

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

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

PETITION FOR RECONSIDERATION

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The National Cable Television Association (“NCTA”), pursuant to Section 1.429 of the Commission’s rules, hereby Petitions for Reconsideration of the Report and Order in the above-captioned proceeding.¹

INTRODUCTION

The cable industry is not opposed to the concept of video description. In fact, a cable network – Turner Classic Movies – has been at the forefront of voluntary efforts to provide some video-described cable network programming. However, the provision of video description is best left to voluntary industry efforts based on determinations about the extent to which there is an audience for such programming and whether it can be provided in a cost-effective manner.

We continue to object to the Commission’s attempt to impose video description mandates. Most fundamentally, the Report and Order’s legal rationale cannot overcome the language of Section 713 of the 1996 Telecommunications Act and its legislative history, which give the FCC power to conduct an inquiry and report, but reserve to

¹ Implementation of Video Description of Video Programming, 65 Fed. Reg. 54805 (Sept. 11, 2000.)

Congress the decision whether to take additional measures to encourage – or mandate – video description. Even if Congress had not expressly spoken to the issue, the Commission could not ignore a separate provision of the Cable Act that restricts its ability to regulate the provision or content of cable service.

Jurisdictional questions aside, the video description rules unreasonably restrict a program network’s ability to count repeats of video-described programs toward meeting the quarterly benchmark. This limitation will increase the burdens on cable networks and remove the intended flexibility to choose which programs to video describe.

The procedural aspects of the rules should be reconsidered as well. While modeled on the closed captioning rules, the video description rules depart from those rules in ways that make the complaint proceedings more cumbersome and “undue burden” waiver requests less workable.

ARGUMENT

I. THE COMMISSION LACKS STATUTORY AUTHORITY TO IMPOSE VIDEO DESCRIPTION RULES ON CABLE OPERATORS OR PROGRAMMERS

The Commission finds no bar to imposing video description rules on the cable industry. The Report and Order claims support for this action under the FCC’s “ancillary” jurisdiction under sections 1 and 4(i) of the Communications Act.²

But, as Commissioner Powell explained, “because ... Congress spoke to video description in section 713(f) of the Act, and purposely limited the Commission to studying the issue

² Report and Order at ¶58.

and reporting to Congress,”³ the FCC lacks authority under which to proceed to a rulemaking.

This conclusion is evident from the differences between the closed captioning and video description provisions of Section 713. The closed captioning provision required the FCC to adopt rules within a prescribed time period,⁴ while the video description language required the FCC to conduct an inquiry and report to Congress.⁵ The Report and Order dismisses these contrasting mandates, claiming that “[t]he difference in treatment between closed captioning and video description simply means that Congress intended the Commission not to have any discretion on whether to adopt closed captioning rules, but left it to the Commission to decide whether to adopt video description rules.”⁶ But Congress specifically rejected language that would have given the Commission precisely the discretion it now claims. The House bill would have permitted – but not required – a rulemaking on video description.⁷ Thus, Congress made clear that it did not intend for the Commission to have such rulemaking authority – and the Report and Order offers no other explanation for the deletion of the House provision.

³ Separate Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part at 1 (hereinafter “Powell Dissent”).

⁴ 47 U.S.C. § 613(b) (“Within 18 months after such date of enactment, the Commission shall prescribe such regulations as are necessary to implement this section.”)

⁵ Id., § 613(f) (“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.”)

⁶ Report and Order at ¶60.

⁷ H. R. 1555, § 204(f) (“Following the completion of [the video description] inquiry, the Commission may adopt regulation it deems necessary to promote the accessibility of video programming to persons with visual impairments.”)

In any event, the thrust of the majority’s reasoning is that it makes no difference what Congress said about video description. In fact, the Report and Order acknowledges that the legislative history “indicates that Section 713 should not be construed to authorize a Commission rulemaking....”⁸ But the majority rationalizes that the FCC already had the authority to conduct a rulemaking to impose video description, even prior to the 1996 Telecommunications Act, and that Congress would be required to expressly prohibit the FCC from adopting rules under its general rulemaking authority if it did not want the FCC to proceed. But as Commissioner Powell’s dissent explained, “This view turns the notion of a delegated agency on its head. The Commission can act only where it is authorized to do so. It is not free to act unless expressly prohibited from doing so.”⁹

Regardless of the breadth of the FCC’s ancillary jurisdiction, or the validity of its arguments as to its general rulemaking power, Section 624(f) provides independent ground for finding the Commission’s authority here lacking as to cable. Congress removed the FCC’s ability to rely on ancillary authority – under Sections 1, 4(i) or elsewhere in the Communications Act – to regulate the content or provision of cable service.¹⁰ It provided that “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.”¹¹ The FCC thus cannot adopt new cable regulations

⁸ Report and Order at ¶58.

⁹ Powell Dissent at 3; see also Statement of Commissioner Harold Furchtgott-Roth, Concurring in Part and Dissenting in Part at 2.

¹⁰ See Dissenting Statement of Commissioner Furchtgott-Roth at 2 n. 3 (“With respect to cable operators, there may indeed be a provision of the Communications Act that prohibits video description rules.... Whether or not video description rules concern ‘content’, they surely regulate the ‘provision of cable services.’”)

¹¹ 47 U.S.C. § 544(f) (emphasis supplied.)

unless Congress expressly granted the FCC that authority in Title VI – and Congress has not done so.

The Report and Order's answer is to argue that the video description rule falls outside this prohibition because it somehow does not regulate “the provision or content of cable services.” It claims, based on United Video v. FCC,¹² that:

the U. S. Court of Appeals for the D.C. Circuit has interpreted this section to forbid “rules requiring cable companies to carry particular programming.” The video description rules we adopt today are not content-based, and as such, do not require cable companies (or any other distributor of video programming) to carry particular programming. Rather, our rules simply require that, if a distributor chooses to carry the programming of the largest networks, it must provide a small amount of programming with video description.¹³

But the video description rules are unlike the syndex rules upheld in United Video precisely because they do require cable operators to provide particular program content – specifically, the video descriptions of certain cable programming.

The United Video court found that syndex rules did not run afoul of Section 624(f) because “[t]he basis on which syndex forbids carriage of certain programs is not their content, but ownership of the right to present them.”¹⁴ Here, the rules do forbid carriage of particular program networks if they fail to contain FCC-mandated program content. Cable operators can only avoid application of the video description rules if they

¹² 890 F.2d 1173, 1188 (D.C. Cir. 1989).

¹³ Report and Order at ¶61.

¹⁴ United Video, 890 F.2d at 1189.

cease carrying altogether the five most popular cable networks.¹⁵ And unlike syndex, where the government interest was related to enforcing property rights, the government interest here is directly tied to ensuring that particular content is provided to cable customers.¹⁶ As the Report and Order elsewhere acknowledges, it is undeniable that the rules “will require ... speech....”¹⁷ These rules, then, are a far cry from syndex which, as the D.C. Circuit noted, “does not require carriage of any particular program or type of program, nor does it prevent a cable company from acquiring the right to present, and presenting, any program.”¹⁸ They require carriage of supplemental program content that a program network would not otherwise choose to provide. And they require cable operators to pass that content on to their customers.

The language and legislative history of Sections 713 and 624(f) bar the Commission from adopting video description rules. Even if the FCC’s authority were at all ambiguous, the serious First Amendment issues raised by compelling program networks

¹⁵ The FCC seems to suggest that Section 624(f) does not apply because the rule is only triggered when a cable operator chooses voluntarily to offer customers one of the top five cable networks. But the FCC cannot escape application of this provision by claiming that a cable operator could choose not to provide this service altogether. See MediaOne Group, Inc. v. County of Henrico, Virginia, 97 F. Supp. 712, 716 (E.D.Va. 2000) (Forced access ordinance violates Section 624(f) because cable operators voluntarily providing cable modem service trigger ordinance’s forced access requirement and because ordinance requires operators to transmit the content of other ISPs. “Accordingly, the Ordinance’s imposition of requirements regarding both the ‘provision’ and the ‘content’ of cable services violated Section 544(f)(1).”).

¹⁶ See Horton v. City of Houston, Texas, 179 F.3d 188 (5th Cir. 1999) (“Whether regulation is content neutral depends on whether it is justified without reference to the content of the speech or serves purposes unrelated to the content....”) Here, video description by definition is related to the content of a program; it requires the creation of content to supplement that which the operator would otherwise choose to offer and compels speech.

¹⁷ Report and Order at ¶63. See 47 C.F.R. § 79.3(b)(MVPDs that serve 50,000 or more subscribers “must provide” 50 hours of video description per calendar quarter “on each channel on which they carry one of the top five national nonbroadcast networks”); id., § 79.3(e)(3)(ii)(penalties for violations may include “a requirement that the video programming distributor deliver video programming containing video description in excess of its requirements”).

¹⁸ United Video, Inc., 890 F.2d at 1189.

and cable operators to speak warrant adopting a more narrow, rather than expansive, view of the FCC's power. We respectfully urge the Commission to reconsider, and withdraw, its assertion of jurisdiction here.

II. THE COMMISSION SHOULD REVISE ITS RULES REGARDING REPEATS OF VIDEO-DESCRIBED PROGRAMMING

The rules require multichannel video programming distributors (“MVPDs”) to provide fifty hours of video-described programming during prime time¹⁹ or children’s programming each calendar quarter on the top five cable networks.²⁰ Beyond the fifty-hour-per-quarter requirement, the rules say little else. For example, unlike closed captioning, the rules *do not* exempt categories of programs for which video description would serve little or no purpose or would be highly burdensome. The rules *do not* differentiate between programming (so-called “pre-rule” programming in the captioning context) created *before* the video description obligation and programming created *after* adoption of the rules. The rules *do not* exempt networks that make significant other uses of the secondary audio program (SAP).

¹⁹ The rules do not delineate which hours constitute “prime time” for these purposes. The cable rules define “prime time” to mean 6-11 p.m. local time; between 5-10 p.m. C.S.T., and between 5-10 p.m. or 6-11 p.m. Mountain time. 47 C.F.R. § 76.5 (n)(definition of prime time). This definition differs from the common industry definition of prime time (from 8-11 p.m. Monday – Saturday, and 7-11 p.m. Sunday.) The Commission should clarify which hours it considers to be “prime time” for purposes of its rule.

In addition, certain cable networks – “single feed” networks – transmit only one signal by satellite nationwide. The Commission should clarify that “prime time” for single feed networks will be considered “prime time” in the Eastern time zone.

²⁰ Those networks are determined based on Nielsen prime time ratings for October 1, 1999 – September 30, 2000. The rules, which were adopted prior to the end of that period, do not delineate the cable networks to which this requirement applies.

The Commission presumably did not feel it necessary to adopt these measures because it considered the rules to be of a “limited nature,”²¹ designed to “[e]nhance the availability of video description without imposing an undue burden on the television programming production and distribution industries.”²² And the Commission believed that the costs of describing programming would be “a very small portion of the production budget for the typical prime time program.”²³ But the limited burden that the Commission envisioned is undercut significantly by the rules’ unfair and unjustified treatment of reruns.

Under the rules, “broadcast stations and MVPDs may not count toward their 50-hour quarterly requirement programming that they have previously aired with video description, once the rules go into effect.”²⁴ Thus, once a cable network has aired a video-described program, it cannot be counted toward meeting that network’s benchmark again – either during that same quarter or any other quarter. The Report and Order contains no explanation of why the Commission adopted this restriction. Nor was there any notice that it was under consideration. But its inclusion in the rules imposes a significant hardship on cable program networks in several respects.

A. Reruns on the Same Network

To meet its obligation, a cable network would need to provide, on average, four new hours of described programming every week of the year. While the amount of original programming on cable networks has been increasing over the years, cable

²¹ Report and Order at ¶43 (“Given the limited nature of our initial video description rules, we decline to exempt any particular categories of programming or class of programming providers.”)

²² Id. at ¶26 (emphasis supplied).

²³ Id. at ¶36 (emphasis supplied).

²⁴ Id. at ¶33.

networks routinely re-air that programming and other programming throughout the year. The decision to restrict cable networks' ability to count reruns containing video description toward reaching the quarterly benchmark will therefore adversely impact networks in several ways. It will force networks either to include video description in programs for which it makes little practical or economic sense or to modify their programming practices solely to accommodate the video description rules. Neither option makes sense.

Because the rules limit video-described programs to be counted to children's or prime time programming, program networks already have little flexibility in choosing which programs to video describe. That flexibility is further limited because most cable networks covered by the rules do not provide children's programming. And most prime time or children's programming offered on the top five cable networks is not first-run programming or the type of programming for which video description is practical.

For example, during one representative week in September 2000, sports programming accounted for much of the new prime time programming airing on several of the top cable networks.²⁵ Providing video description for programming of this nature would be costly, burdensome, and unnecessary. But if repeat video-described programming cannot be counted toward reaching the benchmark, a cable network would have little other choice. Moreover, any other programming that premieres on a cable network would likely be aired on that network again in the future.

²⁵ Baseball and wrestling accounted for 10 of the 11 hours of prime time, non-repeat original programming on TBS during the week September 12 – September 19; wrestling was aired during two of the three hours of prime time, non-repeat original programming on TNT, and during two out of the five hours of prime time, non-repeat original programming on USA Network during that same period.

Contrary to what appears to have been the Commission's assumption, with rerun restrictions in place, a network may have little choice but to pay to include video description in licensed product. Few programs currently exist that are video-described.²⁶ The decision to restrict counting of reruns of original product, therefore, means that program networks likely would be forced to pay to video-describe programming that they do not own.

The Commission apparently believed that the costs of video description would represent only a small fraction of the total production cost of programming.²⁷ It is one thing to compare the \$10,000 cost of video-describing a new movie²⁸ to the cost of producing that motion picture. It is quite another, though, to compare those costs to the relative cost for a cable network to license that motion picture from a movie studio. As licensees of previously-produced programming, networks would not likely be able to reap the rewards of that investment through subsequent licensing of that movie. Thus, the economic calculus underlying the relative costs of video description would change if the restriction on reruns meant that cable networks would be forced to absorb the costs of video describing programming for which they have only limited rights. And that formula would change even more adversely if a cable network could only count that airing once towards meeting its benchmark.²⁹

²⁶ Id. at ¶ 2.

²⁷ Report and Order at ¶ 36.

²⁸ See generally Video Accessibility Report, 11 FCC Rcd. 19214, 19258-59 (1997.)

²⁹ Some cable networks that produce and own the programming aired on their networks generally offer that programming exclusively and do not license it to others. Therefore, the efficiencies enjoyed by some program producers who create product for wide distribution are not enjoyed by these cable networks.

Furthermore, as cable networks rerun programming that they already have video-described, their options for reaching the 50 hour per quarter benchmark will quickly decrease. The relatively few programming hours in which to place new video-described programming will fill up. The flexibility the Commission believes that it gave programmers to decide which programs to video describe will thus disappear.

B. Reruns on Other Networks

A further problem is caused by the requirement that if a MVPD counts a program with video description toward its minimum requirement for any quarter on any program network, it may never be counted by that MVPD again.³⁰ This would mean, for example, if a video-described movie aired on TNT after the rules' effective date, a subsequent airing of that same movie by USA Network could not be counted toward the video description obligation for USA Network. And an original, made-for-cable program aired on TNT that is later aired on TBS could not be counted toward satisfying the video description obligation for TBS, either. The Report and Order contains no explanation for such a restriction.

* * *

In short, the Commission did not appear to intend that the requirement on the top five cable networks to provide some limited amount of video-described programming would so severely interfere with scheduling their lineups. The limitations on counting video-described programming when it is rerun, however, will unfairly impact programming

³⁰ 47 C.F.R. § 79.3(c)(2) (“programming with video description will count toward a broadcaster’s or MVPD’s minimum requirement for a particular quarter only if that programming has not previously been counted by that broadcaster or MVPD toward its minimum requirement for any quarter.”)

choices, and will raise the costs of complying with this new requirement by limiting subsequent showings of that programming.

The Commission has not imposed this limitation in the captioning arena. The captioning rules generally set forth a benchmark based on an hourly target and do not further differentiate between original airings and repeats of a program.³¹ The record contains no evidence that the failure to exclude reruns from the captioning hourly benchmark has subverted the purpose of its rules. There is no reason to make that assumption here.

In light of the difficulties caused by the rerun restriction, the Commission should eliminate it. Doing so will present little if any risk of harming customers with visual disabilities, as video-described programming will still be available during 50 hours each quarter on each of the covered cable networks. And a programmer's interest in providing quality programming to the widest possible audience will ensure a steady flow of new programming containing video description.

III. THE COMMISSION SHOULD MODIFY ITS COMPLAINT PROCEDURES

The Report and Order adopts a different regime for filing video description complaints than applies to closed captioning complaints. We urge the Commission to reconsider it. Under the new rules, a complainant may file informally with the Commission at any time alleging a video description rule violation. This procedure will unnecessarily embroil the Commission in non-meritorious disputes.

³¹ Id., § 79.1(b) (defining captioning benchmarks based on number of hours per quarter).

The closed captioning complaint procedures provide a useful model for resolving disputes outside formal FCC processes. Those rules permit a complaint to be filed with the Commission only after the complaint has been sent to the cable operator responsible for delivering the cable program network and the operator has had an opportunity to respond.³² This initial step facilitates the resolution of any factual disputes over whether a particular program was captioned, and if not, whether it should have been captioned, prior to Commission involvement. And any needed corrective action can be handled in a more expedited fashion, “eliminating any unnecessary administrative burden for consumers and video programming distributors.”³³

The benefits of this approach are well-known to the Commission. In fact, the agency considered and rejected on reconsideration of the closed captioning rules a request to adopt the procedure it has now put in place here. It understood “that in many cases requiring the complainant to go to the video programming distributor first will allow the parties to more quickly and satisfactorily resolve the dispute. Indeed, the direct relationship between the video programming distributor and the consumer was, in part, our justification for holding the video programming distributor responsible for compliance with the captioning rules.”³⁴ The same holds true in this case.

By contrast, the video description complaint process could have the unintended consequence of increasing, rather than minimizing, disputes. For example, complaints may be filed at any time; no notice is even required to be given to the MVPD about which a

³² Id., § 79.1(g).

³³ Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996; Video Programming Accessibility, 13 FCC Rcd. 3272, 3381 (1997) (hereinafter “Captioning Order”).

complaint is being lodged; and no standards are established for determining what would be “sufficient to show that the broadcast station or MVPD has violated or is violating the Commission’s rules....”³⁵ This loose, standardless complaint process is particularly troubling insofar as the rules operate on a quarterly basis, leaving ample opportunity for complaints that have no merit to be filed at some point before the end of that quarter. Again, the Commission anticipated these issues in its captioning rules, where at the very least complainants were required to provide some “basis for believing that a violation has taken place and not simply allege that an individual program lacks captions. Thus, any complaint should, at a minimum, state with specificity the Commission rules violated and should provide some information which supports the alleged rule violation.”³⁶

The Commission provides no explanation for its abrupt departure from the closed captioning precedent. Yet, we are unaware of any evidence of widespread non-compliance by cable program networks and cable operators with the captioning rules – and unaware of any need for the Commission to fear any such action with respect to video description. Under these circumstances, it makes little sense to create any entirely new complaint procedure. It makes less sense to subject cable operators to complaint proceedings without first giving them the opportunity to obtain the facts from program networks and informally resolve disputes with their customers. The Commission should reconsider its decision.

³⁴ Captioning Order on Reconsideration, 13 FCC Rcd. 19973, 20025 (1998).

³⁵ Id.

³⁶ Captioning Order, 13 FCC Rcd. at 3381.

IV. THE COMMISSION SHOULD MODIFY ITS “SUBSEQUENT AIRING” REQUIREMENT

Section 97.3(c)(3) provides that “once an entity has aired a particular program with video description, it is required to include video description with all subsequent airings of that program, unless the entity uses the SAP channel in connection with the program for a purpose other than providing video description.” This requirement would impose a significant – and seemingly unintended – burden on multichannel providers and cable program networks.

The Report and Order explains that this requirement “[s]hould not impose any burden on any broadcast station or MVPD subject to our rules, or on their programming suppliers. This is because the cost of both describing programming, and upgrading equipment and infrastructure to distribute it, generally should be a one-time fixed cost.”³⁷ But this assumption does not hold true if this obligation applies to cable operators.³⁸

It would mean instead that if a broadcast station carried by the cable operator airs a video-described program, and a cable program network later airs that same program, that cable network would have to create the entire infrastructure necessary to provide that one program with video description – even if that network would not be otherwise subject to the video description rules. And an operator distributing that network would not be permitted to air that program without including video description. This provision would thus force cable operators to obtain equipment for that new network, as well as for the five cable networks covered by the rule.

³⁷ Report and Order at ¶33 (emphasis supplied).

The Commission surely did not intend to expand video description obligations this way. Nor would it make any sense to apply the rule in this manner. Accordingly, the Commission should clarify that MVPDs are not subject to this requirement.

In addition, cable networks have limited experience with the provision of video-described programming. The costs and difficulties attendant to creating additional capacity to offer video description in the SAP are not well-known. Therefore, it is premature to conclude that this obligation, even if limited to repeat airings of video-described programming on the same network, would be “cost-free.” Providing the infrastructure to offer video description throughout the entire day may impose costs not considered by the Commission. Accordingly, where additional costs would be imposed, the Commission should not require video description to follow the program at all times.

V. PROGRAM NETWORKS SHOULD BE PERMITTED TO FILE UNDUE BURDEN WAIVERS

The Commission intended to “adopt the ‘undue burden’ exemption procedures and standards that we use in the closed captioning context.”³⁹ But the rules fail to mirror the captioning rules. The captioning rules permit a video programming provider, video programming producer, or video programming owner to file for a waiver.⁴⁰ In contrast, Section 79.3(d) permits “a video programming distributor [to] 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

³⁸ The rule applies to “an entity” that has “aired a particular program” with video descriptions. While the entity to which the rule applies is ambiguous, the Report and Order suggests that this provision would apply to the cable operator or other MVPD. Id.

³⁹ Id. at ¶42.

⁴⁰ 47 C.F.R. § 79(1)(f).

undue burden.” And the factors to be considered in a video description undue burden request include the impact on the operation of the video programming distributor, the financial resources of the video programming distributor, and the type of operations of the video programming distributor.⁴¹

The rules thus confine undue burden waivers to a “video programming distributor” – which Part 79 defines as a television station licensee, cable operator or other 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.”⁴²

Under the definition, then, cable program networks or program owners are not considered to be video programming distributors. But these entities, rather than the cable operator, would be the appropriate entities to file undue burden waivers in most cases. They would have financial and operational information about video description that their distributors would lack. Thus, just as in the case of closed captioning undue burden waivers, the rules should be amended to permit both distributors and programmers to file requests for waiver.

CONCLUSION

The Commission lacks the statutory authority to impose video description requirements. We urge the Commission to reconsider the rules’ applicability to cable. If the Commission nevertheless pushes forth with its video description initiative, the rules as

⁴¹ Id., § 79.3(d)(2).

adopted miss the mark in several respects. We respectfully urge the Commission to reconsider them.

Respectfully submitted,

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⁴² Id., § 79.1(a)(2).