

other method that would best accommodate a complainant's disability. A complaint shall include the name and address of the complainant. The complaint shall include the name of the broadcast station or MVPD against whom the complaint is alleged. A complaint against a broadcast station should include the name and address of the station, and its call letters and network affiliation. A complaint against an MVPD should include the name and address of the MVPD, and the name of the network that provides the programming that is the subject of the complaint. Complaints should include a statement of facts sufficient to show that the broadcast station or MVPD has violated or is violating the Commission's rules, and, if applicable, the date and time of the alleged violation; the specific relief or satisfaction sought by the complainant; and the complainant's preferred format or method of response to the complaint (such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, or some other method that would best accommodate a complainant's disability). Complaints should be sent to the Commission's Consumer Information Bureau. That bureau will forward formal complaints to the Commission's Enforcement Bureau, and we delegate authority to the Enforcement Bureau to act on and resolve any complaints in a manner consistent with this *Report and Order*.

46. Complaints satisfying the requirements described above will be promptly forwarded by Commission staff to the broadcast station or MVPD involved, which shall be called on to answer the complaint within a specified time, generally within 30 days. To ensure fair and meaningful enforcement of our video description requirements, we will authorize the staff to either shorten or lengthen the time required for responding to complaints in particular cases. For example, if a complaint alleges that the video description disappeared during a program, we believe that it is appropriate to require the broadcast station or MVPD to respond within 10 days after being notified of the complaint in order to minimize the risk of repeat or recurring problems. If, on the other hand, a complaint alleges that a broadcast station or MVPD has not met its quarterly requirements, it may not be appropriate to require the broadcast station or MVPD to respond until the end of the quarter that is the subject of the complaint. However, recurring complaints or a pattern of such complaints against a particular broadcast station or MVPD may warrant a more immediate response to ensure that quarterly requirements are being addressed by the broadcast station or MVPD in manner consistent with their intended purposes. Commission staff will manage our complaint processes to reflect these and other case specific differences. The burden of proof of compliance in response to a complaint is on the broadcast station or MVPD, and they must maintain records sufficient to show their compliance with our rules.

47. Commission staff will review all relevant information provided by the complainant and defendant broadcast station or MVPD and may request additional information from either or both parties when needed for a full resolution of the complaint. Certifications of compliance from programming suppliers, including programming producers, programming owners, networks, syndicators and other distributors, may be relied on by broadcast stations and MVPDs to defend against claims of noncompliance. As a general matter, distributors will not be held responsible for situations where a program source falsely certifies that programming delivered to the distributor meets our video description requirements and the distributor did not know and could not have reasonably ascertained that the certification was false. However, we expect broadcast stations and MVPDs to establish appropriate policies and procedures to safeguard against such false certifications. Commission staff will scrutinize complaints to ensure that broadcast stations and MVPDs vigilantly adhere to our video description requirements. If we determine that a violation has occurred, we will use our considerable discretion under the Act to tailor sanctions and remedies to the individual circumstances of a particular violation. For example, in egregious cases or cases demonstrating a pattern or practice of noncompliance, sanctions may include a requirement that the video programming distributor deliver video programming containing video description in excess of its requirements.

VIII. EMERGENCY INFORMATION

48. Background. In the *Notice*, we observed that public safety messages that scroll across the TV screen are not accessible to persons with visual disabilities, and sought comment on a proposal to require an aural tone to accompany the messages to alert such persons to turn on a radio, the SAP channel, or a designated digital channel.¹³⁰ We sought comment on the proposal, and any other effective approaches, such as whether these messages could be provided via "open" video description.¹³¹ The NFB and some of its members that filed comments supported the Commission taking steps to enhance the accessibility of emergency information.¹³² Some other commenters suggested that we consider this issue in a different proceeding.¹³³

49. Discussion. Consistent with our recent decision to require any broadcast station or MVPD that provides emergency information to make the critical details of that information accessible to persons with hearing disabilities,¹³⁴ we require any broadcast station or MVPD that provides local emergency information to make the critical details of that information accessible to persons with visual disabilities. Our rule applies to all broadcast stations and MVPDs that provide emergency information, as opposed to just those in the largest TV markets or with the largest number of subscribers. We believe this is appropriate both because of the importance of emergency information and because it does not involve the kinds of technical issues involved in using a SAP channel. We envision that affected broadcast stations and MVPDs will aurally describe the emergency information in the main audio as part of their ordinary operations. This would be similar to providing "open" video description. We define emergency information to be that which is intended to protect life, health, safety, and property, *i.e.*, critical details about an emergency and how to respond to the emergency. Examples of the types of emergencies covered include tornadoes, hurricanes, floods, tidal waves, earthquakes, icing conditions, heavy snows, widespread fires, discharge of toxic gases, widespread power failures, industrial explosions, civil disorders, school closings and changes in school bus schedules resulting from such conditions, and warnings and watches of impending changes in weather. These examples are intended to provide guidance as to what is covered by the rule and are not intended to be an exhaustive list. We do not believe an exhaustive list of examples is necessary to convey what is covered by the rule. Our definition of emergency information will include the provision of critical details in an accessible manner. Critical details could include, among other things, specific details regarding the areas that will be affected by the emergency, evacuation orders, detailed descriptions of areas to be evacuated, specific evacuation routes, approved shelters or the way to take shelter in one's home, instructions on how to secure personal property, road closures, and how to obtain relief assistance.

50. The rule will require broadcast stations and MVPDs that provide local emergency information to make that information accessible to viewers who are blind or have visual disabilities in the affected local area through aural presentation whenever such information is provided during regularly scheduled newscasts, unscheduled newscasts that preempt regularly scheduled programming or during continuing

¹³⁰ 14 FCC Rcd at 19856-19857, ¶ 32.

¹³¹ 14 FCC Rcd at 19856-19857, ¶ 32.

¹³² NFB at 4-5. *See also* Dunnam, Sanders, Walker.

¹³³ NTVAC at 13; WGBH at 19.

¹³⁴ 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. 95-176, *Second Report and Order*, FCC 00-136 (released April 14, 2000).

coverage of a situation. As a result of our rule, persons with visual disabilities will have access to the same critical information to which other viewers have access. Under this rule, broadcast stations and MVPDs are not required to provide in an accessible format all of the information about an emergency situation that they are providing to viewers visually, only the visual information intended to further the protection of life, health, safety, and property. In determining whether particular details need to be made accessible, we will permit programmers to rely on their own good faith judgments.

51. We believe that our requirement that broadcast stations and MVPDs make the critical details of emergency information available during regularly scheduled newscasts and newscasts that are sufficiently urgent to interrupt regular programming will generally ensure that the critical details of emergency information will be accessible to persons with visual disabilities. This is because we expect that broadcast stations and MVPDs will provide emergency information of an extremely urgent nature by interrupting their regularly scheduled programming with a newsbreak, and we require them to make the critical details of this information accessible. To the extent, however, that a broadcast station or MVPD does not interrupt its regular programming to provide emergency information but rather does so through another manner, such as a "crawl" or "scroll," during that programming, we require them to accompany that information with an aural tone, as referenced in the *Notice*.¹³⁵

52. The new rules regarding emergency information will be effective upon approval by the Office of Management and Budget. We adopt an earlier effective date for this rule because of the importance of emergency information, and because there should be little if any equipment and infrastructure costs associated with compliance.

IX. JURISDICTION

53. Background. In the *Notice*, we sought comment on whether we have the statutory authority to adopt video description rules.¹³⁶ We noted the general purpose of the Act in establishing the Commission, as well as the Commission's general jurisdiction and rulemaking powers.¹³⁷ We also noted that Congress has expressed the goal of increasing the accessibility of communications services for persons with disabilities.¹³⁸ We further noted that Title III of the Act requires the Commission to find that the "public interest, convenience, and necessity" will be served by the grant, renewal, or transfer of a license authorized pursuant to that title.¹³⁹ Finally, we observed that Congress had directed the Commission to conduct an inquiry and issue a report on video description.¹⁴⁰

54. Discussion. We conclude that we have the authority to adopt video description rules. Section 1 of the Act (codified as 47 U.S.C. § 151) established the Commission "[f]or 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

¹³⁵ 14 FCC Rcd at 19856, ¶ 32.

¹³⁶ 14 FCC Rcd at 19857-19859, ¶¶ 34-39.

¹³⁷ 14 FCC Rcd at 19857, ¶ 35.

¹³⁸ 14 FCC Rcd at 19858, ¶ 36.

¹³⁹ 14 FCC Rcd at 19858, ¶ 37.

¹⁴⁰ 14 FCC Rcd at 19858, ¶ 38.

the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service. . . . (emphasis added). Section 1 also established the Commission “for the purpose of promoting safety of life and property through the use of wire and radio communication.” Section 2(a) of the Act (codified as 47 U.S.C. § 152(a)) states that “[t]he provisions of this act shall apply to all interstate and foreign communication by wire or radio” and “all persons engaged within the United States in such communication.” Section 4(i) (codified as 47 U.S.C. § 154(i)) 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” and section 303(r) (codified as 47 U.S.C. § 303(r)) states that “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. . . .”

55. Congress has thus authorized the Commission to make available to all Americans a radio and wire communication service, and to promote safety and life through such service, and to make such regulations to carry out that mandate, that are consistent with the public interest and not inconsistent with other provisions of the Act or other law. In other words, as the Commission has previously explained, “[t]he courts have consistently held that the Commission has broad discretion so long as its actions further the legislative purposes for which the Commission was created and are not contrary to the basic statutory scheme.”¹⁴¹ Thus, in considering the Commission’s power to create the universal service fund (for which at the time there was no explicit statutory authority), the U.S. Court of Appeals for the D.C. Circuit relied, solely, on sections 1 and 4(i) of the statute, holding: “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 statutory authority.”¹⁴²

56. We disagree with those parties that contend that video description rules would be inconsistent with other provisions in the Act or other law. Specifically, some parties contend that video description rules are inconsistent with sections 624 and 713 of the Act, and the First Amendment. Others suggest that the rules interfere with the rights of copyright holders. We address each of these below.

57. *Section 713.* Some commenters contend that section 713(f) of the Act, codified as 47 U.S.C. § 613(f), only authorizes the Commission to conduct an inquiry, and thus forecloses a rulemaking, on video description.¹⁴³ Section 713(f) of the Act states, in its entirety:

Within 6 months after the date of enactment of the Telecommunications Act of 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 the appropriate methods and schedule for phasing 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 deems appropriate.

Section 713(f) is silent with respect to – and thus by itself neither authorizes nor precludes – a rulemaking.

¹⁴¹ Amendment of Part 67 of the Commission’s Rules and Establishment of a Joint Board, CC Docket No. 80-286, *Decision and Order*, 96 FCC 2d 781, 787 n.15 (1984).

¹⁴² *Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1315 (1988).

¹⁴³ A&E at 6; DirecTV at 4; HBO at 1; Lifetime at 3; MPAA at 3; NAB at 2-4; NCTA at 4.

In other words, section 713(f) does not change the purpose for which the Commission was created, as expressed in section 1 of the Act, nor does it derogate the general rulemaking powers the Commission has, as expressed in sections 4(i) and 303(r) of the Act.

58. We recognize, as some commenters point out,¹⁴⁴ that the legislative history to section 713 indicates that Congress considered, but did not enact, language explicitly referencing a rulemaking proceeding. The Conference Report indicates that the House amendment to the Senate bill contained language explicitly referencing a rulemaking proceeding: "Following the completion of this inquiry the Commission may adopt regulations it deems necessary to promote the accessibility of video programming to persons with visual impairments."¹⁴⁵ The conferees agreed, however, to remove such language: "The agreement deletes the House provision referencing a Commission rulemaking with respect to video description."¹⁴⁶ While this history indicates that section 713 should not be construed to authorize a Commission rulemaking, the history does not indicate that section 713 should be construed to prohibit such a rulemaking, given our otherwise broad powers to make rules, as expressed in sections 4(i) and 303(r) of the Act. Had Congress intended to limit our general authority, it could have expressly done so, as it has elsewhere in the Act.¹⁴⁷

59. NAB suggests that a general canon of statutory construction – the "specific governs the general" – precludes our reliance on the general jurisdictional sources of sections 4(i) and 303(r) when the specific language and legislative history of section 713 do not authorize a Commission rulemaking.¹⁴⁸ We agree that if section 713 prohibited us from adopting video description rules we could not rely on our general rulemaking authority to do so. As discussed above, however, section 713 does not limit our authority. NAB's argument, therefore, is misplaced. Congress did not enact section 713 as freestanding legislation, but rather as part of the Telecommunications Act of 1996, and in particular as part of the portion of that legislation that amended the Communications Act. Just last term, the Supreme Court made clear that the action of incorporating portions of the 1996 Act into the Communications Act means that those portions are subject to the Commission's general rulemaking powers.¹⁴⁹ "[W]e think that what the later statute contemplates is best determined . . . by the clear fact that the 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence part of, an Act which said that '[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.' [One] cannot plausibly assert that the 1996 Congress was unaware of the general grant of the rulemaking authority contained within the Communications Act. . . ."¹⁵⁰

60. A number of commenters suggest that the difference in treatment in section 713 between closed

¹⁴⁴ A&E at 7-8; HBO at 2; MPAA at 3-4; NAB at 4-6; NCTA at 4-5.

¹⁴⁵ H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 183 (1996).

¹⁴⁶ H.R. Conf. Rep. at 184.

¹⁴⁷ See, e.g., 47 U.S.C. § 152(b) (stating that "nothing in this Act shall be construed to apply to or give the Commission jurisdiction with respect to" certain items).

¹⁴⁸ NAB at 7-10.

¹⁴⁹ *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377-378 (1999).

¹⁵⁰ *Id.* at 378 n.5 (1999). The Supreme Court was interpreting the legal effect of general provision in section 201(b) of the Act on the more specific provisions in section 251 and 252, which the Telecommunications Act of 1996 added as amendments to the Communications Act. The language of section 201(b) (set forth in the text) is quite similar to the language in section 4(i) and 303(r).

captioning and video description indicates that Congress did not intend the Commission to adopt video description rules,¹⁵¹ and that this difference precludes the Commission from adopting such rules.¹⁵² Subsections (a)-(e) of section 713 deal with closed captioning. Subsection (a) directs the Commission to conduct an inquiry on closed captioning, and submit a report to Congress, and subsections (b)-(e) include a requirement that the Commission adopt rules, and set forth certain parameters for those regulations. Subsection (f) deals with video description, and as stated above, only requires the Commission to conduct an inquiry and submit a report to Congress. However, as the Supreme Court recently held in resolving similar statutory issues elsewhere in the Communications Act: "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 regulations 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 explicit authority."¹⁵³ In other words, the difference in treatment between closed captioning and video description simply means that Congress intended the Commission not to have any discretion on whether to adopt closed captioning rules, but left it to the Commission to decide whether to adopt video description rules. The difference in treatment does not displace the Commission's more general rulemaking powers, as expressed in sections 4(i) and 303(r). In sum, section 713 does not preclude the Commission from adopting video description rules.

61. *Section 624(f)*. Some commenters also contend that, absent express authority to conduct a rulemaking on video description elsewhere in the Act, section 624(f) of the Act precludes the Commission from adopting video description rules for cable operators.¹⁵⁴ Section 624(f) states that "[a]ny Federal agency . . . may not impose requirements regarding the provision or content of cable services, except as expressly provided in [Title VI]." The U.S. Court of Appeals for the D.C. Circuit has interpreted this section to forbid "rules requiring cable companies to carry particular programming."¹⁵⁵ The video description rules we adopt today are not content-based, and as such, do not require cable companies (or any other distributor of video programming) to carry particular programming. Rather, our rules simply require that, if a distributor chooses to carry the programming of the largest networks, it must provide a small amount of programming with video description.

62. *First Amendment*. Some commenters argue that requiring video description is inconsistent with the First Amendment, because it compels speech, or otherwise is content-based regulation.¹⁵⁶ Other commenters, however, contend that our rules are content-neutral regulations, similar to time, place, and manner regulations, and under the applicable test, are consistent with the First Amendment.¹⁵⁷ The Supreme Court has held that "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling

¹⁵¹ A&E at 6-7; DirecTV at 4; MPAA at 3-4; NAB at 6-7; NCTA at 5.

¹⁵² A&E at 6-7; DirecTV at 4; MPAA at 4.

¹⁵³ *Iowa Utilities Bd.*, 525 U.S. at 384-385.

¹⁵⁴ A&E at 8-9; NCTA at 5-6.

¹⁵⁵ *United Video, Inc. v. FCC*, 890 F.2d 1173, 1188 (1989).

¹⁵⁶ C-SPAN at 5-8; Lifetime at 3; MPAA at 10-16; RTNDA at 5-6.

¹⁵⁷ AFB Reply at 2-4; NTVAC Reply at 11, 18-19; WGBH Reply at 10-12.

consideration. A regulation that serves purposes unrelated to free expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.¹⁵⁸ The purpose of our video description rules is to enhance the accessibility of video programming to persons with disabilities, and is not related to content.

63. The fact that our rules will require, as opposed to restrict, speech does not change the analysis.¹⁵⁹ As a number of commenters explain, a mandate to provide video description does not require a programmer to express anything other than what the programmer has already chosen to express in the visual elements of the program.¹⁶⁰ Our rules simply require a programmer to express what it has already chosen to express in an alternative format to enhance the accessibility of the message. As such, our rules are comparable to a requirement to translate one's speech into another language in other contexts.¹⁶¹ A requirement to provide programming with video description is most similar to our existing requirements to provide programming with closed captioning, which, as several commenters point out,¹⁶² has not been challenged on First Amendment grounds. Indeed, the U.S. Court of Appeals for the D.C. Circuit concluded nearly twenty years ago that any requirement to provide programming with closed captioning would not violate the First Amendment.¹⁶³

64. Given that our video description rules are content-neutral regulations, the applicable test for reviewing their constitutionality is whether the regulations promote an important government purpose, and whether they do not burden substantially more speech than necessary.¹⁶⁴ As indicated above, our purpose in adopting our rules is to enhance the accessibility of television programming to persons with visual disabilities. As we observed in the *Notice*, television programming shapes American culture and public opinion in myriad ways, because it is our principal source of news and information, and provides hours of entertainment weekly.¹⁶⁵ Millions of Americans have visual disabilities and have difficulty following the visual elements in television programming, which can be overcome through video description. We believe this is an important government purpose in the context of the First Amendment, and believe that other legislation designed to enhance the accessibility of communications to persons with disabilities supports our conclusion.

65. We also believe that video description will not burden any more speech than necessary. As described above, video description is in effect the translation of the visual elements of programming into

¹⁵⁸ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations omitted).

¹⁵⁹ A number of commenters claim that our rules will compel or force speech. A&E at 12-13; C-SPAN at 5-8; Lifetime at 3; MPAA at 8-16; NAB at 10-13; NCTA at 6-7; RTNDA at 5-6.

¹⁶⁰ AFB Reply at 2-4; WGBH Reply at 11-12.

¹⁶¹ For example, NTVAC notes that the District of Columbia courts require eviction notices to be presented in both English and Spanish. NTVAC Reply at 19.

¹⁶² NTVAC Reply at 11; WGBH Reply at 11.

¹⁶³ *Gottfried v. FCC*, 655 F.2d 297, 311 n.54 (1981), *rev'd in part*, 459 U.S. 498 (1983). The Supreme Court decision did not disturb the *dictum* of the D.C. Circuit Court of Appeals regarding the constitutionality of closed captioning rules.

¹⁶⁴ *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997).

¹⁶⁵ *Notice*, 14 FCC Red at 19845, ¶ 1.

another language to provide functional equivalency for the blind. Our rules will require only a limited amount of programming to contain video description. To the extent the video description is distracting to viewers who do not wish to hear it, they can simply listen to the main audio instead of the SAP channel.

66. *Copyright.* Some commenters also suggest that our video description rules are in tension with copyright law.¹⁶⁶ MPAA explains that the video description of a program requires the creation of a second script, which is a derivative work that itself enjoys copyright protection, and that video description could only be undertaken with the consent of the holder of the copyright to the program, for all stages of the production and distribution of the program.¹⁶⁷ WGBH, however, which actually describes programming, states that in more than ten years of doing so, no copyright issues have arisen that prevented it from describing programming.¹⁶⁸ WGBH explains that video description always occurs with the consent of the copyright holder (as does closed captioning), and that copyright holders are willing to permit the video description of their programs because they continue to hold the copyright and the video description adds value to their programs.¹⁶⁹ While MPAA points out that WGBH's apparent success in obtaining the necessary copyright clearances occurred in a voluntary environment,¹⁷⁰ we believe that the limited nature of our video description rules does not change this environment in such a dramatic fashion that copyright problems will become an obstacle for those responsible to provide video description to in fact do so. Rather, we envision copyright holders and distributors working as NTVAC suggests,¹⁷¹ just as a broadcast network, in negotiating the rights to air a movie, may request copyright holders to change a program in order to comply with indecency restrictions, so may it request copyright holders to provide video description of the program. Should the distributors that are subject to our rules be unable to obtain the necessary clearances from copyright holders, they are free to bring those difficulties to our attention, and seek appropriate relief.

X. CONCLUSION

67. Today we adopt rules to enhance the accessibility of the important medium of television to persons with visual disabilities. We do not impose an undue burden on the programming production and distribution industries. Our rules will require only the largest broadcast stations and MVPDs – which provide television programming to the majority of the public – to provide a limited amount of programming with video description. These broadcast stations and MVPDs will provide programming with video description on the largest networks they carry – which provide the most watched television programming. Our rules will thus create a benefit to the greatest number of persons with visual disabilities but at the same time impose a cost on the least number of broadcast stations and MVPDs. As the industry and the public gain greater experience with video description, we hope that more broadcast stations and MVPDs will provide video description, and those that do so will provide more hours of programming with video description.

¹⁶⁶ Lifetime at 3-4; MPAA at 16-22; NAB at 23-24.

¹⁶⁷ MPAA at 16.

¹⁶⁸ WGBH at 18-19.

¹⁶⁹ WGBH at 19, 32-34.

¹⁷⁰ MPAA Reply at 25-26.

¹⁷¹ NTVAC at 15-16.

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XI. ADMINISTRATIVE MATTERS

68. This document is available to individuals with disabilities requiring accessible formats (electronic ASCII text, Braille, large print, and audiocassette) by contacting Brian Millin at (202) 418-7426 (voice), (202) 418-7365 (TTY), or by sending an email to access@fcc.gov.

69. Final Paperwork Reduction Act Analysis. This *Report and Order* contains information collection requirements that the Commission is submitting to the Office of Management and Budget requesting clearance under the Paperwork Reduction Act of 1995.

70. Final Regulatory Flexibility Certification. Pursuant to the Regulatory Flexibility Act of 1980, as amended, 5 U.S.C. § 601 *et seq.*, the Commission's Final Regulatory Certification in this *Report and Order* is attached as Appendix C.

71. Additional Information. For additional information, please contact Eric J. Bash, Policy and Rules Division, Mass Media Bureau, (202) 418-2130 (voice), (202) 418-1169 (TTY), or ebash@fcc.gov, or Meryl S. Icove, Disabilities Rights Office, Consumer Information Bureau, (202) 418-2372 (voice), 418-0178 (TTY), or micove@fcc.gov.

XII. ORDERING CLAUSES

72. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, 310, and 713 of the Communications Act, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, 310, 613, Part 79 of the Commission's rules are amended as set forth in Appendices B and C.

73. IT IS FURTHER ORDERED that the rules set forth in Appendix B that revise section 79.2 of the Commission's rules, 47 C.F.R. § 79.2, SHALL BECOME EFFECTIVE upon approval from the Office of Management and Budget, and the rules set forth in Appendix B that add section 79.3 to the Commission's rules, 47 C.F.R. § 79.3, SHALL BECOME EFFECTIVE on April 1, 2002.

74. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

75. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

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.
Feigenblatt, 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)
Cummings, Cheryl (C. Cummings)
Cummings, Thomas (T. Cummings)
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)
Jacobson, 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 complainant'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 received 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).

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.

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 F.2d 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

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 referencing a Commission rulemaking with respect to video description."). This Commission today (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 the 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 been marginalized in this discussion.⁵ I thus intend to air NFB's opinions fully.

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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.

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 (continued....)

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 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.

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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>.

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

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).