbara (Walker)
Weather Channel, Inc. (Weather Channel)
West Virginia Department of Education and the Arts, Division of Rehabilitation Services (WV Dep't of Education and the Arts)
Zweifel, Clyde (Zweifel)

APPENDIX B

RULES

Part 79 of Title 47 of the U.S. Code of Federal Regulations is amended by revising it to read as follows:

Part 79--CLOSED CAPTIONING OF VIDEO PROGRAMMING

1. The authority citation for Part 79 is revised to read as follows:

AUTHORITY: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 613.

2. The title of Part 79 is revised to read as follows:

Part 79--CLOSED CAPTIONING AND VIDEO DESCRIPTION OF VIDEO PROGRAMMING

3. Section 79.2 is amended by revising paragraph (a) (1) and (b) (1) and (3) to read as follows:

§ 79.2 Accessibility of Programming Providing Emergency Information.

(a) Definitions.

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

* * * * *

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

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

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

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

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

(2) * * *

(3) Video programming distributors must ensure that:

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

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

* * * * *

4. Part 79 is amended by adding new Section 79.3 to read as follows:

§ 79.3 Video description of video programming.

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

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

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

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

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

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

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

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

(2) Television broadcast stations that are affiliated or otherwise associated with any television network, must pass through video description when the network provides video description and the broadcast station has the technical capability necessary to pass through the video description;

(3) Multichannel video programming distributors (MVPDs) that serve 50,000 or more subscribers, as of September 30, 2000, must provide 50 hours of video description per calendar quarter during prime time or on children's programming, on each channel on which they carry

one of the top five national nonbroadcast networks, as defined by an average of the national audience share during prime time of nonbroadcast networks, as determined by Nielsen Media Research, Inc., for the time period October 1999-September 2000; and

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

(i) must pass through video description on each broadcast station they carry, when the broadcast station provides video description, and the channel on which the MVPD distributes the programming of the broadcast station has the technical capability necessary to pass through the video description; and

(ii) must pass through video description on each nonbroadcast network they carry, when the network provides video description, and the channel on which the MVPD distributes the programming of the network has the technical capability necessary to pass through the video description.

(c) Responsibility for and determination of compliance.

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

(2) Programming with video description will count toward a broadcaster's or MVPD's minimum requirement for a particular quarter only if that programming has not previously been counted by that broadcaster or MVPD towards its minimum requirement for any quarter.

(3) Once an entity has aired a particular program with video description, it is required to include video description with all subsequent airings of that program, unless the entity uses the SAP channel in connection with the program for a purpose other than providing video description.

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

(d) Procedures for exemptions based on undue burden.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) Complaint procedures.

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

(i) the name and address of the complainant;

(ii) the name and address of the broadcast station against whom the complaint is alleged and

its call letters and network affiliation, or the name and address of the MVPD against whom the complaint is alleged and the name of the network that provides the programming that is the subject of the complaint;

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

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

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

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

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

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

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

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

APPENDIX C

FINAL REGULATORY FLEXIBILITY ACT CERTIFICATION

The Regulatory Flexibility Act (RFA)[1] requires that an agency prepare a regulatory flexibility analysis for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[2] The *Notice of Proposed Rulemaking* (*Notice*)[3] published in this proceeding proposed rules to provide video description on video programming in order to ensure the accessibility of video programming to persons with visual impairments.

In an abundance of caution, the Commission published an Initial Regulatory Flexibility Analysis (IRFA) in the *Notice*,[4] even though the Commission was reasonably confident that the proposed rules would not have the requisite "significant economic impact" on a "substantial number of small entities." The IRFA sought written public comment on the proposed rules. No written comments were receive on the IRFA, nor were general comments received that raised concerns about the impact of the proposed rules on small entities.

The rules adopted in this *Report and Order* requiring stations to provide video descriptions on video programming will affect at most five small broadcasters, which are affiliates of the top four networks in the top 25 Nielsen Designated Market Areas, in the amount of $5,000 to $25,000 each. We recognize that the upper end of the possible economic impact might constitute a significant impact for some small broadcasters, but, as noted, this impact will reach, at most, five entities, and we have provided an exemption (upon application) for those small entities for which the cost is burdensome. The pass through of programming will have no significant economic impact on small entities because they are required to pass through programming with video description only if they already have the technical capability necessary to do so. The Commission believes that the emergency notification requirement will have a negligible effect on small entities as well. In addition, if this requirement should prove burdensome to small entities, they may apply for an exemption.

The Commission therefore certifies, pursuant to the RFA, that the rules adopted in the present *Report and Order* will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Report and Order*, including a copy of this final certification, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Report and Order*, including a copy of this final certification, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, a copy of the *Report and Order* and this final certification will be published in the Federal Register. *See* 5 U.S.C. § 605(b).

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[2] *See* 5 U.S.C. § 605(b).

[3] *See Notice of Proposed Rule Making*, In the Matter of Implementation of Video Description of Video Programming, MM Docket No. 99-339, 14 FCC Rcd 19845 (1999) (*Notice*).

[4] *See id.* at 19862-69.

SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS

In re: Report and Order, In the Matter of Implementation of Video Description of Video Programming, MM Doc. No. 99-339

All Americans – including those with visual disabilities – should have meaningful access to video programming. That is the noble goal of this Report and Order. In celebrating the tenth anniversary of the Americans with Disabilities Act, we all should strive to help those with disabilities participate fully in the cultural fabric of our society. Moreover, this Commission has a legal and moral responsibility to ensure that all Americans have access to emergency information, especially concerning their health and safety.

While I would have preferred more explicit delegation from Congress, I believe that Congress did not preclude us from taking the steps that we have adopted today to make programming available to those with visual disabilities. Also, while on balance I support this item, I have significant reservations regarding our implementation of these well-intentioned goals. The item reflects what was a spotty record in many respects, especially concerning the cost, technical feasibility, and demand for this service. But by limiting the application of our entertainment programming requirements to only the largest program providers and only the largest television stations and cable systems, and by requiring only a modest number of hours to be video described, we have an opportunity to gain valuable experience and answers to these questions before we undertake any expansion of these requirements.

Emergency Information

This Order requires broadcasters and multichannel video programming distributors (MVPDs) to make emergency information accessible to those who have visual disabilities -- an action I unequivocally support. The Commission's responsibility is to ensure accessibility to communications, "to all people of the United States" for the purpose of "promoting safety of life and property."[1] The Order we adopt today addresses this fundamental tenet of the Telecommunications Act by requiring that all broadcasters and MVPDs which provide emergency information make the critical details of that information accessible to those with visual disabilities. In contrast to the record on video entertainment description, the record reflects unanimous agreement that meaningful access to emergency information is vital. I am especially pleased that we have expedited the effective date of this requirement.

The Order begins but does not fully address the needs expressed by the visual disabilities community for access to emergency information. For example, consumers will still find it frustrating to hear a tone which precedes written weather, news, or sports information scrolled across the bottom of the television screen, but will not have oral access to that information. In addition, the National Federation of the Blind notes that many new Secondary Audio Programming (SAP)-equipped televisions require navigating menus to access the SAP channel but that such menus are visual and therefore inaccessible to those with visual disabilities.[2] The Commission should use its good offices to bring together representatives of the consumer electronics industry and advocates for those with visual disabilities to generate practical solutions to this problem.

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[1] 47 U.S.C. § 151.

[2] See Letter from Bonnie J.K. Richardson, Vice President, Trade and Federal Affairs, Motion Picture Association of America, to Magalie Roman Salas, Secretary, Federal Communications Commission, MM Doc. No. 99-339, at 1 (July 13, 2000).

Video Programming Description

The issues raised by the video entertainment description requirements of the Order are more problematic. Commenters raised legitimate questions about the demand for, cost, and feasibility of video description. To what extent will visually impaired consumers avail themselves of video described prime time and children's programming? Do many even have access to SAP-enabled television receivers? Does it make sense to video describe all categories of programming? Will broadcasters and MVPDs be forced to supplant Spanish language programming on the SAP channel with video description? These questions are not fully answered.

Every regulation that government imposes has a cost associated with it. Inevitably, consumers pay that cost. We therefore must ensure that any requirements we impose are as narrowly tailored as are necessary to address the public need. The limited rollout of video description that we order today will enable us to assess the efficacy of, and consumer demand for, this service. We will carefully evaluate that experience before expanding upon the requirements adopted today.

Conclusion

We are all mindful of our responsibility to follow the law in carrying out our duties, including our efforts to ensure that all Americans have meaningful access to video programming. While I have concerns about the record in this proceeding, the limited scope of our rules will enable us to assess the efficacy and consumer demand for descriptive video service before we entertain further expansion.

STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH, CONCURRING IN PART AND DISSENTING IN PART

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

It is with regret that I dissent from the portion of this Order adopting rules requiring video description. I understand well the concerns of those who support this item, and it is more than apparent to me that their views are deeply and personally held. At the same time, however, such factors cannot trump the clear limits on our statutory authority. In short, as much as I might like to support this item in its entirety, I am unable to read the Communications Act as authorizing rules requiring video description.[1]

I. Statutory Authority

In the Notice of Proposed Rulemaking in this matter, we specifically sought comment on the question whether the Commission possesses statutory authority to require broadcasters, cable operators, and satellite companies to provide video description. *See* 14 FCC Rcd. 19845 at para. 39 (1999). I have reviewed carefully the comments on this issue and had hoped there to find persuasive arguments for authority. I can only conclude that the legal arguments in favor of jurisdiction can be described as weak, at best.

The argument for authority here is grounded in the theory of ancillary jurisdiction under sections 1 and 4(i) of the Communications Act. *See Order* at paras. 54-55. While it is true that the Supreme Court and the D.C. Circuit have upheld the Commission's exercise of that type of jurisdiction, this case is distinguishable from those in one very important regard: in none of those cases had Congress expressly addressed the Commission's duties with respect to the regulated area at issue. For example, in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), there were no preexisting statutory provisions regarding the Commission's oversight of the cable industry. Similarly, in *Rural Telephone Coalition v. FCC*, 838 F2d 1307 (D.C. Cir. 1988), Title 47 was silent on the question of federal funding for universal service.

Here, by contrast, Congress has clearly delineated our duties with respect to video description. In section 713(f) of the Act, Congress directed the Commission to commence an inquiry and issue a report on the matter. This has been done; there is no more authority that can be wrung out of that section. Indeed, the fact that section 713(f) requires a report and no more suggests that Congress was not prepared to, and purposefully intended not to, go any further. Juxtaposition of this section with the contemporaneously enacted one concerning closed captioning, *see* section 713(b), only strengthens this inference of purposeful limitation. That section, which requires both a report *and* a rulemaking on closed captioning, makes clear that Congress understood the difference between a study and a rulemaking and that Congress knew how to take the additional step of mandating rules regarding television services for the disabled.[2]

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[1] I concur, however, in the adoption of the emergency information rules. I do so on the theory of jurisdiction laid out in Part II of the separate statement of Commissioner Powell.

[2] If independent confirmation of these textual implications were necessary, one need only briefly review the legislative history of section 713(f). That history shows that Congress originally included and then, in conference, removed a rulemaking requirement from the section. *See Telecommunications Act of 1996*, S. Conf. Rep. 104-230 at 411 ("The [conference] agreement deletes the House provision (continued....)

To say that section 713(f) does not *prohibit* rules requiring video description, as the Order does, *see R&O* at para. 58, is not enough to *establish* jurisdiction here.[3] As the item itself acknowledges, that the provision does not authorize such rules, and so can provide no affirmative support for this action. Further, as discussed above, the "negative pregnant" of its text is that anything more than the issuance of a report would be in excess of that authority.

The Commission is not long delayed by these statutory points. On its view of administrative law, Congress must expressly prohibit the Commission from going further than a particular provision authorizes it to go in order to make the textual limits of any provision stick. In an administrative scheme based on delegated powers -- where the Commission possesses only those powers granted by Congress, not all powers except those forbidden by Congress -- this approach to jurisdiction is clearly erroneous.

II. Comments Regarding the Rules

Notably, not all those in the blind community are supportive of these rules. Of course, as with all people grouped together on the basis of a common physical, immutable trait, blindness is no guarantor of monolithic thinking on matters of public policy. In fact, some of the philosophical divisions among the blind on questions such as education and assimilation are profound and have been so for many, many years.

Yet one would have to be particularly astute, even psychic, to glean this fact from the Order. *See R&O* at paras. 4 & n. 11, 38. While discussing extensively the comments from groups for the blind in support of video description, no mention is made of the express opposition of the National Federation of the Blind (NFB), the largest and most historically significant force of and for the blind.[4] I fear that because NFB's philosophy of blindness and of the way its members can best achieve their life goals differs from that held by other disability groups, as well as some people at the Commission, its views have not been given they respect they deserve. In other words, I am concerned about the possibility that because NFB does not believe what others think they should about what is best for its members, it has

(Continued from previous page)
referencing a Commission rulemaking with respect to video description."). This Commission today adopts rules that Congress consciously chose not to require.

[3] With respect to cable operators, there may indeed be a provision of the Communications Act that prohibits video description rules. Section 624(f) states that no federal agency may "impose requirements regarding the provision or content of cable services, except as expressly provided in [Title VI]." Whether or not video description rules concern "content," they surely regulate the "provision" of cable services. To be sure, *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989), contains some broad dictum regarding the overall effect of section 624(f). But that case did not squarely address, and no party appeared to argue, the meaning of the provision prong of the statutory language.

[4] NFB was founded in 1940 and has over 50,000 members, with affiliates in all 50 fifty states and over 700 local chapters. *See* www.NFB.org. According to a web site dedicated to serving the blind, NFB "has become by far the most significant force in the affairs of the blind today." http://www.blind.net/bwholead.htm (page entitled "Who Are the Blind, Who Lead the Blind"). Contrary to the suggestion of some in this proceeding, NFB is not some sort of outlier in the blind community, but rather the oldest and largest group composed of and for the blind.

been marginalized in this discussion.[5] I thus intend to air NFB's opinions fully.

In its comments, NFB states unequivocally: "We oppose the imposition of audio description as a federal mandate." Comments of NFB at 1 (filed Feb. 23, 2000). As to the level of actual demand for this service among the blind, they remark: "Some like the service. . .; some dislike it; many are frankly indifferent." *Id.* They further describe the blind population as "ambivalent" about video description. *Id.* This is so, they say, because of differences between those who are born blind and those who lose their vision later in life. For the congenitally blind, the description of events in essentially visual terms – *i.e.*, "the woman wore a red dress" – provides them no benefit whatsoever. And on a philosophical level, NFB argues that "undue emphasis on entertainment as an issue for the blind draws attention away from the real and cruel forms of economic discrimination and exclusion of blind people from normal integration into society." *Id.* at 2.

This potential lack of demand for the service creates a mismatch between the means and ends of the regulations. As an initial matter, it is unclear whether these rules benefit the targeted population in general. And if the benefits of video description accrue largely to those who become blind later in life and those with diminished vision due to aging (not the congenitally blind), then it makes little sense to allow complete fulfillment of the video description requirement with children's programming. *See R &O* at para. 36. The bulk of those with visual disabilities consist of an older population, not the audience for children's television.

This means-ends misfit undermines the legitimacy of these rules under a potential First Amendment analysis. Even if one accepts as permissible the Commission's content-based selection of children's programming as a category for description, the regulations' non-furtherance of the interests of the primary beneficiaries of the rules is a vexing problem. Furthermore, when a large segment of the

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[5] Generally, NFB believes that with adequate education and opportunity, the blind can participate in society as well as any sighted person; in short, they wish to be treated like any other person, no better and no worse. Often, this philosophy results in NFB's taking a position against what it perceives as special or preferential policies for the blind. For instance, the NFB supported the Americans with Disabilities Act on the ground that it include what is now section 501 of that Act, which states that "[n]othing in this Act shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept." NFB's theory was "that, although blind people should have help when needed, imposed help can be and is one of the most degrading parts of the discrimination we suffer as a group." http://www.blind.net/bg600010.htm (page entitled "The Right to Refuse Help"). For a full exposition of NFB's principles, *see* http://NFB.org.

very people that the Commission purports to help actively opposes these regulations, one wonders why the Commission is so insistent upon pushing the statutory envelope.

III. Conclusion

Video description may be a wonderful idea whose time has come; its current absence in programming may indeed represent the sort of true market failure that justifies government intervention; and its benefits to society may outweigh its costs. But those assertions, even if true, cannot overcome the threshold question of statutory authority for this Commission to act in the area. Contrary to the assumption of this item – that Congress must prohibit a rulemaking before we lack authority to undertake it -- this Commission has only those powers affirmatively vested in it by Congress. However compelling the underlying subject matter, we may not transgress the larger scheme of laws that governs this agency's actions.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL, CONCURRING IN PART AND DISSENTING IN PART

In The Matter of Implementation of Video Description of Video Programming, MM Docket No. 99-339, *Report and Order*

This item represents another worthy effort by the Commission to improve the disability community's access to communications services. Proudly, this is an area that has received significant attention by both Congress and this Commission, remedying many years of neglect. I applaud the government's continuing focus on these issues.

The item is noteworthy, however, for another reason that I find much less laudable. Though for a very worthy purpose, the Commission yet again is extending its reach beyond a specific statutory provision by availing itself of ancillary jurisdiction under the broad provisions of sections 4(i) and 303(r) of the Communications Act.[1] While the Commission certainly may act on ancillary authority in the absence of a specific statutory provision, it cannot and should not do so where Congress has spoken specifically on an issue or where there is a clear contrary congressional intention. Because I find Congress spoke to video description in section 713(f) of the Act, and purposely limited the Commission to studying the issue and reporting to Congress, I dissent to the adoption of video description rules under ancillary jurisdiction. I do, however, support that portion of the *Order* that provides for emergency text information in audio form.

I. The Statute Does Not Allow For Video Description Rules

A. *The Text of the Statute Does Not Authorize Rules*

Congress comprehensively considered the issue of access to video programming by the blind and deaf communities in drafting the Telecommunications Act of 1996. The result was section 713, entitled "Video Programming Accessibility." 47 U.S.C. § 613. The provisions contained in section 713(a)-(e) deal with closed captioning for the deaf. They direct the Commission to "prescribe such regulations as are necessary" to implement closed captioning.[2]

Section 713(f) addresses video description for the visually impaired, a service that is roughly analogous to closed captioning.[3] In stark contrast to closed captioning, Congress did not mandate video

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[1] Section 4(i) reads, "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Section 303(r) of the Act provides, in pertinent part, "the Commission from time to time, as public convenience, interest, or necessity requires shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. . ." 47 U.S.C. § 303(r).

[2] The Commission did issue closed captioning rules in 1997. *See* In the Matter of Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Accessibility of Emergency Programming, MM Docket No. 95-17, *Report and Order*, 13 FCC Rcd 3272 (1997), *on recon.*, 13 FCC Rcd 19973 (1998).

[3] Video description "means the insertion of audio narrated *descriptions* of a television program's key visual elements into natural pauses between the program's dialogue." 47 U.S.C. § 613(g) (emphasis added). Closed captioning is "[t]he visual *display* of the audio portion of video programming contained in line 21 of the vertical (continued....)

description, nor did it direct the Commission to prescribe regulations.[4] Congress only directed the Commission to conduct an inquiry on video description and to report its findings to Congress.[5] When subsections (a) and (f) of section 713 are viewed together (one mandating rules and one not), it is fairly plain that by negative implication Congress did not wish to legally require video description, but instead it wished to consider the matter more fully, after receiving a report from the FCC.[6] Indeed, in 1996, and again in 1998, the FCC did issue reports, but Congress elected not to take action. *See* n.5 *supra*.

Yet, as evidenced by its *Order* today, the majority is unfazed and undeterred by the negative implication of section 713(f) and the stark contrast with closed captioning. In its view, Congress may not have directed the FCC to draft rules, but it did not tell them they could not either. The majority insists that it can advance video description rules under section 4(i)'s general authorization to "make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i).[7] This sweeping authority is invoked to carry out the equally broad purpose in section 1 of the Communications Act to "make available, so far as possible, to all the people of the United States . . .[a] world-wide wire and radio communication service." 47 U.S.C. § 151.

Unquestionably, Congress conferred very broad authority on the Commission under section 4(i), and the courts have sanctioned the exercise of that authority on occasion. *See, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *Rural Tel. Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988). But this broad residual authority is not unrestrained. *See United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). It surely can be supplanted by subsequent, more specific acts of Congress. If, as is the case here, Congress considers and speaks directly to an issue, the Commission should be bound to that specific judgment and not chart a different course that it prefers, riding section 4(i).

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blanking interval (VBI) pursuant to the technical specifications set forth in [the Commission's rules] or the equivalent thereof." 47 C.F.R. § 79.1(a)(4) (1999) (emphasis added).

[4] The juxtaposition is quite telling. *See National Rifle Assoc. v. Reno*, 2000 WL 800830 (D.C. Cir. July 11, 2000), at *7 ("'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (*quoting Russello v. U.S.*, 464 U.S. 16, 23 (1983)).

[5] The Commission has in fact reported to Congress on two occasions. In both instances, Congress neither considered nor took action on video description. *See, e.g.*, In the Matter of Closed Captioning and Video Description of Video Programming, MM Docket No. 95-176, *Report*, 11 FCC Rcd 19214, 19222, 19271 (1996) (report recommended "the best course is for the Commission to continue to monitor the deployment of video description and the development of standards for new video technologies that will afford greater accessibility of video description"); Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141, *Fourth Annual Report*, 13 FCC Rcd 1034 (1998).

[6] The specific criteria for the report suggests Congress wanted the Commission to study at a detailed level the issues surrounding video description, in order for it to have a more substantial record on which to consider the propriety of taking government action. The report had to include an assessment of the "appropriate methods and schedules for phasing video descriptions into the marketplace, technical and quality standards for video description, a definition of programming for which video descriptions would apply, and other technical and legal issues that the Commission deemed appropriate." 47 U.S.C. § 613(f).

[7] The Commission also cites section 303(r), which is nearly identical to 4(i). *Compare* 47 U.S.C. § 303(r) *with* 47 U.S.C. § 154(i).

The majority would probably agree with this canon of statutory interpretation on its face. Nonetheless, it seems to think that even where Congress considers the very same issue and promulgates a statutory directive, it can exceed the scope of that directive if Congress fails to specifically prohibit the Commission from acting. Here, Congress comprehensively considered the issue of video description. It passed a law directing the Commission to conduct an inquiry and submit a report of its findings. It did not authorize the Commission to issue rules. But, because Congress did not specifically say the FCC could not issue rules, the majority feels free to do so under its general authority.

The majority's approach is breathtaking, for it suggests the Commission can favor its preferences over those of Congress (as long as its actions are within the expansive scope of section 1), if Congress fails to affirmatively prohibit it from acting. Apparently, in the majority's view, it is not enough for Congress to simply pass a law of limited scope. This view turns the notion of a delegated agency on its head. The Commission can act only where it is *authorized* to do so. It is not free to act unless expressly *prohibited* from doing so. *See Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161 (4th Cir. 1998) ("We begin with the basic proposition that agency power is 'not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'") (*quoting Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14) (1976)). I recognize that Congress granted the Commission its broad authority in section 4(i). But, in doing so it surely did not obligate itself in the future to the Herculean task of specifically prohibiting any possible action by the Commission when it crafts new laws in any area within the scope of section 1. Congress cannot possibly, nor should it be required to, proscribe FCC action every time a legislative enactment falls in the scope of "making available to all the people of the United States a wire and radio service."[8] In section 713(f) Congress told the Commission to produce a report. The completion of that task should have ended the matter, unless and until Congress acted further.

B. *The Legislative History Squarely Shows Congress Rejected Giving The FCC Discretion to Promulgate Rules.*

I understand the impulse not to accept the negative inference of section 713(f)'s reporting requirement (though it is more troubling when compared to mandatory closed captioning rules). One might accept, as does the majority, that section 713(f) is insufficiently clear, or specific, to rob the Commission of section 4(i) authority. But, a review of the legislative history closes the door on any suggestion that Congress was not adverse to FCC mandated rules, though unwilling to mandate video description itself.

In the 103rd and 104th Congresses, both houses introduced telecommunications bills. In the House of Representatives, H.R. 3636, section 206, as reported out of the subcommittee, *mandated* video description.[9] In full committee, Congressman Carlos Moorhead of California offered an amendment (which was adopted) that allowed the FCC to promulgate video description rules at its *discretion*, rather than statutorily requiring such rules. The amendment read:

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[8] Section 1 of the Communications Act of 1934, as amended (paraphrased).

[9] See H.R. 3636, § 206 (the Telecommunications and Finance subcommittee draft mandated that the Commission "*shall*, within 1 year after enactment of the [video programming accessibility] section, *prescribe* such regulations as are necessary to ensure that all video programming is fully accessible to individuals with disabilities through the provision of closed captioning service *and video description*." (emphases added).

> Following the completion of such inquiry, the Commission *may adopt* regulation it deems necessary to promote the accessibility of video programming to persons with visual impairments.[10]

The amended bill was reintroduced in the 104th Congress as H.R. 1555, and passed by the House of Representatives.[11] The Senate version of this bill, S. 652, directed the Commission only to submit a report to Congress and did not contain language mandating video description, or delegating discretion to the FCC to do so through a rulemaking.[12] Both versions of the bill, however, mandated closed captioning and specifically directed the Commission to implement the mandate by promulgating closed caption rules.

The Senate and House bills ultimately were sent to the conference committee to resolve conflicting provisions. One of which, of course, was the discrepancy on video description, with the House bill allowing the FCC to promulgate video description rules at its discretion and the Senate bill only authorizing a report. When the conference agreement was announced the committee had stricken the House language in favor of the Senate's reporting requirement:

> The conference agreement adopts the House provision with modifications which are incorporated as new section 713 of the Communications Act. The agreement deletes the House provision referencing a Commission rulemaking with respect to video description.[13]

This version of the bill ultimately was passed by the Congress and signed into law by the President.[14]

By the chronology of the legislative drafting and the actions of the conference, it is abundantly clear that Congress specifically considered granting discretionary authority to the FCC to promulgate video description rules and elected not to do so. It is well-established that "[a] contrast in statutory language is 'particularly telling' when it represents a decision by a conference committee to resolve a dispute in two versions of a bill, and the committee's choice is then approved by both Houses of Congress." *See Goncalves v. Reno*, 144 F.3d 110, 132 (1st Cir. 1998) (citation omitted). *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199-200 (1974) (deletion of a provision by a Conference Committee "militates against a judgment that Congress intended a result that it expressly declined to enact"). I am at a complete loss to understand how the Commission can hold that section 713(f), though not mandating rules, nonetheless permits the Commission the discretion to put forth rules against this legislative backdrop. Congress squarely considered and rejected the very permissive adoption of rules the Commission now embarks upon.[15]

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[10] Amendment no. 8, offered by Congressman Carlos Moorhead, to H.R. 3636 in March 16, 1994 Full Committee Mark-up was agreed to by a voice vote. The Moorhead amendment was subsequently incorporated the version passed by full committee. *See* H.R. 3636, § 206(f); H.R. Rep. No. 103-560 at 88 (1994).

[11] *See* H.R. 1555, § 204(f); H.R. Rep. No. 104-204, Part I at 140 (1995). *See also* H.R. Conf. Rep. No. 104-458 at 184 (1996).

[12] *See* H.R. Conf. Rep. No. 104-458 at 184 (1996).

[13] *See id.*

[14] *See* Pub. L. No. 104-104, 110 Stat. 56 (1996).

[15] I cannot help noting that the FCC has been repeatedly and badly bruised by a Congress that believes this agency is disrespectful of its judgments and willing to ignore congressional intent in favor of its own favored (continued....)

It is important to emphasize that section 4(i) is not a stand-alone basis of authority and cannot be read in isolation. It is more akin to a "necessary and proper" clause. Section 4(i)'s authority must be "reasonably ancillary" to other express provisions.[16] And, by its express terms, our exercise of that authority cannot be "inconsistent" with other provisions of the Act.[17] The reason for these limitations is plain: Were an agency afforded *carte blanche* under such a broad provision, irrespective of subsequent congressional acts that did not squarely prohibit action, it would be able to expand greatly its regulatory reach.[18]

It is for this reason that I believe the courts often scrutinize carefully an agency's attempt to expand the scope of its jurisdiction. As the D.C. Circuit has noted, "[w]hen an agency's assertion of power into new arenas is under attack . . . courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue." *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987). Such scrutiny in this matter reveals an unambiguous congressional intent not to mandate rules, or to authorize the Commission discretionary authority to do so, thereby supplanting any reliance on the catchall provision of section 4(i).

For this reason, I cannot support the *Order's* adoption of rules mandating video description.[19]

II. The Statute Does Allow for Audio Description of Emergency Text Information

I can, however, support our adoption today of rules that require broadcasters and multi-channel

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policies. *See* Mark Wigfield, *Budget Cuts, Miscues Boost Tensions Between FCC, Congress*, Wall St. J., July 3, 2000, at B6. Actions such as this, ignoring congressional choice, and pushing ahead based on ancillary jurisdiction, partly explain Congress' ire.

[16] *See, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (the Court sanctioned the Commission's general jurisdiction of interstate communications, to the extent that the regulations were "*reasonably ancillary* to the effective performance of the Commission's various responsibilities. . .") (emphasis added); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1479 (D.C. Cir. 1994); *Capital Network Sys. v. FCC*, 3 F.3d 1526, 1527 (D.C. Cir. 1993).

[17] 47 U.S.C. § 154(i).

[18] Indeed, it would be difficult to maintain that the legislative power of the United States rested exclusively with Congress, as it constitutionally must.

[19] My concerns about the Commission's assertion of ancillary jurisdiction are not newfound. In July 1999, I dissented in part to the Section 255 implementation *Order* because of my "grave concern" of the Commission's reliance on the "use of 'ancillary jurisdiction' to extend the accessibility requirements of Section 255 to providers of voicemail and interactive menu services, as well as to manufacturers of telecommunications equipment and CPE which perform such functions." *See* Implementation of Section 255 of the Telecommunications Act of 1996—Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities, *Report and Order* and *Notice of Inquiry* (WT Docket No. 96-198) (Separate Statement of Michael K. Powell, Commissioner, Federal Communications Commission) [available on the World Wide Web at <http://www.fcc.gov/commissioners/powell>].

video programming distributors ("MVPDs") to provide audio description of scrolling emergency text information. Those of us who are sighted have experienced that "beep, beep, beep" while watching television that alerts us to the presence of a critical warning that then scrolls across the screen for us to view. The blind, however, after hearing the beeps, are unable to learn the substance of the alert, since it scrolls across the screen silently. This poses a serious and unnecessary threat to the blind community and should be remedied.

While I have continuing concerns about ancillary jurisdiction as a basis for rulemaking generally, I believe requiring emergency text that is scrolled on television to be read is an appropriate use of section 4(i). Section 1 states that a central purpose of the Communications Act and the FCC is "promoting safety of life and property through the use of wire and radio communication." 47 U.S.C. § 151. Moreover, for many years the Commission, by rule, has required the operation of an Emergency Alert System ("EAS") designed to provide wide dissemination of emergency information. 47 C.F.R. Part 11, § 73.1250 (1999).[20] Additionally, emergency information is simply a more compelling justification for policy action than video description of entertainment programming.

Unlike with video description, Congress has not expressed a desire that we not act in this area. Section 713(f) deals with video description that is the "insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue." 47 U.S.C. § 613(g). Scrolled emergency text that is inserted without regard to the original program by the broadcast station or MVPD operator is not a "key visual element" of the program that is airing, and it is not inserted into "natural pauses between the program's dialogue." *Id.* Thus, I am confident that section 713 does not cover the action we take today with respect to such information. Consequently, the legislative history that shows Congress did not wish us to advance video description rules also is inapplicable. As a result, I am comfortable that the general authority of 4(i) and 303(r) has not been supplanted by a more specific statutory provision.

Congress has not denied us authority in this area. Indeed, it appears to have recognized and ratified the invocation of our general authority for emergency information purposes. For example, section 624(g) of the Act states that "each cable operator shall comply with such standards as the Commission shall prescribe to ensure that viewers of video programming on cable systems are afforded the same emergency information as is afforded by the emergency broadcasting system." 47 U.S.C. § 544(g). The Emergency Broadcasting System (now known as the Emergency Alert System) was initially developed over 40 years ago and its specific provisions and scope are a product of Commission rulemaking, resting on sections 4(i), 303(r) and other broad provisions. For these reasons, I can support the emergency text portion of today's *Order*.

III. Other Infirmities of this *Order*

In addition to jurisdiction, I believe this *Order* attempts to gain weight from the admittedly high

[20] 47 C.F.R. § 73.1250 reads, in relevant part:
(a) Emergency situations in which the broadcasting of information is considered as furthering the safety of life and property include, but are not limited to the following: Tornadoes, hurricanes, floods, tidal waves, earthquakes, icing conditions, heavy snows, widespread fires, discharge of toxic gasses, widespread power failures, industrial explosions, civil disorders and school closing and changes in school bus schedules resulting from such conditions.

purpose of helping a segment of the disability community gain access to video programming. But, I believe the benefits are substantially less than celebrated in the *Order*. Moreover, I believe the *Order* is faulty in several key respects. I will list some of these points briefly:

First, I would note that the blind community is not unanimous in its support for video description rules. The National Federation of the Blind ("NFB"), representing 55,000 blind individuals, is the largest and oldest organization of the blind. NFB filed comments in which it stated unequivocally, "[w]e oppose the imposition of audio description as a federal mandate."[21] True, others support the action, but we should not brush aside the opposing views of such a substantial portion of the blind community simply because they are inconsistent with our notion of what is best for blind people.

Second, the *Order* seems to suggest that government intervention is required because a market has failed to develop for video described programming. However, there is some evidence that suggests that the market has failed because there is not substantial demand by the blind community for such programming. For example, video described tapes have been available in the market for years, but as the Motion Picture Association of America notes, there has been very limited demand for these films.[22]

Third, the *Order* wrongly analogizes the ease of video description to closed captioning. It is important to note that video description is a creative work. It requires a producer to evaluate a program, write a script, select actors, decide what to describe, decide how to describe it and choose what style or what pace. In contrast, closed captioning is a straight translation of dialogue into text. The same can be said for foreign language translations. Consequently, video description is more elaborate (and more costly) than closed captioning. Additionally, video description is overlaid onto an existing audio track. Some programs that are rich in dialogue or description, such as a news broadcast or a sports play-by-play program, may not benefit from additional description and in fact may be ruined for blind consumers. Also, some programs, like music videos or live events, may move too quickly to afford an opportunity for an adequate description in the pauses of the program. The point is that the viability and benefits of this service can vary widely based on the nature of the program. Yet, the Commission makes no categorical exemptions for programming types (as it did in closed captioning), nor does its waiver standard contemplate any of these bases for a waiver.

Fourth, access to video description is only obtained through the Secondary Audio Programming ("SAP") channel. As of 1998, only 59% of televisions sold had SAP functionality.[23] Moreover, before 1990 very few sets had this feature at all and many of those sets remain in the homes of consumers. With closed captioning, Congress mandated that television manufacturers include that functionality in television sets. No such command runs to manufacturers for SAP functionality. Thus, I question the reach or benefits of this service. Additionally, SAP functionality is an analog signal function. Because we are in the midst of a transition to digital television ("DTV"), it is highly likely that what benefits this

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[21] *See* National Federation of the Blind, Comments on Notice of Proposed Rulemaking in the Matter of Video Description of Video Programming, MM Docket No. 99-339 (filed Feb. 23, 2000) at 1 (In the first paragraph of comments, NFB unequivocally opposes "the imposition of audio description as a federal mandate").

[22] *See* Motion Picture Association of America, Comment on Notice of Proposed Rulemaking in the Matter of Video Description of Video Programming, MM Docket No. 99-339 (filed Feb. 23, 2000) at 25-26 (*citing* J. Packer & C. Kirchner, American Foundation for the Blind, *Who's Watching? A Profile of the Blind and Visually Impaired Audience for Television and Video*, at Table 2, p.9 (1997)).

[23] *Id* at 20 (citing Consumer Electronics Manufacturers Association data).

service affords may be short lived.[24]

Fifth, I am unimpressed with the *Order's* evaluation of the costs. The item suggests that the revenues of the large commercial broadcast networks (and their affiliates) and the "larger MVPDs" are more than sufficient to account for any video description upgrade.[25] The item, however, only looks at total revenues without considering any other operating costs (especially the enormous costs associated with the transition to digital).[26] The issue of revenues cannot be considered in a vacuum, without reference to expenditures for utilities, personnel, programming, etc. To do so would be like considering a person's ability to shoulder an additional financial burden based on his overall income without regard to his existing burdens (*e.g.*, rent or mortgage, tuition, car and insurance payments). Moreover, the *Order* also fails to consider rigorously the costs of production, which might vary depending on the type of program and will be passed on in programming costs. As I mentioned above, there is a need for writers to draft video described scripts, actors to describe the scenes, directors to direct and producers to produce. These personnel resources also contribute to the overall costs of programming, at a time when there is already an initial concern about the escalating costs of premium primetime and sports programming.[27]

Finally, one should not lightly dismiss the limitations on free speech that may result from these new rules. I question the majority's conclusion that its action is content-neutral. Video description is a creative work. It requires artistic and editorial judgment. Moreover, it is only one form of blind accessible programming. A programmer, if free to, might choose instead to introduce more dialogue or sound cues in the original soundtrack, rather than to have the program secondarily described. In addition, there are other uses for the SAP channel, such as Spanish language translation, that a provider must forgo in order to comply with the Commission's mandate. We are mandating a particular form of programming and I doubt the infringement is merely a secondary effect of improving access for the visually impaired.

These difficulties with the item reflect some of the challenges of mandating video description. It also may explain Congress' decision to evaluate the issue further, rather than requiring, or allowing, the Commission to require rules in this area.

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[24] The *Order* seems to embrace WGBH's view that digital television will require additional audio tracks and, thus, SAP functionality will not be wasted. We have no real confirmation of this view. One should note that we are adopting digital closed captioning rules in a separate proceeding today, and likely would have to reevaluate video description for DTV.

[25] *See Report* at ¶¶ 22, 27, 28.

[26] The Report also assumes SAP equipment capability from newspaper articles, not from comments or other authoritative industry resources. *See id* at ¶ 21 nn. 57-59.

[27] *See, e.g.*, Kyle Pope, *Network Makes $850 Million Deal with Warner Bros.*, Wall St. J., Jan. 15, 1998, at B1 (NBC strikes "a record $850 million deal to keep the nation's top-rated show, ER"); *NFL Buyers, Sellers Could Butt Heads on Rates*, Multichannel News, Jan. 26, 1998, at 28 ("Fox Broadcasting, ABC, CBS and ESPN will shell out a combined $17.6 billion across eight [NFL] seasons."); John M. Higgins, *Cable Operators Blast ESPN for NFL Megabid*, Broadcasting & Cable, Jan. 19, 1998, at 10 (Of $17.6 billion total, ESPN "agreed to pay $600 million per season for 18 Sunday night games"); *See Disney Offer Would Triple NHL's Current TV Deal*, Palm Beach Post, Aug. 6, 1998, at 8C (Walt Disney Co. offered "to pay the [NHL] almost $600 million for exclusive U.S. broadcast rights for five years"...the deal "would triple the amount Fox Sport and ESPN [paid] the league" under the previous deal).

IV. Conclusion

I wish I could support this *Order* more fully. I share my colleague's passion in wanting to help the visually impaired. It is discomforting not to support a service for so deserving a community. But, it is precisely when the end is noble that the rule of law is most severely tested. I personally cannot read the law conveniently, even for so worthy a constituency.