



August 18, 2011

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of Ex Parte Communication, MB Docket No. 11-43

Dear Ms. Dortch:

On August 17, 2011, the undersigned of the National Association of Broadcasters (NAB) met with Erin McGrath, Acting Legal Advisor, Media, in the Office of Commissioner McDowell.

The purpose of the meeting was to discuss the rules governing the implementation of Video Description, MB Docket No. 11-43. We reiterated our position that video description programming requirements should not become effective until October 1, 2012.¹

We also discussed the timing for stations that may become affiliates of the top-four commercial networks in the top 25 markets after the effective date of the rules, and their obligations under the Congressional timetables contemplated by the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA). *Id.* at p. 11. A broadcast licensee not currently a top-four network affiliate may in the future become a top-four affiliate but may not at that time be technically ready to pass through video description. That station will need a reasonable period to become technically capable. The CVAA itself does not require an immediate imposition of the video description rules on a station that newly becomes a "top-four, top-25" affiliate, and NAB anticipates that without such a grace period, a station in this situation would seek a waiver of the rules.

¹ See Comments of the National Association of Broadcasters, In the Matter of Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, MB Docket No. 11-43, April 28, 2011 at pp. 15-17.

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Accordingly, rather than burdening Commission staff with waiver requests, a reasonable phase-in period of at least three months (but preferably six months), and in regulatory parity with other providers of video description, should be permitted to allow such stations time to become technically capable of passing through video description.

Finally, as we discussed in our comments, we discussed specific technical recommendations of the ATSC DTV standard A/53, Part 5. *Id.* at pp. 7-8.

Please direct any questions regarding these matters to the undersigned.

We attach a copy of our brief and a copy of the Court of Appeals decision in *MPAA v. FCC*, 309 F.3d 796 (2002).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ann West Bobeck". The signature is stylized, with a large, looped initial "A" and a horizontal line extending from the end of the name.

Ann West Bobeck
Senior VP and Deputy General Counsel
Legal and Regulatory Affairs

cc: Erin McGrath

Attachments

PERMANENT

Nos. 01-1149, 01-1155 (consolidated)

ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 6, 2002

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

MAY 16 2002

RECEIVED

In the

United States Court of Appeals
for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED

MAY 28 2002

CLERK

MOTION PICTURE ASSOCIATION OF AMERICA, INC., *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

On Petition for Review from the
Federal Communications Commission

BRIEF FOR PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certify as follows:

A. PARTIES AND AMICI

1. The parties and intervenors appearing in this Court are:

a. Petitioners:

Motion Picture Association of America

National Association of Broadcasters

National Cable & Telecommunications Association

National Federation for the Blind (No. 01-1155)

b. Respondents:

Federal Communications Commission

United States of America

c. Intervenors (on behalf of Respondents):

National Television Video Access Coalition

Metropolitan Washington Ear, Inc.

WGBH Educational Foundation

American Council of the Blind

Blinded Veterans Association

American Foundation for the Blind

2. Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, petitioners state: The Motion Picture Association of America (“MPAA”) is a trade association that represents the American motion picture, home video and

television industries. The National Association of Broadcasters (“NAB”) is a trade association that promotes and protects the interests of radio and television broadcasters in the United States. The National Cable & Telecommunications Association (“NCTA”), formerly the National Cable Television Association, is the principal trade association of the cable television industry in the United States. Petitioners have no stockholders and are not publicly traded.

B. RULINGS UNDER REVIEW

The rulings under review are *Implementation of Video Description of Video Programming*, MM Docket No. 99-339, *Memorandum Opinion and Order on Reconsideration*, 16 FCC Rcd. 1251 (2001), 66 Fed. Reg. 8521 (Feb. 1, 2001), which affirms on reconsideration *Implementation of Video Description of Video Programming*, MM Docket No. 99-339, *Report and Order*, 15 FCC Rcd. 15230 (2000), 65 Fed. Reg. 54805 (Sept. 11, 2000). The Commission also issued an erratum to the latter ruling under review: *Implementation of Video Description of Video Programming*, MM Docket No. 99-339, *Erratum*, (Feb. 21, 2001), 66 Fed. Reg. 16618 (March 27, 2001).

C. RELATED CASES

Pursuant to Circuit Rule 28(a)(1)(C), petitioners state that the National Federation of the Blind has in Case No. 01-1155 petitioned this Court for review of the rulings set forth above. That action has been consolidated with No. 01-1149. Petitioners are aware of no other related cases in this Court or any

other court of appeals involving substantially the same parties and the same or similar issues.

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GLOSSARY

FCC	Federal Communications Commission
SAP	Secondary Audio Programming
MPAA	Motion Picture Association of America
NAB	National Association of Broadcasters
NCTA	National Cable & Telecommunication Association
NFB	National Federation for the Blind

Nos. 01-1149, 01-1155 (consolidated)

ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 6, 2002

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Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

On Petition for Review from the
Federal Communications Commission

BRIEF FOR PETITIONERS

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the matters in this case pursuant to 28 U.S.C. §§ 2342(1) & 2344, governing appeals from final orders of the Federal Communications Commission ("FCC" or "Commission"). Venue lies in this Court pursuant to 28 U.S.C. § 2343. Petitioners seek review of the final orders of the FCC in *Implementation of Video Description of Video Programming*, MM Docket No. 99-339, *Memorandum Opinion and Order on Reconsideration*, 16 FCC Rcd. 1251

(2001), 66 Fed. Reg. 8521 (Feb. 1, 2001), and *Report and Order*, 15 FCC Rcd. 15230 (2000), 65 Fed. Reg. 54805 (Sept. 11, 2000) (together, the “Orders”), which culminated a rulemaking proceeding wherein the Commission adopted then revised 47 C.F.R. §§ 79.2, 79.3 to require broadcasters and multichannel video programming distributors to provide “video description” of television programming.

ISSUES PRESENTED FOR REVIEW

(1) Whether the video description rules exceed the FCC’s statutory authority where (a) the plain language of Section 713 of the Telecommunications Act omits FCC rulemaking authority for video description rules, (b) the legislative history confirms that Congress intentionally deleted such authority from the Act, and (c) established rules of statutory construction indicate that Congress intentionally denied authority for the FCC to adopt video description rules.

(2) Whether the video description rules exceed the FCC’s general “public interest” rulemaking authority where (a) the Commission’s interpretation of the Communications Act would give it unlimited authority over broadcast and cable programming, (b) the video description rules conflict with the statutory scheme of the Communications Act, and (c) the video description rules conflict with the First Amendment.

STATUTES

Pertinent sections of the Communications Act, 47 U.S.C. § 151, as amended, are reproduced in the Addendum (“ADD”).

STATEMENT OF THE CASE

This case presents the question whether the FCC has unbounded authority to adopt programming mandates in order to serve the “public interest” as set forth in the Communications Act. In the proceeding under review, the Commission adopted rules requiring certain video programming providers to transmit specific amounts of programming with “video descriptions” despite the fact that Congress expressly withheld FCC authority to adopt such rules. In the Telecommunications Act of 1996, Congress adopted provisions governing video programming accessibility, including a specific FCC mandate for closed-captioning rules. But it declined to adopt corresponding authority for video description rules. Acknowledging that Congress stopped short of establishing such authority, the Commission asserted that its general rulemaking power to implement the “public interest” pursuant to the Communications Act supports the adoption of rules unless Congress explicitly says otherwise.

Petitioners challenge the Commission’s statutory authority to adopt video description rules. The decision by Congress to withhold such authority in the Telecommunications Act of 1996 reflected its clear intention to deny such power to the Commission. Congressional intent is amply demonstrated by the plain language of the Telecommunications Act and its legislative history, as confirmed by established rules of statutory construction. Accordingly, a *Chevron* “track one” inquiry is sufficient to decide that the FCC is not empowered to adopt video description rules since “Congress has directly spoken to the precise question at

issue,” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), and it said “no.”

The Commission’s assertion of unbounded authority to regulate programming pursuant to the “public interest” standard of the Communications Act is invalid as well under *Chevron* track two analysis, which asks whether the action under review is based on a reasonable interpretation of the organic statute. *Id.* at 843. The FCC’s claim that it may adopt any programming mandates it chooses unless Congress expressly disagrees is unreasonable because it would vest the agency with unlimited authority over broadcast and cable programming. Such an expansive interpretation is inconsistent with the overall design of the Communications Act, conflicts with specific statutory provisions, and creates significant First Amendment tensions.

The FCC’s claim of authority in this proceeding violates the well-established concept that “the use of the words ‘public interest’ in a regulatory statute is not a broad license to promote the general public welfare.” *NAACP v. FPC*, 425 U.S. 662, 669 (1976). In particular, Congress did not vest the Commission with unfettered authority to regulate programming. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 650 (1994). And the use of FCC regulatory authority to influence programming content would create significant constitutional tensions. *Cf. MD/DC/DE Broadcasters Ass’n. v. FCC*, 236 F.3d 13 (D.C. Cir. 2001), *cert. denied*, ___ S. Ct. ___, 2002 WL 75691 (Jan. 22, 2002); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998).

The Commission's decision to impose video description mandates will have a significant impact on Petitioners' members. *See Playboy Entm't Group, Inc. v. United States*, 30 F. Supp.2d 702, 711-712 (D. Del. 1998) (the economic impact of content regulation serves as a quantitative measure of lost opportunities to engage in expressive activities), *aff'd*, 529 U.S. 803 (2000). In this case, the cost of adding video description to programs in 2002 alone could range from \$1,350,000 to \$5,400,000. ^{1/} In addition, the cost to broadcast networks for modifying their origination facilities and satellite distribution systems in order to distribute video described programming to their affiliates has been estimated to run into the millions of dollars. (JA519-21) Plus, the vast majority of network-affiliated stations required to provide video description would also need to modify or reconstruct their studio plants and transmitters to receive and route the network's described programming, at an estimated average cost of over \$160,000 per station. (JA348) The estimated cost of cable network hardware and systems adjustments and additions that may be necessary to provide video description ranges from \$100,000 to more than \$200,000 per network. (JA550) Accordingly, Petitioners respectfully request that the Court vacate the Commission's video description rules.

^{1/} This estimate is based on the Commission's finding that the cost of adding video description to a given program ranges from one to four thousand dollars per hour. *Closed Captioning and Video Description of Video Programming, Report to Congress*, 11 FCC Rcd. 19214, 19258 (1996). ("Video Accessibility Report"). (JA90).

STATEMENT OF FACTS

A. Statutory Background

Section 305 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, added new provisions to the Communications Act of 1934, 47 U.S.C. § 151, *et seq.* (“the Act”), regarding video programming accessibility. As ultimately codified at Section 713 of the Act, 47 U.S.C. § 613, the new provisions govern FCC authority with respect to closed captioning and video description. Closed captioning involves the textual display of the audio portion of video programming for the hearing impaired pursuant to technical specifications set forth in FCC rules. *See* 47 C.F.R. § 79.1(a)(4). “Video description” for persons with visual disabilities is defined as “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). Video description generally is transmitted over a secondary audio programming (“SAP”) channel, a subcarrier that allows video distributors to transmit an additional soundtrack, such as alternative language programming. *Video Accessibility Report*, 11 FCC Rcd. at 19221-22, 19256. (JA53-54, 88).

Video description differs significantly from closed captioning in that it requires the creation of a new and entirely different script from the original program, as opposed to a verbatim transcription that converts spoken words to text. Thus, in its Report to Congress on the issue, the Commission pointed out that any

video description requirement necessitates “the development of a second script, which raises creativity and copyright issues.” *Id.* at 19221-22. (JA53-54).

In the Telecommunications Act, Congress adopted separate regulatory approaches to closed captioning and video description. Section 713(a) required the Commission to complete a closed captioning inquiry and to report its findings to Congress within 180 days of the Act’s passage. 47 U.S.C. § 613(a). Sections 713(b) and (c) required the Commission to prescribe closed captioning regulations and established compliance deadlines. 47 U.S.C. §§ 613(b)-(c). Sections 713(d) and (e) established exemptions from the closed captioning rules, including exemptions based on “undue burden,” and set forth detailed criteria by which the FCC must consider such requests. 47 U.S.C. § 613(d)-(e). In sharp contrast, Sections 713(g) and (f) – the sole subsections dealing with video description – merely defined “video description” and required the FCC to prepare a report to Congress. 47 U.S.C. § 613(g)-(f).

The different legislative approaches to closed captioning and video description were not a result of happenstance, but reflected the legislature’s conscious judgment. Both houses of Congress considered telecommunications bills in the mid-1990’s. The initial House bill, H.R. 3636, included Section 206, which would have required the FCC to adopt both closed captioning and video description rules. *See Powell Dissent*, 15 FCC Rcd. at 15274 n.9 (the FCC “shall, within 1 year after enactment of the [video accessibility] section, *prescribe* such regulations as are necessary to ensure that all video programming is fully accessible to individuals

with disabilities through the provision of closed captioning service *and video description.*”) (emphases original in dissent) (JA193). In committee, Congressman Moorhead proposed an amendment to change the mandatory video description requirement to a discretionary grant of authority. The new language provided that “[f]ollowing the completion of such inquiry, the Commission may adopt regulation it deems necessary to promote the accessibility of video programming to persons with visual impairments.” Amendment No. 8 to H.R. 3636 (Moorhead) (Mar. 16, 1994) (JA237). The amendment was adopted by voice vote, and the amended language was incorporated into the bill adopted by the full committee. *See* H.R. 3636, § 206(f), 103d Cong. (2d Sess. 1994) (JA237); H.R. Rep. No. 103-560, at 94 (1994), as amended. (JA273).

A new bill containing the discretionary provision on video programming accessibility, renumbered as Section 204, passed the House of Representatives as H.R. 1555. *See* H.R. 1555, § 204(f), 104th Cong. (1st Sess. 1995) (JA259); H.R. Rep. No. 104-204, Part I at 140 (1995). (JA284). *See also* H.R. Conf. Rep. No. 104-458, at 184 (1996). (JA289). However, the corresponding Senate telecommunications bill (S. 652), directed the FCC only to submit a report on video description to Congress, and did not mandate video description or delegate rulemaking authority to the FCC. *See* S. 652, § 305, 104th Cong. (1st Sess. 1995) (JA251-53); S. Rep. No. 104-23, at 52-54 (1995). (JA276-78); *see also* H.R. Conf. Rep. No. 104-458, at 184 (1996) (JA289). The divergent provisions relating to video description were reconciled in conference committee where the Senate provision was

adopted and the House language authorizing the FCC to adopt rules was stricken. The Conference Report stated that “[t]he conference agreement . . . deletes the House provision referencing a Commission rulemaking with respect to video description.” See S. Conf. Rep. No. 230, *reprinted in* 1996 U.S.C.C.A.N. 197. This version of the bill was passed by Congress and signed into law by the President.

B. FCC Proceedings

The FCC’s initial analyses of the law tracked closely the differential treatment of closed captioning and video description in the Act and the legislative history. In a *Notice of Inquiry* issued during the legislative debates, the Commission noted that the proposed Telecommunications Act, “if enacted, would for the first time generally mandate the closed captioning of video programming, and . . . would require the Commission to *study* the uses of video description and the appropriate means for making video programming accessible to persons with visual disabilities.” *Closed Captioning and Video Description of Video Programming, Notice of Inquiry*, 11 FCC Rcd. 4912, 4913 (1995) (emphasis added) (JA29). It pointed out that the House version of the bill – but not the Senate draft – would have permitted the FCC to adopt video description rules. *Id.* at 4916-17, 4928 (JA32-33, 44).

After the Telecommunications Act was signed into law, the FCC extended its *Notice of Inquiry*, noting that the Act merely required the Commission to “commence an inquiry” on video description and to report its findings to Congress. *Closed Captioning and Video Description of Video Programming, Order*,

11 FCC Rcd. 5783 (1996). In the report to Congress that resulted, the Commission never suggested it had independent rulemaking authority, but simply reported that “the best course is . . . to continue to collect information and monitor the deployment of video description and the development of standards for new video technologies that are likely to affect the availability of video description.” *Video Accessibility Report*, 11 FCC Rcd. at 19271 (JA103); see also *id.* at 10270 (“[t]he nature and speed of the process for video descriptions remains dependent on the resolution of certain technical, funding, legal and cost issues”) (JA102). The FCC said it would issue continuing reports on video description, and suggested that Congress might consider increasing funding mechanisms for “pilot programs” and that the legislature could “use the development of closed captioning as a model for broadening video accessibility” in the future. *Id.*

The Commission supplemented these findings in *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd. 1034, 1163-70 (1998) (“1997 Cable Competition Report”); see also *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Notice of Inquiry*, 12 FCC Rcd. 7829, 7844-45 (1997). Once again, the Commission did not suggest that it had independent authority to enact mandatory video description rules. Rather, the FCC reaffirmed its analysis in the *Video Accessibility Report* that implementation of video description faced a number of significant obstacles, including:

- Video description “requires the development of a second script” that can add considerably to the production time and costs of producing a

script, and can create copyright conflicts. *Video Accessibility Report*, 11 FCC Rcd. at 19262-63; (JA94-95) *1997 Cable Competition Report*, 13 FCC Rcd. at 1168-69.

- The costs of producing programming with video description are “substantial,” and “significantly higher than those associated with closed captioning.” *1997 Cable Competition Report*, 13 FCC Rcd. at 1169.
- Any schedule for implementing video description depends on the transition to digital television because analog SAP channel capacity is a limited resource and video description must compete with other possible uses of the SAP channel. *Id.* at 1167.

Consequently, the Commission told Congress that “a period of trial and experimentation” was needed before considering mandates or public funding in order to obtain “more specific information . . . as to the types of programming that would most benefit from description, the costs of providing video descriptions, and other matters.” *Id.* at 1170.

Two years later, the Commission changed course and for the first time proposed the adoption of video description mandates based upon its own authority. *Implementation of Video Description of Video Programming, Notice of Proposed Rulemaking*, 14 FCC Rcd. 19845 (1999). It sought comment on whether statutory authority existed for it to adopt video description rules, and asked whether the general “public interest” mandates of the Communications Act provided such authority. The FCC described Section 713 as “relevant to this inquiry.” *Id.* at 19857-58 (JA138-39).

After reviewing the comments submitted in response to this inquiry, the Commission, by a 3-2 vote, adopted rules requiring certain video programmers to transmit specified amounts of programming with video descriptions.

Implementation of Video Description of Video Programming, MM Docket No. 99-339, *Report and Order*, 15 FCC Rcd. 15230 (2000) (“*Video Description Order*”). It did so over objections by Petitioners, among others, that Congress specifically declined to authorize FCC rulemaking authority, and that video description rules would violate the Communications Act, copyright law, and the First Amendment. Comments of MPAA, MM Docket No. 99-339, Feb. 23, 2000, at 3-14 (JA488-99); Comments of NAB, MM Docket No. 99-339, Feb. 23, 2000, at 2-13 (JA506-17); Comments of NCTA, MM Docket No. 99-339, Feb. 23, 2000, at 3-7 (JA538-42).

The rules the Commission promulgated require broadcasters affiliated with the top four networks (ABC, CBS, Fox and NBC) operating in the top 25 markets, and the top five national non-broadcast cable networks carried by multi-channel providers 2/ serving 50,000 subscribers or more, to provide 50 hours per calendar quarter of video-described prime-time and/or children’s programming. 3/ The rules set forth detailed requirements for which programs, including re-runs, count toward fulfilling the FCC-prescribed minimums. *Id.* § 79.3(c)-d). The rules

2/ The rules apply to all multichannel programming distributors, but for ease of reference this brief will use the terms “cable operators” and “cable networks.” The rules impose obligations directly on cable operators, but much of the burden of compliance falls on cable networks, over which the FCC has no direct regulatory jurisdiction.

3/ See C.F.R. §§ 79.3(b)(1),(3). Based on Nielsen ratings for the year October 1999 through September 2000, the critical period for determining the top five cable networks for purposes of the video description rules, see 47 C.F.R. § 79.3(b)(3), the networks required to provide video descriptions are USA, TBS, Nickelodeon, Lifetime, and TNT.

also require all broadcasters affiliated or associated with a network, and all cable operators regardless of size, to pass through video descriptions provided by other program providers if the broadcaster or cable operator has the technical capability to do so. *Id.* § 79.3(b)(2),(4). Broadcasters and cable operators that fail to meet these requirements are subject to what the FCC called its “considerable discretion under the Act to [impose] sanctions and remedies,” *Video Description Order*, 15 FCC Rcd. at 15249 (JA168), which may include compelling provision of additional video-described programming in excess of that otherwise required. 47 C.F.R. § 79.3(e)(3)(ii).

In light of the statutory language and legislative history, the Commission shifted its position on its authority to adopt rules. The FCC noted that “Section 713(f) is silent with respect to . . . a rulemaking” but asserted that the provision “by itself neither authorizes nor precludes” such action. *Video Description Order* 15 FCC Rcd. at 15253 (JA172); *see also Implementation of Video Description of Video Programming*, 16 FCC Rcd. 1251, 1271 (2001) (“*Reconsideration Order*”) (JA220) (“[S]ection 713(f) . . . neither authorizes nor prohibits a rulemaking on video description”). The Commission claimed to derive its authority to adopt video description rules not from Section 713(f), but from the Communications Act’s preface and its more “general rulemaking powers” in Sections 1, 2(a), 4(i) and 303(r) of the Act. It reasoned that it could exercise its general rulemaking authority in the absence of a provision expressly prohibiting video description rules. 15 FCC Rcd. at 15253. (JA172).

Commissioners Powell and Furchtgott-Roth dissented from the Commission's order. Both reasoned that the Communications Act does not authorize the FCC to adopt video description rules, and in fact, can be fairly read only as denying authority to do so. *Id.* at 15268-69 (Furchtgott-Roth, Comm'r, dissenting) ("Furchtgott-Roth Dissent") (JA187-88); *id.* at 15272-76 (Powell, Comm'r, dissenting) ("Powell Dissent"). (JA191-95). Commissioner (now Chairman) Powell gave a detailed account of the legislative history and evolution of Section 713(f), and explained that the provision's chronology and basic precepts of statutory interpretation precluded a finding that the FCC could use general grants of authority to undertake what Congress otherwise disallowed. *Id.* at 15273-76 (Powell Dissent). (JA192-95). Commissioner Furchtgott-Roth agreed, noting "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." *See Id.* at 15268 (Furchtgott-Roth Dissent). (JA187). He added that the inference of "purposeful limitation" is strengthened by juxtaposing the contemporaneous mandate for closed captioning rules with the very limited authority for video description. *Id.*

Commissioner Furchtgott-Roth also pointed out that the Commission majority downplayed the opposition of important segments of the blind community to the video description rules. Noting the lack of discussion of this issue in the *Video Description Order*, he wrote that "one would have to be particularly astute, even psychic, to glean . . . from the Order" the fact that the National Federation for the Blind ("NFB") opposed the rules. *Id.* at 15269 (Furchtgott-Roth Dissent).

(JA188). Ultimately, the NFB also sought review in this Court of the FCC's video description orders and its appeal was consolidated with this one. *Order*, Nos. 01-1149 and 01-1155 (D.C. Cir. filed May 29, 2001).

Petitioners sought reconsideration of the *Video Description Order*, primarily on the ground that the FCC had exceeded its legal authority in adopting video description rules. Petition for Reconsideration of MPAA, MM Docket No. 99-339, Oct. 11, 2000, at 3-8 (JA332-37); Petition for Partial Reconsideration and Clarification Submitted by NAB, MM Docket No. 99-339, Oct. 11, 2000, at 8-11 (JA350-53); Petition for Reconsideration, filed by NCTA, MM Docket No. 99-339, Oct. 11, 2000, at 2-7 (JA358-63). The FCC denied reconsideration except to refine certain implementation issues with respect to the new rules. *Reconsideration Order*, 16 FCC Rcd. 1251 (JA200), *erratum issued* (Mass Med. Bur. Feb. 21, 2001) (JA231). The FCC repeated its rejection of the statutory and constitutional arguments against the video description rules. Commissioners Powell and Furchtgott-Roth again dissented, citing the reasons set forth in their separate statements to the initial order. (JA229-30) The instant petition for review followed.

SUMMARY OF ARGUMENT

The FCC lacks statutory authority to adopt video description rules. The Telecommunications Act of 1996 added new provisions into the Communications Act requiring the FCC to, *inter alia*, conduct inquiries and report to Congress on closed captioning and video description, and to adopt rules requiring video programmers to provide closed captioning. *Id.* § 305, codified at 47 U.S.C.

§ 613. Although an earlier House version of the law would have empowered the FCC to adopt video description rules, this provision was deleted in conference and was not part of the law ultimately adopted.

Where, as here, Congress has specifically addressed the question at issue, the administrative agency charged with implementing the law must give effect to the unambiguously expressed intent of Congress. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-126, 132 (2000). Under *Chevron* “track one” analysis, the reviewing court examines the statute and its legislative history and uses traditional tools of statutory construction to determine whether Congress spoke to the subject at hand. If it did so, that intention “is the law and must be given effect.” *Chevron*, 467 U.S. at 843 n.9 (1984). On the other hand, if the statute is either silent or ambiguous with respect to “the precise question at issue,” *Chevron* “track two” asks whether the agency’s action is based “on a permissible construction of the statute.” *Id.* at 843.

In this case the government seeks to bypass *Chevron* track one analysis since it agrees that Congress considered but declined to adopt any affirmative mandate regarding video description rules. The Commission acknowledges that Section 713 includes no provision authorizing – much less requiring – the FCC to prescribe such rules, but takes this to mean that the provision “by itself neither authorizes nor precludes” such action. *Video Description Order*, 15 FCC Rcd. at 15252-53. (JA171-72). *See also Reconsideration Order*, 16 FCC Rcd. at 1271 (JA220). Accordingly, the Commission claims to derive its

authority to adopt video description rules not from Section 713(f), but from its “more general rulemaking powers” in the Communications Act. *Reconsideration Order*, 16 FCC Rcd at 1270 (JA219); *Video Description Order* 15 FCC Rcd. at 15254 (JA173). In other words, the Commission claims that the Communications Act’s “necessary and proper clauses” empower it to mandate specific programming content requirements that Congress expressly declined to adopt.

The FCC’s analysis of its statutory power is deeply flawed, beginning with its erroneous assumption that Congress was silent on the subject of video description. While it acknowledges, as it must, that Section 713 contains no affirmative grant of rulemaking authority, the Commission ignores the legislative history and statutory context that reveal clear congressional intent to withhold such power. The difference between the Act’s detailed closed captioning mandates and the absence of rulemaking authority for video descriptions indicates Congress did not merely overlook this issue or inadequately express its intent. The FCC also disregarded the canon of statutory construction, *expressio unius est exclusio alterius*, which holds that where a statute provides authority for an action, but is silent as to a similar, related action, it must be interpreted as authorizing only the former. Accordingly, the rules are invalid under *Chevron* track one analysis, making it unnecessary to pursue the matter further.

However, the Commission’s reasoning is also wrong under *Chevron* track two. Contrary to the FCC’s assumptions, it cannot assert authority to make rules simply because the Communications Act “does not expressly *negate* the

existence of a claimed administrative power (*i.e.*, when the statute is not written in ‘thou shalt not’ terms).” *Railway Labor Executives’ Ass’n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*) (emphasis in original), *amended*, 38 F.3d 1224, *cert. denied*, 514 U.S. 1032 (1995). “Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.” *Id.* (emphasis in original). See *Comsat Corp. v. FCC*, 114 F.3d 223, 227 (D.C. Cir. 1997). As Commissioner Powell noted, the Commission’s claim that it has general rulemaking authority to adopt any affirmative content requirements it deems to be in the public interest unless Congress “specifically say[s] the FCC could not issue rules” is “breathtaking.” 15 FCC Rcd. at 15274 (Powell Dissent) (JA193).

Not only is the Commission’s expansive reading of its statutory authority over programming content unreasonable as a general proposition, it conflicts both with the “ultimate purposes” of the Communications Act as well as the “means” prescribed by Congress “for the pursuit of those purposes.” *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 231 n.4 (1994). Section 326 of the Act, which prohibits censorship and denies to government the power to interfere with “free speech by means of radio communication,” 47 U.S.C. § 326, precludes FCC reliance on general rulemaking power to compel the inclusion of video descriptions in broadcast fare. Likewise, Section 624(f) limits the Commission’s ability to

regulate the content of cable programming or the provision of cable services absent express statutory authority. 47 U.S.C. § 544(f).

Finally, the video description requirements create constitutional tensions by compelling program distributors to create new works of original authorship. *Riley v. National Fed'n of the Blind of N.C.*, 487 U.S. 781, 796-797 (1988) (“‘freedom of speech,’ . . . necessarily compris[es] the decision of both what to say and what *not* to say.”) (emphasis in original). The Commission acknowledged that video description entails the creation of an entirely new script for affected programming. The FCC’s broad interpretation of the Communications Act to permit such compelled speech is therefore suspect because it raises unnecessary and substantial First Amendment problems. *See Jones v. United States*, 526 U.S. 227, 239 (1999) (“[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter”) (quotation omitted). Consequently, its assertion of authority here is not based on a permissible construction of the statute.

ARGUMENT

“[A]n administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.” *Brown & Williamson*, 529 U.S. at 161 (2000); *Lyng v. Payne*, 476 U.S. 926, 937 (1986). Where a reviewing court “ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *Chevron*, 467

U.S. at 843 n.9. This *Chevron* “track one” analysis applies in cases like this one where “Congress has directly spoken to the precise question at issue.” If the court, “employing traditional tools of statutory construction,” finds that Congress had an intention on the specific provision before it, “that is the end of the matter.” *Id.* at 842-843. On the other hand, if the statute is either silent or ambiguous with respect to “the precise question at issue,” track two of *Chevron* asks whether the agency’s action is based “on a permissible construction of the statute.” *Id.* at 843.

As set forth below, the Commission’s video description rules should be vacated pursuant to *Chevron* track one because Congress expressed its clear intention to withhold rulemaking authority from the FCC. Congressional intent is manifest in the statutory language, the legislative history and from basic rules of statutory interpretation. Where legislative intent is clear, as it is in this case, it is unnecessary for the Court to conduct a *Chevron* track two analysis. *E.g., Halverson v. Slater*, 129 F.3d 180, 184 (D.C. Cir. 1997). However, Petitioners also examine the video description rules under track two since the FCC puts all of its eggs in that basket. As detailed below, the Commission’s assertion of inherent authority to adopt rules where Congress did not is an unreasonable construction of the Communications Act.

I. THE PLAIN LANGUAGE OF SECTION 713 ALONG WITH ITS CONTEXT AND LEGISLATIVE HISTORY BARS ANY MANDATE FOR VIDEO DESCRIPTION RULES

The plain language of Section 713 provides the primary guide to congressional intent with respect to video description. *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). Although Section 713 sets forth detailed requirements for FCC rules governing closed captioning, it included no comparable mandate for video description. Section 713(a) required the Commission to complete a closed captioning inquiry and to report its findings to Congress within a specified time frame. Sections 713(b) and (c) then required the Commission to prescribe closed captioning regulations and established compliance deadlines, while subsections (d) and (e) prescribed criteria for exemptions from the rules. By sharp contrast, Section 713(f) merely directs the Commission to “commence an inquiry to examine the use of video descriptions on video programming” and to “report to Congress on its findings.” 47 U.S.C. § 613(f).

It is a “cardinal canon” of statutory construction “that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). Here, the difference between the detailed closed captioning mandates set forth in Sections 713(a)-(e) and the complete absence of rulemaking authority for video descriptions in Section 713(f) was not the result of congressional oversight or poor draftsmanship. To the contrary, Congress specifically considered – and rejected – FCC rulemaking authority for video description.

A. The Legislative History of Section 713 Confirms That Congress Denied the FCC Authority to Adopt Video Description Rules

Congress was not neutral on the issue of video description as the Commission suggested in the orders under review. *See Video Description Order*, 15 FCC Rcd. at 15252-54 (JA171-73). While it recognized that “Congress considered, but did not enact, language explicitly referencing a rulemaking proceeding,” *id.* at 15253 (JA172), the FCC plainly misread the legislative history when it claimed that the Conference Report “left it to the Commission to decide whether to adopt video description rules.” *Id.* at 15254 (JA173). Congressional intent to deny FCC rulemaking authority is evident: The House bill as initially introduced would have required the FCC to adopt *both* closed captioning and video description rules. *See* H.R. 3636, § 206. (JA234). That provision was amended in the final version of the bill to provide discretionary rulemaking authority for video description, while the Senate bill directed the FCC only to report on the subject. *See* H.R. Conf. Rep. No. 104-458 at 184 (1996). (JA289). The Conference Committee adopted the Senate version and eliminated the House bill’s rulemaking provision altogether. *Id.*

The Commission is wrong to interpret this as congressional “silence” regarding video description. *See Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (it “misconstrues the *Chevron* analysis” to argue that because Congress has not mentioned particular authority in a statute, it is “‘silent or ambiguous’ as to that issue”) (quoting *Chevron*, 467 U.S. at 843). Quite to the contrary, Congress fully considered and consciously rejected giving the FCC rulemaking authority. *See*

15 FCC Rcd. at 15275 (Powell Dissent) (“Congress specifically considered granting discretionary authority to the FCC to promulgate video description rules and elected not to do so.”) (JA194). Here, Congress indicated what the FCC should not do by what it chose not to adopt. *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996). See *Railway Labor Executives’ Ass’n*, 29 F.3d at 666.

If Congress intended to empower the Commission to promulgate video description rules, “it was strange indeed that [the Conference Committee] omitted the one clear provision that would have accomplished that result.” *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 392 (1951). “Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987). See *Chickasaw Nation v. United States*, 122 S. Ct. 528, 534 (2001).

It is beyond dispute that the conference committee’s deletion of a provision “strongly militates against a judgment that Congress intended a result that it expressly declined to enact.” *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199-200 (1974). The elimination in conference of a House proposal providing video description rulemaking authority represents a “conscious choice” that reveals congressional intent. See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527-528 (1982); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981) (“Congress thus has rejected the very concept which petitioner seeks to have the Court judicially legislate.”); *Russello v. United States*, 464 U.S. 16, 23-24 (1983)

("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."). *Cf. Brown & Williamson*, 529 U.S. at 144 (FDA lacks authority to regulate tobacco products as "drugs" or "devices" where "Congress considered and rejected bills that would have granted the FDA such jurisdiction"). Next to language of "the statute itself," a conference report is regarded as "the most persuasive evidence of congressional intent," because it "represents the final statement of terms agreed to by both houses." *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981).

The Commission below cited *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), for the proposition that congressional silence with respect to a particular provision does not preclude the agency's reliance on general rulemaking authority. *Video Description Order*, 15 FCC Rcd. at 15253-55 (JA172-74). However, that case actually undermines the FCC's position. In *Iowa Utilities Board*, the Supreme Court held that general Title II rulemaking authority in Section 201 of the Communications Act extended to newly enacted Sections 251-252 of the Telecommunications Act which established a process for competitive market entry into local telecommunications service. Section 251 established interconnection mandates for carriers and required the Commission to adopt implementing rules, *see* 47 U.S.C. § 251(d), while Section 252, which set forth procedures for negotiation, arbitration, and approval of interconnection agreements, was silent on the FCC's rulemaking authority. The Court reasoned that the "lack of parallelism" of the two

provisions was “not peculiar” since Section 251 was mandatory for the FCC, while Section 252 was not. *Iowa Utilities Board*, 525 U.S. at 384-385. It concluded that the Commission’s general authority applied because “the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the ‘provisions of this Act,’ which include §§ 251 and 252, added by the Telecommunications Act of 1996.” *Id.* at 378.

But *Iowa Utilities Board* is inapposite – Congress never considered and rejected rulemaking language for Section 252 of the Act, as it did with Section 713(f). Nor is it tenable to suggest that congressional silence implies discretionary FCC authority for video description when compared to mandatory closed-captioning requirements. While the Commission might have had a colorable argument regarding a “lack of parallelism” if Congress had rejected a *mandatory* video description requirement, the conference committee deleted a proposed grant of *permissive* rulemaking authority. It is simply implausible for the FCC to assert that the committee cut out a provision granting discretionary authority for video description rules because Congress preferred to rely on “the Commission’s more general rulemaking powers.” *Video Description Order* at 15254 (JA173).

Significantly, *Iowa Utilities Board* repudiates directly the Commission’s assumption that it has the authority to adopt rules unless specifically barred by statute. *See, e.g., Id.* at 15253. (JA172). The Court emphatically declined to accept the proposition now put forward by the Commission – that pre-existing general regulatory power also provides ancillary rulemaking authority for matters

that were not included in the more recent enactment. *See Iowa Utilities Board*, 525 U.S. at 381 n.8 (“The Commission could not . . . regulate any aspect of intrastate communication *not* governed by the 1996 Act on the theory that it had an ancillary effect on matters within the Commission’s primary jurisdiction.”) (emphasis in original); *see also Bell Atlantic Md., Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 303 (4th Cir. 2001) (“we should not infer a grant of federal jurisdiction unless Congress manifests its intent to confer jurisdiction”), *cert. granted*, 121 S. Ct. 2548 (2001); *Texas Office of Pub. Util. Counsel v. FCC*, 193 F.3d 393, 424-425 (5th Cir. 1999); *Railway Labor Executives’ Ass’n.*, 29 F.3d at 670 (categorically rejecting argument that an agency “possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area”) (emphases in original).

As explained in more detail below, the Communications Act generally limits the FCC’s ability to exert unbridled control over broadcast and cable programming, and the Commission can point to nothing in the 1996 Act that expands its power in this regard. This point relates to both *Chevron* track one and track two analysis. As this Court has found “it will not do for an agency to invoke the broad purposes of an entire act in order to contravene Congress’ intent embodied in a specific provision of the statute.” *International Brotherhood of Teamsters v. ICC*, 801 F.2d 1423, 1430 (D.C. Cir. 1986), *different result reached on reh’g*, 818 F.2d 87 (1987) (original decision mooted by subsequent legislation). Here, congressional intent is clear, both that FCC lacks rulemaking authority for

video description and that the Communications Act does not provide an unlimited mandate to regulate cable and broadcast programming.

B. Rules of Statutory Construction Confirm That Congress Denied the FCC Authority to Adopt Video Description Rules

The structure of Section 713 further suggests that Congress did not intend to vest the FCC with rulemaking authority for video description. *See Brown & Williamson*, 529 U.S. at 132; *American Bankers Ass'n v. National Credit Union Admin.*, 271 F.3d 262, 267-268 (D.C. Cir. 2001). Under the maxim *expressio unius est exclusio alterius*, where a statute provides authority for an action, and is silent as to a similar, related action, the law must be interpreted as authorizing only the former and not the latter. *E.g., Nextwave Personal Communications, Inc. v. FCC*, 254 F.3d 130, 152-153 (D.C. Cir.), *petition for cert granted*, 122 S. Ct. 1202 (U.S. Mar. 4, 2002) (No. 01-657). *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978). That is, “[a] statute listing the things it does cover exempts, by omission, the things it does not list. As to the items omitted, it is a mistake to say that Congress has been silent. Congress has spoken – these are matters outside the scope of the statute.” *Original Honey Baked Ham Co. v. Glickman*, 172 F.3d 885, 887 (D.C. Cir. 1999). “[W]here 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 and exclusion.” *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (quoting

Russello at 23). That conclusion should be even stronger where, as here, the difference is between contemporaneously adopted subsections.

This Court recently applied the *expressio unius* maxim in a highly relevant context. In *Independent Insurance Agents of America, Inc. v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000), this Court held that national banks cannot act as insurance agents despite a broad statutory grant of authority enabling them to “exercise . . . all such incidental powers as shall be necessary to carry on the business of banking.” *Id.* at 639 (citation omitted). The National Bank Act was amended twice in the Twentieth Century to permit certain designated national banks to engage in various insurance-related activities. In 1997, however, the Comptroller of the Currency decided that *all* national banks could sell crop loss insurance, relying solely on the original law authorizing banks to exercise “all such incidental powers as shall be necessary.” *Id.* at 639-640. This Court rejected such an expansive reading of the law, reasoning that “[a] broad statute when passed ‘may have a range of plausible meanings,’ but subsequent acts can narrow those meanings ‘where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.’” ^{4/} Even if the general provisions in the organic statute reasonably could have been read to encompass

^{4/} *Hawke*, 211 F.3d at 643 (quoting *Brown & Williamson*, 529 U.S. at 143). The Court also cited an 1888 treatise on statutory interpretation which advised that “the special mention of one thing indicates that it was not intended to be covered by a general provision which would otherwise include it.” *Id.* (quoting G.A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES § 399 (1888)).

national banks' sale of insurance, it noted, the subsequent more specific amendments "precluded such a reading." *Id.* at 642. The Comptroller's reliance on general statutory authority transgressed not just rules of statutory construction, but "common sense" as well, the Court pointed out, since Congress would have no need to "confer insurance authority to some national banks if all national banks already had that power." *Id.* at 643-644. *See also Halverson*, 129 F.3d at 187.

And so it is here, where Congress made its intention clear with respect to the programming accessibility mandates of Section 713. The Commission disregarded this canon of statutory construction, claiming only that Congress did not affirmatively limit its authority to adopt video description rules. *Video Description Order*, 15 FCC Rcd. at 15253 (JA172). But this response begs the question of what Congress intended when it adopted Section 713. Where it authorized the Commission to conduct a study and report to Congress, it did so quite clearly both in Section 713(a) (closed captioning) and 713(f) (video description). By contrast, when Congress created new authority to enact closed captioning rules, it crafted specific mandates, deadlines and exemptions in Sections 713(b), (c) and (d), while the only specific reference to video description rulemaking authority was removed in conference. *See supra* at 7-9. In short, where Congress intended to create either mandatory or discretionary requirements regarding the accessibility of communications technology it did so explicitly, not implicitly.

The Commission's reading of the Act is plainly wrong in that it fails to present a "symmetrical and coherent regulatory scheme." *Brown & Williamson*,

529 U.S. at 132-133 (citation omitted). It violates established principles of statutory construction which hold that Congress uses language purposely, and its decision to include a specific mandate in one section while omitting it in another should be respected. *Russello*, 464 U.S. at 22-23. See also *Shook v. District of Columbia Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998); *Halverson*, 129 F.3d at 185; *Ethyl Corp. v. EPA*, 51 F.3d at 1061; *Michigan Citizens for an Indp. Press v. Thornburgh*, 868 F.2d 1285, 1292-93 (D.C. Cir.), *aff'd by equally divided court*, 493 U.S. 38 (1989). This Court should reverse the FCC's decision to adopt video description rules in the face of contrary congressional intent, because it places the agency's judgement in matters of communications policy over that of the legislature that created it.

II. THE FCC'S GENERAL RULEMAKING AUTHORITY DOES NOT SUPPORT VIDEO DESCRIPTION RULES

The Commission's argument that its "more general rulemaking powers" in Sections 4(i) and 303(r) of the Communications Act authorize it to adopt video description rules, *Video Description Order*, 15 FCC Rcd. at 15251-52 (JA170-71); *Reconsideration Order*, 16 FCC Rcd. at 1270 (JA219), is not based "on a permissible construction of the statute" pursuant to *Chevron* track two analysis. *Chevron*, 467 U.S. at 843. Congress does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not . . . hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. at 468. As a general matter, reviewing courts and the FCC are bound "not only by the ultimate purposes Congress has selected, but by the means it has deemed

appropriate, and prescribed, for the pursuit of those purposes.” *MCI Telecomm. Corp.*, 512 U.S. at 231 n.4. Agencies may not “invoke the broad purposes of an entire act in order to contravene Congress’ intent embodied in a specific provision of the statute.” *Teamsters v. ICC*, 801 F.2d at 1430. Here, the Commission’s statutory analysis finds no support in the Communications Act and threatens to undermine First Amendment protections.

A. The Commission’s Unlimited Assertion of Authority Over Programming is Patently Unreasonable

Administrative agencies do not have the power to make law; they are accorded delegated authority only “to adopt regulations to carry into effect the will of Congress as expressed by . . . statute.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976). The FCC’s assertion that it has plenary authority to adopt new programming requirements both for broadcasters and cable operators unless Congress vetoes particular rules is unreasonable because it usurps legislative power and provides “no logical stopping point.” *Hawke*, 211 F.3d at 645 (such expansive authority would enable regulatory agencies “to constantly expand their field of operations on an incremental basis without congressional action”). The Commission’s claim “comes close to saying that [it] has the power to do whatever it pleases merely by virtue of its existence,” a construction of law this Court has variously described as “incredible” and “tortured.” *University of the Dist. of Columbia Faculty Ass’n/NEA v. District of Columbia Fin. Responsibility and Mgmt. Assistance Auth.*, 163 F.3d 616, 621 (D.C. Cir. 1998) (quotation omitted).

This Court repeatedly has refused “to presume a delegation of power merely because Congress has not expressly withheld such power.” *Ethyl Corp. v. EPA*, 51 F.3d at 1060. *See also Shook*, 132 F.3d at 782; *Hawke*, 211 F.3d at 645; *Halverson*, 129 F.3d at 185; *Oil, Chem. & Atomic Workers Int’l Union, AFL-CIO v. NLRB*, 46 F.3d 82, 90 (D.C. Cir. 1995); *Railway Labor Executives’*, 29 F.3d at 671; *Natural Res. Def. Council v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993). Commissioner Powell noted in dissent that all reasonable inferences run against such an open-ended delegation of power, since Congress “surely did not obligate itself in the future to the Herculean task of specifically prohibiting any possible action by the Commission when it crafts new laws in any area within the scope of section 1.” 15 FCC Rcd. at 15274 (Powell Dissent). (JA193). He added that “Congress cannot possibly, nor should it be required to, proscribe FCC action every time a legislative enactment falls within the scope of ‘making available to all the people of the United States a wire and radio service.’” *Id.* *See also* 15 FCC Rcd. at 15269 (Furchtgott-Roth Dissent). (JA188). (“In an administrative scheme based on delegated powers . . . the Commission possesses only those powers granted by Congress, not all powers except those forbidden by Congress.”).

The FCC’s general rulemaking power is no exception to this rule. “Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission’s specific statutory responsibilities.” *California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990) (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)). It is not

credible to suggest, as the FCC does here, that Congress gave it *carte blanche* to adopt any affirmative programming requirement the Commission deems to be in the public interest unless expressly barred by the legislature, and that it did so by the “subtle device” of a general grant of rulemaking authority. *MCI Telecomm. Corp.*, 512 U.S. at 231. Not only does the Communications Act provide express limits on programming regulation, as detailed below, the Commission can point to no ambiguities in the statute, and no “gaps” to fill that suggest an “implicit delegation” of such authority. *Brown & Williamson*, 529 U.S. at 159; *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) (“the Commission was not delegated unrestrained authority”). ^{5/} The question of applying FCC “ancillary” authority does not even arise in a case such as this, where Congress provided clear direction to the agency concerning video description.

B. Video Description Rules Are Inconsistent With the Statutory Scheme of the Communications Act

The Commission’s expansive reading of its statutory authority over programming content conflicts both with the “ultimate purposes” of the Communications Act as well as the “means” prescribed by Congress “for the pursuit

^{5/} In situations such as this, the Court will reject the Commission’s effort to rely on long-established general authority to enact rules covered by a more recent amendment. *Telecommunications Research & Action Ctr. v. FCC*, 836 F.2d 1349, 1357-58 (D.C. Cir. 1988) (“the weight we accord an agency’s interpretation is determined in part by the *consistency* with prior agency pronouncements, as well as the *length of time* the agency has applied its interpretation and whether the agency made its interpretation *contemporaneously* with the enactment of the statute.”) (quotation omitted) (emphasis in original).

of those purposes.” *MCI Communications Corp.*, 512 U.S. at 231 n.4. The Commission’s claim that it can mandate video description rules because it has general authority to promulgate rules to further the “public interest” reads far too much into the Act’s ultimate purposes and fails to consider statutory limits on the FCC’s ability to prescribe programming content.

1. Video Description Rules Are Inconsistent With Section 326 of the Communications Act

Not only is the Commission’s current assertion of unchecked authority over programming incompatible with the ultimate goals of the Communications Act, it conflicts with particular statutory limits. For example, Section 326 of the Communications Act prohibits censorship and expressly withholds from government the power to “interfere with the right of free speech by means of radio communication.” 47 U.S.C. § 326. The general rulemaking authority at issue here cannot trump specific limits, since the general provisions empower the Commission only to adopt rules “not inconsistent with law.” ^{6/} Even in the area of common carrier regulation, which the Commission uses as its touchstone here, such statutory reservations preclude an expansive reading of inherent authority. *E.g.*, *Iowa Utilities Board*, 525 U.S. at 381 n.8; *Louisiana Pub. Serv. Comm’n v. FCC*, 476

^{6/} See, e.g., 47 U.S.C. § 154(i) (“[t]he Commission may . . . make such rules and regulations, and issue such orders, *not inconsistent with this Act*, as may be necessary in the execution of its functions”) (emphasis added); 47 U.S.C. § 303(r) (“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. . . .”) (emphasis added).

U.S. 355, 370 (1986); *California v. FCC*, 905 F.2d at 1240 n.35 (“The system of . . . regulation established by Congress cannot be evaded by the talismanic invocation of the Commission’s Title I authority.”).

This not to suggest that Section 326 precludes all programming regulation in the broadcasting context, since history teaches otherwise. Rather, the key point is that the Commission’s assertion that the Communications Act gives it plenary discretionary authority over programming is an unreasonable interpretation of the statute, particularly where, as here, Congress declined to give the FCC new authority to make rules. *See Midwest Video Corp.*, 440 U.S. at 704 (Section 326 evinces “a legislative desire to preserve values of private journalism”) (quotation omitted). The Commission always has had to “walk a ‘tightrope’” to preserve the free speech values embedded in the Communications Act, a balancing act the Supreme Court has described as “a task of great delicacy and difficulty.” *CBS, Inc. v. DNC*, 412 U.S. 94, 102, 117 (1973). This Court similarly has noted that the “power to specify material the public interest requires or forbids to be broadcast . . . carries the seeds of the general authority to censor denied by the Communications Act and the First Amendment alike.” ^{7/}

^{7/} *Anti-Defamation League of B’nai B’rith v. FCC*, 403 F.2d 169, 172 (D.C. Cir. 1968) (“the First Amendment demands that [the FCC] proceed cautiously [in reviewing programming content] and Congress . . . limited the Commission’s powers in this area”). *See also Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1443 (8th Cir. 1993) (en banc) (Arnold, C.J., concurring) (“There is something about a government order compelling someone to utter or repeat speech that rings legal alarm bells.”).

By adopting video description rules without specific congressional authorization, the Commission discarded its traditional caution regarding content controls and embraced a regulatory mandate limited only by its notions of "good" programming. Such an approach is at odds with the Communications Act. As the Supreme Court has cautioned, "the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations" *Turner Broadcasting Sys.*, 512 U.S. at 650. *Cf., Zamora v. CBS*, 480 F. Supp. 199, 205 (S.D. Fla. 1979) ("Congress has given the F.C.C. carefully circumscribed control over the transmissions coming within the purview of the legislation.").

2. Video Description Rules Are Inconsistent With Section 624(f) of the Communications Act

The statutory restriction on FCC regulatory authority is even more explicit for cable television. ^{8/} Section 624(f) provides that "[a]ny Federal agency . . . may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title." 47 U.S.C. § 544(f). As the House Committee explained, this provision "limits the authority of the FCC . . . to regulate the provision or content of cable services *other than as provided in this new title of the Communications Act.*" H.R. Rep. No. 934, 98th Cong., 2d Sess. 70 (1984) (emphasis added). Given this express statutory limitation, it is untenable for the

^{8/} Petitioner National Association of Broadcasters does not join in the argument set forth in this section of the brief.

Commission to maintain, as it does here, that the Act's pre-existing general rulemaking provision authorizes content requirements that were not contained in the new law.

The FCC's claim that video description rules are consistent with Section 624(f) because they do not require cable operators to carry "particular programming," *Video Description Order*, 15 FCC Rcd. at 15254 (JA173); *Reconsideration Order*, 16 FCC Rcd at 1271 (JA220) simply misreads the statute. Section 624 prohibits regulations regarding the "provision or content" of cable services, except as otherwise specified in the Act. *See MediaOne Group, Inc. v. County of Henrico, Va.*, 97 F. Supp. 2d 712, 716 (E.D. Va. 2000) ("imposition of requirements regarding both the 'provision' and the 'content' of cable services violate[s] Section 544(f)"), *aff'd on other grounds*, 257 F.3d 356 (4th Cir. 2001). Section 624(f) bars creation of a video description requirement without express statutory authority regardless whether the rules are characterized as a regulation of "content" or as a mandate to provide cable "services." It is difficult to understand how the Commission could conclude that it may require a new programming service for the visually impaired without running afoul of the specific prohibition of this section. 9/

9/ Without discussion, the *Video Description Order* cites *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989) to support the proposition that Section 624(f) bars only rules that are "content-based" in that they require cable operators to carry "particular programming." But *United Video* analyzed Section 624(f) in the very different context of copyright-based rules that predated the Cable Act. The *United Video* court stressed that Section 624(f) forbids extra-statutory requirements "that particular programs or types of programs be provided" and it noted that Section 624(f) indicates "Congress thought that a cable company's owners, not government

[Footnote continued]

Moreover, in an argument equally applicable to Sections 624(f) and 326, it is simply playing with words for the Commission to claim that its rules are “not content-based” because they only require distributors to “provide a small amount of programming with video description.” *Video Description Order*, 15 FCC Rcd. at 15254 (JA173). A video description requirement is inherently content-based because it requires programmers to create and transmit new programming material. Entirely new scripts must be written, actors hired to read the new text, and the soundtrack synchronized. As the Commission itself recognized, any requirement for video description would necessitate “the development of a second script, which raises creativity and copyright issues.” *Video Accessibility Report*, 11 FCC Rcd. at 19221-22. (JA53-54). *See also* 15 FCC Rcd. at 15278 (Powell Dissent) (“It is important to note that video description is a creative work. It requires a producer to evaluate a program, write a script, select actors, decide what to describe, decide how to describe it and choose what style or pace.”) (JA197).

It is beyond dispute that video description rules require cable operators to “provide content” and to transmit “particular types of programs.” Not only is video description inherently content based, the rules give distributors credit only for describing primetime and children’s programming. Video distributors that fail to provide sufficient amounts of programming in these content-based categories will be considered in violation of the rule and subject to FCC penalties, including

officials, should decide what sorts of programming the company would provide.” *Id.* at 1189 (emphasis added).

the possibility of being ordered to transmit described programming in excess of the normal requirements. *See* 47 C.F.R. § 79.3(e)(3)(ii). Whether a distributor satisfies the Commission's rule or not would depend entirely on an evaluation of the *content* of that entity's programming. In addition, the transmission of the video description soundtrack on the SAP channel will prevent the use of the SAP channel for any other purpose, including Spanish language programming, *1997 Cable Competition Report*, 13 FCC Rcd. at 1167, and the Commission has acknowledged that "no technical solution to allow two uses of the SAP channel simultaneously is currently available." ^{10/} Accordingly, video description rules fall within the prohibition of Section 624(f), just as they conflict with Section 326.

C. Video Description Rules Are Inconsistent With the First Amendment

Finally, the Commission's assertion of plenary authority to regulate programming content is an unreasonable interpretation of the Communications Act because it raises significant tensions with the First Amendment. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided,

^{10/} *Reconsideration Order*, 16 FCC Rcd. at 1266 (JA215). The Commission asserts, without having conducted a specific analysis of prime time programming, that it does not believe the current mandate for video description will cause substantial displacement of other programs. *Video Description Order*, 15 FCC Rcd. at 15245 (JA164). However, the Commission may not make such an assumption without adequate record support. *Time Warner Entm't Co.*, 240 F.3d 1126, 1132-33 (D.C. Cir.), *cert. denied*, 122 S. Ct. 644 (2001). Moreover, the Commission has made clear that it plans to increase the video description obligations in the future. *Video Description Order*, 15 FCC Rcd. at 15234 (JA153).

our duty is to adopt the latter.” *Jones*, 526 U.S. at 239 (quotation omitted). This rule “has for so long been applied by this Court that it is beyond debate.” See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-576 (1988). As a corollary to this rule, reviewing courts will reject an agency interpretation of a statute that would ordinarily receive deference under *Chevron* track-two if the agency’s reading raises serious constitutional doubts. *Texas Office of Pub. Utils. Council v. FCC*, 183 F.3d at 443. They do so with the understanding that “Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.” *Solid Waste Agency v. United States Army Corps. of Eng’rs*, 121 S. Ct. 675, 683 (2001).

It is no answer for the FCC to assert that the general “public interest” mandate of the Communications Act overcomes any constitutional tensions. As the Supreme Court has stressed, “the ‘public interest’ standard necessarily invites reference to First Amendment principles.” *CBS v. DNC*, 412 U.S. at 122; *FCC v. League of Women Voters*, 468 U.S. 364, 381 (1984) (First Amendment “requires a critical examination of the interests of the public and broadcasters in the light of the particular circumstances of each case”). To whatever extent a general reference to the public interest standard might have permitted certain types of content regulation in the past, courts have begun to reduce the latitude accorded the Commission with the passage of time and changing conditions. See, e.g., *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173 (1999); *Radio-Television News Directors’ Ass’n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000). The video description

rules create First Amendment tensions because they represent a significant expansion of FCC authority over programming (that was not authorized by Congress) at a time when courts are increasingly skeptical of content regulation.

This Court has noted that the Supreme Court “since *Red Lion* has increasingly focused on the editorial discretion of broadcasters.” *Radio-Television News Directors’ Ass’n v. FCC*, 184 F.3d 872, 887 n.19 (D.C. Cir. 1999) (citing *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673-674 (1998)). And as for cable programming, the Commission has never had the same ability under the Constitution to regulate content as it has claimed in the past for broadcasting. *E.g.*, *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 815 (2000) (rationale for broadcast regulation is inapplicable to cable television); *Turner Broadcasting Sys. v. FCC*, 512 U.S. at 637 (“the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, . . . does not apply in the context of cable regulation.”); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 28 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). *Cf. Time Warner Entm’t Co.*, 240 F.3d at 1135. In addition, the video description rules will have a significant impact on the First Amendment interests of program producers and other members of the creative community not contemplated by the statute, in the absence of any indication of Congressional intent to do so. *Cf. Brown & Williamson*, 520 U.S. at 159-60.

Additionally, the rules violate the constitutional prohibition against compelled speech because they require programmers to create new derivative works, and operators to transmit that newly-created content. *See Video*

Accessibility Report, 11 FCC Rcd. at 19221-22 (video description requires creation of a second script). (JA53-54). Just as the First Amendment limits the government's ability to restrict what a person can say, it also prevents the government from forcing a speaker to communicate. *Riley*, 487 U.S. at 797 (“‘freedom of speech,’ . . . necessarily compris[es] the decision of both what to say and what *not* to say.”) (emphasis in original); *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 573 (1995); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). A rule requiring the creation of new programs clearly implicates the First Amendment. 11/

The Commission's claims that video description rules merely “require a programmer to express what it has already chosen to express in alternative format,” and that such rules “are comparable to a requirement to translate one's speech into another language,” *Video Description Report*, 15 FCC Rcd at 15255 (JA174), are factually incorrect and legally irrelevant. As noted above, video description is a creative work and not a mere “translation” or “expression in an alternate format.” *See supra* at 37-38. Regardless of this fact, the translation of a dramatic work into another language constitutes a derivative work for copyright purposes, which by

11/ A rule requiring the creation of new artistic works is not akin to a content-neutral time, place or manner regulation, as the Commission suggests. *See Video Description Order*, 15 FCC Rcd. at 15255 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). (JA174). Nor is it relevant that the rule is viewpoint-neutral. The Supreme Court has rejected the argument that the government may compel statements of fact rather than opinion, noting that “either form of compulsion burdens protected speech.” *Riley*, 487 U.S. at 797-798.

definition is an “original work of authorship.” 12/ In this regard, a person’s choice of language – the decision whether to “translate” his speech, or not – is protected by the First Amendment. 13/ Just as the government cannot prohibit people “from speaking in the tongue of their choice,” *Yniguez*, 69 F.3d at 937-938 (citing *Meyer*, 262 U.S. at 401), it cannot compel them to speak in a language of its choice.

Accordingly, the video description rules, which require certain distributors to “translate” their programs, raises significant First Amendment issues. The Commission’s broad interpretation of its statutory powers is therefore unreasonable, since the law should be construed to avoid such constitutional conflicts.

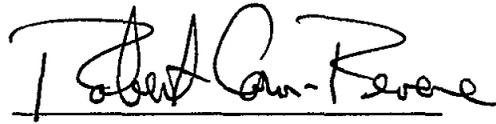
CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court reverse the FCC’s decision below and vacate the rules.

12/ The Copyright Act defines a “derivative work” as “a work based upon one or more preexisting works, such as a translation . . .” 17 U.S.C. § 101. See *Radji v. Khakbaz*, 607 F. Supp. 1296, 1300 (D.D.C. 1985) (noting that 17 U.S.C. § 106(2) “gives the copyright holder the exclusive right to prepare derivative works, which includes the right to make translations”), *amended*, 1987 WL 11415 (May 15, 1987).

13/ See *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 935 (9th Cir. 1995) (*en banc*) (“Language is by definition speech, and the regulation of any language is the regulation of speech.”), *vacated on other grounds*, 520 U.S. 43 (1997). See also *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998) (*en banc*) (same), *cert. denied*, 525 U.S. 1093 (1999); *cf.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Farrington v. Tokushige*, 273 U.S. 284 (1927).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert Corn-Revere", written over a horizontal line.

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CERTIFICATE OF WORD COUNT

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I hereby certify that the foregoing brief was produced using the Century Schoolbook monospaced typeface and contains 11,048 words.



Ronald G. London

ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

47 U.S.C. § 151 provides:

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. § 154 provides in relevant part:

§ 154. Federal Communications Commission

(i) Duties and powers

The 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. § 301 provides:

§ 301. License for radio communication or transmission of energy

It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t)); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

47 U.S.C. § 303 provides in relevant part:

§ 303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall--

(r) Make 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, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

(u) Require that apparatus designed to receive television pictures broadcast simultaneously with sound be equipped with built-in decoder circuitry designed to display closed-captioned television transmissions when such apparatus is manufactured in the United States or imported for use in the United States, and its television picture screen is 13 inches or greater in size.

47 U.S.C. § 326 provides:

§ 326. Censorship

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

47 U.S.C. § 544 provides in relevant part:

§ 544. Regulation of services, facilities, and equipment

(f) Limitation on regulatory powers of Federal agencies, States, or franchising authorities; exceptions

(1) Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title.

(2) Paragraph (1) shall not apply to—

(A) any rule, regulation, or order issued under any Federal law, as such rule, regulation, or order (i) was in effect on September 21, 1983, or (ii) may be amended after such date if the rule, regulation, or order as amended is not inconsistent with the express provisions of this title; and

(B) any rule, regulation, or order under Title 17.

(g) Access to emergency information

Notwithstanding any such rule, regulation, or order, each cable operator shall comply with such standards as the Commission shall prescribe to ensure that viewers of video programming on cable systems are afforded the same emergency information as is afforded by the emergency broadcasting system pursuant to Commission regulations in subpart G of part 73, title 47, Code of Federal Regulations.

47 U.S.C. § 613 provides:

§ 613. Video programming accessibility

(a) Commission inquiry

Within 180 days after the date of enactment of the Telecommunications Act of 1996, the Federal Communications Commission shall complete an inquiry to ascertain the level at which video programming is closed captioned. Such inquiry shall examine the extent to which existing or previously published programming is closed captioned, the size of the video programming provider or programming owner providing closed captioning, the size of the market served, the relative audience shares achieved, or any other related factors. The Commission shall submit to the Congress a report on the results of such inquiry.

(b) Accountability criteria. Within 18 months after such date of enactment, the Commission shall prescribe such regulations as are necessary to implement this section. Such regulations shall ensure that—

(1) video programming first published or exhibited after the effective date of such regulations is fully accessible through the provision of closed captions, except as provided in subsection (d); and

(2) video programming providers or owners maximize the accessibility of video programming first published or exhibited prior to the effective date of such regulations through the provision of closed captions, except as provided in subsection (d).

(c) Deadlines for captioning

Such regulations shall include an appropriate schedule of deadlines for the provision of closed captioning of video programming.

(d) Exemptions. Notwithstanding subsection (b)—

(1) the Commission may exempt by regulation programs, classes of programs, or services for which the Commission has determined that the provision of closed captioning would be economically burdensome to the provider or owner of such programming;

(2) a provider of video programming or the owner of any program carried by the provider shall not be obligated to supply closed captions if such action would be inconsistent with contracts in effect on the date of enactment of the Telecommunications Act of 1996, except that nothing in this section shall be construed to relieve a video programming provider of its obligations to provide services required by Federal law; and

(3) a provider of video programming or program owner may petition the Commission for an exemption from the requirements of this section, and the Commission may grant such petition upon a showing that the requirements contained in this section would result in an undue burden.

(e) Undue burden. The term "undue burden" means significant difficulty or expense. In determining whether the closed captions necessary to comply with the requirements of this paragraph would result in an undue economic burden, the factors to be considered include—

(1) the nature and cost of the closed captions for the programming;

(2) the impact on the operation of the provider or program owner;

(3) the financial resources of the provider or program owner; and

(4) the type of operations of the provider or program owner.

(f) Video descriptions inquiry. 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 appropriate methods and schedules 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.

(g) Video description. For purposes of this section, "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.

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

Selected Provisions of Title 47 of the
Code of Federal Regulations

PART 79—CLOSED CAPTIONING AND
VIDEO DESCRIPTION OF VIDEO
PROGRAMMING

§ 79.1 Closed captioning of video
programming.

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

(1) *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. Video programming includes advertisements of more than five minutes in duration but does not include advertisements of five minutes' duration or less.

(2) *Video programming distributor.* Any television broadcast station licensed by the Commission and any multichannel video programming distributor as defined in § 76.1000(e) of this chapter, 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. An entity contracting for program distribution over a video programming distributor that is itself exempt from captioning that programming pursuant to paragraph (e)(9) of this section shall itself be treated as a video programming distributor for purposes of this section. To the extent such video programming is not otherwise exempt from captioning, the entity that contracts for its distribution shall be required to comply with the closed captioning requirements of this section.

(3) *Video programming provider.* Any video programming distributor and any other entity that provides video programming that is intended for distribution to residential households including, but not limited to broadcast or nonbroadcast television network and the owners of such programming.

(4) *Closed captioning.* The visual display of the audio portion of video programming contained in line 21 of the vertical blanking interval (VBI) pursuant to the technical specifications set forth in part 15 of this chapter.

(5) *New programming.* Video programming that is first published or exhibited on or after January 1, 1998.

(6) *Pre-rule programming.* (i) Video programming that was first published or exhibited before January 1, 1998.

(ii) Video programming first published or exhibited for display on television receivers equipped for display of digital transmissions or formatted for such transmission and exhibition prior to the date on which such television receivers must, by Commission rule, be equipped with built-in decoder circuitry designed to display closed-captioned digital television transmissions.

(7) *Nonexempt programming.* Video programming that is not exempt under paragraph (d) of this section and, accordingly, is subject to closed captioning requirements set forth in this section.

(b) *Requirements for closed captioning of video programming.* — (1) Requirements for new English language programming. Video programming distributors must provide closed captioning for nonexempt video programming that is being distributed and exhibited on each channel during each calendar quarter in accordance with the following requirements:

(i) Between January 1, 2000, and December 31, 2001, a video programming distributor shall provide at least 450 hours of captioned video programming or all of its new nonexempt video programming must be provided with captions, whichever is less;

(ii) Between January 1, 2002, and December 31, 2003, a video programming distributor shall provide at least 900 hours of captioned video programming or all of its new nonexempt video programming must be provided with captions, whichever is less;

(iii) Between January 1, 2004, and December 31, 2005, a video programming distributor shall provide at least an average of 1350 hours of captioned video programming or

all of its new nonexempt video programming must be provided with captions, whichever is less; and

(iv) As of January 1, 2006, and thereafter, 100% of the programming distributor's new nonexempt video programming must be provided with captions.

(2) *Requirements for pre-rule English language programming.* (i) After January 1, 2003, 30% of the programming distributor's pre-rule nonexempt video programming being distributed and exhibited on each channel during each calendar quarter must be provided with closed captioning.

(ii) As of January 1, 2008, and thereafter, 75% of the programming distributor's pre-rule nonexempt video programming being distributed and exhibited on each channel during each calendar quarter must be provided with closed captioning.

(3) *Requirements for new Spanish language programming.* Video programming distributors must provide closed captioning for nonexempt Spanish language video programming that is being distributed and exhibited on each channel during each calendar quarter in accordance with the following requirements:

(i) Between January 1, 2001, and December 31, 2003, a video programming distributor shall provide at least 450 hours of captioned Spanish language video programming or all of its new nonexempt Spanish language video programming must be provided with captions, whichever is less;

(ii) Between January 1, 2004, and December 31, 2006, a video programming distributor shall provide at least 900 hours of captioned Spanish language video programming or all of its new nonexempt Spanish language video programming must be provided with captions, whichever is less;

(iii) Between January 1, 2007, and December 31, 2009, a video programming distributor shall provide at least an average of 1350 hours of captioned Spanish language video programming or all of its new nonexempt Spanish language video programming must be provided with captions, whichever is less; and

(iv) As of January 1, 2010, and thereafter, 100% of the programming distributor's new nonexempt Spanish

language video programming must be provided with captions.

(4) *Requirements for Spanish language prerule programming.* (i) After January 1, 2005, 30% of the programming distributor's pre-rule nonexempt Spanish language video programming being distributed and exhibited on each channel during each calendar quarter must be provided with closed captioning.

(ii) As of January 1, 2012, and thereafter, 75% of the programming distributor's pre-rule nonexempt Spanish language video programming being distributed and exhibited on each channel during each calendar quarter must be provided with closed captioning.

(5) Video programming distributors shall continue to provide captioned video programming at substantially the same level as the average level of captioning that they provided during the first six (6) months of 1997 even if that amount of captioning exceeds the requirements otherwise set forth in this section.

(c) *Obligation to pass through captions of already captioned programs.*--All video programming distributors shall deliver all programming received from the video programming owner or other origination source containing closed captioning to receiving television households with the original closed captioning data intact in a format that can be recovered and displayed by decoders meeting the standards of § 15.119 of this chapter unless such programming is recaptioned or the captions are reformatted by the programming distributor.

(d) *Exempt programs and providers.*--For purposes of determining compliance with this section, any video programming or video programming provider that meets one or more of the following criteria shall be exempt to the extent specified in this paragraph.

(1) *Programming subject to contractual captioning restrictions.* Video programming that is subject to a contract in effect on or before February 8, 1996, but not any extension or renewal of such contract, for which an obligation to provide closed captioning would constitute a breach of contract.

(2) *Video programming or video programming provider for which the*

captioning requirement has been waived. Any video programming or video programming provider for which the Commission has determined that a requirement for closed captioning imposes an undue burden on the basis of a petition for exemption filed in accordance with the procedures specified in paragraph (f) of this section.

(3) *Programming other than English or Spanish language.* All programming for which the audio is in a language other than English or Spanish, except that scripted programming that can be captioned using the "electronic news room" technique is not exempt.

(4) *Primarily textual programming.* Video programming or portions of video programming for which the content of the soundtrack is displayed visually through text or graphics (e.g., program schedule channels or community bulletin boards).

(5) *Programming distributed in the late night hours.* Programming that is being distributed to residential households between 2 a.m. and 6 a.m. local time. Video programming distributors providing a channel that consists of a service that is distributed and exhibited for viewing in more than a single time zone shall be exempt from closed captioning that service for any continuous 4 hour time period they may select, commencing not earlier than 12 a.m. local time and ending not later than 7 a.m. local time in any location where that service is intended for viewing. This exemption is to be determined based on the primary reception locations and remains applicable even if the transmission is accessible and distributed or exhibited in other time zones on a secondary basis. Video programming distributors providing service outside of the 48 contiguous states may treat as exempt programming that is exempt under this paragraph when distributed in the contiguous states.

(6) *Interstitials, promotional announcements and public service announcements.* Interstitial material, promotional announcements, and public service announcements that are 10 minutes or less in duration.

(7) *ITFS programming.* Video programming transmitted by an Instructional

Television Fixed Service licensee pursuant to §§ 74.931(a), (b) or (c) of the rules.

(8) *Locally produced and distributed non-news programming with no repeat value.* Programming that is locally produced by the video programming distributor, has no repeat value, is of local public interest, is not news programming, and for which the "electronic news room" technique of captioning is unavailable.

(9) *Programming on new networks.* Programming on a video programming network for the first four years after it begins operation, except that programming on a video programming network that was in operation less than four (4) years on January 1, 1998 is exempt until January 1, 2002.

(10) *Primarily non-vocal musical programming.* Programming that consists primarily of non-vocal music.

(11) *Captioning expense in excess of 2% of gross revenues.* No video programming provider shall be required to expend any money to caption any video programming if such expenditure would exceed 2% of the gross revenues received from that channel during the previous calendar year.

(12) *Channels producing revenues of under \$3,000,000.* No video programming provider shall be required to expend any money to caption any channel of video programming producing annual gross revenues of less than \$3,000,000 during the previous calendar year other than the obligation to pass through video programming already captioned when received pursuant to paragraph (c) of this section.

(13) *Locally produced educational programming.* Instructional programming that is locally produced by public television stations for use in grades K-12 and post secondary schools.

(e) *Responsibility for and determination of compliance.* (1) Compliance shall be calculated on a per channel, calendar quarter basis;

(2) Open captioning or subtitles in the language of the target audience may be used in lieu of closed captioning;

(3) Live programming or repeats of programming originally transmitted live that are captioned using the so-called "electronic newsroom technique" will be considered

captioned, except that effective January 1, 2000, and thereafter, the major national broadcast television networks (i.e., ABC, CBS, Fox and NBC), affiliates of these networks in the top 25 television markets as defined by Nielsen's Designated Market Areas (DMAs) and national nonbroadcast networks serving at least 50% of all homes subscribing to multichannel video programming services shall not count electronic newsroom captioned programming towards compliance with these rules. The live portions of noncommercial broadcasters' fundraising activities that use automated software to create a continuous captioned message will be considered captioned;

(4) Compliance will be required with respect to the type of video programming generally distributed to residential households. Programming produced solely for closed circuit or private distribution is not covered by these rules;

(5) Video programming that is exempt pursuant to paragraph (d) of this section that contains captions, except video programming exempt pursuant to paragraph (d)(5) of this section (late night hours exemption), can count towards the compliance with the requirements for new programming prior to January 1, 2006. Video programming that is exempt pursuant to paragraph (d) of this section that contains captions, except that video programming exempt pursuant to paragraph (d)(5) of this section (late night hours exemption), can count towards compliance with the requirements for pre-rule programming.

(6) For purposes of paragraph (d)(11) of this section, captioning expenses include direct expenditures for captioning as well as allowable costs specifically allocated by a programming supplier through the price of the video programming to that video programming provider. To be an allowable allocated cost, a programming supplier may not allocate more than 100% of the costs of captioning to individual video programming providers. A programming supplier may allocate the captioning costs only once and may use any commercially reasonable allocation method;

(7) For purposes of paragraphs (d)(11) and (d)(12) of this section, annual gross

revenues shall be calculated for each channel individually based on revenues received in the preceding calendar year from all sources related to the programming on that channel. Revenue for channels shared between network and local programming shall be separately calculated for network and for non-network programming, with neither the network nor the local video programming provider being required to spend more than 2% of its revenues for captioning. Thus, for example, compliance with respect to a network service distributed by a multichannel video service distributor, such as a cable operator, would be calculated based on the revenues received by the network itself (as would the related captioning expenditure). For local service providers such as broadcasters, advertising revenues from station-controlled inventory would be included. For cable operators providing local origination programming, the annual gross revenues received for each channel will be used to determine compliance. Evidence of compliance could include certification from the network supplier that the requirements of the test had been met. Multichannel video programming distributors, in calculating non-network revenues for a channel offered to subscribers as part of a multichannel package or tier, will not include a pro rata share of subscriber revenues, but will include all other revenues from the channel, including advertising and ancillary revenues. Revenues for channels supported by direct sales of products will include only the revenues from the product sales activity (e.g., sales commissions) and not the revenues from the actual products offered to subscribers. Evidence of compliance could include certification from the network supplier that the requirements of this test have been met.

(8) If two or more networks (or sources of programming) share a single channel, that channel shall be considered to be in compliance if each of the sources of video programming are in compliance where they are carried on a full time basis;

(9) Video programming distributors shall not be required to provide closed captioning for video programming that is by law not subject to their editorial control, including but not limited to the signals of

television broadcast stations distributed pursuant to sections 614 and 615 of the Communications Act or pursuant to the compulsory copyright licensing provisions of sections 111 and 119 of the Copyright Act (Title 17 U.S.C. 111 and 119); programming involving candidates for public office covered by sections 315 and 312 of the Communications Act and associated policies; commercial leased access, public access, governmental and educational access programming carried pursuant to sections 611 and 612 of the Communications Act; video programming distributed by direct broadcast satellite (DBS) services in compliance with the noncommercial programming requirement pursuant to section 335(b)(3) of the Communications Act to the extent such video programming is exempt from the editorial control of the video programming provider; and video programming distributed by a common carrier or that is distributed on an open video system pursuant to section 653 of the Communications Act by an entity other than the open video system operator. To the extent such video programming is not otherwise exempt from captioning, the entity that contracts for its distribution shall be required to comply with the closed captioning requirements of this section.

(10) In evaluating whether a video programming provider has complied with the requirement that all new nonexempt video programming must include closed captioning, the Commission will consider showings that any lack of captioning was de minimis and reasonable under the circumstances.

(f) *Procedures for exemptions based on undue burden.* (1) A video programming provider, video programming producer or video programming owner may petition the Commission for a full or partial exemption from the closed captioning requirements. Exemptions may be granted, in whole or in part, for a channel of video programming, a category or type of video programming, an individual video service, a specific video program or a video programming provider upon a finding that the closed captioning requirements will result in an undue burden.

(2) A petition for an exemption must be supported by sufficient evidence to demonstrate that compliance with the

requirements to closed caption video programming would cause an undue burden. The term "undue burden" means significant difficulty or expense. Factors to be considered when determining whether the requirements for closed captioning impose an undue burden include:

(i) The nature and cost of the closed captions for the programming;

(ii) The impact on the operation of the provider or program owner;

(iii) The financial resources of the provider or program owner; and

(iv) The type of operations of the provider or program owner.

(3) In addition to these factors, the petition shall describe any other factors the petitioner deems relevant to the Commission's final determination and any available alternatives that might constitute a reasonable substitute for the closed captioning requirements including, but not limited to, text or graphic display of the content of the audio portion of the programming. Undue burden shall be evaluated with regard to the individual outlet.

(4) An original and two (2) copies of a petition requesting an exemption based on the undue burden standard, and all subsequent pleadings, shall be filed 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) Comments or oppositions to the petition shall be served on the petitioner and shall include a certification that the petitioner was served with a copy. Replies to comments or oppositions shall be served on the commenting or opposing party and shall include a certification that the commenter 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) All petitions and responsive pleadings shall contain 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 closed captioning requirements.

(11) During the pendency of an undue burden determination, the video programming subject to the request for exemption shall be considered exempt from the closed captioning requirements.

(g) *Complaint procedures.* (1) No complaint concerning an alleged violation of the closed captioning requirements of this section shall be filed with the Commission unless such complaint is first sent to the video programming distributor responsible for delivery and exhibition of the video programming. A complaint must be in writing, must state with specificity the alleged Commission rule violated and must include some evidence of the alleged rule violation. In the case of an alleged violation by a television broadcast station or other programming for which the video programming distributor is exempt from closed captioning responsibility pursuant to paragraph (e)(9) of this section, the complaint shall be sent directly to the station or owner of the programming. A video programming distributor receiving a complaint regarding such programming must forward the complaint within seven days of receipt to the programmer or send written instructions to the complainant on how to refile with the programmer.

(2) A complaint will not be considered if it is filed with the video programming distributor later than the end of the calendar quarter following the calendar quarter in which the alleged violation has occurred.

(3) The video programming distributor must respond in writing to a complaint no later than 45 days after the end of the calendar quarter in which the violation is alleged to have occurred or 45 days after receipt of a written complaint, whichever is later.

(4) If a video programming distributor fails to respond to a complaint or a dispute remains following the initial complaint resolution procedures, a complaint may be filed with the Commission within 30 days after the time allotted for the video

programming distributor to respond has ended. An original and two (2) copies of the complaint, and all subsequent pleadings shall be filed in accordance with § 0.401(a) of this chapter. The complaint shall include evidence that demonstrates the alleged violation of the closed captioning requirements of this section and shall certify that a copy of the complaint and the supporting evidence was first directed to the video programming distributor. A copy of the complaint and any supporting documentation must be served on the video programming distributor.

(5) The video programming distributor shall have 15 days to respond to the complaint. In response to a complaint, a video programming distributor is obligated to provide the Commission with sufficient records and documentation to demonstrate that it is in compliance with the Commission's rules. The response to the complaint shall be served on the complainant.

(6) Certifications from programming suppliers, including programming producers, programming owners, networks, syndicators and other distributors, may be relied on to demonstrate compliance. Distributors will not be held responsible for situations where a program source falsely certifies that programming delivered to the distributor meets our captioning requirements if the distributor is unaware that the certification is false. Video programming providers may rely on the accuracy of certifications. Appropriate action may be taken with respect to deliberate falsifications.

(7) The Commission will review the complaint, including all supporting evidence, and determine whether a violation has occurred. The Commission shall, as needed, request additional information from the video programming provider.

(8) If the Commission finds that a violation has occurred, penalties may be imposed, including a requirement that the video programming distributor deliver video programming containing closed captioning in an amount exceeding that specified in paragraph (b) of this section in a future time period.

(h) *Private rights of action 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.

§ 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.

(6) *Prime time.* The period from 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday local time, except that in the central time zone the relevant period shall be between the hours of 7 and 10:00 p.m. Monday through Saturday, and 6 and 10:00 p.m. on Sunday, and in the mountain time zone each station shall elect whether the period shall be 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday, or 7 to 10:00 p.m. Monday through Saturday, and 6 to 10:00 p.m. on Sunday.

(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, 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;

(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, that reach 50 percent or more of MVPD households; 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, 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; 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, 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.

(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 through June 30, 2002.

(2) In order to meet its fifty-hour quarterly requirement, a broadcaster or MVPD may count each program it airs with video description no more than a total of two times on each channel on which it airs the program. A broadcaster or MVPD may count the second airing in the same or any one subsequent quarter.

(3) Once a commercial television broadcast station as defined under paragraph (b)(1) of this section has aired a particular program with video description, it is required to include video description with all subsequent airings of that program on that same broadcast station, 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.

(4) Once an MVPD as defined under paragraph (b)(3) of this section:

(i) Has aired a particular program with video description on a broadcast station they carry, it is required to include video description with all subsequent airings of that program on that same broadcast station, 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; or

(ii) Has aired a particular program with video description on a nonbroadcast station they carry, it is required to include video description with all subsequent airings of that program on that same nonbroadcast station, 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.

(5) 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 provider 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;

(v) 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 the complainant's disability); and

(vi) a certification that the complainant attempted in good faith to resolve the dispute with the broadcast station or MVPD against whom the complaint is alleged.

(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 either to shorten or lengthen the time required for responding to complaints in particular cases. The answer to a complaint must include a certification that the video programming distributor attempted in good faith to resolve the dispute with the complainant.

(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.

CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of May, 2002, caused to be served copies of the foregoing Brief for Petitioners by first-class mail, postage prepaid, on:

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Title Ins. Co. v. Brown, 511 U.S. 117, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994) (per curiam) (raising, without deciding, the question of whether due process forbids enforcing a class-action judgment against an absent plaintiff who wishes to bring her own individual lawsuit for money damages, where the class was properly certified as a no-opt-out class action). Second, the constitutional concerns raised in *Shutts* and *Ticor* may also implicate the concerns underlying Rule 23. The drafters of the 1966 amendments, which gave rise to the rule as we know it today, were concerned with the binding effect of class actions and the due process protections required for parties to be bound. FED. R. CIV. P. 23 advisory committee notes (noting the need to “assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class”). They drafted the rule to clarify that “all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class.” *Id.*

Because of the importance of these issues to the interpretation of Rule 23 and because their implications for this case are entirely unbriefed, we think it best to decline to exercise our Rule 23(f) discretion to consider the Department’s arguments at this time. Following full briefing in the district court and any revised order issued by that court, the Department remains free to seek appellate review, either in another 23(f) petition or otherwise.

The Department’s petition is denied.

So ordered.



MOTION PICTURE ASSOCIATION OF AMERICA, INC., et al., Petitioners.

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents.

National Television Video Access Coalition, et al., Intervenors.

Nos. 01-1149, 01-1155.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 6, 2002.

Decided Nov. 8, 2002.

Following denial of motion for reconsideration of Federal Communications Commission (FCC) order adopting rules which mandated a certain amount of television programming with video descriptions per quarter, 2001 WL 43382, motion picture association petitioned for review of orders. The Court of Appeals, Harry T. Edwards, Circuit Judge, held that rules were not authorized by any section of the Telecommunications Act.

Petition for review granted; reversed in part.

Karen LeCraft Henderson, Circuit Judge, filed concurring opinion.

1. Statutes ⇔219(1)

An administrative agency’s interpretation of a statute is not entitled to *Chevron* deference absent a delegation of authority from Congress to regulate in the areas at issue.

2. Statutes ⇔219(1)

Even if an administrative agency has acted within its delegated authority, no

Chevron deference is due unless the agency's action has the force of law.

3. Telecommunications ⇔383

Provisions of Telecommunications Act defining "video description," and requiring Federal Communications Commission (FCC) to undertake study examining use of video descriptions on video programming and report to Congress on its findings, did not authorize FCC to adopt regulations mandating video descriptions. Communications Act of 1934, § 713(f), as amended, 47 U.S.C.A. § 613(f).

4. Statutes ⇔223.2(1.1)

Statutory provisions in *pari materia* normally are construed together to discern their meaning.

5. Telecommunications ⇔383

Provisions of Telecommunications Act, which stated that the Act applied to all interstate and foreign communication by wire or radio and to all persons engaged within the United States in such communication, did not authorize the Federal Communications Commission (FCC) to adopt rules mandating a certain amount of television programming with video descriptions per quarter; video description rules regulated programming content, and provision of statute at issue did not confer authority to regulate program content. Communications Act of 1934, §§ 1, 2(a), as amended, 47 U.S.C.A. §§ 151, 152(a).

6. Telecommunications ⇔383

Federal Communications Commission (FCC) rules mandating a certain amount of television programming with video descriptions per quarter, even if they furthered a valid communications policy goal and were in the public interest, were not authorized by provision of Telecommunications Act permitting FCC to regulate in the public interest as necessary to carry out provisions of the Act, where rules were not authorized under any other provision.

Communications Act of 1934, § 303(r), as amended, 47 U.S.C.A. § 303(r).

7. Telecommunications ⇔383

Federal Communications Commission (FCC) rules mandating a certain amount of television programming with video descriptions per quarter were not authorized by provision of Telecommunications Act stating that FCC could make rules that were not inconsistent with the Act as necessary in execution of its functions. Communications Act of 1934, § 4(i), as amended, 47 U.S.C.A. § 154(i).

On Petitions for Review of Orders of the Federal Communications Commission.

Robert Corn-Revere argued the cause for petitioner Motion Picture Association of America, Inc., et al. With him on the briefs was Ronald G. London.

Daniel F. Goldstein argued the cause and filed the briefs for petitioner National Federation of the Blind.

C. Grey Pash, Jr., Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were Jane E. Mago, General Counsel, Daniel M. Armstrong, Associate General Counsel, and Jacob M. Lewis, Attorney, United States Department of Justice. Catherine G. O'Sullivan, Chief Counsel, and Nancy C. Garrison, Attorney, United States Department of Justice, entered appearances.

Donald J. Evans argued the cause for intervenors. With him on the brief were Liliana E. Ward, Keith A. Noreika, and Robert A. Long, Jr.

Before: EDWARDS, HENDERSON,
and ROGERS, Circuit Judges.

Opinion for the Court filed by Circuit Judge HARRY T. EDWARDS.

Concurring opinion filed by Circuit Judge KAREN LeCRAFT HENDERSON.

HARRY T. EDWARDS, Circuit Judge:

The Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (“the Telecommunications Act”), added new provisions covering video programming accessibility to the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (“the Act”). The new provisions, codified in § 713 of the Communications Act, 47 U.S.C. § 613, specifically dealt with “closed captioning” and “video description” technologies that can be employed to enhance television video services for hearing and visually impaired individuals. Closed captioning displays the audio portion of television signals as words displayed on the screen and can be activated at a viewer’s discretion. Video descriptions provide aural descriptions of a television program’s key visual elements (such as the movement of a person in a scene) that are inserted during pauses in the program dialogue. Video descriptions change program content because they require the creation of new script to convey program details, whereas closed captions present a verbatim transcription of the program’s spoken words.

Congress treated the two technologies quite differently when it passed the Telecommunications Act, which added § 713 to the Communications Act. Section 713(a) required the Commission to complete a closed captioning inquiry and to report its findings to Congress within 180 days of the Act’s passage. 47 U.S.C. § 613(a). Sections 713(b) and (c) required the Commission to prescribe closed captioning regulations and established compliance deadlines. 47 U.S.C. § 613(b)-(c). Sections 713(d) and (e) established exemptions from the closed captioning rules. 47 U.S.C. § 613(d)-(e). In contrast, subsections 713(f) and (g) – the sole subsections deal-

ing with video description – merely defined “video description” and required the FCC to prepare a report to Congress. 47 U.S.C. § 613(f)-(g). Unlike the provisions covering closed captioning, § 713 did not authorize the Commission to adopt regulations implementing video descriptions.

After releasing a report on video description, the FCC announced that it was seeking commentary on proposed rules mandating video description. *Implementation of Video Description of Video Programming, Notice of Proposed Rulemaking*, 14 F.C.C.R. 19,845, 1999 WL 1044393 (1999) (“*Notice of Proposed Rulemaking*”). The FCC then adopted rules mandating television programming with video descriptions. *Implementation of Video Description of Video Programming, Report and Order*, 15 F.C.C.R. 15,230, 2000 WL 1091672 (2000) (“*Report and Order*”). The Motion Picture Association of America (“MPAA”) and the National Federation of the Blind (“NFB”) both petitioned this court for review of the agency’s regulations mandating video descriptions. MPAA contends that the new regulations should be struck down because they are not authorized by § 1 and they are precluded by § 713 of the Act. *See* 47 U.S.C. §§ 151, 613. NFB contends that the regulations should be rejected as arbitrary and capricious, because the FCC failed to assess whether visually impaired persons actually want or need video description, as opposed to rules requiring spoken articulation of on-screen text.

By its terms, the Act does not provide the FCC with the authority to enact video description rules. Contrary to the FCC’s arguments suggesting otherwise, § 1, 47 U.S.C. § 151, does not give the FCC unlimited authority to act as it sees fit with respect to all aspects of television transmissions, without regard to the scope of the proposed regulations. We hold that

where, as in this case, the FCC promulgates regulations that significantly implicate program content, § 1 is not a source of authority. Because the FCC can point to no other statutory authority, the video description regulations must be vacated. Accordingly, MPAA's petition for review is hereby granted. NFB's petition for review is dismissed as moot, because the regulations to which they object will be vacated pursuant to the court's judgment in this case.

I. BACKGROUND

The Telecommunications Act added to the Communications Act new video programming accessibility provisions involving closed captioning and video description. 47 U.S.C. § 613. Video description is defined in the statute to include "the insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue." *Id.* § 613(g). Video descriptions are usually transmitted over a secondary audio programming channel, a sub-carrier that allows video distributors to transmit additional soundtracks, such as foreign language programming. *Closed Captioning and Video Description of Video Programming, Report*, 11 F.C.C.R. 19,214, 19,221, 1996 WL 420237 (1996) ("*Video Accessibility Report*").

There is a marked difference between Congress' treatment of closed captioning and video description in § 713 of the Act. The new provision required the FCC to complete an inquiry into closed captioning, and report the results to Congress within 180 days of the Act's passage. 47 U.S.C. § 613(a). It also affirmatively required that the FCC prescribe regulations for the implementation of closed captioning, *id.* § 613(b), and established compliance deadlines for that action, *id.* § 613(c). In contrast, § 713 only required that the FCC prepare a video description report for Con-

gress; it did not mandate any implementation of visual descriptions. *Id.* § 613(f).

The initial House bill preceding the enactment of § 713 would have required the FCC to adopt video description rules. *See Report and Order*, 15 F.C.C.R. at 15,274 n. 9 (Powell, dissenting) (noting that H.R. 3636 § 206 provided that the FCC "*shall*, within 1 year of enactment of the [video programming accessibility] section, *prescribe* such regulations as are necessary to ensure that all video programming is fully accessible to individuals with disabilities through the provision of closed captioning service *and video description*" (emphases and bracketed language in original)). However, the bill was amended in committee to provide a discretionary grant of authority rather than mandate that the FCC provide video description. The new language provided that, "[f]ollowing the completion of such inquiry, the Commission may adopt regulation [sic] it deems necessary to promote the accessibility of video programming to persons with visual impairments." Amendment No. 8 to H.R. 3636 (Moorhead) (Mar. 16, 1994), *reprinted in* Joint Appendix ("J.A.") 237. This new version of the bill passed the House in 1995. H.R. 1555, § 204(f), 104th Cong. (1st Sess.1995), *reprinted in* J.A. 254-59.

The corresponding Senate bill, however, only directed the FCC to report to Congress about video description: It neither mandated video description nor provided the FCC with discretionary authority to adopt such rules. S. 652, § 305, 104th Cong. (1st Sess.1995), *reprinted in* J.A. 251-53. The conference committee adopted the Senate version, abandoning the House language providing the FCC with discretionary authority. Congress passed this version of the bill and the President signed it into law.

After the enactment of § 713, the FCC issued the report that the Act mandated.

The report stated that “the best course is . . . to continue to collect information and monitor the deployment of video description and the development of standards for new video technologies that are likely to affect the availability of video description.” *Video Accessibility Report*, 11 F.C.C.R. at 19,271. The FCC supplemented this report with a second report, *Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, Report*, 13 F.C.C.R. 1034, 1998 WL 10229 (1998). Then, in 1999, the FCC announced that it was seeking commentary on proposed rules that would mandate video description. *Notice of Proposed Rule-making*, 14 F.C.C.R. 19,845. The Commission sought commentary, *inter alia*, about whether the FCC possessed statutory authority to enact such rules. *Id.* at 19,857-59 ¶¶ 34-39.

After reviewing the comments, the FCC voted 3-2 to adopt rules requiring certain video programmers to supplement certain programming with video descriptions. *See Report and Order*, 15 F.C.C.R. 15,230. The FCC concluded that it possessed the statutory authority to adopt these rules pursuant to § 1 of the Act. 47 U.S.C. § 151. Section 1 gives the FCC authority to regulate “interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . .” 47 U.S.C. § 151. The FCC majority also rejected the argument that § 713, 47 U.S.C. § 613, precluded the agency from mandating video description merely because the provision only authorized the FCC to conduct an inquiry. *Report and Order*, 15 F.C.C.R. at 15,252-54 ¶¶ 57-61. Finally, the FCC found that the record demonstrated “the importance of video description to persons with visual disabilities.” *Id.* at 15,232 ¶ 4. The FCC primarily based this conclusion on the

American Council for the Blind’s submission, which contained more than 250 e-mails and letters of support for the rules. *Id.*

The FCC’s video description rules require commercial television broadcasters affiliated with the top four commercial networks (ABC, CBS, Fox, and NBC) to provide fifty hours of video description per quarter during either prime time or children’s programming. 47 C.F.R. § 79.3(b)(1). The rules also require multi-channel video programming distributors that serve 50,000 or more subscribers to provide fifty hours of video description per quarter during prime time or children’s programming on each channel that carries one of the top five nonbroadcast networks. *Id.* § 79.3(b)(3).

Commissioners Powell and Furchtgott-Roth dissented from the visual description order, because they did not believe that the Communications Act authorized the FCC to adopt video description rules. *Id.* at 15,268-69 (Furchtgott-Roth, dissenting); 15,272-76 (Powell, dissenting).

Various parties sought reconsideration of the FCC’s Order, primarily on the ground that the rules exceeded the FCC’s legal authority. *Petition for Reconsideration of the MPAA*, MM Docket No. 99-339, Oct. 11, 2000, reprinted in J.A. 330-38; *Petition for Partial Reconsideration and Clarification Submitted by the National Association of Broadcasters*, MM Docket No. 99-339, Oct. 11, 2000, reprinted in J.A. 339-54; *Petition for Reconsideration of the National Cable Television Association*, MM Docket No. 99-339, Oct. 11, 2000, reprinted in J.A. 355-74. The FCC denied reconsideration, although it did refine certain implementation issues related to the new rules. *Implementation of Video Description of Video Programming, Memorandum Opinion and Order on Reconsideration*, 16 F.C.C.R. 1251, 2001 WL 43382

(2001), *erratum issued*, 66 Fed.Reg. 16,618 (Mar. 27, 2001). MPAA and NFB then filed petitions for review.

II. ANALYSIS

A. Standard of Review

[1] In deciding whether to defer to the FCC's construction of the Act, we adhere to the tests enunciated by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) and *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). In *Chevron*, the Court held that, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43, 104 S.Ct. at 2781. This is so-called "*Chevron* Step One" review. If Congress "has not directly addressed the precise question" at issue, and the agency has acted pursuant to an express or implicit delegation of authority, the agency's interpretation of the statute is entitled to deference so long as it is "reasonable" and not otherwise "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44, 104 S.Ct. at 2782. This is so-called "*Chevron* Step Two" review. In either situation, the agency's interpretation of the statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue. See *Ry. Labor Executives Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C.Cir.1994) (en banc) (*Chevron* "deference is warranted only when Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.'" (quoting *Chevron*, 467 U.S. at 843-44, 104 S.Ct. at 2781-83).

[2] *Mead* reinforces *Chevron's* command that deference to an agency's interpretation of a statute is due only when the agency acts pursuant to "delegated author-

ity." 533 U.S. at 226-27, 121 S.Ct. at 2170-71. The Court in *Mead* also makes it clear that, even if an agency has acted within its delegated authority, no *Chevron* deference is due unless the agency's action has the "force of law." *Id.* at 227, 121 S.Ct. at 2171.

In this case, the principal question is whether Congress "delegated authority" to the FCC to promulgate visual description regulations. Absent such authority, we need not decide whether the regulations are otherwise "reasonable." An agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress.

B. The FCC Lacks Statutory Authority to Adopt the Video Description Rules

MPAA argues that § 713 precludes the adoption of rules mandating video description and that § 1 does not otherwise authorize the FCC to adopt video description rules. We largely agree, although we rest principally on the latter point.

1. Section 713

[3] There is no doubt that § 713, 47 U.S.C. § 613, by its terms, does not provide the FCC with the authority to enact video description rules, and the FCC does not suggest that it does. The harder question is whether the provision effectively bars the FCC from mandating video description.

[4] Statutory provisions *in pari materia* normally are construed together to discern their meaning. *Erlenbaugh v. United States*, 409 U.S. 239, 244, 93 S.Ct. 477, 480, 34 L.Ed.2d 446 (1972) (noting that the rule that statutes *in pari materia* should be construed together "is . . . a logical extension of the principle that individual sections of a single statute should be construed together"); *Holyoke Water*

Power Co. v. FERC, 799 F.2d 755, 766 (D.C.Cir.1986) (“The three sections are *in pari materia* and must be read together.”); *FAIC Sec., Inc. v. United States*, 768 F.2d 352, 363 (D.C.Cir.1985) (“[T]hese two statutes are *in pari materia* and must be construed together.”). Here, when subsections (a), (b), and (f) of § 713 – all addressed to video programming accessibility – are construed together, a strong argument can be made that Congress meant not to authorize the Commission to mandate video description. The dissenting opinion of FCC Chairman Powell powerfully demonstrates this point. *See* 15 F.C.C.R. at 15,274-76 (Powell, dissenting).

Subsections (a) and (f) merely call for the FCC to undertake studies on closed captioning and video description, respectively. Subsection (f), which deals with video description, provides:

Within 6 months after the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996], the Commission shall commence an inquiry to examine the use of video descriptions on video programming in order to ensure the accessibility of video programming to persons with visual impairments, and report to Congress on its findings. The Commission’s report shall assess appropriate methods and schedules for phasing 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.

47 U.S.C. § 613(f). In contrast, subsection (b) affirmatively mandates that

the Commission shall prescribe such regulations as are necessary to implement this section. Such regulations shall ensure that – (1) video programming first published or exhibited after the effective date of such regulations is

fully accessible through the provision of closed captions . . . ; and (2) video programming providers or owners maximize the accessibility of video programming first published or exhibited prior to the effective date of such regulations through the provision of closed captions. . . .

47 U.S.C. § 613(b). The difference in the language employed in these sections makes it clear that subsection (f) is not intended to provide a mandate for video description requirements. Subsection (f) neither parallels the closed captioning mandate contained in subsection (b) nor suggests that Congress provided the FCC with discretionary authority to adopt video description rules.

We need not decide whether § 713 positively forecloses agency rules mandating video description. Rather, we find that § 713 does not authorize the FCC to adopt such rules. We also find that, when coupled with the absence of authority under § 1 (discussed below), § 713 clearly supports the conclusion that the FCC is barred from mandating video description. We now turn to the question whether § 1, or any other provision in the Act, authorizes the Commission to mandate video description.

2. *Section 1 of the Communications Act of 1934*

[5] The FCC’s *Report and Order* argues that the FCC’s authority to mandate video description is derived from the combination of § 1 of the Communications Act, 47 U.S.C. § 151, § 2(a) of the Act, 47 U.S.C. § 152(a) (stating that “[t]he provisions of this Act shall apply to all interstate and foreign communication by wire or radio . . . and to all persons engaged within the United States in such communication”), § 4(i) of the Act, 47 U.S.C. § 154(i) (stating 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 § 303(r) of the Act, 47 U.S.C. § 303(r) (stating 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”). At oral argument, counsel for the FCC essentially conceded that if the agency cannot find its authority in § 1 then the video description regulations must be vacated by the court. We agree.

The FCC’s majority opinion argues that § 1 authorizes the agency to mandate video description, because

Congress . . . 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.

15 F.C.C.R. at 15,252. This is a very frail argument, in no small part because it completely ignores the fact that video description regulations significantly implicate program content.

There is no doubt that the video description rules regulate programming content. Video description is not a regulation of television transmission that only incidentally and minimally affects program content; it is a direct and significant regulation of program content. The rules require programmers to create a second script. As Chairman Powell noted in his dissent, “video description is a creative work. It requires a producer to evaluate a program, write a script, select actors, decide what to describe, decide how to de-

scribe it and choose what style or what pace. In contrast, closed captioning is a straight translation of dialogue into text.” *Report and Order*, 15 F.C.C.R. at 15,278 (Powell, dissenting). Ultimately, video descriptions require a writer to amend a script to fill in audio pauses that were not originally intended to be filled. Not only will producers and script writers be required to decide on what to describe, how to characterize it, and the style and pace of video descriptions, but script writers will have to describe subtleties in movements and mood that may not translate easily. And many movements in a scene admit of several interpretations, or their meaning is purposely left vague to enhance the program content. In short, it is clear that the implementation of video descriptions invariably would entail subjective and artistic judgments that concern and affect program content. The FCC has even acknowledged that the creation of this second script “raises creativity . . . issues.” *Video Accessibility Report*, 11 F.C.C.R. at 19,221. These effects are not insignificant, and there can be no doubt that the result is a direct regulation of program content.

The FCC’s arguments to the contrary are entirely unpersuasive. *See Report and Order*, 15 F.C.C.R. at 15,254-56. First, the Commission is wrong in its claim that video descriptions are the same as closed captioning. One is a simple transcript, a precise repetition of the spoken words. The other requires an interpretation of visual scenes. They are not the same. Second, the FCC’s statement that video descriptions are “not related to content” is specious. *Id.* at 15,255. FCC’s counsel would not even endorse that position at oral argument. Requiring someone to change or add to a program script is related to the program’s content. Finally, the FCC claims that the video description regulations are “content-neutral.” *Id.* at 15,-

254-55. We need not decide that issue, because it is irrelevant. The question that we face is whether § 1 provides the FCC with authority to promulgate regulations that significantly regulate programming content. The content-neutrality of the rules is irrelevant to the inquiry of the FCC's delegated authority.

During oral argument, counsel for the FCC acknowledged that it was not self-evident from the statute that the FCC is authorized to regulate *program content* pursuant to § 1. Counsel's hesitation was well placed, because § 1 merely authorizes the agency to ensure that all people of the United States, without discrimination, have access to wire and radio communication transmissions. Section 1 does not otherwise authorize the FCC to regulate program content, as the video description regulations clearly do. Both the terms of § 1 and the case law amplifying it focus on the FCC's power to promote the accessibility and universality of transmission, not to regulate program content. Neither the FCC's Order nor its brief to this court cite any authority to suggest otherwise. To regulate in the area of programming, the FCC must find its authority in provisions other than § 1. *See, e.g.*, 47 U.S.C. § 531 (governing designation of cable channels for public, educational, or governmental use).

The Communications Act was implemented for the purpose of consolidating federal authority over communications in a single agency to assure "an adequate communication system for this country." S.REP. NO. 73-830, at 3 (1934); *see also* H.R.REP. NO. 73-1850, at 3-4 (1934). Given the limited distribution of communications facilities in 1934, § 1's mandate to serve "all the people of the United States" is a reference to the geographic availability of service. *See* Michael J. Aguilar, Note, *Micro Radio: A Small Step in the Return to Localism, Diversity, and Competitiveness*

in Broadcasting, 65 BROOK. L.REV. 1133, 1136-37 (1999) (explaining how limited facilities influenced passage of the Communications Act of 1934); *see also Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216, 63 S.Ct. 997, 1009, 87 L.Ed. 1344 (1943) ("The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest."). Under § 1, Congress delegated authority to the FCC to expand radio and wire transmissions, so that they would be available to all U.S. citizens. *See, e.g., United States v. Midwest Video Corp.*, 406 U.S. 649, 667-68, 92 S.Ct. 1860, 1870, 32 L.Ed.2d 390 (1972) ("[T]he critical question . . . is whether the Commission has reasonably determined that its origination rule will 'further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services. . . .'" (citation omitted); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172, 88 S.Ct. 1994, 2002-03, 20 L.Ed.2d 1001 (1968) ("[I]t was precisely because Congress wished to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission . . . that it conferred upon the Commission a unified jurisdiction and broad authority.") (citations, footnotes, and internal quotations omitted). Section 1 does not address the *content* of the programs with respect to which accessibility is to be ensured. In other words, the FCC's authority under § 1 is broad, but not without limits.

The cases cited to this court by the FCC do not hold otherwise. These cases do not relate to program content. *See, e.g., United Video v. FCC*, 890 F.2d 1173 (D.C.Cir.1989) (FCC's "syndicated exclusivity" rules found to be content-neutral, not otherwise arbitrary and capricious,

and not violative of the Copyright Act of 1976 or the Cable Act of 1984; § 1 of the Communications Act not implicated); *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C.Cir.1988) (“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. We have recognized previously that universal service is an important FCC objective.”); *North Am. Telecomm. Ass’n v. FCC*, 772 F.2d 1282 (7th Cir.1985) (action for review of FCC orders relating to conditions upon which major telecommunications corporation’s regional operating companies could enter telephone equipment business); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 730 (2d Cir.1973) (regulations prescribing conditions under which common carriers may sell data processing services, designed to insure that “carriers provide efficient and economic service to the public”).

One of the reasons why § 1 has not been construed to allow the FCC to regulate programming content is because such regulations invariably raise First Amendment issues. *E.g.*, *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 651, 114 S.Ct. 2445, 2464, 129 L.Ed.2d 497 (1994) (“[O]ur cases have recognized that Government regulation over the content of program broadcasting must be narrow, and that broadcast licensees must retain abundant discretion over programming choices.”); *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 126, 93 S.Ct. 2080, 2098, 36 L.Ed.2d 772 (1973) (describing “the risk of an enlargement of Government control over the content of broadcast discussion of public issues” as a “problem of critical importance to broadcast regulation and the First Amendment”). Indeed, the parties in this case have argued over whether the video description rules infringe free speech precepts. *See* Br. of Petitioner at 39-43;

Br. of Respondent at 35-41. To avoid potential First Amendment issues, the very general provisions of § 1 have not been construed to go so far as to authorize the FCC to regulate program content. Rather, Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content. *E.g.*, 18 U.S.C. § 1464 (“Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”); 47 U.S.C. § 315 (governing provision of broadcast time to candidates for public office); 47 U.S.C. § 399 (“No noncommercial educational broadcasting station may support or oppose any candidate for political office.”). And Congress has imposed limitations on regulations implicating program content. *See* 47 U.S.C. § 544(f) (providing that “[a]ny Federal agency . . . may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title”); *see also* 47 U.S.C. § 326 (providing that the FCC does not possess the power of censorship, and “no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication”). It is therefore clear that § 1 is not the provision in the Act from which the FCC can find delegated authority to regulate the content of broadcast programming. The FCC must look beyond § 1 to find authority for regulations that significantly implicate program content.

The FCC’s position seems to be that the adoption of rules mandating video description is permissible because Congress did not expressly foreclose the possibility. This is an entirely untenable position. *See Ry. Labor Executives’*, 29 F.3d at 671 (“Were courts to *presume* a delegation of power absent an express *withholding* of

such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.”) (emphasis in original). See also *Halverson v. Slater*, 129 F.3d 180, 187 (D.C.Cir.1997) (quoting *Ry. Labor Executives*, 29 F.3d at 671); *Oil, Chem. & Atomic Workers Int’l Union v. NLRB*, 46 F.3d 82, 90 (D.C.Cir.1995) (same); see also *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C.Cir.1995) (“We refuse . . . to presume a delegation of power merely because Congress has not expressly withheld such power.”); *Natural Res. Def. Council v. Reilly*, 983 F.2d 259, 266 (D.C.Cir.1993) (“[I]t is only legislative intent to delegate such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron*.”) (quoting *Kansas City v. Dep’t of Housing & Urban Dev.*, 923 F.2d 188, 191-92 (D.C.Cir.1991)) (alteration in original).

Congress enacted the closed captioning and video description provisions of § 713 together. After originally entertaining the possibility of providing the FCC with authority to adopt video description rules, Congress declined to do so. This silence surely cannot be read as ambiguity resulting in delegated authority to the FCC to promulgate the disputed regulations.

3. Other Statutory Provisions Cited by the Commission

[6] The Commission’s brief to this court advances the somewhat opaque argument that the video description rules are “obviously a ‘valid communications policy goal’ and in the public interest.” Respondent’s Br. at 26. The Commission thus claims that the regulations are justified under § 303(r), which permits the FCC to regulate in the public interest “as may be necessary to carry out the provisions of [the] Act.” 47 U.S.C. § 303(r). But this statutory provision simply cannot carry the weight of the Commission’s argument.

The FCC cannot act in the “public interest” if the agency does not otherwise have the authority to promulgate the regulations at issue. An action in the public interest is not necessarily taken to “carry out the provisions of the Act,” nor is it necessarily authorized by the Act. The FCC must act pursuant to *delegated authority* before any “public interest” inquiry is made under § 303(r). This of course means, as FCC counsel conceded at oral argument, that the video description rules are arguably justified only if the FCC had authority to act pursuant to § 1 of the Act.

[7] The FCC’s suggestion that § 4(i), without more, gives the agency authority to promulgate the disputed rules cannot withstand scrutiny. Chairman Powell’s discussion of this provision says it all:

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

15 F.C.C.R. at 15,276 (Powell, dissenting). We agree.

Finally, there is really nothing to be said about § 2(a), 47 U.S.C. § 152(a), which was also cited by the FCC in support of the video description regulations. This provision does not, on its own, support the regulations. Neither the FCC’s Order nor counsel’s argument on behalf of the FCC suggested otherwise.

In short, the FCC can point to no statutory provision that gives the agency authority to mandate visual description rules. The rules may be highly salutary. But that is not the issue before this court and we offer no judgment on the question. What is determinative here is the FCC acted without delegated authority from Congress. Section 1 does not furnish the authority sought, because the regulations significantly implicate program content and the FCC can cite no authority in which a court has upheld agency action under § 1 where program content was at the core of the regulations at issue. And it does not matter that the disputed rules here are arguably “content-neutral.” The point is that the rules are about program content and therefore can find no authorization in § 1.

Finally, if there were any serious question about proper result in this case, all doubt is resolved by reference to § 713. In § 713(f), Congress authorized and ordered the Commission to *produce a report* – nothing more, nothing less. The statute does not, as with closed captioning, instruct (or even permit) the FCC to promulgate regulations mandating video description. Once the Commission completed the task of preparing the report on video description, its delegated authority on the subject ended.

III. CONCLUSION

[G]iven the minimal extent to which the FCC and Congress actually influence the programming offered by broadcast stations, it would be difficult to conclude that Congress enacted [video description] in an effort to exercise content control. . . . In a regime where Congress or the FCC exercised more intrusive control over the content of broadcast programming, an argument similar to [the argument raised by the Commission] might carry greater weight. But

in the present regulatory system, those concerns are without foundation.

Turner Broad. Sys., 512 U.S. at 652, 114 S.Ct. at 2464. Accordingly, for the reasons given in this opinion, we hereby grant the petition for review filed by MPAA, and reverse and vacate the Commission’s Order insofar as it requires broadcasters to implement video description.

So ordered.

KAREN LeCRAFT HENDERSON,
Circuit Judge, concurring:

I believe that section 713 of the Communications Act, 47 U.S.C. § 613, plainly does not authorize the FCC to promulgate video description rules and, for that reason, I fully concur in that portion of the majority opinion that so holds. I do not agree, however, that the video description rules constitute “a direct and significant regulation of program content.” Maj. Op. at 803. I fail to see how video description need consist of anything more than spoken stage directions. If so, video description, at least in my view, does not regulate program content. While I agree that section 1 of the Communications Act, 47 U.S.C. § 151, does not provide the FCC with authority to promulgate the video description rules, it is not because the rules regulate program content; in my view, neither section 1, nor any of the other provisions of the Act the FCC relies on, independently delegates authority that section 713 plainly withholds.

