

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

In the Matter of)	
)	
Video Description: Implementation of the)	MB Docket No. 11-43
Twenty-First Century Communications and)	
Video Accessibility Act of 2010)	

**REPLY COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (NCTA) hereby submits reply comments in response to the comments filed in the above-referenced proceeding.¹ As emphasized in NCTA’s initial comments, the cable industry is committed to enhancing the accessibility of its video programming services to its customers with disabilities. The record in this proceeding demonstrates that Commission adoption of rules that provide sufficient time and flexibility will best ensure the success of the new video description regime.

In the Twenty-First Century Communications and Video Accessibility Act (“CVAA” or the “Act”), Congress carefully limited the Commission’s authority in this rulemaking to reinstatement of its prior video description rules, with certain specified exemptions and limitations.² The CVAA also sets the course for future Commission efforts in this area. The video description working group of the Video Programming Accessibility Advisory Committee (“VPAAC”) is examining ways to improve the delivery of video description outside the

¹ See *In re Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Notice of Proposed Rulemaking, 26 FCC Rcd 2975 (2011) (“Notice”).

² See Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, § 202(a)(3), § 713(f)(1), 124 Stat. 2751 (2010) (“CVAA” or the “Act”). The revised Section 713(f)(1) of the Communications Act provides that “the Commission shall, after a rulemaking, reinstate its video description regulations contained in the Implementation of Video Description of Video Programming Report and Order (15 F.C.C.R. 15,230 (2000)), recon. granted in part and denied in part, (16 F.C.C.R. 1251 (2001)), modified as provided in paragraph (2).” *Id.*

rulemaking process.³ Those efforts will ensure that even after the Commission adopts rules in this proceeding, the cable industry and other stakeholders will continue to explore future voluntary advancements in this area.

DISCUSSION

In the initial comment round, the broadcast and cable industries recommended that the Commission designate the fourth calendar quarter of 2012 – one year after the rules are adopted – as the beginning calendar quarter for which compliance with the video description rules will be calculated.⁴ This approach is amply supported by record evidence, which demonstrates that significant preparation and coordination is required to ensure the seamless provision of video description to customers, and that the schedule proposed in the *Notice* does not allow sufficient time for this groundwork to take place.⁵ In sum, because “[i]mplementation of the CVAA in the 2011 digital world necessarily will have many moving parts and will require significant technical coordination among broadcasters, non-broadcast programmers, multichannel video programming distributors (MVPDs), and manufacturers,”⁶ the proposed compliance date of January 1, 2012 in the *Notice* is simply “far too soon.”⁷

³ See CVAA § 201(e)(2).

⁴ See NAB Comments at 15-16 (explaining that video description programming requirements should become effective on October 1, 2012); NCTA Comments at 13 (same); see also APTS/CPB/PBS Joint Comments at 5 (requesting that the Commission delay the pass-through requirement “until January 1, 2013, or at least until one year after adoption of the rules – October 18, 2012”).

⁵ See NCTA Comments at 9-13; NAB Comments at 15-16; APTS/CPB/PBS Joint Comments at 4-5.

⁶ NAB Comments at 2.

⁷ APTS/CPB/PBS Joint Comments at 5.

The record likewise demonstrates that the exemptions for “program-related conflicts” must be preserved in the new rules.⁸ While some commenters mistakenly believe that the transition to digital has obviated the need for these exemptions,⁹ the record proves otherwise.

Cable, broadcast, and satellite commenters all showed that much of their infrastructure today is designed for a two audio channel (main and secondary) world, and that the exemptions are still necessary to account for potential conflicts on the one shared secondary audio stream that will be used to provide video description.

For example, NAB noted that “[w]hile it is possible for over-the-air DTV broadcasters to *transmit* more than one additional audio stream under the current ATSC standard, *reception* is an entirely different matter. For example, due to the limitations of some MVPDs, as well as the over 100 million legacy analog television receivers connected to digital-to-analog converter boxes, many customers are limited to only two audio program channels.”¹⁰ The DBS providers similarly stated that “neither the passage of time nor the digital transition has had a measurable effect on the DBS Providers’ technological constraints and the exception should be retained.”¹¹ NAB noted that, in light of equipment and distribution issues, it “would not be realistic to require broadcasters to provide video description in any manner other than the use of the single additional audio stream.”¹²

⁸ Under 47 C.F.R. § 79.3(b)(4), MVPDs were required to pass through video description on each broadcast station or non-broadcast network they carry, “unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description.” Section 79.3(c)(4) contains a similar exemption from the requirement to otherwise include video description on all subsequent airings of a previously-described program.

⁹ See WGBH National Center for Accessible Media (“NCAM”) Comments at 3; American Council of the Blind (“ACB”) Comments at 6 (urging the Commission to remove the SAP exemption).

¹⁰ NAB Comments at 4 (emphasis in original), *see also id.* at 6-8.

¹¹ DIRECTV/DISH Joint Comments at 2, 3-4 (explaining that DBS providers “have designed their systems to include only a single secondary audio channel”); *see also* AT&T Comments at 3.

¹² NAB Comments at 22.

Disney also urged the Commission to retain this “program-related conflicts” exemption for subsequent airings of video described programming, explaining that it is “particularly important for non-broadcast networks like Disney Channel because Disney Channel airs a significant number of repeats of its popular children’s and family programming.”¹³ The exemption enables programmers to “ensure that [their] programming is accessible by both the visually-impaired and the Spanish-speaking communities.”¹⁴ It is critical for networks to be able to continue to serve Spanish-speaking audiences by providing Spanish language in a secondary audio stream even if that program contains video description when aired at other times.¹⁵ Accordingly, maintenance of the “program-related conflicts” exemptions – from both the “pass through” and “repeat airings” requirements – is warranted.

Other commenters seek to have the Commission prescribe certain technical aspects of cable operators’ delivery of video description. The American Council of the Blind (“ACB”), for example, suggests that the Commission “require that at least one audio channel be set aside for audio description.”¹⁶ However, the Commission must recognize that legacy equipment limits industry’s flexibility to provide video description other than in the secondary audio stream. While the industry, along with other interested stakeholders, is considering alternative ways to

¹³ See Disney/ESPN Comments at 4.

¹⁴ *Id.*; see also NAB Comments at 22.

¹⁵ Today, several of the networks that would be covered by the rules provide Spanish language on a substantial amount of their programming line-up.

¹⁶ ACB Comments at 6. See also Dolby Laboratories Comments at 3 (proposing receiver-mix approach); CEA Comments at 4 (stating that “MVPDs need to ensure that set-top boxes provide a means to select video description and then present that audio in place of the normal program audio on the interface to the television” and that where an MVPD network is accessed directly by a consumer-owned device, “video description must pass through the network and be signaled in accordance with the standard governing program information for that network”). With respect to CEA’s proposals, cable set-top boxes already provide a way for customers to select and utilize video descriptions, and there are already established methods whereby cable systems can pass through, and signal the presence of, video descriptions to digital cable-ready products.

provide video description, those voluntary efforts are outside the scope of the FCC's rulemaking authority.

Several other proposals set forth in the comments exceed the Commission's authority and accordingly must be rejected. For example, the WGBH National Center for Accessible Media ("NCAM") seeks adoption of a rule that would require a non-broadcast network that falls out of the top five ranked networks to continue to provide described programs as it had during the period when it was ranked in the top five.¹⁷ As the Commission explained in the *Notice*, Congress directed that the rules apply to only the top five national non-broadcast networks.¹⁸ The Commission has no authority to expand the rules to cover additional non-broadcast networks beyond those five, and it would be unfair to do so in any event. Congress determined that the five most popular non-broadcast networks could best bear the significant costs associated with video description. If a network no longer is one of those top networks, the assumptions underlying its ability to bear those recurring costs no longer would hold.

Similarly, the Commission must reject the request by ACB to disregard the statutory mandate to categorically exempt live and near-live programming from the new rules.¹⁹ Although some networks may voluntarily choose to provide video description on certain exempt programming, Congress clearly instructed that the Commission must exempt such programming from the new video description obligations.²⁰

¹⁷ See NCAM Comments at 2-3.

¹⁸ See *Notice* ¶ 13; see also CVAA § 202(a)(3), § 713(f)(1).

¹⁹ See ACB Comments at 6. The Commission must also reject ACB's request that "not all of a network's description content should be from children's programming." See *id.* at 2. The rules adopted by the Commission in 2000 included no such prohibition, and the Commission does not have authority to add one.

²⁰ See CVAA § 202(a)(3), § 713(f)(2)(E) ("The regulations shall not apply to live or near-live programming.").

In that regard, with respect to considerations relevant to the definition of “near-live,” as NAB explains, “[t]he question is not what type of programming is similar to live programming, but rather what type of programming is produced with a production time so limited that it does not allow for video description.”²¹ Indeed, “the critical factor in near-live programming is not when the program was ‘performed and recorded,’ but rather when the program is delivered to a network in final edited and approved form to begin the video description insertion process.”²² Although NCAM asserts that it has the capability to “turn around description for a one-hour program in less than 24 hours,”²³ NCTA’s understanding is that the typical production process takes significantly longer even today, where much less video description is being produced than will be the case under the forthcoming rules.²⁴ Moreover, entities like NCAM only perform part of the process of producing descriptions. Thus, the Commission should view skeptically claims that a less-than-24 hour timeframe is appropriate and fashion a definition of “near-live” that can truly accommodate the process of creating video-described programming.²⁵ In addition, as NAB suggests, the Commission should make clear that the near-live exemption applies to delayed or repeated near-live programming.²⁶

²¹ NAB Comments at 16-17.

²² *Id.* at 17.

²³ NCAM Comments at 4.

²⁴ *See* NCTA Comments at 14-15. Many variables affect the timing of video description production, including that a network may rely on different vendors to perform the various steps of the process.

²⁵ *See, e.g.*, NAB Comments at 17 (proposing that the Commission define near-live as “programming delivered to the network in final, edited and approved form no less than 168 hours (seven days) prior to the time it is first aired”).

²⁶ *See id.* at 18.

NCAM and ACB also urge the Commission to craft quality standards for the new description rules.²⁷ The initial round of comments is replete with evidence that the Commission should not do so. Such action would raise significant jurisdictional and constitutional concerns.²⁸ Adopting quality standards risks unintended consequences, such as freezing into place a “lowest common denominator” of standards that would ultimately harm consumers.²⁹ In light of these concerns, the Commission should not adopt regulations governing quality.

The Commission should also reject calls to establish regulations related to description of online programming.³⁰ As noted, Congress carefully limited the Commission’s authority to reinstatement of its prior rules. With respect to online distribution of video programming, the CVAA allows the Commission to study such issues beginning “not later than 1 year after the

²⁷ See ACB Comments at 7; NCAM Comments at 5. ACB also asks the Commission to investigate issues related to sound quality. See ACB Comments at 8. The cable industry is committed to working with equipment suppliers and other participants in the video distribution ecosystem to preserve good sound quality on video descriptions. There is no basis for imposing technical mandates in this area and, in any event, technical requirements would be exceedingly difficult to develop and implement given the dynamic, evolving, and highly diverse nature of MVPD networks. In addition, adopting technical requirements that may not be possible for cable operators to meet would make many more operators “technically incapable” of providing video description and hence not able to pass the video description through to customers. This would be counterproductive to the CVAA’s intent to ensure increased access to video description for those with visual disabilities.

²⁸ See NCTA Comments at 17-18; NAB Comments at 24-25 (“There is no basis for the Commission to impose quality standards for video description, either on the network that provides the video described programming or on the local broadcast affiliate stations that have no ability to monitor quality of the programming they pass through.” Moreover, “evaluating quality of video description would require subjective determinations by the Commission that are not appropriate in light of First Amendment concerns and the no censorship provision of the Act. It would be almost wholly subjective and clearly inappropriate for the Commission to attempt to determine, for example, that a particular scene in a video program should have been described differently or somehow ‘better.’”).

²⁹ See APTS/CPB/PBS Joint Comments at 6 (recommending that the Commission rely on the marketplace to regulate quality because “the establishment of quality standards often has the opposite effect over time of reducing quality and hampering improvement. Initial standards are often written to the then current lowest common denominator in order for easy and timely implementation, and this sets the bar at a low point, thus acting as a disincentive in motivating the marketplace to provide improvements over time”).

³⁰ For example, ACB urges the Commission to require that covered networks “ensure that whenever the described content prepared for prime time or children’s broadcasting is made available via internet, all such content has accompanying audio description without exception.” See ACB Comments at 4. In addition, ACB urges the Commission to “consider broadcasts via the internet as another delivery mechanism for type of broadcast and for pass-through purposes.” *Id.* at 7.

completion of the phase-in of the reinstated regulations.”³¹ However, it provides no authority to the Commission to require video description of online programming.³²

Finally, as explained in our comments, the Commission should use the flexibility afforded in Section 713(f)(2)(D) of the Communications Act, as added by the CVAA, to adopt a new categorical exemption to ensure that its new rules do not adversely impact the providers of video description or program owners.³³ Specifically, the Commission should make clear that a network is exempt from the 50-hour requirement in a particular quarter if the network does not have the requisite hours of non-exempt, non-repeat programming in its prime-time or children’s programming line-up to describe.³⁴ Adoption of such a categorical exemption would clarify that the obligation is to provide video description on 50 hours (or all, whichever is less) of non-exempt children’s or prime-time programming.³⁵ Such action will preserve programmers’ ability to schedule programming without requiring advanced governmental approval in the form of a waiver.

³¹ CVAA § 202(a)(3), § 713(f)(3)(B).

³² *See id.* § 713(f)(4)(B) (limiting any additional authority to certain increases in the hours of video-described programming).

³³ *See* NCTA Comments at 16-17.

³⁴ Otherwise, as noted in NCTA’s comments, a conflict could arise if a program network airs a considerable amount of live or near-live programming during prime-time in any particular calendar quarter (for example, to offer seasonal sporting event programming), or if a network schedule is largely comprised of previously-described programming. Under the rules, only video-described children’s or prime-time programming is credited toward the 50 hour benchmark within a calendar quarter, and only a single rerun of such programming counts within that quarter. Thus, it is possible that in some instances a network may simply run out of programs that can be counted toward the 50 hour requirement. *See* NCTA Comments at 17.

³⁵ This is analogous to the Commission’s handling of a similar issue in its captioning rules. *See* 47 C.F.R. § 79.1(b).

CONCLUSION

As the initial comments in this proceeding make clear, the provision of video description is a complex undertaking. A coordinated effort is needed to ensure that the widespread roll-out of this service proceeds smoothly. The Commission should provide sufficient time and flexibility to help ensure its successful implementation. It also should adhere to the careful balance of interests that Congress intended in authorizing reinstatement of the video description rules.

Respectfully submitted,

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May 27, 2011

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