

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**NATIONAL TELEVISION VIDEO ACCESS COALITIONS'S  
OPPOSITION TO STAY REQUEST**

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## SUMMARY

The video description rules are scheduled to become effective in less than 30 days. This appeal has been pending for almost a year. In that time, with no stay requested, video description companies have hired personnel to create the video descriptions. Many broadcasters and cablecasters have already purchased video-described programming and have established the facilities to enable the feed of described programs over the SAP channel. If the television industry wanted a stay of these rules, it should have requested it a year ago before substantial effort and expense had gone into implementation of the rules by all concerned.

Petitioners have not shown that they will suffer any irreparable harm whatsoever. Most of the costs they complain of have either already been incurred or will not be wasted in any event. On the contrary, it is the visually impaired community who will suffer unnecessary exclusion from the video mainstream if the effective date of the rules is stayed. The public interest therefore weighs very heavily in favor of permitting these long-delayed rules to go into effect. Finally, petitioners have not shown that they are likely to succeed on the merits of their Petition for Review. The Commission has broad authority to create and implement the video description rules in response to Congress's articulated goal of "ensur[ing] the accessibility of video programming to persons with visual impairments." 47 U.S.C. § 713(f). The Petitioners place great weight on Congress' removal of language regarding video description from the statute. However, Congress may have thought that giving the FCC express discretion to promulgate rules was redundant with the existing broad FCC powers, and thus left it out. In fact, while § 713 specifically limits the discretion of the FCC to choose to promulgate or forgo closed caption regulation, it does not similarly restrict the FCC's rulemaking powers regarding video description.

Petitioners next argue that the Commission's video description rules are an impermissible interference with free speech and exercise of control over content. The FCC's video description regulations do not regulate content. Like closed captioning regulations, these regulations specify the manner in which programs may appear. They do not identify which specific programs should be video described, nor do they require a specific video description format. A producer is free to choose from any number of video descriptions of the same work, and a broadcaster is free to choose which programs to broadcast with video descriptions.

The Petitioners have thus not met the Commission's standard for stay of the video description rules.

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The National Television Video Access Coalition (“NTVAC”) hereby opposes the Request for Stay filed by MPAA, NAB, and NCTA (“Petitioners”) on February 22, 2002, in the above captioned rulemaking proceeding. For the reasons set forth below, the Petitioners have failed by a long shot to meet any of the threshold criteria needed to justify a stay. Their request must therefore be denied.

**ARGUMENT**

The Commission’s adoption of the video description rules two years ago was the culmination of almost fifteen years of effort by the visually impaired community to make television programming accessible for the first time. The visually impaired are now on the very brink of making the same quantum leap forward that the sighted world made in the 1950’s when people turned off their radios and turned to television for news and entertainment. As the Commission has recognized, television represents the main artery through which modern American culture pulsates. *Implementation of Video Description of Video Programming*, 15 F Rcd 15230 (2000). It is the single common and nationwide denominator for entertainment and news. Without overstating the case, exclusion from access to television prevents the visually impaired from participating fully in popular contemporary American

culture. The television media now seek at the eleventh hour to deny those 12 million Americans that right.

Petitioners recognize that they must meet the four part test of *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F. 2d 921, 925 (DC Cir. 1958) in order to justify the extraordinary equitable relief of a stay. Their motion concentrates heavily on what they consider the likelihood of success on the merits, giving very short shrift to the other three key elements. Before turning to their likelihood of success, however, we should address those critical elements of the test that Petitioners glide over so quickly.

**I. THERE IS NO IRREPARABLE HARM.**

Petitioners argue that they will incur as a group between \$1.3 million and \$5.4 million in costs by adding video description to programs for the rest of this year. The video description rules were originally adopted in July of 2000. Most prudent programming distributors recognized that it would be necessary to contract for video described programs well in advance of the April 1, 2002, effective date, and they have in fact done that. As the attached declarations of Narrative Television Network and WGBH attest, the covered media entities have *already arranged* the video description of a considerable portion of the programming necessary to meet the Commission's mandate. The money has already been spent. It simply makes no sense for Petitioners to have waited until a month before the rules go into effect to request a stay since all of the infrastructure costs and much of the program production costs must already have been incurred. Granting a stay at this point would not give the Petitioners the relief they posit. Indeed, the contrary might be the case: having now expended the funds necessary to comply with the rule, it would be absurd and wasteful for that investment to be shelved while the rules themselves are undergoing judicial review.

Several other points about the “irreparable harm” bear note. First, the \$1-5 million cost of producing described programs -- spread over nine major media conglomerates -- is so infinitesimally small as to be laughable. NBC, for example, recently boasted to the trade press that it had grossed \$740 million and cleared \$75 million in profit just on its coverage of the Winter Olympics alone.<sup>1</sup> That profit was on a single set of programs on a single network in one two-week period. We may cautiously extrapolate that the costs of video description are less than one-thousandth of the network's and cable system's profits. Industry-wide, the cost of video description is so low as to represent pocket change to the networks, not even warranting a footnote on their bloated financial statements. To assert that these costs represent "irreparable harm" borders on the frivolous.

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<sup>1</sup>*NBC's Olympics Alchemy: Gold from Brass, The Washington Post*, February 25, 2002.

As for the infrastructure costs, the Commission expressed serious doubts in adopting the rules that the costs would be anywhere near as high as the networks were guesstimating. During the rulemaking, WGBH showed that notoriously underfunded public television stations were easily able to make the SAP channel available for network feeds at a fraction of the costs waved around by the networks. Having rejected those inflated figures before, the Commission should not give them any more credence now.<sup>2</sup> Moreover, Petitioners vaguely suggest that Spanish language programming “might” be displaced by the video described programming. To the extent that is true -- and the record in this case does not demonstrate any significant displacement -- that means that the SAP infrastructure is already there. The “costs” they are talking about to install a SAP infrastructure have *already* been incurred for reasons independent of video description. This also shows that any infrastructure costs incurred from video description will not be wasted regardless of the outcome of the appeal.

In sum, (a) the program distributors have already incurred most of the costs they are asking to avoid, (b) those costs are themselves minuscule in the context of national television profits, (c) the cost estimates are grossly overstated in any case, and (d) the infrastructure either already is being or may be used for other useful program distribution purposes and will therefore not be wasted. The crucial element of irreparable harm is just not here.

## **II. HARM TO OTHER PARTIES.**

Petitioners blithely assert that since the visually impaired have never had video description, they won't be hurt by delaying its implementation for almost a year. That's like saying, “they've been blind all their lives, who cares if they stay blind a few months longer?”

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<sup>2</sup> Implementation of Video Description, *supra*, at footnote 34. Curiously, Petitioners persist in relying on estimates of the infrastructure costs even though we know for a fact that some distributors have already installed the required facilities. The fact that they have avoided use of the true costs can only support the inference that the real costs are

The long exclusion of the visually impaired from the mainstream of American media is not a reason for delaying implementation – it’s the strongest reason *not* to delay implementation a second longer. It is impossible to quantify what it means to a visually impaired person not to be able to share in the ordinary television viewing experience that the sighted world takes for granted, always to be getting just a fraction of the information communicated in a TV show. Hundreds of visually impaired persons took the time to express their strong support for video description during the rulemaking phase. In case after case they related their personal stories of what a difference it has meant to experience video description on the few occasions when it has been available over the air. To say that no one will be harmed by the delay is to deny the very real needs of the 12 million visually impaired people in this country, as fully developed in the record of this proceeding.

In this regard, we note that the National Television Video Access Coalition includes all of the major organizations concerned with the needs of the visually impaired in the United States except the National Federation for the Blind. NFB, for its part, has actually argued that the FCC’s rules should, in some ways, be *more* extensive than the rules as adopted. They say the rules should be expanded to include all on-screen text. Moreover, even within NFB, there is very substantial sentiment among the rank and file members in favor of video description.

Also harmed by a stay would be the segments of the video description community who have geared up to meet the demand for described programming. Even the relatively light 50 hours per quarter of described programming mandated by the FCC’s rule cannot be produced out of thin air. An infrastructure of describers has had to be organized and, in some cases,

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a lot lower than they had earlier claimed.

expanded, in order to handle the demand . As noted above, this description community is already producing described programs at a brisk pace. If the FCC were to suddenly put a hold on the rules, it would cripple the effort that has already been made to put video description on a systematic and routine production basis. We believe that by fostering the growth and development of a number of video describers, the costs of video description to all program producers will ultimately be lowered. Imposition of a stay now would strangle this essential mini-industry in its cradle.

### **III. WHERE LIES THE PUBLIC INTEREST?**

Petitioners effectively concede that there is no specific public interest justification for imposing a stay. They simply assert that if their expansive view of the First Amendment is adopted by the Court, in that event they would have been unlawfully burdened by the video description regulations. Of course, in *any* situation in which the legality of regulations is in issue, there is always a possibility that rules will go into effect which are later found to be unlawful. The *Virginia Petroleum Jobbers* standard requires a more careful weighing of the public interest balance than that.

Here we have an extremely modest regulation which the Commission has found will benefit as many as 12 million people in a direct, dramatic, and immediate, though largely unquantifiable, way. Making this programming accessible furthers the Congressionally promulgated policy of the United States “to make available, so far as possible, to *all* people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service.” 47 U.S.C. § 151. Even more to the point, Congress has ordained that all telecommunication services should be made accessible to the disabled, 47 U.S.C. Section 255, and that to the greatest extent possible, discrimination against the disabled should be

eliminated. 42 U.S.C. 12101(b)(1). The Commission's regulations are a first faltering step toward these well established and lofty national goals. In addition, the Supreme Court has recognized that "the public interest would be served by making television broadcasting more available and more understandable to the substantial portion of our population that is handicapped by impaired hearing." *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 508 (1983). The video description rules obviously serve a similar public interest purpose.

On the other hand, we have broadcast and cable networks who reap billions of dollars in revenue from their use of the public airwaves and the public rights of way. As part of their public interest obligation, they are being required here to incur the negligible expense of procuring described programs and feeding them through their distribution system. They are not being told what to say in any way cognizable by the First Amendment. Rather, they are being told that when they depict something visually – whatever that something is – they must make it available to the visually impaired. Weighing the benefits to the public against the trivial burdens imposed on the entertainment industry, it is clear that the Commission made the right choice in the first place by adopting these rules. The public interest lies squarely with the regulations as adopted.

**IV. PETITIONERS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR CHALLENGE TO THE FCC'S VIDEO DESCRIPTION RULES.**

Petitioners raise for the third time the same arguments regarding jurisdiction and content regulation which they have raised before. The Commission considered exactly these same arguments before adopting these rules and again on reconsideration of the rules. Nothing has happened in the meantime to suggest that the Commission was any less correct on the law then than it is now.

**A. Congress Did Not Preclude FCC Adoption of Video Description Rules.**

Petitioners argue that § 713, in not expressly requiring video description, expressly denied the Commission the authority to adopt video description rules. Reliance on the maxim of *expressio unius est exclusio alterius* – that the expression of one is the exclusion of others – is misplaced. “The maxim ‘has little force in the administrative setting,’ where [courts] defer to an agency’s interpretation of a statute unless Congress has “‘directly spoken to the precise question at issue’”” *Mobile Comms. Corp. of Am. v. FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996) (quoting *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991)). See also *id.* at 1405 (“*Expressio unius* ‘is simply too thin a reed to support the conclusion that Congress has clearly resolved [an] issue.’”). In *Mobile Comms.*, the D.C. Circuit upheld an FCC rule promulgated under the same general powers relied upon in this case. See *id.* In that case, the FCC ordered the charging of a fee for a license when Congress had no expressly provided for such a fee, but had expressly done so for a different type of license.

The lack of parallelism between § 713's treatment of closed captioning and video description is, similarly, not evidence of Congress’ preclusion of the adoption of video description rules. “There is undeniably a lack of parallelism here, but it seems to us adequately explained by the fact that [one provision] specifically requires the Commission to promulgate regulations implementing that provision, where [a subsection of another provision] does not. It seems to us not peculiar that the mandated regulation should be specifically referenced, where regulations permitted pursuant to the Commission’s [more general] authority are not. In any event, the mere lack of parallelism is surely not enough to displace that existing authority.” *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 384-85 (1999). A recent Supreme Court case

further rebuts Petitioners' arguments. See *National Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, \_\_\_ U.S. \_\_\_, 122 S. Ct. 782, (Jan. 16, 2002)(ruling that general grant of FCC rulemaking power for pole attachments was not limited because the FCC's rules did not fall within one of two more specific, overlapping grants of FCC authority).

**B. The FCC Has the Authority to Adopt Video Description Rules**

Congress adopted the Communications Act of 1934 “for the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, *to all the people of the United States . . .* a rapid, efficient, Nation-wide, and world-wide wire and radio communications service . . .” 47 U.S.C. § 151 (Section 1 of the Act)(emphasis added). “The underlying policy of the Communications Act is the securing and protection of the public interest.” *WOKO, Inc. v. FCC*, 109 F.2d 665, 667 (D.C. Cir 1939). “Within the area bounded by the standard of public interest, convenience and necessity, the Commission has wide discretionary power. If it acts within this area of discretion prescribed by the Act, and its determination is supported by substantial evidence, there is no ground or reason for judicial interference. . . .” *Id.* (citations omitted).

Courts have broadly interpreted the FCC's general rule-making powers under the Act. The Act, in 47 U.S.C. § 154(i) ( Section 4(i) of the Act), states that “[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.” The D.C. Circuit permitted the FCC to create a universal service fund (for which at the time there was no express statutory authority) relying on Sections 1 and 4 of the Act (47 U.S.C. § § 151 and 154, respectively). “As the Universal Service Fund was proposed in order to further the objective of making communication service available to all Americans at reasonable charges, the proposal

was within the Commission’s authority.” *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988).

The FCC’s video description rules likewise were “proposed in order to further the objective of making communication service available to all Americans,” 838 F. 2d at 1315, and therefore “was within the Commission’s authority,” *id.*, under sections 154(i) and 303(r). The language of § 713 contains no restriction on the FCC’s broad rule-making authority. Courts should not lightly imply such a restriction on their own. *Cf. United States v. Oakland Cannabis Buyers’ Cooperative*, 535 U.S. \_\_\_, \_\_\_, 12 S. Ct. 1711, 1718, 1721 (2001)(rejecting lower court’s adoption of an implied necessity defense where plain language of the statute did not support it). Section 713 requires both closed captioning and video description be studied. In the case of video descriptions, § 713 reads in relevant part:

Within 6 months after February 8, 1996, the Commission shall commence an inquiry to examine the use of video descriptions on video programming in order to ensure the accessibility of video programming to persons with visual impairments, and report to Congress on its findings. The Commission’s report shall assess appropriate methods and schedules for phasing in video descriptions into the marketplace, technical and quality standards for video descriptions, a definition of programming for which video descriptions would apply, and other technical and legal issues that the Commission would deem appropriate.

Clearly Congress expresses here an interest in ensuring the accessibility of video programming to persons with visual impairments. This expression of interest is completely consistent with Congress’ general goal of increasing accessibility of services to the public. Accordingly, the adoption of the video description rules was within the FCC’s rulemaking power.

### **C. The Video Description Rules Do Not Regulate Content**

Petitioners argue that the video description rules impermissibly interfere with the right to free speech by regulating content. However, the concept of regulation of content is defined

as regulation of the message being conveyed. “Not every governmental action which affects speech implicates the First Amendment.” *Block v. Meese*, 793 F.2d 1303, *cert. denied*, 478 U.S. 1021, *rehearing denied*, 481 U.S. 1043 (1986). “The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.” *Time Warner v. FCC*, 211 F.3d 1313 (D.C. Cir. 2000)(quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791(1989)) (alterations in original). The First Amendment protects persons from being compelled to express adherence to ideological point of view he finds unacceptable. *People of State of California v. FCC*, 75 F.3d 1350, *cert denied*, *California v. FCC*, 517 U.S. 1216 (1996); *R.A.V. v. City of St. Paul, Minn*, 505 U.S. 377 (1992). (The First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of ideas expressed).

On the other hand, “[a]ssuring that the public has access to multiplicity of informational sources is governmental purpose of highest order, as it promotes values central to the First Amendment.” *Time Warner Entertainment Co., L.P. v. F.C.C.*, 93 F.3d 294 (D.C. Cir.), *rehearing in banc denied*, 105 F. 3d 723 (D.C. Cir. 1995). In this case, the FCC’s video description regulations do not regulate content. Like closed captioning regulations, these regulations specify the manner in which programs may appear in order to ensure that they reach the broadest audience possible, whatever the message may be. They do not identify which specific programs should be video described, nor do they require a specific video description format. A producer is free to choose from any number of video descriptions of the same work, and a broadcaster is free to choose which programs to broadcast with video-descriptions. The

FCC has not focused on the message, it has focused on disseminating information to the public – a governmental purpose of the highest order.

V. **CONCLUSION.**

Because Petitioners have failed to meet the high burden necessary to justify a stay, their request should be denied.

Respectfully submitted,

**NATIONAL TELEVISION VIDEO  
ACCESS COALITION**

By \_\_\_\_\_ /S/

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## CERTIFICATE OF SERVICE

I, Deborah N. Lunt, a secretary with the law firm of Feltcher, Heald & Hildreth, PLC, hereby certify that true copies of the foregoing OPPOSITION TO STAY REQUEST were sent by first class mail, postage prepaid, this 1<sup>st</sup> day of March, 2002, to the following:

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