

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Video Description: Implementation of the
Twenty-First Century Communications and
Video Accessibility Act of 2010

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)
) MB Docket No. 11-43
)
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**REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

**NATIONAL ASSOCIATION OF
BROADCASTERS**

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The National Association of Broadcasters (NAB)¹ submits these reply comments in response to the above-referenced *Notice of Proposed Rulemaking (NPRM)*,² which proposes to reinstate audio description³ rules with certain modifications, as required by the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA).⁴

¹ NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission (“FCC” or the “Commission”) and other federal agencies, and the courts.

² *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43, Notice of Proposed Rulemaking, FCC 11-36 (rel. Mar. 3, 2011) (*NPRM*). In these reply comments, all comments filed on or about April 28, 2011 in this proceeding are short-cited by name of party.

³ NAB fully supports substituting use of the term “audio description” for video description if such term is preferable to consumers and potential users of such technology. See American Council for the Blind (ACB) at 3. Accordingly, NAB uses the term audio description throughout these reply comments.

⁴ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of Title 47 of the United States Code). The law was enacted on October 8, 2010 (S. 3304, 111th Cong.). See *also* Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010), also enacted on October 8, 2010, to make technical corrections to the CVAA and the CVAA’s amendments to the Communications Act of 1934.

I. INTRODUCTION

As discussed in NAB's initial comments in this proceeding, the provision of audio description is technically challenging and involves many moving parts, requiring significant coordination among broadcasters, non-broadcast programmers, multichannel video programming distributors (MVPDs), and manufacturers. As such, the Commission's rules must afford sufficient time and flexibility to allow broadcasters to deploy this important service in broadcast television programming. Congress recognized these challenges in enacting the CVAA, directing the Commission to establish the Video Programming Accessibility Advisory Committee (VPAAC) to work through technical issues. Congress also was clear in establishing timelines for Commission action, recognizing that some developments necessarily would occur sooner than others. The Commission thus should reject any proposals that are inconsistent with statutory timelines or VPAAC's work, as well as any other proposals that would delay the provision of audio description of broadcast programming in a practical and workable manner. Similarly, the Commission should reject any calls for audio description quality standards, as such standards are unnecessary and impracticable, and would be constitutionally suspect.

II. THE RECORD CONFIRMS THAT AUDIO DESCRIPTION IN THE DIGITAL WORLD POSES SUBSTANTIAL TECHNICAL CHALLENGES

A. Technical Issues and Practical Considerations Compel the Provision of Only One Additional Audio Channel at This Time

Commenters agree that, despite the move to digital technology, practical considerations and technical constraints limit video programming to a two-audio environment now and for the foreseeable future. This limitation affects all platforms: cable operators, direct broadcast satellite (DBS) providers, telecommunications

providers offering video delivered via Internet protocol (IPTV providers), and broadcasters all agree that, at least in the near-term, audio description must be sent as one of two audio streams.⁵ Digital technology may allow for the possibility of multiple streams of audio, but capacity constraints and legacy equipment make actual implementation of multiple audio streams unachievable at this time. Accordingly, requiring a near-term approach other than the use of a two-audio stream solution could undermine accessibility, disenfranchising many viewers who are not able to access audio-described programming through their current services or equipment. Such an approach necessarily would be inconsistent with the Congressional directive to expeditiously reinstate the audio description rules.

The clear technical limitations of the two-audio environment also underscore that the Commission should exercise caution in adopting overly prescriptive audio description requirements that are not based on technical collaboration. Together, all of the relevant stakeholders need time to determine the best way for consumers to receive and access audio description. Indeed, in explicitly charging the VPAAC with considering audio description, Congress recognized that regulations adopted in the near-term without sufficient technical input could entrench an approach that would be

⁵ See NAB at 8 (“NAB ... believes that, in the near term, use of a two-audio stream approach for the distribution of video description may be necessary to ensure that consumers are immediately able to access video description.”); AT&T at 3 (“[A]s a practical matter, MVPDs may not be able to effectively provide a third digital audio stream in all cases.”); DIRECTV and DISH at 3 (“Consistent with the limited capacity available for satellite delivery of broadcast programming, the DBS Providers have designed their systems to include only a single secondary audio channel.”); National Telecommunications and Cable Association (NCTA) at 6 (“[T]o ensure consumer access to descriptive services, and to minimize the potential for technical incompatibilities, legacy equipment issues necessitate the continuing provision of only one secondary audio channel.”).

less preferable to consumers in the long run. The VPAAC, through its Working Group Two, is considering various technologies and methodologies for the effective pass through and delivery of audio description to consumers. The Commission should allow the VPAAC time to conduct its statutorily-required review before the Commission considers any substantial changes to the manner in which audio description is provided.

B. Sufficient Ramp-Up Time is Necessary to Ensure that Audio Description is Provided in an Effective Manner

Numerous commenters have identified their respective technical concerns with the provision of audio description and are requesting sufficient time to address these concerns.⁶ As discussed in NAB's comments, an effective date of October 1, 2012 would allow networks and stations time to adjust the network program production schedules and shore up technical capabilities where feasible.⁷ Public broadcasters face some of the same obstacles as NAB members, as well as additional challenges: the Association of Public Television Stations, the Corporation of Public Broadcasting, and the Public Broadcasting Service (Public Broadcast Commenters) note that 47% of public television stations are not currently broadcasting a second audio service and that many of these stations do not have the technical ability to do so.⁸ In addition, many of these stations may struggle to secure funding to build out pass-through facilities in the proposed time frame.⁹ NAB also fully supports the requests of other key industries for additional time to ensure a quality audio description experience for consumers. For example, NCTA points out that "cable networks and operators, even those that were

⁶ See, e.g., NAB at 15; AT&T at 6; NCTA at 9-12; Public Broadcast Commenters at 5.

⁷ See NAB at 15.

⁸ Public Broadcast Commenters at 4.

⁹ *Id.* at 5.

previously briefly covered by the original video description rules, cannot instantaneously provide video description at the scale anticipated by the reinstated rules.”¹⁰ The record makes clear that it will take time for broadcasters and distributors to be ready to provide audio description as required.

The Commission should not establish an unworkable deadline that could cause a significant number of entities to be out of compliance on the effective date of the new rules, and therefore would result in many requests for waivers of the new rules. To conserve both agency and industry resources, the Commission should focus on identifying the most constructive and effective path forward. This will allow all parties sufficient time to roll out audio description. Broadcasters share the government’s goal of providing consumers access to audio description as soon as possible, with a minimum of consumer disruption. Consumers seeking increased accessibility would be increasingly frustrated if they were unable to access audio description after the implementation deadline. Thus, the Commission will best serve consumers and potential users of audio description by ensuring that the entities throughout the distribution chain are prepared as a general matter to roll out audio description on the day the rules go into effect.¹¹

C. The Commission Should Require Compliance Only to the Extent Appropriate for Each Entity in the Distribution Chain

As described above and in NAB’s initial comments, the provision of audio description involves coordination among a number of entities along the chain of

¹⁰ NCTA at 11.

¹¹ See NAB at 13-14 (noting that because pass-through of described programming should be limited to those that are technically capable at commencement of the first quarter of programming requirements, there may be some broadcast stations that will, as contemplated by the CVAA, require additional time to implement audio description).

distribution. There is no question that consumers and the goals of Congress will be best served if each entity in that chain fulfills its obligations to the best of its ability. However, there are a large number of players involved, and each may only have a limited technical ability and thus a limited practical role in the provision of audio description along the distribution chain. As Verizon notes, “there are practical limits on what distributors can do to detect and fix problems with video description.”¹² Similarly, broadcast stations can send programs with audio description according to the Commission’s rules, but consumers may nonetheless have difficulty accessing the audio descriptions for a variety of technical reasons, including issues with consumer equipment. In adopting audio description rules for the digital world, the Commission should recognize that it would be arbitrary and unreasonable to hold any entity responsible for compliance with an element of audio description provision or pass-through that is not under its control. Specifically, the Commission should make clear that broadcasters are only required to take reasonable steps to provide and/or pass through audio description and are not responsible for the receipt, access, and quality of audio description by consumers via all platforms.

D. The Commission Should Not Mandate Inclusion of the ISO-639 Descriptor

NCTA argues that a cable system should be deemed technically incapable of passing through the audio descriptions broadcast by an over-the-air DTV station if such station does not include the ISO-639 language descriptor in its signal.¹³ According to NCTA, lack of an ISO-639 language descriptor is problematic and generally due to the

¹² Verizon at 2.

¹³ See NCTA at 8-9.

fact that insertion of such descriptor is not mandatory under either the ATSC standard or the Commission's Rules.¹⁴ Resolution of issues such as this are best handled through inter-industry coordination and do not warrant any regulatory mandate.

Even though the ISO-639 language descriptor is no longer required under the ATSC standard, it is recommended, and the vast majority of DTV broadcasters continue to include the descriptor in their transmissions. However, in those instances where the descriptor might be omitted from a DTV station's signal, the local cable operator can simply contact the local broadcaster and coordinate the reinsertion of the descriptor. Accordingly, it would be unnecessary for the FCC to mandate use of the ISO-639 descriptor by DTV broadcasters. Broadcasters will continue to work with the cable industry through standards bodies such as the ATSC and through the VPAAC to coordinate this and other important technical issues.

III. THE DEFINITION OF NEAR-LIVE PROGRAMMING SHOULD BE CRAFTED PRACTICALLY AND CONSISTENT WITH CONGRESSIONAL INTENT

The Commission must craft the definition of "near-live" programming in a meaningful, practical way that is consistent with the intent of Congress. The *NPRM* proposes that "programming performed and recorded less than 24 hours prior to the time it is first aired be deemed near-live...."¹⁵ However, as the *NPRM* recognizes, Congress directed the Commission to exempt programs produced a short time before airing because there is not sufficient time for the creation of audio descriptions.¹⁶ NAB demonstrated in its initial comments that 24 hours would not be sufficient time for the

¹⁴ See *id.* at 9.

¹⁵ *NPRM* at ¶ 21 (internal quotations omitted).

¹⁶ *Id.*

creation of audio descriptions. NAB also noted that the critical factor is *when a network receives the programming*, not when it is recorded.

A. The Definition of Near-Live Programming Should Conform to the Legislative Purpose of the Exemption

ACB asks the Commission to exclude programming from the near-live exemption if 66% of the content is prerecorded, a threshold that is neither addressed in nor consistent with the statute.¹⁷ Moreover, as explained more fully in NAB's initial comments, such a rule would be impractical in light of production realities.

The critical factor for starting the clock ticking for insertion of audio description is when the program is delivered to a network in final edited and approved form.¹⁸ A network cannot begin the audio description process until it has the programming in final edited form, whether or not the programming was substantially prerecorded. The fact that a portion of the programming was prerecorded is irrelevant to the time it takes to finish editing and then insert audio description. Further, even if a network were able to begin the audio description insertion process on the prerecorded portion of the programming – which it cannot – there still would be insufficient time to insert audio description on the rest of the programming. Defining near-live in a way that ignores the actual turnaround time it takes to insert audio description would render the exemption largely meaningless, would be inconsistent with Congress's intentions, and could result in numerous out-of-compliance programs that should qualify as "near-live" but for the arbitrary 66% prerecorded threshold.

¹⁷ See ACB at 6.

¹⁸ See NAB at 17. In NAB's initial comments and these reply comments, NAB uses the term "network" to refer to a particular step in the process of implementing audio description. However, the near-live timeframe is not limited to network programming and applies to any audio description vendor of a final script.

B. The Experience of a Single Existing Vendor Providing Audio Description Services Does Not Account for the Scope of Services Required Once the Rules Are in Full Effect

In its comments, NAB proposed a definition of near-live programming as programming delivered to the network in final, edited, and approved form no less than 168 hours prior to the time it is first aired, noting that the critical factor is when a network receives the programming, not when it is recorded.¹⁹ We detailed that broadcast networks typically receive programs (such as prime time series) a very short time before air, which obviously creates significant challenges for the inclusion of video description.²⁰ Moreover, given the copyright protections of the separate scripts needed for video description, the provision of described programming will require additional authorizations to be obtained from the creators of the pre-existing scripts and the revision of existing contractual obligations with the creative communities. This process will also require additional time.

WGBH Media Access Group (WGBH) suggests that it is able to turn around audio description for a one-hour program in less than 24 hours, and that the Commission's proposed near-live definition is therefore appropriate.²¹ But the Commission cannot base its near-live definition on WGBH's claim. First, WGBH is only one provider of audio description services – others may have different processes that take more time. Indeed, NAB members currently providing audio description report that the insertion of audio description can take up to seven days. Second, WGBH's timing likely does not take into account the greatly increased amount and variety of

¹⁹ See NAB at 17.

²⁰ See *id.*

²¹ WGBH Media Access Group at 4.

programming that will need to be audio-described once the rules are implemented. Some programs may take longer periods to insert audio description based on the nature of the programming. In addition, at least in the short term, the flood of requests to insert audio description in new programming may well overwhelm describers – it will take time for processes to be improved and for more audio describers to enter the market.²² The Commission should not rely on a timing estimate that generally is not applicable today and likely will prove unattainable when the rules are in full effect. Instead, the Commission should adopt a more expansive definition, which can be adjusted in the future if the time it takes to insert audio description ultimately decreases.

IV. THE COMMISSION SHOULD NOT CONSIDER AUDIO DESCRIPTION OF INTERNET VIDEO PROGRAMMING IN THIS PROCEEDING

The Commission should not exceed its authority in this proceeding by adopting rules regarding audio description of Internet programming, when the statute directs the Commission to prepare a report to Congress on this issue. ACB asks the Commission to “[e]stablish a rule that requires all covered networks to ensure that whenever the described content prepared for prime time or children’s broadcasting is made available via internet, all such content has accompanying audio description without exception.”²³ The U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit), however, has previously concluded that a statutory direction to produce a report on audio description did not

²² NAB appreciates WGBH’s suggestion that it may individually be able to accommodate this increased demand. See WGBH at 4. However, some broadcasters use or may seek to use other providers of audio description, and the Commission cannot establish a definition of “near-live” based only on the singular prediction of WGBH, whose experience has been inconsistent with that of NAB members.

²³ ACB at 4.

authorize the Commission to adopt audio description rules.²⁴ Similar to the circumstances in *MPAA*, the CVAA directs the Commission to *prescribe closed captioning over Internet protocol regulations* (as well as to reinstate the audio description rules for certain broadcast and non-broadcast programming), but only directs the Commission to *prepare a report on audio description* for programming offered via Internet protocol.²⁵ Given the clear holding of *MPAA*, had Congress wanted the Commission to adopt rules regarding audio description on Internet video programming, Congress would have said so explicitly, just as it did for closed captioning on Internet video programming. Consistent with *MPAA*, the statute thus should be read to constrain the FCC's authority to take any action beyond the preparation of a report. As such, ACB's proposal goes beyond the Commission's authority and therefore should be rejected.

Moreover, the adoption of any IP audio description rules in this proceeding would be at best premature, given the time and processes established by the CVAA to work through technical challenges. As discussed above, the record makes clear that the implementation of audio description by broadcast stations and MVPDs through traditional media already poses significant technical challenges and coordination issues, without an added layer of complexity of providing audio description on the Internet. Congress understood the challenges posed, and therefore mandated that the VPAAC

²⁴ See *Motion Picture Ass'n of America, Inc. v. Federal Communications Comm.*, 309 F.3d 796 (D.C. Cir. 2002) (finding that the FCC lacked authority to mandate audio description and vacating the FCC's rules).

²⁵ Compare 47 U.S.C. § 613(c)(2)(A) (“[T]he Commission shall revise its regulations to require the provision of closed captioning on video programming delivered using Internet protocol....”) with 47 U.S.C. § 613(f)(3) (“The Commission shall commence the following inquiries ... and shall report to Congress on ... [v]ideo description in video programming distributed on the internet.”)

submit a report to the Commission with the performance and technical procedures to allow for the delivery of audio-described programming using Internet protocol 18 months after the CVAA's enactment.²⁶ In addition, the Commission is required under the CVAA to initiate a rulemaking within one year after the phase-in of the reinstated regulations in order to *report* to Congress (within one year thereafter) on “[t]he technical and operational issues, costs, and benefits of providing video descriptions for video programming that is delivered using Internet protocol.”²⁷ Congress, aware of the numerous technical issues with providing audio description over Internet protocol, provided significant time to work through these issues (see discussion of VPAAC above). Given the technical challenges, and the processes and proceedings required by the CVAA to understand and develop solutions to the technical challenges, requiring any entity to make audio description available over the Internet now would not only exceed the Commission's authority, but also would be vastly premature.

V. THERE IS NO BASIS TO MANDATE STATION-BY-STATION EVALUATION OF TECHNICAL INCAPABILITY

ACB seems to suggest that the Commission consider technical incapability to pass through audio-described content on a case-by-case basis.²⁸ If this indeed is ACB's suggestion, it is simply unworkable. It would be an extraordinary drain on Commission resources to undertake a station-by-station determination of technical capability. The Commission would have to consider whether each and every affiliated broadcast station was technically incapable of passing through audio description and

²⁶ See CVAA § 201(e)(2).

²⁷ 47 U.S.C. § 613(f)(3)(B).

²⁸ See ACB at 5.

whether \$25,000 to \$50,000, the cost of outfitting a station for pass-through, would be economically burdensome for the station. Rather than create such significant administrative difficulties and unnecessary burdens, especially for small-market stations, the Commission should only require pass through of audio description when a station becomes technically capable, consistent with the terms and structure of the CVAA.

VI. ADOPTION OF QUALITY STANDARDS IS UNNECESSARY AND INAPPROPRIATE

Contrary to the requests of WGBH and ACB,²⁹ the Commission should not, and cannot, implement quality standards for audio description. NAB has said, and multiple other commenters agree, that quality standards would inherently involve a subjective judgment from the Commission.³⁰ Unlike closed captions, which attempt to display spoken words verbatim, audio description necessarily contains a subjective element – the description itself is an authored script and describes the actions in a scene in a way to demonstrate the creative intent of the producer. Therefore, any quality standards would require the Commission itself to make subjective determinations – subjective determinations that are not appropriate in light of the First Amendment. Instead of establishing quality standards, the Commission should focus on ways to encourage industry best practices. NAB looks forward to working with the FCC and other partners in this regard.

²⁹ See ACB at 8; WGBH at 5.

³⁰ See NAB at 24-25; NCTA at 18; Public Broadcast Commenters at 6; Verizon at 3.

VII. CONCLUSION

As detailed above and in NAB's initial comments, the Commission should ensure that the audio description rules are implemented in a way that is workable for broadcasters and other program creators and distributors, and consistent with the intentions of the CVAA and the First Amendment.

Respectfully submitted,

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