

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

*In the Matter of*

ACCESSIBLE EMERGENCY INFORMATION, AND  
APPARATUS REQUIREMENTS FOR EMERGENCY  
INFORMATION AND VIDEO DESCRIPTION:  
IMPLEMENTATION OF THE TWENTY-FIRST CENTURY  
COMMUNICATIONS AND VIDEO ACCESSIBILITY ACT  
OF 2010

MB Docket No. 12-107

VIDEO DESCRIPTION: IMPLEMENTATION OF THE  
TWENTY-FIRST CENTURY COMMUNICATIONS AND  
VIDEO ACCESSIBILITY ACT OF 2010

MB Docket No. 11-43

**COMMENTS OF DIRECTV, LLC**

DIRECTV, LLC (“DIRECTV”) hereby submits comments in response to the Commission’s *Further Notice*<sup>1</sup> concerning implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”)<sup>2</sup> and other proposals intended to make video programming more accessible to the blind and visually impaired. DIRECTV supports the Commission’s continuing efforts to make video content more accessible to people with audio and visual impairments. It has participated in the Commission’s efforts to implement the CVAA, including through its involvement with the Video Programming Accessibility Advisory Committee (“VPAAC”).

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<sup>1</sup> *Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, 28 FCC Rcd. 4871 (2013) (“*Further Notice*”).

<sup>2</sup> Pub. L. No. 111-260, 124 Stat. 2751 (2010). *See also* Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA).

The Commission previously adopted rules for video description and emergency information accompanying linear video programming provided by the systems of multichannel video programming distributors (“MVPDs”).<sup>3</sup> The *Further Notice* seeks comment on proposals for (1) extension of accessibility requirements to linear video programming accessed via tablets, laptops, personal computers, and other similar devices; and (2) customer support service obligations. Many of these proposals present significant technological and logistical challenges. More significantly, however, many of them fall outside the statutory authority conferred upon the Commission by the CVAA, and therefore cannot be adopted absent further legislative action.

## **I. THE COMMISSION SHOULD NOT EXTEND ACCESSIBILITY REQUIREMENTS TO PROGRAMMING ACCESSED VIA TABLETS, LAPTOPS, AND SIMILAR DEVICES**

### **A. The Commission Lacks Authority to Impose Video Description and Emergency Information Requirements on Linear Programming Provided via Internet Protocol**

The Commission does not have *carte blanche* to regulate in this area. Agencies are creatures of Congress; thus, “an agency literally has no power to act . . . unless and until Congress confers power upon it.”<sup>4</sup> As the D.C. Circuit has made clear, “[a]n agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress.”<sup>5</sup>

The Commission’s past experience with video description on traditional television is particularly relevant in this regard. As part of the Telecommunications Act of 1996, Congress dealt with both closed captioning and video description. However, it treated the two

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<sup>3</sup> See *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, 26 FCC Rcd. 11847 (2011); *Further Notice*, *supra*.

<sup>4</sup> *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U. S. 355, 374 (1986).

<sup>5</sup> *Motion Picture Ass’n of America, Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) (“MPAA”). See also *id.* at 806 (“The FCC cannot act in the ‘public interest’ if the agency does not otherwise have the authority to promulgate the regulations at issue.”).

technologies quite differently. Specifically, Section 713 of the 1996 Act required the Commission to adopt closed captioning regulations and establish compliance deadlines, and established exemptions from those rules.<sup>6</sup> By contrast, it merely defined video description and required the Commission to prepare a report to Congress.<sup>7</sup> Nonetheless, the Commission adopted rules mandating that certain video programmers supplement certain television programming with video description.<sup>8</sup>

Upon review, the D.C. Circuit reversed and vacated the Commission’s video description requirements. The *MPAA* court started by analyzing the structure of the statute, noting that “[s]tatutory provisions *in pari materia* normally are construed together to discern their meaning.”<sup>9</sup> It contrasted the affirmative mandate to adopt closed captioning rules with the direction merely to undertake studies on video description, and concluded that, when the relevant provisions Section 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.”<sup>10</sup> Given this straightforward statutory construction, even the Commission did not claim to have authority to regulate video description under the 1996 Act’s provisions, but rather invoked its general authority under Section 1 of the Communications Act to regulate radio communications.<sup>11</sup> Yet the court rejected this argument as well, concluding that

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<sup>6</sup> See 47 U.S.C. § 613(b)-(e).

<sup>7</sup> See *id.* at § 613(f)-(g).

<sup>8</sup> See *Implementation of Video Description of Video Programming*, 15 FCC Rcd. 15230 (2000) (“*2000 Video Description Order*”), *recon.*, 16 FCC Rcd. 1251 (2001) (“*2001 Video Description Recon*”).

<sup>9</sup> *MPAA*, 309 F.3d at 801 (citing cases).

<sup>10</sup> *Id.* at 802 (emphasis added).

<sup>11</sup> *Id.* at 800 (citing 47 U.S.C. § 151, which give 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 communications service”).

“[t]o regulate in the area of programming, the FCC must find its authority in provisions other than § 1.”<sup>12</sup> The court concluded that, “when coupled with the absence of authority under § 1 . . . , § 713 clearly supports the conclusion that the FCC is barred from mandating video description.”<sup>13</sup>

In the CVAA, Congress directed the Commission to reinstate the video description rules previously adopted for traditional television.<sup>14</sup> It specifically mandated that such regulations could be modified only in specific ways, one of which explicitly required that the regulations shall apply to video programming only “insofar as such programming is transmitted for display on televisions in digital format.”<sup>15</sup> It also directed the Commission to prepare a report to Congress on the “technical and operational issues, costs, and benefits of providing video descriptions for video programming that is delivered using Internet protocol.”<sup>16</sup> Thus, to use the *MPAA* court’s reasoning, “a strong argument can be made that Congress meant *not* to authorize the Commission to mandate” video description for video programming delivered using IP.<sup>17</sup>

By contrast, the CVAA specifically directed the Commission to “require the provision of *closed captioning* on video programming delivered using Internet protocol.”<sup>18</sup> Clearly, Congress knew how to authorize accessibility requirements for programming delivered via IP, but chose

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<sup>12</sup> *Id.* at 804.

<sup>13</sup> *Id.* at 802.

<sup>14</sup> *See* 47 U.S.C. § 613(f)(1).

<sup>15</sup> *Id.* at § 613(f)(2)(A). Citing this provision, the Commission concluded that, “accordingly, the video description rules require video description only by television broadcast stations and MVPDs.” *Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, 27 FCC Rcd. 14728, ¶ 6 (2012) (“*Emergency Information NPRM*”).

<sup>16</sup> 47 U.S.C. § 613(f)(3)(B).

<sup>17</sup> *MPAA*, 309 F.3d at 802 (emphasis added).

<sup>18</sup> 47 U.S.C. § 613(c)(2)(A) (emphasis added).

not to do so with respect to video description. Indeed, it took the opposite approach by specifying that the rules should only apply to programming “transmitted for display on televisions.”

Thus, the situation in 2013 is a virtual repeat of the situation in 2000. In both cases, a single statute deals with program accessibility, but treats closed captioning and video description very differently. The juxtaposition of an explicit grant of authority with respect to closed captioning of programming delivered via IP and the mere requirement for a study of the issues potentially relevant to providing video description via IP is especially telling, given that this was a significant factor in the court’s decision to invalidate the prior video description rules. Now as then, the Commission lacks statutory authority to adopt the proposed video description requirements.

Similar statutory limitations apply to the Commission’s proposals on other accessibility issues made in the *Further Notice*, especially those concerning emergency information. The CVAA directs the Commission to promulgate regulations that require video programming providers (“VPPs”), video programming distributors (“VPDs”), and program owners to convey emergency information in a manner accessible to individuals who are blind or visually impaired.<sup>19</sup> As the Commission has recognized, this directive does not mention programming delivered via IP.<sup>20</sup> It is thus very similar to the provisions for video description and markedly different from the provisions for closed captioning.

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<sup>19</sup> See 47 U.S.C. § 613(g).

<sup>20</sup> See *Emergency Information NPRM*, ¶ 6 (“Notably, Congress did not explicitly extend the scope of the emergency information rules to IP-delivered video programming, as it did in requiring closed captioning of IP-delivered video programming. Instead, Congress referenced television-based definitions of video programming distributors and providers.”).

Moreover, the statute directs the Commission to clarify that the terms VPD and VPP include an entity that makes programming available to end users via IP, but only “for the purposes of implementation, of [the IP closed captioning] subsection.”<sup>21</sup> Congress provided for no similar extension of those terms with respect to emergency information.

Congress’s decision to extend one accessibility rule to the IP context rather than extending all of them is a strong indication that Congress in fact intended not to apply the other rules to IP. This is consistent with the *expressio unius* canon of statutory construction, which holds that “to express or include one thing implies the exclusion of the other, or of the alternative.”<sup>22</sup> While application of this canon is not robotic, the D.C. Circuit has found “its use is appropriate when ‘one can be confident that a normal draftsman when he expressed “the one thing” would have likely considered the alternatives that are arguably precluded.’”<sup>23</sup> In this case, there can be no doubt that Congress, in enacting a statute devoted to accessibility with separate provisions specifically applicable to closed captioning and emergency information, demonstrated its intent by including authority over programming delivered via IP in the former while omitting it from the latter.<sup>24</sup>

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<sup>21</sup> 47 U.S.C. § 613(c)(2)(D)(iii).

<sup>22</sup> *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 999 n.5 (D.C. Cir. 2013).

<sup>23</sup> *Id.* at 999 (quoting *Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998)).

<sup>24</sup> The fact that the CVAA directs the VPAAC to submit a report to the Commission on issues related to the provision of emergency information with programming delivered via IP does not undercut this conclusion. See *Further Notice*, n.26 (citing CVAA, §§ 201(e)(2)(B), (C), and (E)). Establishing a committee to identify performance objectives, additional technical capabilities, and potential regulatory provisions that would be needed to support the delivery of emergency information via IP may be prefatory to the adoption of rules to implement such a regime, but it is not the same as actually authorizing adoption of such rules.

## **B. Extending These Requirements to Online Programming Would Also be Bad Policy**

In addition to being beyond the Commission's authority, extension of video description and emergency information requirements to linear programming delivered over the Internet would be unwise for several reasons. First, it would be highly problematic from a technical perspective. Both of these accessibility features are delivered by broadcasters and MVPDs using the secondary audio channel. As both the consumer and industry representatives on the VPAAC recognized, "[t]oday, the *one audio* approach is the primary audio for delivery over the sometimes-bandwidth-constrained Internet pipe."<sup>25</sup> Accordingly, "further effort would be required to develop internet technologies to accommodate consistent delivery of programming" with these assistive technologies.<sup>26</sup>

Indeed, that is a significant understatement. Developing the technological ecosystem for a secondary IP audio stream to support video description and emergency information would be a massive undertaking. Linear programming delivered via IP today does not include this capability, nor does the equipment used to view such programming support it. Moreover, the additional data added to the video stream would further congest already strained broadband capabilities. In addition, with respect to emergency information, there is no guarantee that the viewer receiving the programming stream would be anywhere near the location affected by the emergency. By directing the Commission and the VPAAC to study the issues involved in providing additional accessibility capabilities (beyond closed captioning) to programming

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<sup>25</sup> See Second Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010: Video Description, at 27, 28 (Apr. 9, 2012) (*available at* <http://vpaac.wikispaces.com/>).

<sup>26</sup> *Id.* at 27.

delivered via IP, Congress clearly indicated its view that much more information, development, and consideration are necessary before making a decision about whether and how to proceed.

Moreover, there is no reason for the Commission to impose a technological construct adopted for traditional television upon the much different and in many ways more capable architecture of the Internet. Devices capable of receiving programming from a broadband connection offer myriad possibilities for accessibility features that simply are not available from broadcast technology. For example, a broadband-connected device can include text messaging, e-mail, phone, and text-to-speech applications and services that provide user-configured alerts for a variety of emergency situations (*e.g.*, specific school closings, traffic alerts for certain commuter routes, specific weather conditions). Touch screens typically include zoom/pan features (activated by swiping with fingers) that offer a viewing solution for visually impaired consumers that may be more functional than switching to a modified audio track. Innovation in this area is just beginning. By stepping in at this nascent stage, the Commission would risk freezing technology in the twentieth century and stymying new developments that maximize the accessibility potential of a broadband connection. Thus, from a policy perspective, there is much to be lost by extending video description and emergency information requirements developed for traditional television to online programming.

## **II. THE COMMISSION LACKS AUTHORITY TO DICTATE CUSTOMER SUPPORT SERVICE REQUIREMENTS**

The *Further Notice* also seeks comment on whether the Commission should impose requirements to provide dedicated customer support services to assist consumers who are blind or visually impaired with accessing the secondary audio stream used for video description.<sup>27</sup> In this regard, the Commission specifically invokes its authority under Sections 202 and 203 of the

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<sup>27</sup> See *Further Notice*, ¶ 86.

CVAA.<sup>28</sup> Yet here again Section 202—the only one of these provisions that relates to the obligations of those who own or distribute video programming<sup>29</sup>—clearly limits the Commission’s authority with respect to video description rules. Section 202(f)(1) directs the Commission to “reinstate its video description regulations contained in the Implementation of Video Description of Video Programming Report and Order (15 F.C.C.R. 15,230 (2000)), recon. granted in part and denied in part, (16 F.C.C.R. 1251 (2001)), modified as provided in paragraph (2).” Section 202(f)(2) provides that the rules previously adopted “shall be modified only” in a list of specific respects.<sup>30</sup> Neither the “rules” to be reinstated<sup>31</sup> nor the “modifications” specified by Congress in the CVAA say anything about customer service or support.

In this regard, Congress could not have been any clearer. The Commission lacks authority to impose additional obligations (including customer support service requirements) with respect to video description at this time. Nor is there any demonstrated need for such requirements. In the highly competitive MVPD marketplace, service providers have strong incentives to provide subscribers with high-quality customer support. Yet as service offerings and support technologies change, MVPDs must also have the flexibility to adapt their methods to best serve their subscribers. A static Commission mandate is therefore not only unnecessary, but could actually have the effect of discouraging innovation on the accessibility front.

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<sup>28</sup> *Id.*

<sup>29</sup> Section 203, by contrast, relates to the obligations of those who manufacture devices used to view video programming.

<sup>30</sup> See 47 U.S.C. § 613(f)(1) and (2).

<sup>31</sup> The rules previously adopted are set forth in Appendix B of the *2000 Video Description Order*, as subsequently modified in Appendix B of the *2001 Video Description Recon.*

DIRECTV shares the Commission's desire to ensure that blind and visually impaired consumers are able to enjoy multichannel video programming services. As Congress recognized in the CVAA, developing the technologies and industry practices necessary to achieve this goal throughout the MVPD market requires further study and careful consideration. Accordingly, Congress directed the Commission to undertake such activities, but did not authorize additional regulation in this area. The Commission must recognize the limits of its authority and resist the urge to mandate further accessibility obligations beyond those Congress authorized.

Respectfully submitted,

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July 23, 2013