

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

In the Matter of)
) MM Docket No. 99-339
Implementation of)
Video Description of)
Video programming) November 13, 2000

To: The Commission

**THE NATIONAL TELEVISION VIDEO ACCESS COALITION'S
CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION**

NATIONAL TELEVISION VIDEO
ACCESS COALITION

By: _____
Dr. Margaret Pfansteihl

November 13, 2000

TABLE OF CONTENTS

	Page
Summary	i
I. Lack of Authority and Compelled Speech	2
II. HBO's Request for Exemption	3
III. Undue Financial Burdens	3
IV. National Federation of the Blind	4
V. Analog and Digital	5
VI. Complaints and Enforcement	6
VII. Repeats, Reruns and Pass Throughs	7
VIII. SAP Usage for Video Description and Spanish-Language	9
IX. Program Distributors Responsible	10
X. Definition of Primetime	10
Conclusion	11

SUMMARY

Needing only modest clarifications and modifications, the Commission's rules, while not nearly as comprehensive as desired by the visually impaired community, nevertheless are sound, reasoned and well substantiated. For the broadcast and cable industries, implementation will open the vast video marketplace for the first time to the visually impaired. For the United States Government implementation will help to alleviate the serious anomaly wherein the Government provides accessibility for deaf and hard of hearing audiences but not for blind and visually impaired audiences.

Most reconsideration petitioners simply revisit matters previously addressed and resolved by the Commission. Most petitions by industry clearly are intended to strangle mandated video description in its cradle. And we have had a decade of voluntary industry inaction. MPAA claims copyright laws would be violated if the describer misinterpreted a facial expression. But sighted people also can misinterpret. However, lack of any description would ensure that visually impaired people would greatly misunderstand many scenes.

The HBO request for exemption based on "audience reach" has merit. As for undue financial burden, industry offers no specifics buttressing their claims.

NFB states that "there is undeniable support for described entertainment" NFB's concerns of the lack of "described information" are real and important and should receive the time and attention they deserve in a separate FCC consideration. Analog and digital programming must be equally accessible – analog continuing, digital when it is here. But the Commission should mandate digital accessibility now, including rules for DTV consumer reception equipment, navigating devices, and allocate now a digital subchannel for video accessibility.

We do not agree that complaints should first be filed with the broadcast or cable outlet. Visually impaired viewers cannot read information from the screen telling them where to call or even which channel or network they are tuned to. It would be simpler and much more efficient to have a single point of contact for complaints.

No broadcast or cable outlet should be forced to change its regularly scheduled programming or add description to classes of programs such as wrestling. We only seek parity with the population at large. Some flexibility may be warranted here. There *is* a need to specify that video description be devoted initially to primetime and children's programs where the need is the greatest. We reject the NAB proposal that descriptions should not be passed through once a station has met its minimums.

Satellite providers worry that their SAP facilities must be totally dedicated to either Spanish language or video description to avoid confusion. We are certain that both Spanish-speaking and visually impaired people can figure out program schedules and adjust their viewing habits.

Program distributors fret that they would be required to add descriptions to programs they only license but do not own. Actually, program licensees have long born the expense and responsibility for captioning programs they merely license for limited distribution. The Commission's captioning rules do not distinguish between owned and licensed programs.

Primetime does indeed need to be defined by the Commission.

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

In the Matter of)	
)	MM Docket No. 99-339
Implementation of)	
Video Description of)	
Video programming)	November 13, 2000

To: The Commission

**THE NATIONAL TELEVISION VIDEO ACCESS COALITION'S
CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION**

The National Television Video Access Coalition (“the Coalition”) hereby submits this consolidated Opposition to the various Petitions for Reconsideration which were filed with respect to the Commission’s August 7, 2000 *Report and Order* adopting new rules mandating the provision of video description over the nation’s major media distribution pipelines. The Commission’s rules constitute a measured but forceful action to open the vast video marketplace for the first time to the visually impaired. Pious calls for voluntary video description had proved meaningless in the light of a decade of voluntary inaction by in this area by the broadcast and cable industries. To a large degree, the petitioners simply revisit arguments which were made to, and rejected by, the Commission at the initial rulemaking stage. The Commission has consistently held that it will not entertain petitions for reconsideration for the purpose of revisiting matters which have already been fully addressed and resolved. Direct Broadcast Satellite Service, 53 RR2d 1637 (1983) Those

petitions should therefore be summarily dismissed. Other petitions suggest minor fine-tunings in the rules as adopted by the Commission. In some respects, we believe that clarification or

adjustment of the rules as originally adopted will conduce to fuller and more economical compliance with the rules, and therefore the Coalition has no objection to those requests. The Coalition will address those points below.

I. Lack of Authority and Compelled Speech.

The majority of the reconsideration petitions filed by eight organizations¹ demonstrate an intention to strangle mandated video description in its cradle. Fortunately the Commission has already reviewed, considered and rejected precisely the arguments raised by petitioners regarding the Commission's authority to mandate video description and the constitutionality of such regulations. The petitioners offer no new evidence for reexamining these issues. If the petitioners were correct that the FCC indeed does not have the authority to require television programs to be accessible to visually impaired and blind audiences, and if video description is indeed compelled speech (and hence unconstitutional), there would be a serious and inexplicable anomaly in the law with respect to different disabled communities: the United States government would be in a position of providing accessibility for the deaf and hard of hearing but not for the blind and visually impaired.

Interestingly, the MPAA also attempted to buttress its negative views by again turning to the copyright laws. The MPAA claims these laws would be violated if a describer misinterpreted the facial expression of one of the actors in a drama. This, they claim, would alter the content and intended meaning of the artist who created the drama. However, sighted people who, without being exposed to any descriptions, also can misinterpret facial expression. When a drama is presented to the public, the artist can never be certain that everyone will read the same meanings into what is

¹ Petitions were filed by Turner Broadcasting System, Inc. ("TBS"), HBO, National Association of Broadcasters ("NAB"), Motion Picture Association of America ("MPAA"), National Cable Television Association ("NCTA"), EchoStar Satellite Corporation, DirecTV, Inc., and National Federation of the Blind ("NFB").

portrayed on the screen. The lack of any descriptions, however, would definitely ensure that blind and low vision people would greatly misunderstand many scenes because they would be deprived of all visual cues.

II. HBO's Request for Exemption.

HBO suggests that it was inadvertently caught in the embrace of the rules applicable to MVPDs due to the Commission's use of "audience reach" versus "audience share" to determine which cable networks should be covered by the rules. HBO also points to its use of its SAP channel for Spanish language purposes. The Coalition has no objection to adjusting the rules so as to make clear that HBO is exempt based on the audience reach criterion. We disagree, however, that HBO's use of the SAP channel for Spanish programming should be reason for their exemption. As we have stated in our filings in this proceeding, Spanish language translations and video descriptions can be offered on alternate feeds of programs on those networks which provide multiple broadcasts or cablecasts of the same programs. Among other considerations, visually impaired viewers would be forced to pay monthly for a service which would only offer them four hours a week of accessible programming, a poor bargain in comparison with the monthly fee providing far more for fully sighted viewers. HBO's exemption should therefore be based on revision of the rule to cover only MVPDs which are both in the top five for audience share and reach 50% of the MVPD households, as suggested by HBO. Alternatively, HBO's status as a premium channel might also qualify it for exemption, but we are reluctant to exclude such programmers categorically.

III. Undue Financial Burdens.

Several petitioners re-raise claims that the rules will place a financial burden on them. While criticizing the Commission's analysis of the financial burden, they offer no specifics on which the Commission could reach an opposite conclusion. We do not believe that any new information has been imparted on this subject. If an organization felt it was entitled to an exemption on this basis, it should have submitted its evidence in the original comments. Moreover, DBS providers can still file appropriate requests for exemption from the rules on grounds of undue burden. At that point, the Commission could consider their specific circumstances with a far more complete view of the financial situation than they have provided to date. The Commission's undue burden procedures are sufficiently broad to permit any petitioner to point out "any other factors the petitioner deems relevant" If undue burden were demonstrated in that context, the Commission could grant an appropriate exemption.

NAB frets that it will be found in violation if one of its members experiences temporary technical difficulties in passing video description through. We assume that the Commission would consider such cases reasonably; the Commission rarely faults a broadcaster or cablecaster for a temporary rule violation stemming from a bona fide temporary technical difficulty. A technical difficulty should not be construed, however, to include the lack of equipment to provide video descriptions which are otherwise required; a temporary difficulty would be a short-term failure of such equipment.

IV. National Federation of the Blind.

NFB stated in its petition for reconsideration "that there is undeniable support for described entertainment among blind people and advocates on behalf of the blind." The Coalition is gratified

that NFB has acknowledged the strong demand in the blind and visually impaired community for this service. Those other petitioners who attempted to demonstrate lack of interest by the blind community in video description by citing previous NFB concerns should take note of this and other similar statements by NFB. NFB also expressed a strong need for "described information" or the rendering of *all* print information appearing on the TV screen into the spoken word. They believe the Commission should not adopt a rule on video description until it can also include provisions for the information they seek. Video description, as considered and mandated by the Commission, is entirely different from the far-reaching "described information" concept alluded to by NFB. The technology and production outlets and know-how for delivering descriptions for television programs have been in place for more than ten years. On the other hand, the methods, means and groundrules for delivering "described information" must be explored and developed. One solution to the "described information" problem (synthetic voice) has already been broached by the industry. While technical issues surrounding synthetic voice must still be resolved (*e.g.*, ensuring that a scrolled message is delivered with adequate aural quality on a separate channel after a tone alert), the technology holds considerable promise for the video industry and consumers alike. Similarly, NFB's concerns about identifying the speaker on news shows can be remedied by sensitizing newscasters to recognize the necessity of aural speaker identification. There is no doubt that NFB's concerns are real and important to the visually-impaired community, but we believe that the broader issues of information accessibility should be totally separated from video description so they may receive the time and attention they deserve. Above all, video description should not be delayed until the wider issues are addressed.

V. Analog and Digital.

Video description rules should apply equally to analog and digital programming. The overwhelming majority of television sets in this country can receive only analog programs, and this state of affairs is most likely to remain for many years. Blind and low vision people should not be expected to wait for relief until the transition to digital can be completed and then be forced to purchase expensive equipment in order to receive the descriptions. Analog is now the basic means of delivering description, as it has been for the past ten years. It should be utilized. However, we strongly believe that the Commission should now mandate transmission and reception of video description in digital television by setting forth rules that require manufacturers of all DTV consumer reception equipment (set-top boxes as well as integrated DTV receivers) to support the ancillary audio channel that video description will utilize in DTV. In addition, the Commission should include in its present rules governing video description a schedule for inclusion of video description on digital broadcasting and cable. In this way, when DTV does become pervasive and affordable, blind and visually impaired people won't face another gap of years before this new technology also becomes accessible. In this regard the Commission should anticipate the need for digital by allocating a digital subchannel for video description services in digital broadcasts. The Commission should also formulate a rule for manufacturers of television sets requiring that navigation of their devices be accessible to visually impaired users. Older TV sets came equipped with a simple button on the remote control to turn on the SAP channel. Most newer sets permit access to the SAP channel only through an on-screen display which is certainly not accessible to the visually impaired population. The equipment manufacturers need to have their consciousness raised with respect to this accessibility issue.

VI. Complaints and Enforcement.

A number of petitioners point to the difference in enforcement procedures for closed captioning and video description. We do not agree that complaints should first be filed with the broadcast or cable outlet in question. Visually impaired viewers cannot read information from the screen telling them where to call or even which broadcast or cable network they are tuned to. Based upon the experiences of our colleagues in the deaf community, viewers will be frustrated as they attempt to track down the appropriate industry person to contact. It would be simpler and far more efficient for visually impaired viewers to have a single point of contact. At first, since many outlets will not carry described programs (and even those who do will carry only four hours a week), there is apt to be much confusion concerning which programs should or should not come with descriptions. The necessity to handle many complaining telephone calls could be obviated if either the Commission or the broadcast and MVPD entities could set up a toll free number to call in order to obtain this basic information and file complaints via some coordinated and accessible system. It would also be helpful if TV guides would clearly designate all described programming so that sighted family members and friends could assist.

The Commission must be directly told about legitimate complaints and should take suitable steps to enforce its rules including, if necessary, fines or license suspension. We believe the necessity for such extreme measures would be rare, if not non-existent. Once the description mandate takes effect, we trust that the broadcast and cable outlets will provide consistent, reliable and effective service. Mistakes may be made, particularly in the beginning, but if the record of any broadcast or MVPD entity is generally good, the blind and visually impaired population will be grateful for the services rendered. We urge the Commission to use every appropriate public venue

to ensure that consumers are aware of the complaint process and documentation requirements outlined in the *Report and Order*.

VII. Repeats, Reruns and Pass Throughs.

We do not believe any broadcast or cable outlet should be forced to change its regularly scheduled programming or add descriptions to classes of programs such as wrestling matches in order to meet video description requirements. NCTA and some individual petitioners say that four hours a week of newly described programming would be difficult to achieve during the summer rerun season. The Coalition is sensitive to this point since we are only seeking parity of the visually impaired with the population at large; no one expects new programs to be created just to accommodate these regulations. Some flexibility here may be warranted to avoid an unintended consequence. If some latitude is granted concerning repeats and reruns, the FCC and the blind and low vision community must be vigilant in determining that it is not abused. Perhaps a maximum number of repeats or reruns in any one quarter could be established. Alternatively, broadcasters and MVPDs could be credited with the first re-run of a described program. (Repeats and/or reruns for closed captioning cannot be compared with video description since the overwhelming majority of TV programs are now captioned and there will be only four hours a week with descriptions. If these four hours turn out to be primarily repeats or reruns, the blind community would continue to have very little access to television.)

TBS also expressed concern that the Commission's rules could be read to disallow the counting of a program described for one cable network but then distributed by another. (The example of a program described for TNT and then run by TBS was cited.) Since the quarterly video description minimums are the responsibility of the MVPDs, this could be a cause of confusion. The

Coalition believes that if the treatment of repeats is modified as discussed above, this situation would also be resolved. We agree that described programming which moves from one cable or broadcast network should be allowed to be counted against quarterly minimums.

One petitioner suggests that there is no need to specify that video description be devoted initially to primetime and children's programming. Given the relatively few hours where video description must be provided, we strongly believe that these hours must be concentrated where the need is greatest. The marketplace cannot be relied upon in this instance, and therefore the Commission's rule should stand.

NAB suggests that stations which have the technical capacity to pass through video descriptions should not be required to pass through described programming once their minimums are met or if they want to use the SAP channel for other purposes. This suggestion should be rejected. The Commission recognized that video description is an important resource to the blind and the visually impaired. However, the Commission adopted an extremely measured approach designed to minimize the financial burdens on those entities required to provide the described programming. In the case of stations which already have the equipment in place and are receiving the programming in described format anyway, there is no reason at all to deprive the visually impaired community of this valuable material. There is so little programming which would fall under this rulemaking and which also would use the SAP channel for Spanish programming that mutually exclusive demands on the SAP channel should be a rare circumstance. The suggestion that an MVPD or local station should be able to use its SAP channel "to provide another service" (comments of NAB, page 3) would leave the door open to a local broadcaster using its SAP channel to reroute its main audio or to carry a local co-owned radio station, and then claim a need for "flexibility" in its use of the SAP channel.

VIII. SAP Usage for Video Description and Spanish-Language.

The contention by satellite providers that their SAP facilities must be either totally dedicated to Spanish language translations or video descriptions for the blind in order to avoid confusion is meritless. Spanish-speaking people and visually impaired people are disadvantaged but they are not mentally impaired. We feel certain that both Spanish speaking and blind people can figure out program schedules and learn to adjust to their viewing habits accordingly.

There are many sections of the country which are almost totally dependent upon satellite delivery. If all satellite providers were allowed to obtain exemptions for one reason or another, this

would greatly reduce the opportunity for blind people to enjoy the new description services. Already only the top 25 markets and top five cable networks will be required to provide any descriptions. If we subtracted areas covered by satellite providers, the area of the country without coverage would increase significantly.

IX. Program Distributors Responsible.

Broadcasters and cable channels have argued that they should not be required to add descriptions to programs which they do not own but only license. The timetable established by the Commission for implementation of video description was very generous for just this reason. By phasing in description over a long period of time and with a very long lead time, the Commission ensured that broadcast and cable licensing agreements could gradually be adjusted to take into account the need to meet FCC requirements for video description. In fact, the history of closed captioning and the Commission's captioning rules don't distinguish between owned and licensed programs. Program licensees have long born the expense and responsibility for captioning programs they merely are licensing for limited distribution. We are confident that in any rare situations where licensing agreements have extremely long lead times, agreements could be reached between program suppliers and their major customer base to add video descriptions to licensed product by agreement. If this were not the case, the undue burden safety valve would always be available. Lack of ownership per se should not be an excuse for not providing descriptions.

X. Definition of Primetime.

Several commenters request that the Commission define primetime more precisely for purposes of determining compliance by nationwide program distributors. The Coalition agrees that a precise definition of prime-time be included in the Commission's rules. We suggest the following

definition: 8-11pm Monday-Saturday in the eastern and pacific time zones; 7-11pm on Sundays in those time zones. Prime time in the Central Time zone coincides with the Eastern Time zone (an hour earlier local time) and prime time in the mountain zone is divided between prime time in the Pacific Time zone and prime time in the Central Time zone. In addition, the Coalition has no objection to the clarification offered by TBS regarding single transponder non-broadcast networks whereby prime time is defined by prime time in the eastern zone (as is the case for TBS) or prime time for whichever zone the single transponder network uses as its origination zone. Should the national distributor like TBS begin to delay their service to the west coast or other time zones and employ additional transponders, the first definition of prime time above should then apply.

CONCLUSION

For all the reasons set forth above and in the voluminous history of this docket, the Commission's rules, while not nearly as far-reaching as the visually impaired community had desired, are sound, reasoned and well substantiated. With the modest clarifications and modifications suggested above, the Commission should reject the petitions for reconsideration and let the video industry commence the work of making video description a reality.

NATIONAL TELEVISION VIDEO ACCESS COALITION

By: _____

Dr. Margaret Pfanstiehl

Donald J. Evans
Fletcher, Heald & Hildreth
1300 N. 17th St.

11th FL
Arlington, VA 22209
703-812-0430

November 13, 2000

CERTIFICATE OF SERVICE

I, Deborah N. Lunt, a secretary with the law firm of Fletcher, Heald & Hildeth, P.L.C., hereby certify that a true copy of the foregoing "THE NATIONAL TELEVISION VIDEO ACCESS COALITION'S CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION" was served by first class mail, postage prepaid, to the following:

Pantelis Michalopoulos
Rhonda M. Rivens
Steptoe & Johnson, LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
Counsel for EchoStar

Gary M. Epstein
James H. Barker
Kimberly S. Reindl
Latham & Watkins
1001 Pennsylvania Avenue, NW
Suite 1300
Washington, DC 20004-2505
Counsel for DIRECTV

James Gashel
Director of Government Affairs
National Federation of the Blind

Daniel L. Brenner
Diane B. Burstein
National Cable Television Association
1724 Massachusetts Avenue, NW
Washington, DC 20036

James J. Popham
Vice President and Statutory License Counsel
Motion Picture Association of America, Inc.
1600 Eye Street, NW
Washington, DC 20006

Henry L. Baumann
Jack N. Goodman
Jerianne Timmerman
National Association of Broadcasters
1771 N Street, NW
Washington, DC 20036

Benjamin J. Griffin
James L. Casserly
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, PC
701 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20004
Counsel for Home Box Office

Bertram W. Carp
Williams & Jensen
1155 21st Street, NW, Suite 300
Washington, DC 20036
Counsel for Turner Broadcasting
Systems, Inc.

Deborah N. Lunt